



Superannuation Industry (Supervision) Act 1993

No. 78 of 1993

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Superannuation Industry (Supervision) Act 1993

No. 78 of 1993

**An Act to make provision for the supervision of certain
entities engaged in the superannuation industry,
and for related purposes**

[Assented to 30 November 1993]

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Division 1—Preliminary

Short title

5 **1.** This Act may be cited as the *Superannuation Industry (Supervision) Act 1993*.

Commencement

2.(1) Subject to this section, Parts 1, 2, 21, 27, 28, 29, 30, 31 and 32 commence on the day on which this Act receives the Royal Assent.

(2) Part 1 (in so far as it relates to section 117) and section 117 are taken to have commenced on 21 October 1992.

(3) Parts 18, 19, 20, 22, 23 and 24 and section 342 commence on 1 July 1994.

(4) The remaining provisions commence on 1 December 1993, but do not apply to a fund, scheme or trust in relation to a year of income of the fund, scheme or trust earlier than the 1994-95 year of income. 5

Object of Act

Supervision of certain superannuation entities

3.(1) The object of this Act is to make provision for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts and for their supervision by the Insurance and Superannuation Commissioner. 10

Basis for supervision

(2) The basis for supervision is that those funds and trusts are subject to regulation under the Commonwealth's powers with respect to corporations or pensions (for example, because the trustee is a corporation). In return, the supervised funds and trusts may become eligible for concessional taxation treatment. 15

Whole industry not covered

(3) The Act does not regulate other entities engaged in the superannuation industry. 20

Summary of provisions

4. The Act contains provisions dealing with the following matters:

<i>Part No.</i>	<i>Matter dealt with</i>
1	interpretation
2	approval of trustees
3	operating standards for funds and trusts
4	lodgment of annual returns by trustees of superannuation entities
5	notices about complying fund status
6	governing rules of funds and trusts
7	rules applying only to regulated superannuation funds
8	in-house asset rules applying to regulated superannuation funds

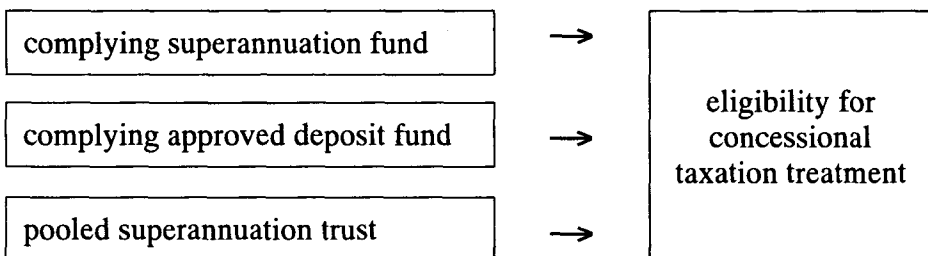
Superannuation Industry (Supervision) No. 78, 1993

<i>Part No.</i>	<i>Matter dealt with</i>
9	equal representation of employers and members in relation to employer-sponsored funds
10	rules applying only to approved deposit funds
11	rules applying only to pooled superannuation trusts
12	statutory duties of trustees of superannuation entities
13	accounts of superannuation entities
14	other provisions relating to funds and trusts
15	standards for trustees, custodians and investment managers of superannuation entities
16	actuaries and auditors of superannuation entities
17	suspension or removal of trustees of superannuation entities
18	false and misleading conduct in relation to superannuation interests
19	rules about dealing with superannuation interests in public offer entities and about the disclosure of information about such entities
20	rules relating to insider trading of superannuation interests in public offer entities
21	civil and criminal consequences of serious breaches of the Act
22	how funds are to deal with unclaimed money
23	financial assistance to funds that suffer loss as a result of fraud or theft
24	rollover of benefits to certain funds when beneficiaries cannot be located
25	monitoring and investigating superannuation entities
26	offences relating to statements and records
27	powers of courts
28	judicial and other proceedings under the Act
29	exemption and modification provisions
30	miscellaneous provisions
31	transition to scheme provided for in the Act
32	additional transitional provisions relating to tax file numbers

Outline of key concepts

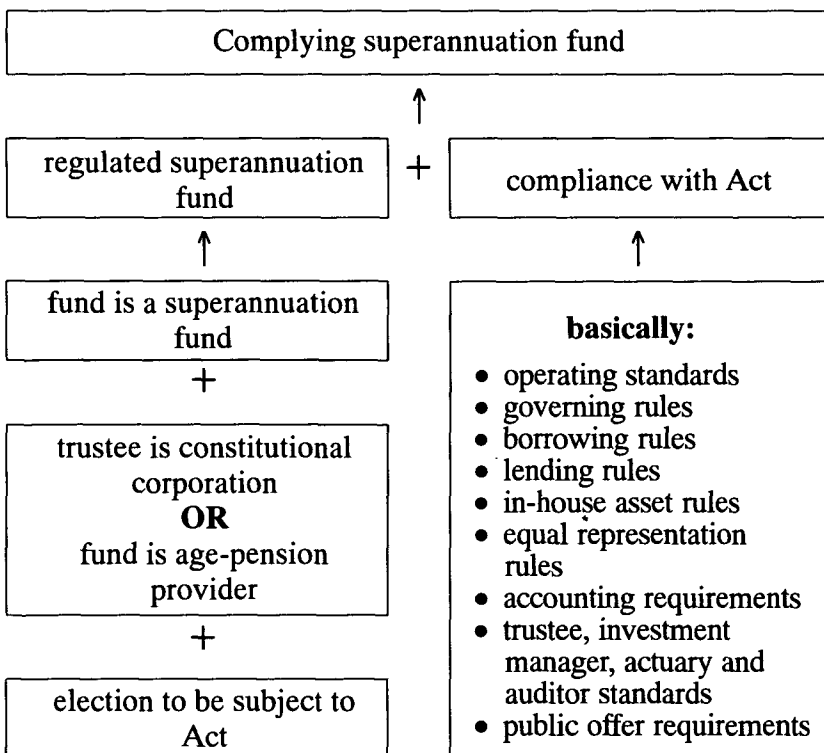
Entities

5.(1) The following superannuation entities are involved:



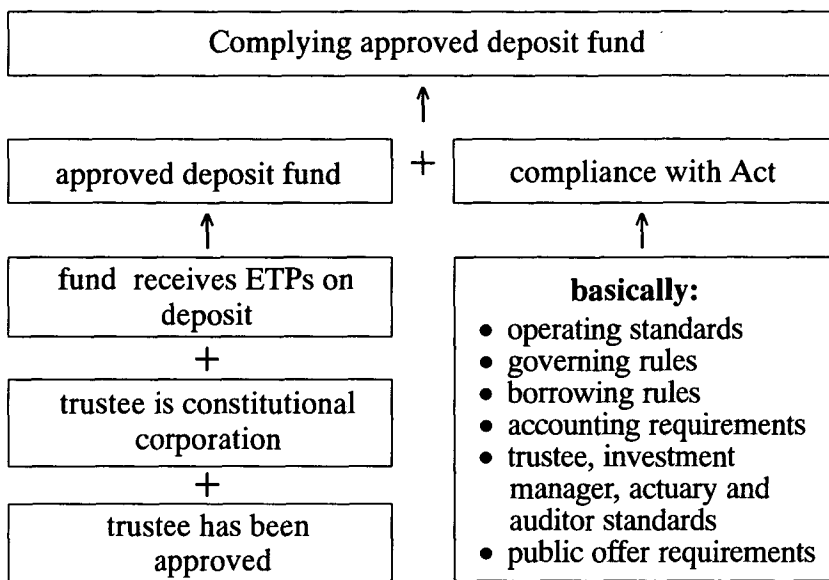
Complying superannuation fund

(2) The complying superannuation fund requirements may be summarised as follows:



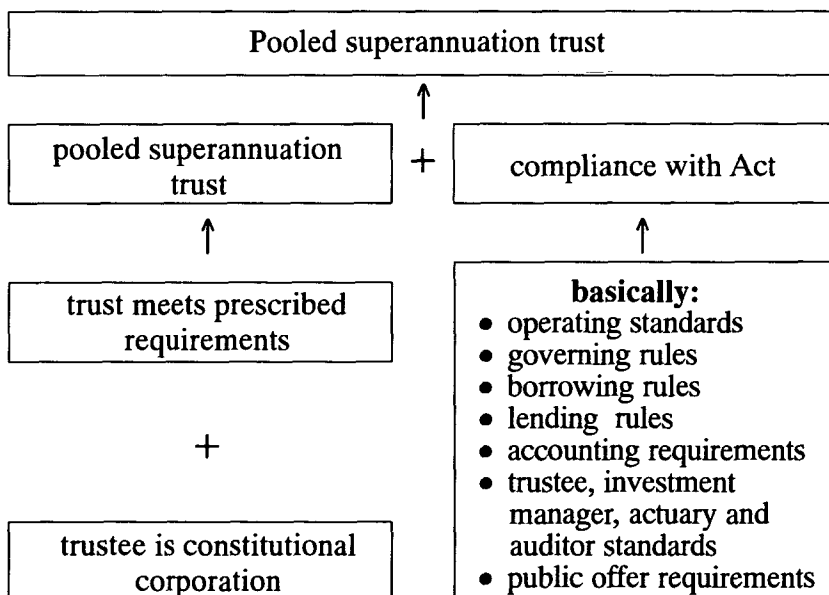
Complying approved deposit fund

(3) The complying approved deposit fund requirements may be summarised as follows:



Pooled superannuation trust

5 (4) The pooled superannuation trust requirements may be summarised as follows:



General administration of Act

6.(1) Subject to subsection (2), the Commissioner has the general administration of this Act.

(2) The Minister may give directions to the Commissioner about the performance or exercise of the Commissioner's functions or powers under this Act. 5

Application of Act not to be excluded or modified

7. This Act applies to a superannuation entity despite any provision in the governing rules of the entity, including any provision that purports to substitute, or has the effect of substituting, the provisions of the law of a State or Territory or of a foreign country for all or any of the provisions of this Act. 10

Act extends to external Territories

8. This Act extends to all the external Territories.

Crown to be bound

9.(1) This Act binds the Crown in all its capacities. 15

(2) The Crown is not liable to be prosecuted for an offence against, or arising out of, this Act.

Division 2—Interpretation

Definitions

10. In this Act, unless the contrary intention appears: 20

“**actuary**” means a person who is a Fellow or an Accredited Member of the Institute of Actuaries of Australia;

“**adopted child**”, in relation to a person, means a person adopted by the first-mentioned person:

(a) under the law of a State or Territory relating to the adoption of children; or 25

(b) under the law of any other place relating to the adoption of children, if the validity of the adoption would be recognised under the law of any State or Territory;

“**amend**”, in relation to the governing rules of a superannuation entity, includes the insertion of a provision in, or the omission of a provision from, those rules; 30

“**annuity**” includes a benefit provided by a life insurance company or a registered organisation, if the benefit is taken, under the regulations, to be an annuity for the purposes of this Act; 35

“**approved auditor**” means a person included in a class of persons specified in regulations made for the purposes of this definition, but does not include a person in respect of whom a disqualification order is in force under section 131;

“approved bank” means:

- (a) a body corporate authorised under Part II of the *Banking Act 1959* to carry on banking business in Australia; or
- 5 (b) the Commonwealth Bank of Australia, the Commonwealth Savings Bank of Australia or the Commonwealth Development Bank of Australia; or
- (c) a State bank;

“approved deposit fund” means a fund that:

- (a) is an indefinitely continuing fund; and
- 10 (b) is maintained by an approved trustee solely for approved purposes; and
- (c) has approved rules;

“approved form” means a form approved by the Commissioner, in writing, for the purposes of the provision in which the expression appears;

15 **“approved guarantee”** means a guarantee given by an approved bank or given by or on behalf of the Commonwealth, a State or a Territory;

“approved purposes”, in relation to a fund, means the purposes of:

- (a) receiving on deposit:
 - 20 (i) amounts that will be taken by section 27D of the Income Tax Assessment Act to have been expended out of eligible termination payments within the meaning of that section; and
 - (ii) amounts paid under Part 24; and
- (b) dealing with such amounts, in accordance with the rules of the fund, in any way calculated directly or indirectly to enhance the value of, or render profitable, property of the fund; and
- 25 (c) subject to any contrary requirement in the standards from time to time applicable to the fund under section 32, paying in accordance with the covenant referred to in section 53 to beneficiaries, or to the legal personal representatives of beneficiaries, amounts deposited with the
- 30 fund together with accumulated earnings on those amounts;

“approved rules”, in relation to a fund, means governing rules of the fund that include all the kinds of provisions specified in regulations made for the purposes of this definition;

35 **“approved trustee”** means a constitutional corporation in relation to which an approval under section 26 is in force;

“associate” has the meaning given by section 12;

“Australian court” means:

- (a) the High Court; or
- (b) a court created by the Parliament; or
- 40 (c) a court of a State or Territory;

“authorised person” means an officer of the Australian Public Service authorised by the Commissioner, in writing, for the purposes of the provision in which the expression appears;

“beneficiary”, in relation to a fund, scheme or trust, means a person (whether described in the governing rules as a member, a depositor or otherwise) who has a beneficial interest in the fund, scheme or trust and includes, in relation to a superannuation fund, a member of the fund despite the express references in this Act to members of such funds; 5

“books” includes:

- (a) any record; or 10
- (b) any accounts or accounting records, however compiled, recorded or stored; or
- (c) a document;

“business day” means a day that is not a Saturday, a Sunday or a public holiday in the place concerned; 15

“child”, in relation to a person, includes an adopted child, a step-child or an ex-nuptial child of the person;

“civil penalty order” means a declaration or order made under section 196;

“civil penalty provision” has the meaning given by section 193;

“Commissioner” means the Insurance and Superannuation Commissioner appointed under the *Insurance and Superannuation Commissioner Act 1987*, or a person for the time being acting as Insurance and Superannuation Commissioner under that Act; 20

“constitutional corporation” means a body corporate that is:

- (a) a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or 25
- (b) a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution);

“corporate trustee”, in relation to a fund, scheme or trust, means a body corporate that is a trustee of the fund, scheme or trust; 30

“Corporations Law” means the Corporations Law set out in the *Corporations Act 1989*;

“court” means any court, when exercising jurisdiction under this Act;

“Court” means the Federal Court of Australia or the Supreme Court of a State or a Territory; 35

“custodian”, in relation to a superannuation entity, means a person (other than the trustee of the entity) who, under a contract with the trustee or an investment manager of the entity, performs custodial functions in relation to any of the assets of the entity; 40

“data processing device” means any article or material (for example, a disc) from which information is capable of being reproduced with or without the aid of any other article or device;

“deed” includes an instrument having the effect of a deed;

5 **“dependant”**, in relation to a person, includes the spouse and any child of the person;

“director”, in relation to a body corporate, has the same meaning as in the Corporations Law;

10 **“disclose”**, in relation to information, means give, reveal or communicate in any way;

“eligibility age”, in relation to an age pension, means:

(a) in the case of a man—65 years or, if another age is prescribed by the regulations in place of 65 years, the age so prescribed; or

15 (b) in the case of a woman—60 years or, if another age is prescribed by the regulations in place of 60 years, the age so prescribed;

“employee” has the same meaning as in the *Superannuation Guarantee (Administration) Act 1992* (for the purposes of this definition, the *Superannuation Guarantee (Administration) Act 1992* has effect as if subsection 12(11) of that Act had not been enacted);

20 **“employer”** has the same meaning as in the *Superannuation Guarantee (Administration) Act 1992* (for the purposes of this definition, the *Superannuation Guarantee (Administration) Act 1992* has effect as if subsection 12(11) of that Act had not been enacted);

25 **“employer representative”**, in relation to a group of trustees of a fund, a policy committee of a fund or the board of directors of a corporate trustee of a fund, means a member of the group, committee or board, as the case may be, nominated by:

(a) the employer or employers of the members of the fund; or

30 (b) an organisation representing the interests of that employer or those employers;

“employer-sponsor” has the meaning given by subsection 16(1);

“employer-sponsored fund” has the meaning given by subsection 16(3);

“excluded approved deposit fund” means an approved deposit fund:

(a) in which there is only one beneficiary; and

35 (b) that satisfies such other conditions (if any) as are specified in the regulations;

“excluded fund” means an excluded superannuation fund or an excluded approved deposit fund;

40 **“excluded superannuation fund”** means a superannuation fund of which there are fewer than 5 members;

“executive officer”, in relation to a body corporate, means a person, by whatever name called and whether or not a director of the body, who is concerned, or takes part, in the management of the body;

“exempt public sector superannuation scheme” means a public sector superannuation scheme that is specified in regulations made for the purposes of this definition; 5

“expert”, in relation to a matter, means a person whose profession or reputation gives authority to a statement made by him or her in relation to that matter;

“function” includes duty; 10

“governing rules”, in relation to a fund, scheme or trust, means any trust instrument, other document or legislation, or combination of them, governing the establishment and operation of the fund, scheme or trust;

“group of trustees”, in relation to a fund, scheme or trust, means a board, committee or other group of trustees of the fund, scheme or trust; 15

“half-year” means a period of 6 months ending on 30 June or 31 December;

“Income Tax Assessment Act” means the *Income Tax Assessment Act 1936*;

“independent director”, in relation to a corporate trustee of a fund, means a director of the corporate trustee who: 20

(a) is not a member of the fund; and

(b) is neither an employer-sponsor of the fund nor an associate of such an employer-sponsor; and

(c) is neither an employee of an employer-sponsor of the fund nor an employee of an associate of such an employer-sponsor; and 25

(d) is not, in any capacity, a representative of a trade union, or other organisation, representing the interests of one or more members of the fund; and

(e) is not, in any capacity, a representative of an organisation representing the interests of one or more employer-sponsors of the fund; 30

“independent trustee”, in relation to a fund, means a trustee of the fund who:

(a) is not a member of the fund; and

(b) is neither an employer-sponsor of the fund nor an associate of such an employer-sponsor; and 35

(c) is neither an employee of an employer-sponsor of the fund nor an employee of an associate of such an employer-sponsor; and

(d) is not, in any capacity, a representative of a trade union, or other organisation, representing the interests of one or more members of the fund; and 40

(e) is not, in any capacity, a representative of an organisation representing the interests of one or more employer-sponsors of the fund;

5 “**individual trustee**”, in relation to a fund, scheme or trust, means an individual who is a trustee of the fund, scheme or trust;

“**insolvent under administration**” means a person who:

(a) under the *Bankruptcy Act 1966* or the law of an external Territory, is a bankrupt in respect of a bankruptcy from which the person has not been discharged; or

10 (b) under the law of a country other than Australia or the law of an external Territory, has the status of an undischarged bankrupt;

and includes:

(c) a person any of whose property is subject to control under:

(i) section 50 or 188 of the *Bankruptcy Act 1966*; or

15 (ii) a corresponding provision of the law of an external Territory or the law of a foreign country; or

(d) a person who has, at any time during the preceding 3 years, executed a deed of assignment or a deed of arrangement under:

(i) Part X of the *Bankruptcy Act 1966*; or

20 (ii) the corresponding provisions of the law of an external Territory or the law of a foreign country; or

(e) a person whose creditors have, within the preceding 3 years, accepted a composition under:

(i) Part X of the *Bankruptcy Act 1966*; or

25 (ii) the corresponding provisions of the law of an external Territory or the law of a foreign country;

“**inspector**” has the meaning given by section 265;

“**investment**” means any mode of application of money for the purpose of gaining interest, income or profit;

30 “**investment manager**” means a person appointed by the trustee of a fund or trust to invest money of the fund or trust;

“**involved**”, in relation to a contravention, has the meaning given by section 17;

35 “**lawyer**” means a duly qualified legal practitioner and, in relation to a person, means such a practitioner acting for the person;

“**legal personal representative**” means the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person;

40 “**life insurance company**” means:

- (a) a company registered under section 19 of the *Life Insurance Act 1945*; or
- (b) a public authority constituted by a law of a State or Territory, being an authority that carries on life insurance business within the meaning of subsection 4(1) of that Act; 5
- “lodge”** means lodge with the Commissioner;
- “market value”**, in relation to an asset, means the amount that a willing buyer of the asset could reasonably be expected to pay to acquire the asset from a willing seller if the following assumptions were made:
- (a) that the buyer and the seller dealt with each other at arm’s length in relation to the sale; 10
- (b) that the sale occurred after proper marketing of the asset;
- (c) that the buyer and the seller acted knowledgeably and prudentially in relation to the sale;
- “member representative”**, in relation to a group of trustees of a fund, a policy committee of a fund or the board of directors of a corporate trustee of a fund, means a member of the group, committee or board, as the case may be, nominated by: 15
- (a) the members of the fund; or
- (b) a trade union, or other organisation, representing the interests of those members; 20
- “modifications”** includes additions, omissions and substitutions;
- “occurrence of an event”** includes the coming into existence of a state of affairs;
- “old-age pensions”** has the same meaning as in paragraph 51(xxiii) of the Constitution; 25
- “pension”**, except in the expression “old-age pension”, includes a benefit provided by a fund, if the benefit is taken, under the regulations, to be a pension for the purposes of this Act;
- “policy committee”**, in relation to a regulated superannuation fund, means a board, committee or other body that: 30
- (a) advises the trustee of the fund about such matters as are specified in the regulations; and
- (b) is established by or under the governing rules of the fund;
- “pooled superannuation trust”** means a unit trust: 35
- (a) the trustee of which is a constitutional corporation; and
- (b) that, under the regulations, is a unit trust to which this definition applies;
- “premises”** includes: 40
- (a) a structure, building, aircraft, vehicle or vessel; and
- (b) any land or place (whether enclosed or built on or not); and

(c) a part of a structure, building, aircraft, vehicle or vessel or of such a place;

“private sector fund” means a superannuation fund other than a public sector fund;

5 **“procure”** includes cause;

“produce” includes permit access to;

“protected document” means a document given or produced under or for the purposes of this Act, being a document containing information relating to the affairs of any fund or trust;

10 **“protected information”** means information disclosed or obtained under or for the purposes of this Act, being information relating to the affairs of any fund or trust;

“public offer entity” means:

(a) a public offer superannuation fund; or

15 (b) an approved deposit fund that is not an excluded approved deposit fund; or

(c) a pooled superannuation trust;

“public offer superannuation fund” has the meaning given by section 18;

20 **“public sector fund”** means a superannuation fund that is part of a public sector superannuation scheme;

“public sector superannuation scheme” means a scheme for the payment of superannuation, retirement or death benefits, where the scheme is established:

(a) by or under a law of the Commonwealth or of a State or Territory; or

25 (b) under the authority of:

(i) the Commonwealth or the government of a State or Territory;
or

30 (ii) a municipal corporation, another local governing body or a public authority constituted by or under a law of the Commonwealth or of a State or Territory;

“rectify”, in relation to a contravention of this Act or the regulations that has occurred in relation to a superannuation entity, includes put in operation managerial or administrative arrangements that could reasonably be expected to ensure that there are no further contraventions of a similar kind;

35 **“redeem”**, in relation to an interest in an approved deposit fund, includes pay an amount equal to the interest pursuant to a covenant of a kind referred to in section 53 that is contained, or taken to be contained, in the governing rules of the fund;

“registered organisation” means:

40 (a) an association registered under a law of a State or Territory as a trade union; or

(b) a society registered under a law of a State or Territory providing for the registration of friendly or benefit societies; or

(c) an association of employees that is registered as an organisation under the *Industrial Relations Act 1988*;

“regulated document”, in relation to a public offer entity, means a document: 5

(a) issued, or authorised to be issued, by the trustee of the entity; and

(b) that the trustee knows, or ought reasonably to know (having regard to the trustee’s abilities, experience, qualifications and other attributes), may influence a person’s decision: 10

(i) whether to apply to have a superannuation interest in the entity issued to a person; or

(ii) whether to apply to become a standard employer-sponsor of the entity;

“regulated superannuation fund” has the meaning given by section 19; 15

“related”, in relation to bodies corporate, has the meaning given by section 20;

“relevant person”, in relation to a fund or trust, means:

(a) if the trustee or an investment manager of the fund or trust is or includes an individual—that individual; or 20

(b) if the trustee or an investment manager of the fund or trust is or includes a body corporate—a responsible officer of that body corporate; or

(c) an auditor of the fund or trust; or

(d) an actuary of the fund or trust; 25

“responsible officer”, in relation to a body corporate, means:

(a) a director of the body; or

(b) a secretary of the body; or

(c) an executive officer of the body;

“reviewable decision” means: 30

(a) a decision of the Commissioner under subsection 18(5) or (6) to make a declaration; or

(b) a decision of the Commissioner under subsection 18(9) to revoke a declaration; or

(c) a decision of the Commissioner under subsection 26(2) refusing an application for approval; or 35

(d) a decision of the Commissioner under subsection 26(3) to specify conditions in an instrument of approval; or

(e) a decision of the Commissioner to give a notice under section 40; or 40

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- 5
- (f) a decision of the Commissioner refusing to give a notice under section 40; or
- (g) a decision of the Commissioner to give a direction under section 63; or
- 10
- (h) a decision of the Commissioner refusing to revoke a direction under section 63; or
- (i) a decision of the Commissioner refusing to make a determination under paragraph 71(1)(e); or
- (j) a decision of the Commissioner to revoke a determination under paragraph 71(1)(e); or
- (k) a decision of the Commissioner to make a determination under subsection 71(4); or
- (l) a decision of the Commissioner refusing to revoke a determination under subsection 71(4); or
- 15
- (m) a decision of the Commissioner under section 92 refusing to grant an approval; or
- (n) a decision of the Commissioner refusing to revoke an approval under section 92; or
- 20
- (o) a decision of the Commissioner under subsection 95(2) refusing to approve a borrowing; or
- (p) a decision of the Commissioner under subsection 117(6) refusing to waive a requirement; or
- (q) a decision of the Commissioner under subparagraph 123(2)(b)(ii) or (3)(c)(ii); or
- 25
- (r) a decision of the Commissioner under subparagraph 126(2)(b)(ii) or (4)(c)(ii); or
- (s) a decision of the Commissioner to make a disqualification order under section 131; or
- (t) a decision of the Commissioner refusing to revoke a disqualification order under section 131; or
- 30
- (u) a decision of the Commissioner under section 141; or
- (v) a decision of the Commissioner under section 164 to make a stop order; or
- (w) a decision of the Commissioner under section 166 to revoke a stop order; or
- 35
- (x) a decision of the Commissioner to bring an action under section 187; or
- (y) a decision of the Commissioner refusing to make a declaration under section 243; or
- 40
- (z) a decision of the Commissioner under section 328 to make an exemption; or

- (za) a decision of the Commissioner under section 329 to make an exemption; or
 - (zb) a decision of the Commissioner under section 332 to make a declaration; or
 - (zc) a decision of the Commissioner under section 333 to make a declaration; or 5
 - (zd) a decision of the Commissioner under section 335 to revoke an exemption or declaration; or
 - (ze) a decision of the Commissioner refusing to give a notice under subsection 342(2) in relation to a fund; or 10
 - (zf) a decision of the Commissioner to give a notice under subsection 342(6) in relation to a fund;
- “spouse”**, in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person; 15
- “standard employer-sponsor”** has the meaning given by subsection 16(2);
- “standard employer-sponsored fund”** has the meaning given by subsection 16(4);
- “standard employer-sponsored member”** has the meaning given by subsection 16(5); 20
- “statement”**, in Parts 18 and 19, includes a promise, estimate or forecast;
- “stop order”** means an order under section 164;
- “Superannuation Complaints Tribunal”** means the Superannuation Complaints Tribunal established by the *Superannuation (Resolution of Complaints) Act 1993*; 25
- “superannuation entity”** means:
- (a) a regulated superannuation fund; or
 - (b) an approved deposit fund; or
 - (c) a pooled superannuation trust;
- “superannuation entity affected by a reviewable decision”**, in relation to a reviewable decision, means the superannuation entity in relation to which the decision was made; 30
- “superannuation fund”** means:
- (a) a fund that:
 - (i) is an indefinitely continuing fund; and 35
 - (ii) is a provident, benefit, superannuation or retirement fund; or
 - (b) a public sector superannuation scheme;
- “superannuation interest”** means a beneficial interest in a superannuation entity;

“superannuation standards officer” means a person who is or has been appointed or employed by the Commonwealth and who, because of that appointment or employment, or in the course of that employment:

(a) may acquire, or has acquired, protected information; or

(b) may have, or has had, access to protected documents;

and includes a person who is or has been an inspector;

“taxation officer” means a person who is an officer for the purposes of section 16 of the Income Tax Assessment Act;

“trustee”, in relation to a fund, scheme or trust, means:

(a) if there is a trustee (within the ordinary meaning of that expression) of the fund, scheme or trust—the trustee; or

(b) in any other case—the person who manages the fund, scheme or trust;

“unclaimed money” has the meaning given by subsection 225(1);

“unit trust” has the same meaning as in Part IX of the Income Tax Assessment Act;

“value” means market value, and includes amount;

“year of income”, in relation to a fund, scheme or trust, means a period that is, for the purposes of the Income Tax Assessment Act, a year of income of the fund scheme, or trust (subsection 6(2A) of that Act applies accordingly).

Approvals, determinations etc. by Commissioner

11. If:

(a) a provision of this Act refers to an approval given, determination made or other act or thing done by the Commissioner; and

(b) there is no other provision of this Act expressly authorising the Commissioner to give the approval, make the determination or do the act or thing;

the Commissioner is authorised to give the approval, make the determination or do the act or thing.

Associates

12.(1) The question whether a person is an associate of another person for the purposes of this Act is to be determined in the same way as that question would be determined under the Corporations Law if the assumptions set out in subsection (2) were made.

(2) The assumptions are as follows:

(a) that sections 12 and 14 and paragraphs 15(1)(b) and 16(1)(b) and (c) of the Corporations Law had not been enacted;

(b) that section 13 of the Corporations Law were not limited to Chapter 7, but extended to all provisions of the Corporations Law.

Single trustees and groups of trustees

13. For the purposes of this Act:

- (a) a fund, scheme or trust has a single corporate trustee if, and only if, there is only one trustee of the fund, scheme or trust and that trustee is a corporate trustee; and
- (b) a fund, scheme or trust has a single individual trustee if, and only if, there is only one trustee of the fund, scheme or trust and that trustee is an individual trustee; and
- (c) a fund, scheme or trust has a group of 2 or more individual trustees if, and only if, the fund, scheme or trust has 2 or more trustees and each trustee is an individual.

Indefinitely continuing fund—application of rules against perpetuities 10

14. If the governing rules of a fund contain a provision the purpose of which is to avoid a breach of a rule of law relating to perpetuities, that provision does not prevent the fund from being treated as an indefinitely continuing fund for the purposes of the definition of “approved deposit fund” or “superannuation fund” in section 10. 15

Payments for purchase of annuities

15.(1) For the purposes of paragraph (c) of the definition of “approved purposes” in section 10, if:

- (a) an amount is deposited with an approved deposit fund; and 20
- (b) on the request of a beneficiary, the amount is paid by the fund to a life insurance company or registered organisation for the purchase of an annuity in the name of the beneficiary;

the amount is taken to be a repayment by the fund of the amount concerned to the beneficiary on request. 25

(2) A reference in subsection (1) to a beneficiary includes a reference to the legal personal representative of a beneficiary.

Definitions associated with employer-sponsorship

Employer-sponsor

16.(1) An **employer-sponsor** of a regulated superannuation fund is an employer who: 30

- (a) contributes to the fund; or
- (b) would, apart from a temporary cessation of contributions, contribute to the fund;

for the benefit of: 35

- (c) a member of the fund who is an employee of:
 - (i) the employer; or
 - (ii) an associate of the employer; or
- (d) the dependants of such a member in the event of the death of the member. 40

Standard employer-sponsor

(2) If an employer so contributes, or would contribute, wholly or partly pursuant to an arrangement between the employer and the trustee of the regulated superannuation fund concerned, the employer is a **standard employer-sponsor** of the fund (as well as being an employer-sponsor of the fund). If the employer only so contributes, or would contribute, pursuant to arrangements between the employer and a member or members of the fund, the employer is not a standard employer-sponsor.

Employer-sponsored fund

(3) An **employer-sponsored fund** is a regulated superannuation fund that has at least one employer-sponsor.

Standard employer-sponsored fund

(4) If a regulated superannuation fund has at least one standard employer-sponsor, the fund is a **standard employer-sponsored fund** (as well as being an employer-sponsored fund).

Standard employer-sponsored member

(5) A **standard employer-sponsored member** is a member of a regulated superannuation fund in respect of whom an employer-sponsor contributes, or would contribute, as mentioned in subsection (1) wholly or partly pursuant to an arrangement between the employer-sponsor and the trustee of the fund.

Persons involved in contravention

17. For the purposes of this Act, a person is involved in a contravention if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

Public offer superannuation fund

Definition

18.(1) A superannuation fund is a **public offer superannuation fund** if:

- (a) one of the following subparagraphs applies to the fund:
 - (i) it is a regulated superannuation fund that is not a standard employer-sponsored fund;
 - (ii) it is a standard employer-sponsored fund that has at least one member:
 - (A) who is not a standard employer-sponsored member; and

- (B) who is not a member of a prescribed class;
 - (iii) it is a standard employer-sponsored fund in relation to which an election under subsection (2) has been made;
 - (iv) a declaration under subsection (6) (which allows for funds to be declared to be public offer superannuation funds) is in force in relation to the fund; and
- (b) no declaration under subsection (7) (which allows for funds to be declared not to be public offer superannuation funds) is in force in relation to the fund.

Election to be a public offer superannuation fund 10

(2) The trustee of a standard employer-sponsored fund may elect that the fund is to be treated as a public offer superannuation fund.

How an election is made

- (3) An election must be made by giving the Commissioner a written notice that is:
- (a) in the approved form; and
 - (b) under the common or official seal of the trustee.

Trustee has power to make election despite anything in the governing rules

(4) The trustee has the power to make an election despite anything in the governing rules of the fund. 20

Election is irrevocable

- (5) An election is irrevocable.

Declaration that fund is a public offer superannuation fund

(6) The Commissioner may, in writing, declare a superannuation fund to be a public offer superannuation fund. 25

Declaration that fund is not a public offer superannuation fund

(7) The Commissioner may, in writing, declare a superannuation fund not to be a public offer superannuation fund.

Commencement of declaration 30

(8) A declaration comes into force when it is made, or, if a later time is specified in the declaration as the time when it comes into force, it comes into force at that later time.

Cessation of declaration

- (9) A declaration remains in force:
- (a) if a time is specified in the declaration as the time when it stops being in force—until that time, or until the declaration is revoked, whichever occurs first; or

(b) otherwise—until the declaration is revoked.

Revocation of declaration

(10) The Commissioner may, in writing, revoke a declaration.

Commissioner must have regard to guidelines when making or revoking a declaration

5

(11) When making or revoking a declaration, the Commissioner must have regard to any written guidelines determined by the Commissioner under this subsection.

Copy of declaration or revocation to be given to trustee

10

(12) As soon as practicable after making or revoking a declaration, the Commissioner must give the trustee of the superannuation fund concerned a copy of the instrument making or revoking the declaration.

Regulated superannuation fund

Definition

15

19.(1) A regulated superannuation fund is a superannuation fund in respect of which subsections (2) to (4) have been complied with.

Fund must have a trustee

(2) The superannuation fund must have a trustee.

Trustee must be a constitutional corporation or fund must be a pension fund

20

(3) Either of the following must apply:

(a) the trustee of the fund must be a constitutional corporation pursuant to a requirement contained in the governing rules;

25

(b) the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions.

Election by trustee

(4) The trustee or trustees must have given to the Commissioner a written notice in the approved form signed by the trustee or each trustee:

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(a) in the case of a corporate trustee—under its common or official seal;
or

(b) in the case of an individual—by him or her;
electing that this Act is to apply in relation to the fund.

Election is irrevocable

(5) An election made as mentioned in subsection (4) is irrevocable.

Trustee has power to make election despite anything in the governing rules etc.

(6) The trustee or trustees have the power to make an election as mentioned in subsection (4) despite anything in the governing rules of the fund.

5

Certain funds must become regulated superannuation funds

(7) If all of the following conditions are satisfied in relation to a superannuation fund at any time during the period beginning on the day on which this Act received the Royal Assent and ending at the end of the fund's 1993-94 year of income:

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(a) the fund has a trustee;

(b) either:

(i) the trustee of the fund is a constitutional corporation; or

(ii) the governing rules of the fund provide that the sole or primary purpose of the fund is the provision of old-age pensions;

15

(c) the fund is not a public sector superannuation scheme;

(d) there is in force a notice under section 12 or 13 of the *Occupational Superannuation Standards Act 1987* stating that the Commissioner is satisfied that the fund satisfied, or should be treated as if it had satisfied, the superannuation fund conditions in relation to a particular year of income;

20

(e) there is not in force a notice under section 12 or 13 of the *Occupational Superannuation Standards Act 1987* stating that the Commissioner is not satisfied that the fund satisfied the superannuation fund conditions in relation to a year of income later than the year of income mentioned in paragraph (d);

25

the trustee of the fund must use its best endeavours to ensure that the fund becomes a regulated superannuation fund at or before the beginning of the fund's 1994-95 year of income.

Contravention of subsection (7) is not an offence

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(8) A contravention of subsection (7) is not an offence. However, a contravention of subsection (7) is a ground for the grant of an injunction under section 315.

References to repealed provisions of OSSA

(9) A reference in this section to a provision of the *Occupational Superannuation Standards Act 1987* includes a reference to the provision as it continues to apply, despite its repeal, because of the *Occupational Superannuation Standards Amendment Act 1993*.

35

Related bodies corporate

20. The question whether bodies corporate are related to each other for the purposes of this Act is to be determined in the same way as that question would be determined under the Corporations Law.

5

PART 2—APPROVAL OF TRUSTEES

Object of Part

21.(1) The object of this Part is to provide for constitutional corporations to be approved as trustees for the purposes of this Act.

(2) The significance of the approval of trustees is as follows:

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(a) a fund cannot be an approved deposit fund unless it is maintained by an approved trustee (the other requirements of the definition of “approved deposit fund” in section 10 must also be satisfied);

15

(b) the trustee of a public offer entity must not engage in conduct to which section 152 applies unless the trustee is an approved trustee (the other requirements of subsection 152(2) must also be satisfied).

Interpretation

22. In this Part:

“relevant entity” means:

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(a) a public offer entity; or

(b) an approved deposit fund.

Application for approval

23.(1) A constitutional corporation may apply to the Commissioner for an approval as a trustee for the purposes of this Act.

(2) An application must:

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(a) be in the approved form; and

(b) contain the information required by the form; and

(c) be accompanied by an application fee of the prescribed amount.

Further information may be requested

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24. If the Commissioner needs further information to decide an application for approval, the Commissioner may ask the applicant to provide the information.

Period within which application for approval is to be decided

25.(1) Subject to this section, the Commissioner must decide an application for approval within 60 days after receiving it.

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(2) If the Commissioner thinks that it will take longer to decide the application, the Commissioner may extend, by up to 60 days, the period for deciding it.

(3) An extension must be made by written notice given to the applicant within 60 days after the Commissioner receives the application.

(4) If the Commissioner makes an extension, the Commissioner must decide the application within the extended period.

(5) If the Commissioner has not decided the application by the end of the day by which the Commissioner is required to decide it, the Commissioner is taken to have decided, at the end of that day, to refuse the application. 5

Deciding an application for approval

26.(1) The Commissioner must, in writing, approve an applicant as a trustee for the purposes of this Act if, and only if: 10

(a) the Commissioner is satisfied that the applicant can be relied on to perform, in a proper manner, the duties of trustee of any relevant entity of which the applicant is or becomes the trustee; and

(b) at least one of the following subparagraphs applies:

(i) the Commissioner is satisfied that the value of the net tangible assets of the applicant is not less than the amount prescribed by the regulations; 15

(ii) the Commissioner is satisfied that the applicant is entitled to the benefit of an approved guarantee of an amount not less than the amount prescribed by the regulations, being a guarantee in respect of the applicant's duties as trustee of each relevant entity of which the applicant is, or is proposing to become, the trustee; 20

(iii) the applicant has agreed to comply with the written requirements given to the applicant by the Commissioner before the granting of the approval, being requirements relating to the custody of the assets of a relevant entity or relevant entities of which the applicant is or becomes the trustee. 25

(2) Otherwise, the Commissioner must, in writing, refuse the application. 30

(3) The approval is subject to any conditions specified in the instrument of approval.

(4) If the Commissioner refuses the application, the Commissioner must set out the reasons for the refusal in the instrument of refusal. 35

(5) The Commissioner must cause the applicant to be given a copy of the instrument of approval or refusal.

When an approval is in force

27. An approval under section 26:

- (a) comes into force when it is granted, or, if a later time is specified in the instrument of approval as the time when the approval comes into force, at that later time; and
- (b) remains in force until it is revoked under section 28.

Revocation of approval

28.(1) The Commissioner may revoke the approval of an approved trustee by written notice given to the trustee.

10 (2) Without limiting subsection (1), the Commissioner may revoke an approval under that subsection if the Commissioner is satisfied, on reasonable grounds, that:

- (a) there has been a contravention of any condition to which the approval is subject; or
- 15 (b) the trustee can no longer be relied on to perform, in a proper manner, the duties of trustee of each relevant entity of which the trustee is the trustee; or
- (c) if subparagraph 26(1)(b)(i) applied to the approval of the trustee—that subparagraph has ceased to apply to the trustee; or
- 20 (d) if subparagraph 26(1)(b)(ii) applied to the approval of the trustee—that subparagraph has ceased to apply to the trustee; or
- (e) if subparagraph 26(1)(b)(iii) applied to the approval of the trustee—the trustee has failed to comply with a requirement of the Commissioner under that subparagraph.

25 (3) The Commissioner must not make a decision under subsection (1) without the written consent of the Minister.

Notification of change in circumstances or breach of conditions

29.(1) An approved trustee must, as soon as practicable, and in any event within 30 days, after becoming aware of an event referred to in subsection
30 (2), give the Commissioner a written notice setting out particulars of the event.

(2) These are the events:

- (a) a contravention of a condition to which the approval of the trustee is subject;
- 35 (b) if subparagraph 26(1)(b)(i) applied to the approval of the trustee—that subparagraph ceasing to apply to the trustee;
- (c) if subparagraph 26(1)(b)(ii) applied to the approval of the trustee—that subparagraph ceasing to apply to the trustee;

- (d) if subparagraph 26(1)(b)(iii) applied to the approval of the trustee—the trustee failing to comply with a requirement of the Commissioner under that subparagraph.

(3) An approved trustee must not, without reasonable excuse, contravene subsection (1). 5

Penalty: 250 penalty units.

PART 3—OPERATING STANDARDS FOR SUPERANNUATION ENTITIES

Object of Part

30. The object of this Part is to provide for a system of prescribed standards applicable to the operation of regulated superannuation funds, approved deposit funds and pooled superannuation trusts. 10

Operating standards for regulated superannuation funds

31.(1) The regulations may prescribe standards applicable to the operation of regulated superannuation funds (“**funds**”). 15

(2) The standards that may be prescribed include, but are not limited to, standards relating to the following matters:

- (a) the persons who may contribute to funds;
- (b) the vesting in beneficiaries in funds of benefits arising directly or indirectly from amounts contributed to the funds; 20
- (c) the amount of contributions that a fund may accept;
- (d) the circumstances in which a fund may accept contributions;
- (e) the form in which benefits may be provided by funds;
- (f) the actuarial standards that will apply to funds;
- (g) the preservation of benefits arising directly or indirectly from amounts contributed to funds; 25
- (h) the payment by funds of benefits arising directly or indirectly from amounts contributed to the funds;
- (i) the portability of benefits arising directly or indirectly from amounts contributed to funds; 30
- (j) the levels of benefits that may be provided by funds and the levels of assets that may be held by funds;
- (k) the application by funds of money no longer required to meet payments of benefits to beneficiaries because the beneficiaries have ceased to be entitled to receive those benefits; 35
- (l) the investment of assets of funds;
- (m) the number of trustees, and the composition of boards or committees of trustees, of funds;

- (n) the keeping and retention of records in relation to funds;
- (o) the financial and actuarial reports to be prepared in relation to funds;
- (p) the disclosure of information to beneficiaries in funds;
- (q) the disclosure of information about funds to the Commissioner;
- 5 (r) the disclosure of information about funds to persons other than beneficiaries or the Commissioner;
- (s) the financial position of funds;
- (t) the funding and solvency of funds;
- (u) the winding-up of funds.

10 **Operating standards for approved deposit funds**

32.(1) The regulations may prescribe standards applicable to the operation of approved deposit funds (“**funds**”).

(2) The standards that may be prescribed include, but are not limited to, standards relating to the following matters:

- 15 (a) the kinds of amounts that may be deposited with funds;
- (b) the preservation of amounts deposited with funds, and of earnings on such amounts;
- (c) the payment out of funds of amounts deposited with the funds, and of earnings on such amounts;
- 20 (d) the portability of amounts deposited with funds, and of earnings on such amounts;
- (e) the form in which benefits may be paid out of funds;
- (f) the investment of assets of funds;
- (g) the keeping and retention of records in relation to funds;
- 25 (h) the financial and actuarial reports to be prepared in relation to funds;
- (i) the disclosure of information to beneficiaries in funds;
- (j) the disclosure of information about funds to the Commissioner;
- (k) the disclosure of information about funds to persons other than beneficiaries or the Commissioner;
- 30 (l) the financial position of funds;
- (m) the funding and solvency of funds;
- (n) the winding-up of funds.

Operating standards for pooled superannuation trusts

35 **33.(1)** The regulations may prescribe standards applicable to the operation of pooled superannuation trusts (“**trusts**”).

(2) The standards that may be prescribed include, but are not limited to, standards relating to the following matters:

- (a) the ownership and disposal of units in trusts;

- (b) the investment of assets of trusts;
- (c) the persons who may be trustees of trusts;
- (d) the number of trustees, and the composition of boards or committees of trustees, of trusts;
- (e) the keeping and retention of records in relation to trusts; 5
- (f) the financial and actuarial reports to be prepared in relation to trusts;
- (g) the disclosure of information to unit-holders in trusts;
- (h) the disclosure of information about trusts to the Commissioner;
- (i) the disclosure of information about trusts to persons other than unit-holders or the Commissioner; 10
- (j) the financial position of trusts;
- (k) the funding and solvency of trusts.

Prescribed operating standards must be complied with

Standards must be complied with

34.(1) The trustee of a superannuation entity must ensure that the prescribed standards applicable to the operation of the entity are complied with at all times. 15

Offence

(2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units. 20

Validity of transaction not affected by contravention of (1)

(3) A contravention of subsection (1) does not affect the validity of a transaction.

PART 4—TRUSTEE OF SUPERANNUATION ENTITY TO LODGE ANNUAL RETURNS WITH THE COMMISSIONER 25

Object of Part

35. The object of this Part is to require the trustee of a superannuation entity to lodge an annual return with the Commissioner.

Trustee to lodge annual returns 30

Lodgment

36.(1) The trustee of a superannuation entity must, within the prescribed period after each year of income, give to the Commissioner:

- (a) a return, in the approved form, containing such information as is required by that form in relation to the entity in respect of that year of income; and 35

- (b) a certificate, in the approved form, by the trustee in relation to the entity in respect of that year of income; and
- (c) the certificate given to the trustee by an approved auditor under Part 13 in relation to the entity in respect of that year of income.

5 *Offence*

(2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

Data processing devices

- 10 (3) An approval given by the Commissioner of a form of return for the purposes of paragraph (1)(a) may require or permit the return to be given on a specified kind of data processing device in accordance with specified software requirements.

Endorsement of certificates

- 15 (4) If the return is given otherwise than on a data processing device, a certificate referred to in paragraph (1)(b) or (c) may be endorsed on the return.

PART 5—NOTICES ABOUT COMPLYING FUND STATUS

Division 1—Objects and interpretation

20 **Objects of Part**

37. The objects of this Part are:

- (a) to provide for a system of notices about complying fund status in relation to a year of income (see Division 2); and
 - (b) to provide for those notices to be used to determine complying fund status for tax purposes (see Division 3).
- 25

Meaning of “entity”

38. In this Part:

“entity” means a fund, scheme or trust.

30 *Division 2—Commissioner may give notices about complying fund status*

Meaning of “contravention”

39.(1) For the purposes of this Division, a contravention of this Act (other than Part 9) or the regulations is to be ignored unless the contravention is:

- (a) an offence; or
- (b) a contravention of a civil penalty provision.

(2) For the purposes of this Division, it is sufficient if a contravention is established on the balance of probabilities.

Notices by Commissioner to trustee 5

Notice about complying fund status

40.(1) The Commissioner may give a written notice to the trustee of an entity stating:

- (a) whether the entity is or is not a complying superannuation fund; or
- (b) whether the entity is or is not a complying approved deposit fund; or 10
- (c) whether the entity is or is not a pooled superannuation trust;

as the case may be, in relation to a year of income specified in the notice.

Reasons

(2) If the Commissioner gives a notice to the trustee of an entity stating that: 15

- (a) the entity is not a complying superannuation fund; or
- (b) the entity is not a complying approved deposit fund; or
- (c) the entity is not a pooled superannuation trust;

as the case may be, in relation to a year of income, the notice must set out the reasons why the Commissioner so stated. 20

Commissioner of Taxation to be told about notice

(3) When the Commissioner gives a notice under this section, the Commissioner must give particulars of the notice to the Commissioner of Taxation.

Revocation 25

(4) If:

- (a) the Commissioner gives a notice under this section (the “**original notice**”) to the trustee of an entity stating that:
 - (i) the entity is a complying superannuation fund; or
 - (ii) the entity is a complying approved deposit fund; or 30
 - (iii) the entity is a pooled superannuation trust;

as the case may be, in relation to a year of income; and

- (b) the Commissioner subsequently gives a notice under this section (the “**second notice**”) to the trustee of the entity stating that:
 - (i) the entity is not a complying superannuation fund; or 35
 - (ii) the entity is not a complying approved deposit fund; or

(iii) the entity is not a pooled superannuation trust;
as the case may be, in relation to the year of income;
the second notice is taken to revoke the original notice.

When Commissioner obliged to give notice of compliance

5 **41.(1)** Except as provided by subsection (2), the Commissioner is not obliged to give a notice under section 40.

10 **(2)** The Commissioner must give a notice under section 40 to the trustee of an entity stating that the entity is a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust, as the case may be, in relation to a year of income (the “**current year of income**”) if:

15 (a) the entity is a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust, as the case requires, in relation to the current year of income; and

15 (b) either:

20 (i) the Commissioner has not given a notice to the trustee under section 40 stating that the entity is a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust, as the case requires, in relation to a previous year of income; or

20 (ii) both:

25 (A) the Commissioner has given a notice to the trustee under section 40 stating that the entity is not a complying superannuation fund, is not a complying approved deposit fund or is not a pooled superannuation trust, as the case requires, in relation to a previous year of income; and

30 (B) the Commissioner has not given a notice to the trustee under section 40 stating that the fund is a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust, as the case requires, in relation to a year of income that is later than that previous year of income and earlier than the current year of income.

35 **(3)** Despite section 2, a previous year mentioned in subsection (2) may be a year of income earlier than the 1994-95 year of income (see section 49). However, despite section 49, for the purposes of the application of subsection (2) to a complying superannuation fund, if the fund was not a regulated superannuation fund at all times during the current year of income
40 when the fund was in existence, paragraph (2)(b) does not apply unless the previous year of income is the 1994-95 year of income or a later year of income.

(4) For the purposes of this section, if a notice under section 40 is revoked, or the decision to give the notice is set aside, the notice is taken never to have been given.

Complying superannuation fund

42.(1) An entity is a complying superannuation fund in relation to a year of income for the purposes of this Division if: 5

(a) at all times during the year of income when the entity was in existence, the entity was a regulated superannuation fund; and

(b) any of the following conditions is satisfied:

(i) the trustee did not contravene this Act or the regulations in relation to the entity in respect of the year of income; 10

(ii) both:

(A) the trustee contravened this Act or the regulations in relation to the entity in respect of the year of income on one or more occasions; and 15

(B) each contravention was rectified within a period of 30 days after the trustee became aware of the contravention or within such further period as the Commissioner allows;

(iii) both: 20

(A) the trustee contravened this Act or the regulations in relation to the entity in respect of the year of income on one or more occasions; and

(B) the Commissioner is satisfied that the seriousness or frequency, or both, of the contraventions does not warrant the giving of a notice stating that the entity is not a complying superannuation fund in relation to the year of income; 25

(iv) the Commissioner, after considering all relevant circumstances, thinks that a notice should be given stating that the entity is a complying superannuation fund in relation to the year of income. 30

(2) For the purposes of subsection (1), if a fund does not comply with Part 9 (which deals with equal representation) at any time during the year of income, the trustee of the fund is taken to have contravened this Act in relation to the fund in respect of the year of income. 35

Complying approved deposit fund

43. An entity is a complying approved deposit fund in relation to a year of income for the purposes of this Division if:

(a) at all times during the year of income when the entity was in existence, the entity was an approved deposit fund; and 40

(b) any of the following conditions is satisfied:

(i) the trustee did not contravene this Act or the regulations in relation to the entity in respect of the year of income;

(ii) both:

5 (A) the trustee contravened this Act or the regulations in relation to the entity in respect of the year of income on one or more occasions; and

10 (B) each contravention was rectified within a period of 30 days after the trustee became aware of the contravention or within such further period as the Commissioner allows;

(iii) both:

15 (A) the trustee contravened this Act or the regulations in relation to the entity in respect of the year of income on one or more occasions; and

20 (B) the Commissioner is satisfied that the seriousness or frequency, or both, of the contraventions does not warrant the giving of a notice stating that the entity is not a complying approved deposit fund in relation to the year of income;

(iv) the Commissioner, after considering all relevant circumstances, thinks that a notice should be given stating that the entity is a complying approved deposit fund in relation to the year of income.

25 **Pooled superannuation trust**

44. An entity is a pooled superannuation trust in relation to a year of income for the purposes of this Division if:

(a) at all times during the year of income when the entity was in existence, the entity was a pooled superannuation trust; and

30 (b) any of the following conditions is satisfied:

(i) the trustee did not contravene this Act or the regulations in relation to the entity in respect of the year of income;

(ii) both:

35 (A) the trustee contravened this Act or the regulations in relation to the entity in respect of the year of income on one or more occasions; and

40 (B) each contravention was rectified within a period of 30 days after the trustee became aware of the contravention or such further period as the Commissioner allows;

(iii) both:

- (A) the trustee contravened this Act or the regulations in relation to the entity in respect of the year of income on one or more occasions; and
- (B) the Commissioner is satisfied that the seriousness or frequency, or both, of the contraventions does not warrant the giving of a notice stating that the entity is not a pooled superannuation trust in relation to the year of income; 5
- (iv) the Commissioner, after considering all relevant circumstances, thinks that a notice should be given stating that the entity is a pooled superannuation trust in relation to the year of income. 10

Division 3—Complying fund status for tax purposes

Complying superannuation fund

45.(1) A fund is a complying superannuation fund for the purposes of Part IX of the Income Tax Assessment Act in relation to a year of income (the “**current year of income**”) if, and only if: 15

- (a) the Commissioner has given a notice to the trustee under section 40 stating that the fund is a complying superannuation fund in relation to the current year of income; or 20
- (b) the Commissioner has given a notice to the trustee under section 40 stating that the fund is a complying superannuation fund in relation to a previous year of income and has not given a notice to the trustee under that section stating that the fund was not a complying superannuation fund in relation to: 25
 - (i) the current year of income; or
 - (ii) a year of income that is:
 - (A) later than that previous year of income; and
 - (B) earlier than the current year of income.

(2) Despite section 2, the previous year mentioned in paragraph (1)(b) may be a year of income earlier than the 1994-95 year of income (see section 49). However, despite section 49, if the fund was not a regulated superannuation fund at all times during the current year of income when the fund was in existence, paragraph (1)(b) does not apply unless the previous year of income is the 1994-95 year of income or a later year of income. 35

(3) For the purposes of this section, if a notice under section 40 is revoked, or the decision to give the notice is set aside, the notice is taken never to have been given.

(4) Section 170 of the Income Tax Assessment Act does not prevent the amendment of an assessment at any time for the purposes of giving effect to subsection (3). 40

(5) For the purposes of this section, if a notice under section 40 is given in relation to a fund in relation to a year of income, the notice is taken to have been given at the beginning of the year of income.

5 (6) Despite subsection (1), if, at all times during a year of income when a fund was in existence, the fund was, or was part of, an exempt public sector superannuation scheme, the fund is a complying superannuation fund in relation to the year of income for the purposes of Part IX of the Income Tax Assessment Act.

10 **Complying superannuation scheme—superannuation guarantee charge**

46. An exempt public sector superannuation scheme is taken to be a complying superannuation scheme for the purposes of the *Superannuation Guarantee (Administration) Act 1992*.

15 **Complying approved deposit fund**

47.(1) A fund is a complying approved deposit fund for the purposes of Part IX of the Income Tax Assessment Act in relation to a year of income (the “current year of income”) if, and only if:

20 (a) the Commissioner has given a notice to the trustee under section 40 stating that the fund is a complying approved deposit fund in relation to the current year of income; or

(b) the Commissioner has given a notice to the trustee under section 40 stating that the fund is a complying approved deposit fund in relation to a previous year of income and has not given a notice to the trustee under that section stating that the fund was not a complying approved deposit fund in relation to:

25 (i) the current year of income; or

(ii) a year of income that is:

(A) later than that previous year of income; and

(B) earlier than the current year of income.

30 (2) Despite section 2, the previous year mentioned in paragraph (1)(b) may be a year of income earlier than the 1994-95 year of income (see section 49).

35 (3) For the purposes of this section, if a notice under section 40 is revoked, or the decision to give the notice is set aside, the notice is taken never to have been given.

(4) Section 170 of the Income Tax Assessment Act does not prevent the amendment of an assessment at any time for the purposes of giving effect to subsection (3).

(5) For the purposes of this section, if a notice under section 40 is given in relation to a fund in relation to a year of income, the notice is taken to have been given at the beginning of the year of income.

Pooled superannuation trust

48.(1) A unit trust is a pooled superannuation trust for the purposes of Part IX of the Income Tax Assessment Act in relation to a year of income (the “**current year of income**”) if, and only if: 5

- (a) the Commissioner has given a notice to the trustee under section 40 stating that the trust is a pooled superannuation trust in relation to the current year of income; or 10
- (b) the Commissioner has given a notice to the trustee under section 40 stating that the trust is a pooled superannuation trust in relation to a previous year of income and has not given a notice to the trustee under that section stating that the trust was not a pooled superannuation trust in relation to: 15
 - (i) the current year of income; or
 - (ii) a year of income that is:
 - (A) later than that previous year of income; and
 - (B) earlier than the current year of income.

(2) Despite section 2, the previous year mentioned in paragraph (1)(b) may be a year of income earlier than the 1994-95 year of income (see section 49). 20

(3) For the purposes of this section, if a notice under section 40 is revoked, or the decision to give the notice is set aside, the notice is taken never to have been given. 25

(4) Section 170 of the Income Tax Assessment Act does not prevent the amendment of an assessment at any time for the purposes of giving effect to subsection (3).

(5) For the purposes of this section, if a notice under section 40 is given in relation to a trust in relation to a year of income, the notice is taken to have been given at the beginning of the year of income. 30

Transitional—notices under the repealed provisions of the Occupational Superannuation Standards Act 1987

Superannuation funds—positive

49.(1) For the purposes of paragraph 41(2)(b) and this Division, if: 35

- (a) a notice under repealed section 12 or 13 of the *Occupational Superannuation Standards Act 1987* stated that the Commissioner is satisfied that:

- (i) a fund satisfied the superannuation fund conditions in relation to a year of income; or 40

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- (ii) a fund should be treated as if it had satisfied the superannuation fund conditions in relation to a year of income; and
- (b) the year of income is the 1993-94 year of income or an earlier year of income;

5 the notice has effect as if it were a notice under section 40 stating that the fund is a complying superannuation fund in relation to the year of income.

ADFs—positive

(2) For the purposes of paragraph 41(2)(b) and this Division, if:

10 (a) a notice under repealed section 14 or 15 of the *Occupational Superannuation Standards Act 1987* stated that the Commissioner is satisfied that:

(i) a fund satisfied the approved deposit fund conditions in relation to a year of income; or

15 (ii) a fund should be treated as if it had satisfied the approved deposit fund conditions in relation to a year of income; and

(b) the year of income is the 1993-94 year of income or an earlier year of income;

the notice has effect as if it were a notice under section 40 stating that the fund is a complying approved deposit fund in relation to the year of income.

20 *PSTs—positive*

(3) For the purposes of paragraph 41(2)(b) and this Division, if:

(a) a notice under repealed section 15B or 15C of the *Occupational Superannuation Standards Act 1987* stated that the Commissioner is satisfied that:

25 (i) a trust satisfied the pooled superannuation trust conditions in relation to a year of income; or

(ii) a trust should be treated as if it had satisfied the pooled superannuation trust conditions in relation to a year of income; and

30 (b) the year of income is the 1993-94 year of income or an earlier year of income;

the notice has effect as if it were a notice under section 40 stating that the trust is a pooled superannuation trust in relation to the year of income.

Superannuation funds—negative

35 (4) For the purposes of paragraph 41(2)(b) and this Division, if:

(a) a notice under the repealed section 12 or 13 of the *Occupational Superannuation Standards Act 1987* stated that the Commissioner is not satisfied that a fund satisfied the superannuation fund conditions in relation to a year of income; and

- (b) the year of income is the 1993-94 year of income or an earlier year of income;

the notice has effect as if it were a notice under section 40 stating that the fund is not a complying superannuation fund in relation to the year of income.

ADFs—negative

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- (5) For the purposes of paragraph 41(2)(b) and this Division, if:

- (a) a notice under the repealed section 14 or 15 of the *Occupational Superannuation Standards Act 1987* stated that the Commissioner is not satisfied that a fund satisfied the approved deposit fund conditions in relation to a year of income; and

10

- (b) the year of income is the 1993-94 year of income or an earlier year of income;

the notice has effect as if it were a notice under section 40 stating that the fund is not a complying approved deposit fund in relation to the year of income.

PSTs—negative

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- (6) For the purposes of paragraph 41(2)(b) and this Division, if:

- (a) a notice under the repealed section 15B or 15C of the *Occupational Superannuation Standards Act 1987* stated that the Commissioner is not satisfied that a trust satisfied the pooled superannuation trust conditions in relation to a year of income; and

20

- (b) the year of income is the 1993-94 year of income or an earlier year of income;

the notice has effect as if it were a notice under section 40 stating that the trust is not a pooled superannuation trust in relation to the year of income.

OSSA—continued operation

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(7) A reference in this section to a provision of the *Occupational Superannuation Standards Act 1987* includes a reference to that provision as it continues to apply, despite its repeal, because of the *Occupational Superannuation Standards Amendment Act 1993*.

Transitional—late lodgment of elections by trustees of superannuation funds

30

28 days late

50.(1) For the purposes of subsection 41(3), paragraph 42(1)(a) and subsection 45(2), if:

- (a) on a particular day (the “**lodgment day**”), the trustee of a superannuation fund lodges an election under section 19; and

35

- (b) the lodgment day is after the end of the fund’s 1993-94 year of income and before 29 July 1994; and

(c) under the regulations, the fund is treated as if it had satisfied the transitional superannuation fund conditions at all times during the period (the “**pre-lodgment period**”):

(i) beginning at the beginning of the fund’s 1994-95 year of income; and

(ii) ending at the end of the lodgment day;

the fund is taken to be a regulated superannuation fund at all times during the pre-lodgment period.

Excluded superannuation funds

(2) For the purposes of subsection 41(3), paragraph 42(1)(a) and subsection 45(2), if:

(a) on a particular day (the “**lodgment day**”), the trustee of an excluded superannuation fund lodges an election under section 19; and

(b) the lodgment day is after the end of the fund’s 1993-94 year of income and before whichever is the earlier of:

(i) 1 January 1995; or

(ii) the beginning of the fund’s 1995-96 year of income; and

(c) under the regulations, the fund is treated as if it had satisfied the transitional superannuation fund conditions at all times during the period (the “**pre-lodgment period**”):

(i) beginning at the beginning of the fund’s 1994-95 year of income; and

(ii) ending at the end of the lodgment day;

the fund is taken to be a regulated superannuation fund at all times during the pre-lodgment period.

Public sector superannuation schemes

(3) For the purposes of subsection 41(3), paragraph 42(1)(a) and subsection 45(2), if:

(a) on a particular day (the “**lodgment day**”), the trustee of a superannuation fund, being a public sector superannuation scheme, lodges an election under section 19; and

(b) the lodgment day is after the end of the fund’s 1993-94 year of income and before:

(i) 1 July 1995; or

(ii) such later date as the Commissioner allows; and

(c) under the regulations, the fund is treated as if it had satisfied the transitional superannuation fund conditions at all times during the period (the “**pre-lodgment period**”):

(i) beginning at the beginning of the fund’s 1994-95 year of income; and

(ii) ending at the end of the lodgment day;

the fund is taken to be a regulated superannuation fund at all times during the pre-lodgment period.

Special circumstances

(4) For the purposes of subsection 41(3), paragraph 42(1)(a) and subsection 45(2), if:

(a) on a particular day (the “**lodgment day**”), the trustee of a superannuation fund lodges an election under section 19; and

(b) the lodgment day is;

(i) after 28 July 1994; and

(ii) before whichever is the earlier of:

(A) 1 January 1995; or

(B) the beginning of the fund’s 1995-96 year of income; and

(c) the trustee satisfies the Commissioner that, because of special circumstances, this subsection should apply in relation to the fund; and

(d) the trustee has complied with such requirements relating to notifying members of the fund about:

(i) the delay in lodging the election; and

(ii) the reasons for the delay in lodging the election;

as are specified in regulations made for the purposes of this paragraph; and

(e) under the regulations, the fund is treated as if it had satisfied the transitional superannuation fund conditions at all times during the period (the “**pre-lodgment period**”):

(i) beginning at the beginning of the fund’s 1994-95 year of income; and

(ii) ending at the end of the lodgment day;

the fund is taken to be a regulated superannuation fund at all times during the pre-lodgment period.

Regulations may apply OSS system

(5) Regulations made for the purposes of paragraph (1)(c), (2)(c), (3)(c) or (4)(e) may:

(a) confer functions or powers on the Commissioner; and

(b) make provision for or in relation to a matter by applying, adopting or incorporating, with such modifications as are prescribed, the provisions, or the repealed provisions, of:

(i) the *Occupational Superannuation Standards Act 1987*; or

(ii) regulations made for the purposes of section 7 of that Act;

(including those provisions as they continue to apply, despite their repeal, because of the *Occupational Superannuation Standards Amendment Act 1993*).

Section 49A of the Acts Interpretation Act 1901

(6) Subsection (5) of this section does not limit the application of section 49A of the *Acts Interpretation Act 1901* to regulations made for the purposes of this section.

5 **PART 6—PROVISIONS RELATING TO GOVERNING RULES OF SUPERANNUATION ENTITIES**

Object of Part

51. The object of this Part is to set out rules about the content of the governing rules of superannuation entities.

10 **Covenants to be included in governing rules**

Governing rules taken to contain covenants

52.(1) If the governing rules of a superannuation entity do not contain covenants to the effect of the covenants set out in subsection (2), those governing rules are taken to contain covenants to that effect.

15 *The covenants*

(2) The covenants referred to in subsection (1) are the following covenants by the trustee:

- (a) to act honestly in all matters concerning the entity;
- 20 (b) to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
- (c) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries;
- 25 (d) to keep the money and other assets of the entity separate from any money and assets, respectively:
 - (i) that are held by the trustee personally; or
 - (ii) that are money or assets, as the case may be, of a standard employer-sponsor, or an associate of a standard
- 30 (e) not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers;
- (f) to formulate and give effect to an investment strategy that has regard
- 35 to the whole of the circumstances of the entity including, but not limited to, the following:
 - (i) the risk involved in making, holding and realising, and the likely return from, the entity's investments having regard to its objectives and its expected cash flow requirements;

- (ii) the composition of the entity's investments as a whole including the extent to which the investments are diverse or involve the entity in being exposed to risks from inadequate diversification;
- (iii) the liquidity of the entity's investments having regard to its expected cash flow requirements; 5
- (iv) the ability of the entity to discharge its existing and prospective liabilities;
- (g) if there are any reserves of the entity—to formulate and to give effect to a strategy for their prudential management, consistent with the entity's investment strategy and its capacity to discharge its liabilities (whether actual or contingent) as and when they fall due; 10
- (h) to allow a beneficiary access to any prescribed information or any prescribed documents.

Covenant referred to in paragraph (2)(e) 15

(3) A covenant referred to in paragraph (2)(e) does not prevent the trustee from engaging or authorising persons to do acts or things on behalf of the trustee.

Covenant referred to in paragraph (2)(f)

(4) An investment strategy is taken to be in accordance with paragraph (2)(f) even if it provides for a specified beneficiary or a specified class of beneficiaries to give directions to the trustee, where: 20

- (a) the directions relate to the strategy to be followed by the trustee in relation to the investment of a particular asset or assets of the entity; and 25
- (b) the directions are given in circumstances covered by regulations made for the purposes of this paragraph.

Regulations may prescribe other covenants

(5) The regulations may prescribe a covenant to be included in the governing rules of a superannuation entity and, if the governing rules of such a superannuation entity do not contain a covenant to the effect of the prescribed covenant, those rules are taken to contain a covenant to that effect. 30

Prescribed covenants may overlap with other requirements

(6) Without limiting the generality of subsection (5), the regulations may prescribe, for the purposes of that subsection, a covenant that elaborates, supplements, or otherwise deals with, any aspect of: 35

- (a) a matter to which a covenant in subsection (2) relates; or
- (b) a matter to which a provision of this Act (other than this section) relates.

But prescribed covenants must be capable of operating concurrently with other requirements

(7) However, a covenant prescribed for the purposes of subsection (5) must be capable of operating concurrently with:

- 5 (a) all the covenants referred to in subsection (2); and
(b) this Act other than this section.

Covenant by corporate trustee has effect as covenant by trustee's directors

10 (8) A covenant by a corporate trustee of a superannuation entity that is to the effect of a covenant referred to in subsection (2), or to the effect of a covenant prescribed by regulations referred to in subsection (5), also operates as a covenant by each of the directors of the trustee to exercise a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out the first-mentioned covenant, and so operates as if the directors were parties to the governing rules.

15 *Reasonable degree of care and diligence*

(9) The reference in subsection (8) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a reasonable person in the position of director of the trustee would exercise in the trustee's circumstances.

20 **Covenants to repay amounts to beneficiaries in approved deposit funds**

Governing rules to contain 2 covenants

25 53.(1) If the governing rules of an approved deposit fund (other than an excluded approved deposit fund) do not contain covenants to the effect of those set out in subsection (2), they are taken to contain covenants to that effect.

Content of the covenants

(2) The covenants are:

- 30 (a) that, if a beneficiary, by written notice given to the trustee, requests the trustee to pay to the beneficiary an amount equal to the beneficiary's interest in the fund, the trustee will pay that amount within a period (not being more than 12 months) determined by the trustee; and
35 (b) that each director of the trustee will ensure that the trustee gives effect to the covenant in paragraph (a).

Directors taken to be parties to governing rules

(3) The covenant in paragraph (2)(b) has effect as if each director were a party to the governing rules.

Period for payments to beneficiaries

(4) The trustee is to determine the period within which amounts are to be paid to beneficiaries under the covenant referred to in paragraph (2)(a).

Variation of payment period

(5) When the trustee has determined the period under subsection (4), the trustee may make a further determination varying that period if, and only if: 5

- (a) the Commissioner has consented in writing to the variation; or
- (b) the requirements of section 54 have been complied with.

Prerequisites to variation of repayment period

54.(1) The requirements referred to in paragraph 53(5)(b) are as follows: 10

- (a) the question whether the variation should be made has been voted on at a meeting of the beneficiaries;
- (b) the trustee convened the meeting by sending by post, to the last-known address of each of the beneficiaries, at least 21 days before the meeting, a notice that set out: 15
 - (i) the date, time and place of the meeting; and
 - (ii) the reason for convening the meeting;
- (c) the beneficiaries who, at the meeting, vote (whether in person or by proxy) on the question hold interests equal in value to at least the prescribed percentage of the total value of all the interests in the fund; 20
- (d) the prescribed percentage of the beneficiaries who voted on the question cast their votes in favour of making the variation.

(2) For the purposes of paragraph (1)(c), the value of an interest is the price at which the trustee would have to make a payment in respect of the interest if the trustee were required to do so, under the covenant referred to in section 53, on the day immediately before the day when the meeting is held. 25

Consequences of contravention of covenant

55.(1) A person must not contravene a covenant contained, or taken to be contained, in the governing rules of a superannuation entity. 30

(2) A contravention of subsection (1) is not an offence and a contravention of that subsection does not result in the invalidity of a transaction.

(3) A person who suffers loss or damage as a result of conduct of another person that was engaged in in contravention of subsection (1) may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention. 35

(4) An action under subsection (3) may be begun at any time within 6 years after the day on which the cause of action arose.

5 (5) It is a defence to an action for loss or damage suffered by a person as a result of the making of an investment by or on behalf of the trustee of a superannuation entity if the defendant establishes that the investment was made in accordance with an investment strategy formulated under a covenant referred to in paragraph 52(2)(f).

(6) It is a defence to an action for loss or damage suffered by a person as a result of the management of any reserves by the trustee of a superannuation entity if the defendant establishes that the management of the reserves was in accordance with a covenant referred to in paragraph 52(2)(g).

10 (7) Subsections (5) and (6) apply to an action for loss or damage, whether brought under subsection (3) or otherwise.

Indemnification of trustee from assets of entity

56.(1) A provision in the governing rules of a superannuation entity is void if:

- 15 (a) it purports to preclude the trustee from being indemnified out of the assets of the entity in respect of any liability incurred while acting as trustee of the entity; or
(b) subject to subsection (2), it limits the amount of such an indemnity.

20 (2) A provision in the governing rules of a superannuation entity is void in so far as it would have the effect of exempting the trustee from, or indemnifying the trustee against:

- (a) liability for breach of trust if the trustee:
25 (i) fails to act honestly in a matter concerning the entity; or
(ii) intentionally or recklessly fails to exercise, in relation to a matter affecting the entity, the degree of care and diligence that the trustee was required to exercise; or
(b) liability for a monetary penalty under a civil penalty order.

30 (3) Nothing in the governing rules of a superannuation entity prohibits the trustee of the entity from seeking advice from any person in respect of any matter relating to performance of the duties or the exercise of the powers of the trustee. A provision in the governing rules that purports to preclude the trustee from being indemnified out of assets of the entity in respect of the cost of obtaining such advice, or to limit the amount of such an indemnity, is void.

35 Indemnification of directors of trustee from assets of entity

57.(1) Subject to subsection (2), the governing rules of a superannuation entity may provide for a director of the trustee to be indemnified out of the assets of the entity in respect of a liability incurred while acting as a director of the trustee.

(2) A provision of the governing rules of a superannuation entity is void in so far as it would have the effect of indemnifying a director of the trustee against:

- (a) a liability that arises because the director:
 - (i) fails to act honestly in a matter concerning the entity; or 5
 - (ii) intentionally or recklessly fails to exercise, in relation to a matter affecting the entity, the degree of care and diligence that the director is required to exercise; or
- (b) liability for a monetary penalty under a civil penalty order.

(3) A director of the trustee of a superannuation entity may be indemnified out of the assets of the entity in accordance with provisions of the entity's governing rules that comply with this section. 10

(4) This section has effect despite section 241 of the Corporations Law of a State or internal Territory.

Trustee not to be subject to direction 15

58.(1) Subject to subsection (2), the governing rules of a superannuation entity other than an excluded fund must not permit the trustee to be subject, in the exercise of any of the trustee's powers under those rules, to direction by any other person.

- (2) Subsection (1) does not apply to: 20
 - (a) a direction given by a court; or
 - (b) a direction given by the Commissioner; or
 - (c) a direction given by a beneficiary or a group of beneficiaries that relates to benefits payable to that beneficiary or those beneficiaries, as the case may be; or 25
 - (d) a direction given by a beneficiary or group of beneficiaries, where the direction is covered by subsection 52(4); or
 - (e) if the entity is an employer-sponsored fund—a direction given by an employer-sponsor, or an associate of an employer-sponsor, in circumstances prescribed by the regulations; or 30
 - (f) a direction given by the Superannuation Complaints Tribunal.

(3) A provision included in the governing rules of a superannuation entity in contravention of this section is void.

Exercise of discretion by person other than trustee

59.(1) The governing rules of a superannuation entity other than an excluded fund must not permit a discretion under those rules that is exercisable by a person other than the trustee to be exercised unless: 35

- (a) those rules require the consent of the trustee to the exercise of that discretion; or

- (b) if the entity is an employer-sponsored fund:
- (i) the exercise of the discretion relates to the contributions that an employer-sponsor will, after the discretion is exercised, be required or permitted to pay to the fund; or
 - (ii) the exercise of the discretion relates solely to a decision to terminate the fund; or
 - (iii) the circumstances in which the discretion was exercised are covered by regulations made for the purposes of this subparagraph.

10 (2) A provision included in the governing rules of a superannuation entity in contravention of subsection (1) is void.

Amendment of governing rules

60.(1) The governing rules of a superannuation entity other than an excluded fund must not permit those rules to be amended unless:

- 15 (a) the trustee has consented to the amendment; or
- (b) if the entity is an employer-sponsored fund:
- (i) the amendment relates to the contributions that an employer-sponsor will, after the amendment, be required or permitted to pay to the fund; or
 - (ii) the amendment relates solely to the termination of the fund; or
 - (iii) the circumstances in which the amendment was made are covered by regulations made for the purposes of this subparagraph; or
- 25 (c) the amendment is made solely for the purpose of conferring on the trustee the power to consent to amendments of those rules.

(2) The governing rules of a regulated superannuation fund must not permit those rules to be amended in such a way that:

- 30 (a) an individual would be eligible to be appointed as trustee unless the rules provide, and will continue to provide after the amendment is made, that the fund has, as its sole or primary purpose, the provision of old-age pensions; or
- (b) the sole or primary purpose of the fund would be a purpose other than the provision of old-age pensions unless the rules provide, and will continue to provide after the amendment is made, that the trustee must be a constitutional corporation.
- 35

(3) If the governing rules of the superannuation entity are inconsistent with subsection (1) or (2), the subsection concerned prevails, and the governing rules are, to the extent of the inconsistency, invalid.

**PART 7—PROVISIONS APPLYING ONLY TO REGULATED
SUPERANNUATION FUNDS**

Object of Part

61. The object of this Part is to set out special rules which apply only to regulated superannuation funds. 5

Sole purpose test

62.(1) The trustee of a regulated superannuation fund must ensure that the fund is maintained solely:

(a) for one or more of the following purposes (the “**core purposes**”):

- (i) the provision of benefits for each member of the fund on or after the member’s retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member’s retirement occurred before, or occurred after, the member joined the fund); 10
- (ii) the provision of benefits for each member of the fund on or after the member’s attainment of an age not less than the age specified in the regulations; 15
- (iii) the provision of benefits for each member of the fund on or after whichever is the earlier of: 20
 - (A) the member’s retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; or
 - (B) the member’s attainment of an age not less than the age prescribed for the purposes of subparagraph (ii); 25
- (iv) the provision of benefits in respect of each member of the fund on or after the member’s death, if: 30
 - (A) the death occurred before the member’s retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; and
 - (B) the benefits are provided to the member’s legal personal representative, to any or all of the member’s dependants, or to both;
- (v) the provision of benefits in respect of each member of the fund on or after the member’s death, if: 35
 - (A) the death occurred before the member attained the age prescribed for the purposes of subparagraph (ii); and
 - (B) the benefits are provided to the member’s legal personal representative, to any or all of the member’s dependants, or to both; or 40

(b) for one or more of the core purposes and for one or more of the following purposes (the “**ancillary purposes**”):

5 (i) the provision of benefits for each member of the fund on or after the termination of the member’s employment with an employer who had, or any of whose associates had, at any time, contributed to the fund in relation to the member;

10 (ii) the provision of benefits for each member of the fund on or after the member’s cessation of work, if the work was for gain or reward in any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged and the cessation is on account of ill-health (whether physical or mental);

(iii) the provision of benefits in respect of each member of the fund on or after the member’s death, if:

15 (A) the death occurred after the member’s retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member’s retirement occurred before, or occurred after, the member joined the fund);
20 and

(B) the benefits are provided to the member’s legal personal representative, to any or all of the member’s dependants, or to both;

25 (iv) the provision of benefits in respect of each member of the fund on or after the member’s death, if:

(A) the death occurred after the member attained the age prescribed for the purposes of subparagraph (a)(ii); and

30 (B) the benefits are provided to the member’s legal personal representative, to any or all of the member’s dependants, or to both;

(v) the provision of such other benefits as the Commissioner approves in writing.

35 (2) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

(3) An approval given by the Commissioner for the purposes of subsection (1) may be expressed to relate to:

(a) a specified fund; or

(b) a specified class of funds.

Commissioner may direct trustees of certain regulated superannuation funds not to accept employer contributions

Directions

63.(1) The Commissioner may give the trustee of a regulated superannuation fund a written notice directing the trustee not to accept any contributions made to the fund by an employer-sponsor. 5

Pre-1994-95 directions

(2) The Commissioner may only give a direction under this section to the trustee of a fund before the fund's 1994-95 year of income (whether in accordance with section 4 of the *Acts Interpretation Act 1901* or otherwise) if the direction takes effect at the beginning of that year of income and, at a time during the period: 10

(a) beginning on the day on which this Act received the Royal Assent; and

(b) ending immediately before the beginning of that year of income; 15

when:

(c) the fund was in existence; and

(d) there were in force regulations for the purposes of subsection 7(1) of the *Occupational Superannuation Standards Act 1987* prescribing standards applicable to the fund; 20

the fund did not comply with any or all of those standards.

Post-1993-94 directions

(3) The Commissioner must not give a direction under this section to the trustee of a fund after the beginning of the fund's 1994-95 year of income unless: 25

(a) the trustee of the fund has contravened this Act or the regulations on one or more occasions after the beginning of that year of income; and

(b) the Commissioner is satisfied that the seriousness or frequency, or both, of the contraventions warrants the giving of the direction.

Reasons 30

(4) A direction under this section must be accompanied by, or included in the same document as, a statement giving the reasons for the direction.

Revocation

(5) The Commissioner may revoke a direction under this section if the trustee of the fund concerned satisfies the Commissioner that there is, and is likely to continue to be, substantial compliance by the trustee with the provisions of this Act and the regulations applicable to the fund. 35

Contravention of equal representation rules

(6) For the purposes of subsections (3) and (5), if a fund does not comply with Part 9 (which deals with equal representation), the trustee of the fund is taken to have contravened this Act.

5 *Offence of contravening direction*

(7) A trustee of a fund must not, without reasonable excuse, contravene a direction under this section.

Penalty: 100 penalty units.

Refund of contributions

10 (8) A contravention of subsection (7) does not result in the invalidity of a transaction. However, if a contribution is accepted in contravention of that subsection, the trustee concerned must refund the contribution within 28 days or such further period as the Commissioner allows.

Notification to employer-sponsors

15 (9) If the trustee of a fund is given a direction under this section, the trustee must take all reasonable steps to notify the direction to each employer-sponsor of the fund.

Offence of contravening subsection (8) or (9)

20 (10) A person who, without reasonable excuse, contravenes subsection (8) or (9) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

Refunded contributions to be ignored for the purposes of income tax and superannuation guarantee charge

25 (11) For the purposes of the Income Tax Assessment Act and the *Superannuation Guarantee (Administration) Act 1992*, if a contribution is refunded under this section, the person who made the contribution is taken never to have made the contribution.

Superannuation guarantee charge—shortfall component to be treated as employer contribution

30 (12) This section has effect as if the payment of a shortfall component to a fund under section 65 of the *Superannuation Guarantee (Administration) Act 1992* were a contribution made to the fund by an employer-sponsor.

OSSA

35 (13) A reference in this section to subsection 7(1) of the *Occupational Superannuation Standards Act 1987* includes a reference to that subsection as it continues to apply, despite its repeal, because of the *Occupational Superannuation Standards Amendment Act 1993*.

Superannuation contributions—deductions from salary or wages to be remitted promptly

Application

64.(1) This section applies if:

- (a) an employer of an employee is authorised (whether by the employee, 5
by force of law or otherwise) to:
 - (i) deduct an amount from salary or wages payable by the
employer to the employee; and
 - (ii) pay to the trustee of a regulated superannuation fund the
amount of the deduction for the purposes of making provision 10
for superannuation benefits for, or for dependants of, the
employee; and
- (b) the employer makes such a deduction.

Prompt remission

(2) The employer must pay to the trustee of the superannuation fund the 15
amount of the deduction before the end of the 28-day period beginning
immediately after the end of the month in which the deduction was made.

Offence

(3) A person who intentionally or recklessly contravenes subsection (2) 20
is guilty of an offence punishable on conviction by a fine not exceeding
100 penalty units.

Definition

(4) In this section:
“**salary or wages**” has the same meaning as in the *Superannuation*
Guarantee (Administration) Act 1992. 25

Part-time domestic workers counted

(5) For the purposes of this section, the *Superannuation Guarantee*
(Administration) Act 1992 has effect as if subsection 11(2) of that Act had
not been enacted.

Lending to members of regulated superannuation fund prohibited 30

Prohibition

65.(1) The trustee or an investment manager of a regulated
superannuation fund must not:

- (a) lend money of the fund to:
 - (i) a member of the fund; or 35
 - (ii) a relative of a member of the fund; or
- (b) give any other financial assistance using the resources of the fund to:

- (i) a member of the fund; or
- (ii) a relative of a member of the fund.

Exception—private sector funds

5 (2) Subsection (1) does not prohibit the lending of money of a private sector fund established before 16 December 1985 to a member if the trustee of the fund, on or before that date:

- (a) had express power to lend money to members; or
- (b) lent money to members and that lending was not expressly prohibited by the governing rules of the fund.

10 *Exception—public sector funds*

(3) Subsection (1) does not prohibit the lending of money of a public sector fund established before 25 May 1988 to a member if the trustee of the fund, on or before that date:

- (a) had express power to lend money to members; or
- 15 (b) lent money to members and that lending was not expressly prohibited by the governing rules of the fund.

Variation of governing rules

(4) If:

- (a) subsection (2) or (3) applies to a regulated superannuation fund; and
- 20 (b) at the beginning of the fund's 1994-95 year of income, a provision included in the governing rules of the fund authorised the lending of the fund's money to members;

a variation of that provision is void unless the variation:

- (c) limits the power to lend the fund's money to members; or
- 25 (d) removes the power to lend the fund's money to members.

Civil penalty provision

(5) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

30 *Definition*

(6) In this section:

“relative” has the same meaning as in the Income Tax Assessment Act.

Acquisitions of certain assets from members of regulated superannuation funds prohibited

35 *Prohibition*

66.(1) Subject to subsection (2), the trustee or an investment manager of a regulated superannuation fund must not intentionally acquire an asset from:

- (a) a member of the fund; or
- (b) a relative of a member of the fund.

Exception—acquisitions of business real property and listed securities

(2) Subsection (1) does not prohibit a trustee or investment manager acquiring an asset from a member of the fund or a relative of such a member if: 5

- (a) the asset is business real property of the member or relative, or a listed security; and
- (b) the asset is acquired at market value; and
- (c) if the asset is business real property—after the acquisition of the business real property, that property, together with any other business real property previously acquired from a member of the fund or a relative of such a member since this Act received the Royal Assent, would represent no more than the acceptable percentage of the total value of the assets of the fund. 10 15

Prohibition of avoidance schemes

(3) A person must not enter into, commence to carry out, or carry out a scheme if the person entered into, commenced to carry out, or carried out the scheme or any part of the scheme with the intention that:

- (a) the scheme would result, or be likely to result, in the acquisition of an asset by the trustee or an investment manager of a regulated superannuation fund, where the asset is acquired from a person who has a connection (either direct or indirect through one or more interposed companies, partnerships or trusts) with: 20
 - (i) a member of the fund; or 25
 - (ii) a relative of a member of the fund; and
- (b) that acquisition would avoid the application of subsection (1) to the fund.

Offence

(4) A person who contravenes subsection (1) or (3) is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 1 year. 30

Definitions

(5) In this section:

“acceptable percentage” means:

- (a) for an excluded superannuation fund—40%; and 35
- (b) otherwise—0%;

“acquire an asset” does not include accept money;

“business” includes any profession, trade, employment, vocation or calling carried on for the purposes of profit, including:

- (a) the carrying on of primary production; and
- (b) the provision of professional services;

but does not include occupation as an employee;

5 **“business real property”** of a person means any freehold or leasehold interest in real property which is used wholly and exclusively in the person’s business;

“listed security” means:

- (a) a share; or
- (b) a unit; or
- 10 (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;

“relative” has the same meaning as in the Income Tax Assessment Act;

15 **“scheme”** means:

- (a) any agreement, arrangement, understanding, promise or undertaking:
 - (i) whether express or implied; or
 - (ii) whether or not enforceable, or intended to be enforceable, by
- 20 (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

Borrowing

Prohibition

25 **67.(1)** Subject to this section, the trustee of a regulated superannuation fund must not:

- (a) borrow money; or
- (b) maintain an existing borrowing of money.

Exception—temporary borrowing to pay beneficiary

30 **(2)** Subsection (1) does not prohibit the trustee of a regulated superannuation fund from borrowing money if:

- (a) the purpose of the borrowing is to enable the trustee to make a payment to a beneficiary which the trustee is required to make by law or by the governing rules and which, apart from the borrowing, the
- 35 trustee would not be able to make; and
- (b) the period of the borrowing does not exceed 90 days; and
- (c) if the borrowing were to take place, the total amount borrowed by the trustee would not exceed 10% of the value of the assets of the fund.

Exception—temporary borrowing to cover settlement of securities transactions

(3) Subsection (1) does not prohibit the trustee of a regulated superannuation fund from borrowing money if:

- (a) the purpose of the borrowing is to enable the trustee to cover settlement of a transaction for the acquisition of any of the following:
 - (i) bonds, debentures, stock, bills of exchange or other securities;
 - (ii) shares in a company;
 - (iii) units in a unit trust;
 - (iv) futures contracts;
 - (v) forward contracts;
 - (vi) interest rates swap contracts;
 - (vii) currency swap contracts;
 - (viii) forward exchange rate contracts;
 - (ix) forward interest rate contracts;
 - (x) a right or option in respect of such a security, share, unit, contract or policy;
 - (xi) any similar financial instrument;
 - (xii) foreign currency; and
- (b) both:
 - (i) at the time the relevant investment decision was made, it was likely that the borrowing would not be needed; and
 - (ii) the borrowing is not taken, under a written determination made by the Commissioner, to be exempt from this paragraph; and
- (c) the period of the borrowing does not exceed 7 days; and
- (d) if the borrowing were to take place, the total amount borrowed by the trustee would not exceed 10% of the value of the assets of the fund.

(4) A determination made by the Commissioner under subsection (3) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Exception—private sector funds

(5) Subsection (1) does not prohibit the trustee of a private sector fund from maintaining an existing borrowing of money if:

- (a) the trustee had, at a time before 12 June 1986, borrowed the money in circumstances that did not comply with the standard set out in paragraph 16(1)(b) of the Occupational Superannuation Standards Regulations; and
- (b) the maintenance occurs before whichever is the earliest of the following:

- (i) the day on which the trustee made such arrangements as were necessary to comply with that standard;
- (ii) the day on which the trustee makes such arrangements as are necessary to comply with subsection (1);
- 5 (iii) 1 July 1995.

Exception—public sector funds

(6) Subsection (1) does not prohibit the trustee of a public sector fund from maintaining an existing borrowing of money if:

- 10 (a) the trustee had, at a time before 2 July 1990, borrowed the money in circumstances that did not comply with the standard set out in paragraph 16(1)(b) of the Occupational Superannuation Standards Regulations; and
- (b) the maintenance occurs before whichever is the earliest of the following:
 - 15 (i) the day on which the trustee made such arrangements as were necessary to comply with that standard;
 - (ii) the day on which the trustee makes such arrangements as are necessary to comply with subsection (1);
 - (iii) 1 July 2000.

20 *Civil penalty provision*

(7) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

Victimisation of trustees etc.

25 *Prohibition*

68.(1) A person must not intentionally or recklessly commit an act of victimisation against:

- (a) the trustee of an employer-sponsored fund; or
- 30 (b) a responsible officer of a corporate trustee of an employer-sponsored fund.

Penalty: Imprisonment for 2 years.

Act of victimisation against trustee

(2) For the purposes of this section, a person is taken to commit an act of victimisation against the trustee of an employer-sponsored fund if, and only if, the person subjects, or threatens to subject, the trustee to a detriment on the grounds that:

- 35 (a) the trustee has fulfilled, is fulfilling, or is proposing to fulfil, an obligation imposed on the trustee; or

- (b) the trustee has exercised, is exercising, or is proposing to exercise, the trustee's powers in a particular way.

Act of victimisation against officer of corporate trustee

(3) For the purposes of this section, a person is taken to commit an act of victimisation against a responsible officer of a corporate trustee of an employer-sponsored fund if, and only if, the person subjects, or threatens to subject, the responsible officer to a detriment on the grounds that: 5

- (a) the trustee or officer has fulfilled, is fulfilling, or is proposing to fulfil, an obligation imposed on the trustee or officer; or
- (b) the trustee or officer has exercised, is exercising, or is proposing to exercise, any of the trustee's powers or the officer's powers, as the case may be, in a particular way. 10

Employers

(4) For the purposes of this section, an employer is taken to subject an employee to a detriment if the employer: 15

- (a) dismisses the employee; or
- (b) injures the employee in his or her employment; or
- (c) alters the position of the employee to the employee's prejudice.

However, for the purposes of this section, an employer is taken not to subject an employee to a detriment if the employer: 20

- (a) permanently ceases to be an employer-sponsor of a superannuation fund of which the employee is a member; or
- (b) temporarily ceases to contribute to a superannuation fund in respect of a class of members in which the employee is included; or
- (c) reduces the level of contributions to a superannuation fund in respect of a class of members in which the employee is included. 25

Reasons

- (5)** In civil proceedings arising out of this section:
- (a) it is not necessary for the plaintiff to prove the defendant's reason for the alleged action; and 30
 - (b) it is a defence if the defendant proves that the action was not motivated (whether in whole or in part) by the alleged reason.

Obligations

(6) A reference in this section to an obligation imposed on a trustee or a responsible officer is a reference to an obligation imposed on the trustee or officer by this Act or the regulations, by the governing rules of the entity concerned or otherwise. 35

Powers

5 (7) A reference in this section to the powers of a trustee or a responsible officer is a reference to the powers conferred on the trustee or the officer by this Act or the regulations, by the governing rules of the entity concerned or otherwise.

Civil liability

(8) If:

(a) a person (the “**defendant**”) commits an act of victimisation against:

10 (i) the trustee of an employer-sponsored fund; or

(ii) a responsible officer of a corporate trustee of an employer-sponsored fund; and

(b) the trustee or officer suffers loss or damage because of the act of victimisation;

15 the trustee or officer may recover the amount of the loss or damage by action against the defendant.

Special meaning of “employee” and “employer”

20 (9) The meaning of the expressions “employee” and “employer”, when used in this section, is to be determined as if subsections 12(3) and (8) of the *Superannuation Guarantee (Administration) Act 1992* had not been enacted. (Those subsections deem certain contractors to be employees.)

PART 8—IN-HOUSE ASSET RULES APPLYING TO REGULATED SUPERANNUATION FUNDS

Division 1—Object and interpretation

Object of Part

25 **69.** The object of this Part is to set out rules about the level of the in-house assets of regulated superannuation funds.

Associate of employer-sponsor

70. For the purposes of this Part:

30 (a) a person is an associate of a standard employer-sponsor of a superannuation fund other than a public sector fund if, and only if, the person is an associate of the employer-sponsor within the meaning of subsection 26AAB(14) of the Income Tax Assessment Act; and

35 (b) a person is an associate of a standard employer-sponsor of a public sector fund if, and only if:

(i) the person is a body corporate; and

- (ii) either:
 - (A) the person has a controlling interest in, or directs the operations of, the employer-sponsor; or
 - (B) the employer-sponsor has a controlling interest in, or directs the operations of, the person.

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Meaning of “in-house asset”

Basic meaning

71.(1) For the purposes of this Part, an in-house asset of a superannuation fund is an asset of the fund that is a loan to, or an investment in, a standard employer-sponsor, or an associate of a standard employer-sponsor, of the fund, but does not include:

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- (a) a life policy issued by a life insurance company; or
- (b) a deposit with an approved bank; or
- (c) an investment in a pooled superannuation trust, where the trustee of the fund and the trustee of the pooled superannuation trust acted at arm’s length in relation to the making of that investment; or
- (d) an asset of a public sector fund, where the asset consists of an investment in securities issued under the authority of:
 - (i) the Commonwealth or a government of a State or a Territory; or
 - (ii) a public authority constituted by or under a law of the Commonwealth, a State or a Territory, where the public authority is neither a standard employer-sponsor, nor an associate of a standard employer-sponsor, of the fund; or
- (e) an asset which the Commissioner, by written notice given to the trustee of the fund, determines is not an in-house asset of the fund; or
- (f) an asset which the Commissioner, by written determination, determines is not an in-house asset of:
 - (i) any fund; or
 - (ii) a class of funds in which the fund is included.

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Agreements

- (2) If:
 - (a) apart from this subsection, an asset of a fund consists of a loan, or an investment, other than an in-house asset; and
 - (b) the loan or investment was made as the result of entering into or carrying out an agreement; and
 - (c) any of the persons who entered into or carried out the agreement did so for the purpose, or purposes that included the purpose, of achieving the result that a loan or investment would be made to or in, or to or in an associate of, a standard employer-sponsor of the fund;

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then:

(d) the asset is taken, for the purposes of this Part, to be a loan to, or an investment in, the standard employer-sponsor, or the associate of the employer-sponsor, as the case requires; and

5 (e) paragraphs (1)(a) to (f) (inclusive) do not apply to the asset.

2 or more purposes

(3) Subsection (2) does not stop the same asset from being treated as if it were a loan to, or an investment in, 2 or more persons if 2 or more purposes apply under paragraph (2)(c).

10 *Commissioner's determination*

(4) If:

(a) apart from this subsection, an asset of a fund consists of a loan, or an investment, other than an in-house asset; and

15 (b) the Commissioner, by written notice given to the trustee of the fund, determines that the asset is to be treated, with effect from the day on which the notice is given, as if the asset were a loan to, or an investment in, a specified standard employer-sponsor of the fund;

then:

20 (c) the asset is taken, for the purposes of this Part, to be a loan to, or an investment in, the employer-sponsor; and

(d) paragraphs (1)(a) to (f) (inclusive) do not apply to the asset.

Paragraph (1)(e) determinations may be retrospective

(5) A determination under paragraph (1)(e) may be expressed to have taken effect at a time earlier than the time when the determination was made.

25 *Paragraph (1)(f) determinations to be disallowable instruments*

(6) A determination under paragraph (1)(f) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

How this Part applies if there are 2 or more unrelated employer-sponsors

30 *Meaning of "unrelated employer-sponsor"*

72.(1) For the purposes of this section, a standard employer-sponsor (the "first employer-sponsor") of a superannuation fund is an unrelated employer-sponsor of the fund if, and only if, there is no other standard employer-sponsor of the fund who is an associate of the first employer-sponsor.

35 *Corresponding classes of in-house assets*

(2) For the purposes of this section, the class of the in-house assets of a fund that corresponds to a particular unrelated employer-sponsor is the class of in-house assets that consists of loans to, or investments in, the employer-sponsor or an associate of the employer-sponsor.

Part applies separately in relation to each unrelated employer-sponsor

(3) If there are 2 or more unrelated employer-sponsors of a superannuation fund:

- (a) this Part does not apply in relation to the fund in relation to the in-house assets of the fund as a whole but, instead, applies in relation to the fund separately in relation to each of the 2 or more corresponding classes of in-house assets of the fund; and 5
- (b) for the purposes of this Part as so applying in relation to each of the 2 or more corresponding classes of in-house assets of the fund, that corresponding class of in-house assets is to be treated as the whole of the in-house assets of the fund. 10

Cost of in-house asset

73.(1) For the purposes of this Part, if:

- (a) an asset of a superannuation fund was acquired:
 - (i) without consideration; or 15
 - (ii) for consideration other than the arm's length value of the asset when it was acquired; or
- (b) the whole or a part of the consideration for which an asset of a superannuation fund was acquired was not money;

the cost of the asset is taken to be the arm's length value of the asset when it was acquired. 20

(2) In this section:

“**arm's length value**”, in relation to an asset, means the amount that the acquirer of the asset could reasonably be expected to have been required to pay to acquire the asset under a transaction where the parties to the transaction are dealing with each other at arm's length in relation to the transaction. 25

Historical cost ratio of fund's in-house assets

74. For the purposes of this Part, the historical cost ratio of a fund's in-house assets is the percentage worked out using the formula: 30

$$\frac{\text{Number of whole dollars in cost of in-house assets of the fund}}{\text{Number of whole dollars in cost of all the assets of the fund}} \times 100$$

Market value ratio of fund's in-house assets

75. For the purposes of this Part, the market value ratio of a fund's in-house assets is the percentage worked out using the formula:

$$\frac{\text{Number of whole dollars in value of in-house assets of the fund}}{\text{Number of whole dollars in value of all the assets of the fund}} \times 100$$

Division 2—Historical cost ratio of fund's in-house assets

5 **Private sector funds established on or after 12 March 1985—
historical cost ratio for the 1994-95 year of income**

76.(1) This section applies to a regulated superannuation fund, if the fund is a private sector fund established on or after 12 March 1985.

10 (2) At all times during the fund's 1994-95 year of income when the fund was in existence, the historical cost ratio of the fund's in-house assets must not exceed 10%.

**Private sector funds established before 12 March 1985—
historical cost ratio for the 1994-95 year of income**

15 77.(1) This section applies to a regulated superannuation fund, if the fund is a private sector fund established before 12 March 1985.

(2) At all times during the fund's 1994-95 year of income when the fund was in existence, the historical cost ratio of the fund's in-house assets must not exceed whichever is the greater of the following percentages:

- 20 (a) whichever is the lesser of the following percentages:
- (i) the percentage equal to the historical cost ratio of the fund's in-house assets as at the end of 11 March 1985;
 - (ii) 70%;
- (b) 10%.

25 (3) Section 72 is to be ignored in working out the percentage mentioned in subparagraph (2)(a)(i).

**Public sector funds established on or after 1 July 1990—
historical cost ratio for the 1994-95 year of income**

78.(1) This section applies to a regulated superannuation fund, if the fund is a public sector fund established on or after 1 July 1990.

30 (2) At all times during the fund's 1994-95 year of income when the fund was in existence, the historical cost ratio of the fund's in-house assets must not exceed 10%.

**Public sector funds established before 1 July 1990—
historical cost ratio for the 1994-95 year of income**

79.(1) This section applies to a regulated superannuation fund, if the fund is a public sector fund established before 1 July 1990.

(2) At all times during the fund's 1994-95 year of income when the fund was in existence, the historical cost ratio of the fund's in-house assets must not exceed whichever is the greater of the following percentages: 5

(a) the percentage equal to the historical cost ratio of the fund's in-house assets as at the end of 1 July 1990;

(b) 10%. 10

(3) Section 72 is to be ignored in working out the percentage mentioned in paragraph (2)(a).

**All funds—historical cost ratio for the 1995-96 year of income,
the 1996-97 year of income and the 1997-98 year of income**

80.(1) This section applies to a regulated superannuation fund. 15

(2) At all times during the period:

(a) beginning at the beginning of the fund's 1995-96 year of income; and

(b) ending at the end of the fund's 1997-98 year of income;

when the fund was in existence, the historical cost ratio of the fund's in-house assets must not exceed 10%. 20

Division 3—Market value ratio of fund's in-house assets

**All funds—market value ratio for the 1998-99 year of income
and the 1999-2000 year of income**

81.(1) This section applies to a regulated superannuation fund.

(2) The market value ratio of the fund's in-house assets as at the end of: 25

(a) the fund's 1998-99 year of income; or

(b) the fund's 1999-2000 year of income;

must not exceed 10%.

**All funds—market value ratio for the 2000-2001 year of income
and later years of income** 30

82.(1) This section applies to a regulated superannuation fund.

(2) If the market value ratio of the fund's in-house assets as at the end of:

(a) the fund's 2000-2001 year of income; or

(b) a later year of income;

exceeds 5%, the trustee of the fund must prepare a written plan. 35

(3) The plan must specify the amount (the “**excess amount**”) worked out using the formula:

$$\boxed{\begin{array}{l} \text{Market value ratio of fund's} \\ \text{in-house assets as at the end of} \\ \text{that year of income} \end{array}} \quad \boxed{5\%} \quad \times \quad \begin{array}{l} \text{Value of fund's} \\ \text{assets as at the end of that} \\ \text{year of income} \end{array}$$

5 (4) The plan must set out the steps which the trustee proposes to take in order to ensure that:

(a) one or more of the fund’s in-house assets held at the end of that year of income are disposed of during the next following year of income; and

10 (b) the value of the assets so disposed of is equal to or more than the excess amount.

(5) The plan must be prepared before the end of the next following year of income.

(6) The trustee must carry out the steps in the plan.

Certain new in-house asset investments prohibited

15 **83.(1)** This section applies to a regulated superannuation fund.

(2) If the market value ratio of the fund’s in-house assets exceeds 5%, the trustee of the fund must not acquire an in-house asset.

20 (3) If the market value ratio of the fund’s in-house assets does not exceed 5%, the trustee of the fund must not acquire an in-house asset if the acquisition would result in the market value ratio of the fund’s in-house assets exceeding 5%.

Division 4—Enforcement

In-house asset rules must be complied with

25 **84.(1)** The trustee of a regulated superannuation fund must take all reasonable steps to ensure that the provisions of Divisions 2 and 3 are complied with.

(2) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

30 (3) A contravention of subsection (1) does not affect the validity of a transaction.

Division 5—Anti-avoidance

Prohibition of avoidance schemes

Prohibition

85.(1) A person must not enter into, commence to carry out, or carry out, a scheme if the person entered into, commenced to carry out, or carried out the scheme or any part of the scheme with the intention that: 5

- (a) the scheme would result, or be likely to result, in an artificial reduction in the market value ratio of the fund's in-house assets; and
- (b) that artificial reduction would avoid the application of any provision of this Part to the fund. 10

Civil penalty provision

(2) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or being involved in a contravention of, that subsection.

Validity of transaction not affected by contravention of subsection (1) 15

(3) A contravention of subsection (1) does not affect the validity of a transaction.

Scheme

(4) In this section:

“scheme” means: 20

- (a) any agreement, arrangement, understanding, promise or undertaking:
 - (i) whether express or implied; or
 - (ii) whether or not enforceable, or intended to be enforceable, by legal proceedings; and 25
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

PART 9—EQUAL REPRESENTATION OF EMPLOYERS AND MEMBERS—EMPLOYER-SPONSORED FUNDS

Object of Part 30

86. The object of this Part is to set out rules about the representation of employers and members in relation to the management and control of standard employer-sponsored funds.

Consequences of non-compliance with this Part

5 **87.** It is not an offence to contravene this Part and a failure to comply with this Part does not result in the invalidity of a transaction. However, a contravention of this Part may result in a fund not being a complying superannuation fund for the purposes of Part IX of the Income Tax Assessment Act (see Part 5 of this Act).

This Part does not apply if acting trustee appointed under Part 17

88. This Part does not apply to a fund if the fund has an acting trustee appointed under Part 17.

10 **Basic equal representation rules**

Basic rule

89.(1) For the purposes of this Part, a fund complies with the basic equal representation rules if:

- 15 (a) both:
 - (i) the fund has a group of 2 or more individual trustees;
 - (ii) the group of trustees consists of equal numbers of employer representatives and member representatives; or
- (b) both:
 - 20 (i) the fund has a single corporate trustee;
 - (ii) the board of the corporate trustee consists of equal numbers of employer representatives and member representatives.

Additional independent trustee or additional independent director

25 **(2)** For the purposes of the application of the basic equal representation rules to a fund, a group of trustees, or the board of a corporate trustee, is taken to consist of equal numbers of employer representatives and member representatives if:

- 30 (a) the group or board includes an additional independent trustee or an additional independent director, as the case may be; and
- (b) the additional independent trustee or additional independent director, as the case may be, is appointed at the request of the employer representatives, or the member representatives, who are the members of the group or board; and
- 35 (c) provision is made in the governing rules for the appointment of the independent additional trustee or additional independent director, as the case may be; and
- (d) the governing rules do not allow the additional independent trustee or additional independent director, as the case may be, to exercise a casting vote in any proceedings of the group or board concerned.

Vacancy

(3) For the purposes of the application of the basic equal representation rules to a fund, if:

- (a) a vacancy occurs in the membership of a group of trustees or of the board of a corporate trustee; and 5
- (b) immediately before the vacancy occurred, the fund complied with the basic equal representation rules; and
- (c) the vacancy is filled within 90 days after it occurred; and
- (d) immediately after the vacancy is filled, the fund complies with the basic equal representation rules; 10

the fund is taken to have complied with the basic equal representation rules at all times during the period of the vacancy.

Pre-1 July 1995 rules—funds with fewer than 200 members

Application

90.(1) This section applies to a standard employer-sponsored fund (other than a public offer superannuation fund) with fewer than 200 members, where: 15

- (a) the fund is a private sector fund established on or after 16 December 1985; or
- (b) the fund is a public sector fund established on or after 25 May 1988; or 20
- (c) if there are 2 or more standard employer-sponsors of the fund—any one of those employer-sponsors is not an associate of any other of those employer-sponsors.

Pre-1 July 1995 25

(2) This section does not apply on or after 1 July 1995.

Rules

(3) The fund must comply with:

- (a) the basic equal representation rules; or
- (b) the alternative agreed representation rule set out in subsection (4). 30

Alternative agreed representation rule

(4) For the purposes of this section, a fund complies with the alternative agreed representation rule if any of the trustees of the fund are appointed following nomination by agreement between:

- (a) either: 35
 - (i) the members of the fund; or
 - (ii) a trade union, or other organisation, representing the interests of those members; and

(b) either:

- (i) the employer or employers of those members; or
- (ii) an organisation representing the interests of that employer or those employers.

5 **Pre-1 July 1995 rules—funds with 200 or more members**

Application

91.(1) This section applies to a standard employer-sponsored fund with 200 or more members, where:

- 10 (a) the fund is a private sector fund established on or after 16 December 1985; or
- (b) the fund is a public sector fund established on or after 25 May 1988; or
- 15 (c) if there are 2 or more standard employer-sponsors of the fund—any one of those employer-sponsors is not an associate of any other of those employer-sponsors.

Pre-1 July 1995

(2) This section does not apply on or after 1 July 1995.

Public offer funds

- 20 (3) If the fund is a public offer superannuation fund:
 - (a) the trustee of the fund must be an independent trustee; and
 - (b) if the regulations provide that the fund is subject to rules about the existence, number and functions of policy committees (“**prescribed policy committees**”)—the fund must comply with those rules; and
 - 25 (c) each prescribed policy committee must consist of equal numbers of employer representatives and member representatives.

Non-public offer funds

(4) If the fund is not a public offer superannuation fund, the fund must comply with the basic equal representation rules.

Transitional

- 30 (5) If, at a particular time, the number of members of a fund increases from a number less than 200 to 200 or more:
 - (a) the trustee of the fund must make such arrangements (if any) as are necessary to enable the fund to comply with this section; and
 - (b) the fund does not have to comply with this section during the period:
 - 35 (i) beginning at that time; and
 - (ii) ending at whichever is the earlier of the following times:

- (A) the time at which such arrangements are made;
- (B) the end of 90 days.

Post-30 June 1995 rules—funds with more than 4, but fewer than 50, members

Application 5

92.(1) This section applies to a standard employer-sponsored fund with more than 4, but fewer than 50, members.

Post-30 June 1995

(2) This section applies on and after 1 July 1995.

Public offer funds 10

(3) If the fund is a public offer superannuation fund:

- (a) the trustee of the fund must be an independent trustee; and
- (b) if the regulations provide that the fund is subject to rules about the existence, number and functions of policy committees (“**prescribed policy committees**”)—the fund must comply with those rules; and 15
- (c) each prescribed policy committee must consist of equal numbers of employer representatives and member representatives.

Non-public offer funds

(4) If the fund is not a public offer superannuation fund, the fund must comply with: 20

- (a) the basic equal representation rules; or
- (b) the alternative agreed representation rule set out in subsection (5).

Alternative agreed representation rule

(5) For the purposes of this section, a fund complies with the alternative agreed representation rule if: 25

- (a) there is a single corporate trustee of the fund; and
- (b) the trustee is appointed following nomination by agreement between:
 - (i) a majority of the members of the fund; and
 - (ii) the employer or employers of those members; and
- (c) there is in force an approval of the trustee under subsection (6); and 30
- (d) the trustee is not an associate of a standard employer-sponsor of the fund.

Approval of trustee

(6) A body corporate may apply for an approval under this subsection.

Application for approval 35

(7) The application must be in writing and must be given to the Commissioner.

Information to accompany application

(8) The application must be accompanied by such information as the Commissioner requires.

Further information

5 (9) The Commissioner may refuse to consider the application unless the applicant gives the Commissioner such further information about the application as the Commissioner requires.

Decision

(10) After considering the application, the Commissioner must:

- 10 (a) grant the approval; or
(b) refuse to grant the approval.

Reasons for refusing approval

15 (11) If the Commissioner makes a decision refusing an application for the grant of an approval, the Commissioner must cause to be given to the applicant a written notice setting out the decision and giving the reasons for that decision.

Revocation of approval

(12) The Commissioner may, by written notice given to the holder of an approval, revoke the approval.

20 **Post-30 June 1995 rules—funds with more than 49 members**

Application

93.(1) This section applies to a standard employer-sponsored fund with more than 49 members.

Post-30 June 1995

25 (2) This section applies on and after 1 July 1995.

Public offer funds

(3) If the fund is a public offer superannuation fund:

- 30 (a) the trustee of the fund must be an independent trustee; and
(b) if the regulations provide that the fund is subject to rules about the existence, number and functions of policy committees (“**prescribed policy committees**”)—the fund must comply with those rules; and
(c) each prescribed policy committee must consist of equal numbers of employer representatives and member representatives.

Non-public offer funds

35 (4) If the fund is not a public offer superannuation fund, the fund must comply with the basic equal representation rules.

Transitional

(5) If, at a particular time, the number of members of a fund increases from a number greater than 4, but less than 50, to 50 or more:

- (a) the trustee of the fund must make such arrangements (if any) as are necessary to enable the fund to comply with this section; and 5
- (b) the fund does not have to comply with this section during the period:
 - (i) beginning at that time; and
 - (ii) ending at whichever is the earlier of the following times:
 - (A) the time at which such arrangements are made;
 - (B) the end of 90 days; and 10
- (c) despite subsection 92(1), the fund must comply with subsection 92(3) or (4) during that 90-day period. 10

PART 10—PROVISIONS APPLYING ONLY TO APPROVED DEPOSIT FUNDS

Object of Part

15

94. The object of this Part is to set out rules about borrowing by the trustees of approved deposit funds.

Borrowing

95.(1) Except with the approval of the Commissioner under subsection (2) or except as provided by subsection (3), the trustee of an approved deposit fund must not borrow money. 20

(2) The Commissioner may approve a borrowing by the trustee of an approved deposit fund if the trustee satisfies the Commissioner that special circumstances exist that justify the borrowing.

(3) Subsection (1) does not prohibit the trustee of an approved deposit fund from borrowing money if: 25

- (a) the purpose of the borrowing is to enable the trustee to cover settlement of a transaction for the acquisition of any of the following:
 - (i) bonds, debentures, stock, bills of exchange or other securities;
 - (ii) shares in a company; 30
 - (iii) units in a unit trust;
 - (iv) futures contracts;
 - (v) forward contracts;
 - (vi) interest rates swap contracts;
 - (vii) currency swap contracts; 35
 - (viii) forward exchange rate contracts;
 - (ix) forward interest rate contracts;

(x) a right or option in respect of such a security, share, unit, contract or policy;

(xi) any similar financial instrument;

(xii) foreign currency; and

5 (b) both:

(i) at the time the relevant investment decision was made, it was likely that the borrowing would not be needed; and

(ii) the borrowing is not taken, under a written determination made by the Commissioner, to be exempt from this paragraph; and

10 (c) the period of the borrowing does not exceed 7 days; and

(d) if the borrowing were to take place, the total amount borrowed by the trustee would not exceed 10% of the value of the assets of the fund.

(4) A determination made by the Commissioner under subsection (3) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

(5) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

20 **PART 11—PROVISIONS APPLYING ONLY TO POOLED SUPERANNUATION TRUSTS**

Object of Part

96. The object of this Part is to set out special rules applying only to pooled superannuation trusts.

Borrowing

25 97.(1) Subject to subsection (2), the trustee of a pooled superannuation trust must not borrow money.

(2) Subsection (1) does not prohibit the trustee of a pooled superannuation trust from borrowing money if:

30 (a) the purpose of the borrowing is to enable the trustee to make a payment to a beneficiary in the trust which the trustee is required to make by law or by the governing rules and which, apart from the borrowing, the trustee would not be able to make; and

(b) the period of the borrowing does not exceed 90 days; and

35 (c) if the borrowing were to take place, the total amount borrowed by the trustee would not exceed 10% of the value of the assets of the trust.

(3) Subsection (1) does not prohibit the trustee of a pooled superannuation trust from borrowing money if:

- (a) the purpose of the borrowing is to enable the trustee to cover settlement of a transaction for the acquisition of any of the following:
- (i) bonds, debentures, stock, bills of exchange or other securities;
 - (ii) shares in a company;
 - (iii) units in a unit trust; 5
 - (iv) futures contracts;
 - (v) forward contracts;
 - (vi) interest rates swap contracts;
 - (vii) currency swap contracts;
 - (viii) forward exchange rate contracts; 10
 - (ix) forward interest rate contracts;
 - (x) a right or option in respect of such a security, share, unit, contract or policy;
 - (xi) any similar financial instrument;
 - (xii) foreign currency; and 15
- (b) both:
- (i) at the time the relevant investment decision was made, it was likely that the borrowing would not be needed; and
 - (ii) the borrowing is not taken, under a written determination made by the Commissioner, to be exempt from this paragraph; and 20
- (c) the period of the borrowing does not exceed 7 days; and
- (d) if the borrowing were to take place, the total amount borrowed by the trustee would not exceed 10% of the value of the assets of the trust.

(4) A determination made by the Commissioner under subsection (3) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. 25

Lending to unit-holders prohibited

98. The trustee or an investment manager of a pooled superannuation trust must not:

- (a) lend money of the trust to a beneficiary of the trust; or 30
- (b) give any other financial assistance using the resources of the trust to a beneficiary of the trust.

Civil penalty provisions

99. Subsection 97(1) and section 98 are civil penalty provisions as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, either of them. 35

PART 12—DUTIES OF TRUSTEES AND INVESTMENT MANAGERS OF SUPERANNUATION ENTITIES

Object of Part

5 **100.** The object of this Part is to impose special duties on the trustees and investment managers of superannuation entities.

Duty to establish arrangements for dealing with inquiries or complaints

10 **101.(1)** The trustee of a regulated superannuation fund other than an excluded superannuation fund, or of an approved deposit fund other than an excluded approved deposit fund, must take all reasonable steps to ensure that there are at all times in force arrangements under which:

- 15 (a) beneficiaries have the right to make inquiries into, or complaints about, the operation or management of the fund in relation to the beneficiary making the inquiry or complaint; and
- (b) inquiries or complaints so made will be properly considered and dealt with within 90 days after they were made.

(2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.

20 **Duty to seek information from investment manager**

102.(1) If the trustee of a superannuation entity enters into an agreement with an investment manager under which money of the entity will be placed under the control of the investment manager, the trustee must:

- 25 (a) ensure that the agreement contains adequate provision to enable the trustee to require the investment manager from time to time:
 - (i) to provide appropriate information as to the making of, and return on, the investments; and
 - (ii) to provide such information as is necessary to enable the trustee to assess the capability of the investment manager to
- 30 (b) whenever it is necessary or desirable to do so, require the investment manager to provide the information.

(2) If:

- 35 (a) the trustee of a superannuation entity entered into an agreement before the commencement of this section with an investment manager under which money of the entity would be placed under the control of the investment manager; and
- (b) the agreement does not contain a provision of a kind mentioned in paragraph (1)(a);

the trustee must as soon as practicable:

- (c) seek to have the agreement amended so as to contain such a provision;
or
- (d) if the investment manager refuses to agree to such an amendment—
terminate the agreement. 5

(3) The trustee of a superannuation entity:

- (a) may terminate an agreement under paragraph (2)(d) despite anything
in the agreement; and
- (b) is not under any liability to the investment manager because of the
termination. 10

(4) A person who intentionally or recklessly contravenes subsection (1)
or (2) is guilty of an offence punishable on conviction by a fine not exceeding
100 penalty units.

Duty to keep minutes and records

103.(1) If a superannuation entity has a group of 2 or more individual
trustees, the trustees must keep, and retain for at least 10 years, minutes of
all meetings of the trustees at which matters affecting the entity were
considered. 15

(2) If there is only one trustee of a superannuation entity:

- (a) if the trustee is a corporate trustee—the directors of the trustee must
keep, and retain for at least 10 years, minutes of all meetings of the
directors at which matters affecting the entity were considered; or 20
- (b) if the trustee is an individual—the trustee must keep, and retain for
at least 10 years, a record of all decisions made by the trustee in
respect of matters affecting the entity. 25

(3) A person who intentionally or recklessly contravenes subsection (1)
or (2) is guilty of an offence punishable on conviction by a fine not exceeding
50 penalty units.

Duty to keep records of changes of trustees

104.(1) The trustee of a superannuation entity must keep, and retain for
at least 10 years, up-to-date records of all changes of trustees, and changes
of directors of any corporate trustee, of the entity and of all consents given
under section 118. 30

(2) A person who intentionally or recklessly contravenes subsection (1)
is guilty of an offence punishable on conviction by a fine not exceeding
50 penalty units. 35

Duty to keep reports

105.(1) The trustee of a regulated superannuation fund or of an approved
deposit fund must:

(a) keep, and retain so long as they are relevant and in any event for at least 10 years, copies of reports that were given in the same form (apart from differences relating to the names and addresses of the persons to whom the notices were given):

5 (i) in the case of a regulated superannuation fund—to all members of the fund, or to all members included in a particular class of members; or

(ii) in the case of an approved deposit fund—to all beneficiaries in the fund, or to all beneficiaries included in a particular class of beneficiaries;

10 if the reports were given under this Act, under the *Superannuation Entities (Taxation) Act 1987* or under the governing rules; and

(b) make those copies available for inspection by a member of the staff of the Commissioner if requested to do so by a member of that staff.

15 (2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

Duty to notify Commissioner of significant adverse events

20 **106.(1)** If the trustee of a superannuation entity becomes aware of the occurrence of an event having a significant adverse effect on the financial position of the entity, the trustee must give written notice to the Commissioner setting out particulars of the event. The trustee must do this no later than the third business day after becoming aware of the event.

25 (2) An event has a significant adverse effect on the financial position of an entity if, as a result of the event, the trustee will not, or may not, be able, at a time before the next annual report by the trustee to beneficiaries entitled to the report, to make payments to beneficiaries as and when the obligation to make those payments arises.

30 (3) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

Duty of trustee of employer-sponsored fund to establish procedure for appointing member representatives

35 **107.(1)** This section applies if the trustee of a standard employer-sponsored fund (other than an excluded superannuation fund) is required by law:

(a) if the trustee is a single corporate trustee—to have member representatives on the board of directors of the trustee; or

40 (b) if there is a group of 2 or more individual trustees—to have member representatives included in the group; or

- (c) in any other case—to have member representatives on a policy committee of the fund.
- (2) The trustee must:
- (a) establish (whether by inclusion in the governing rules or otherwise) rules: 5
- (i) setting out a procedure for appointing the member representatives; and
- (ii) ensuring that member representatives so appointed can only be removed by the same procedure as that by which they were appointed, except in the event of: 10
- (A) death; or
- (B) mental or physical incapacity; or
- (C) retirement; or
- (D) termination of employment; or
- (E) the member representative becoming a disqualified person within the meaning of Part 15; or 15
- (F) the suspension or removal of the trustee under Part 17; or
- (G) other prescribed circumstances; and
- (b) publish those rules in such a way as will make members of the fund aware of the procedure for appointment and removal of member representatives. 20
- (3) A person who intentionally or recklessly contravenes subsection (2) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units. 25

Duty of trustee of employer-sponsored fund to establish procedure for appointing independent trustee or independent member of board of directors of corporate trustee

108.(1) This section applies if a standard employer-sponsored fund (other than an excluded superannuation fund) relies on subsection 89(2) in order to comply with the basic equal representation rules. (That subsection deals with an additional independent trustee or an additional independent director of a corporate trustee.) 30

- (2) The trustee must:
- (a) establish (whether by inclusion in the governing rules or otherwise) rules ensuring that the additional independent trustee or additional independent director, as the case may be, can only be removed by the same procedure as that by which the additional independent trustee or additional independent director was appointed, except in the event of: 35
- 40

- 5 (i) death; or
(ii) mental or physical incapacity; or
(iii) the additional independent trustee or additional independent director, as the case may be, becoming a disqualified person within the meaning of Part 15; or
(iv) the suspension or removal of the trustee under Part 17; or
(v) other prescribed circumstances; and
10 (b) publish those rules in such a way as will make members of the fund aware of the procedure for removal of the additional independent trustee or additional independent director, as the case may be.
- (3) A person who intentionally or recklessly contravenes subsection (2) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.

15 **Investments of superannuation entity to be made on an arm's length basis**

- 1199.(1) The trustee or investment manager of a superannuation entity must not invest money of the entity unless the trustee or investment manager, as the case may be, and the other party to the relevant transaction are dealing with each other at arm's length in respect of the transaction.
- 20 (2) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.
- (3) A contravention of subsection (1) does not affect the validity of a transaction.

25 **PART 13—ACCOUNTS OF SUPERANNUATION ENTITIES**

Object of Part

110. The object of this Part is to set out rules about the accounts of superannuation entities.

Accounting records

- 30 111.(1) The trustee of a superannuation entity must:
- (a) keep such accounting records as correctly record and explain the transactions and financial position of the entity; and
(b) so keep its accounting records so as to enable the following to be prepared:
- 35 (i) the accounts and statements of the entity mentioned in section 112;
(ii) the returns of the entity mentioned in section 36; and

- (c) so keep its accounting records so as to enable those accounts, statements and returns to be conveniently and properly audited in accordance with this Act.

(2) If accounting records of a superannuation entity are kept in accordance with subsection (1), the trustee of the superannuation entity must: 5

- (a) retain the records for at least 5 years after the end of the year of income to which the transactions relate; and
- (b) cause the records to be kept in Australia; and
- (c) keep the records: 10
 - (i) in writing in the English language; or
 - (ii) in a form in which they are readily accessible and readily convertible into writing in the English language.

(3) A person who intentionally or recklessly contravenes subsection (1) or (2) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units. 15

Accounts

112.(1) The trustee of a superannuation entity must, in respect of each year of income of the entity, prepare the following accounts and statements in respect of the entity: 20

- (a) except where the regulations provide that this paragraph does not apply—a statement of financial position;
- (b) except where the regulations provide that this paragraph does not apply—an operating statement;
- (c) such accounts and statements as are specified in the regulations. 25

(2) The regulations may make provision for or in relation to the preparation of accounts and statements covered by subsection (1). If the regulations make such provision, the accounts and statements covered by subsection (1) must be prepared in accordance with the regulations.

(3) The accounts and statements prepared in accordance with subsection (1) must be signed as follows: 30

- (a) if there is a single corporate trustee—by at least 2 directors of the corporate trustee;
- (b) if there is a single individual trustee—by that trustee;
- (c) if there is a group of 2 or more individual trustees—by at least 2 of those trustees. 35

(4) The trustee must retain the accounts and statements prepared in accordance with subsection (1) for a period of 5 years after the end of the year of income to which they relate.

(5) A person who intentionally or recklessly contravenes this section is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.

Audit of accounts

5 **113.(1)** The accounts and statements of a superannuation entity prepared in respect of a year of income in accordance with this Part must be audited by an approved auditor.

10 **(2)** The trustee of the entity must make such arrangements as are necessary to enable the audit of those accounts and statements in accordance with this Part.

(3) A person who intentionally or recklessly contravenes subsection (2) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.

15 **(4)** The auditor must, for the purposes of this Part, give to the trustee a certificate relating to the accounts and statements. The certificate must be given within the prescribed period after the year of income to which the accounts and statements relate. The certificate must be in the approved form.

20 **(5)** A person who intentionally or recklessly contravenes subsection (4) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

PART 14—OTHER PROVISIONS APPLYING TO SUPERANNUATION ENTITIES

Object of Part

25 **114.** The object of this Part is to set out various rules applying to superannuation entities.

Trustee of superannuation entity may maintain reserves

115.(1) The trustee of a superannuation entity may maintain reserves of the entity.

30 **(2)** Subsection (1) does not apply if the governing rules of the entity prohibit the maintenance of reserves.

Agreement between trustee and investment manager

35 **116.** Despite anything in the governing rules of a superannuation entity, any provision of an agreement between the trustee of the entity and an investment manager that purports to exempt the investment manager from liability for negligence, or to limit that liability, is void.

Circumstances in which amounts may be paid out of an employer-sponsored fund to an employer-sponsor

Application—21 October 1992 to Royal Assent

117.(1) This section does not apply to a standard employer-sponsored fund during the period: 5

- (a) beginning on 21 October 1992; and
- (b) ending immediately before the day on which this Act received the Royal Assent;

unless the fund is a complying superannuation fund in relation to each year of income of the fund any part of which occurred during that period. 10

Excluded superannuation funds

(2) This section does not apply to an excluded superannuation fund during the period:

- (a) beginning on 21 October 1992; and
- (b) ending immediately before the day on which this Act received the Royal Assent. 15

This section does not apply to an excluded superannuation fund after the end of that period if, at all times after the end of that period when the fund was in existence, the fund was an excluded superannuation fund.

Basic prohibition 20

(3) Except as provided by this section, the trustee of a standard employer-sponsored fund must not pay an amount, or permit an amount to be paid, out of the fund to a standard employer-sponsor.

Exception—management services

(4) A reasonable amount may be paid out of any standard employer-sponsored fund to a standard employer-sponsor for services rendered in connection with the management or operation of the fund. 25

Exception—special procedures followed

(5) An amount may be paid out of a standard employer-sponsored fund to a standard employer-sponsor if the following requirements are fulfilled: 30

- (a) apart from this section, the governing rules would require or permit the amount to be paid to the employer-sponsor;
- (b) whichever of the following subparagraphs is applicable has been complied with:
 - (i) if the fund has a single corporate trustee: 35
 - (A) the directors of the trustee have, by resolution, declared their intention to pay the amount out of the fund to the employer-sponsor; and

- (B) when that resolution was passed, the board of the corporate trustee consisted of equal numbers of employer representatives and member representatives;
- (ii) if the fund has a group of 2 or more individual trustees:
- 5 (A) the trustees have, by resolution, declared their intention to pay the amount out of the fund to the employer-sponsor; and
- (B) when that resolution was passed, the group of trustees consisted of equal numbers of employer representatives and member representatives;
- 10 (iii) in any other case—the trustee has declared his or her intention to pay the amount out of the fund to the employer-sponsor;
- (c) before the resolution referred to in subparagraph (b)(i) or (ii), as the case may be, was passed:
- 15 (i) an actuary had given a written certificate to the trustee stating that, if the amount were paid, the fund would remain in a satisfactory financial position; and
- (ii) the trustee was satisfied that the payment of the amount and the making of the changes (if any) to the governing rules were reasonable having regard to the interests of the employer-sponsor and of the beneficiaries in the fund;
- 20 (d) the trustee gave notice in accordance with the governing rules to all members of the fund:
- (i) stating the intention to pay the amount to the employer-sponsor; and
- 25 (ii) stating that an actuary has given a certificate to the trustee as required by subparagraph (c)(i); and
- (iii) setting out particulars of any changes to the governing rules that were proposed to be made if the amount were paid to the employer-sponsor;
- 30 (e) at the end of 3 months after the notice mentioned in paragraph (d) was given to members, the provisions of whichever of the following subparagraphs is applicable were complied with:
- (i) if the fund has a single corporate trustee—the directors of the corporate trustee passed a resolution agreeing to pay the amount out of the fund to the employer-sponsor;
- 35 (ii) if the fund has a group of 2 or more individual trustees—the trustees passed a resolution agreeing to pay the amount out of the fund to the employer-sponsor;
- (iii) in any other case—the trustee decided to make the payment;
- 40 (f) any other requirements made by the regulations.

Commissioner may waive requirements

(6) The Commissioner may waive any or all of the requirements specified in subsection (5) in relation to a matter occurring on or after the date of commencement of this section.

Civil penalty provision

5

(7) Subsection (3) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

This section does not apply to loans to, or investments in, a standard employer-sponsor

10

(8) A reference in this section to the payment of an amount out of a standard employer-sponsored fund to a standard employer-sponsor does not include a reference to the payment of an amount by way of the making of a loan to, or an investment in, the standard employer-sponsor.

Additional independent trustee and additional independent director

15

(9) For the purposes of the application of this section to a fund, a group of trustees, or the board of a corporate trustee, is taken to consist of equal numbers of employer representatives and member representatives if:

(a) the group or board includes an additional independent trustee or an additional independent director, as the case may be; and

20

(b) the additional independent trustee or additional independent director, as the case may be, is appointed at the request of the employer representatives, or the member representatives, who are the members of the group or board; and

(c) provision is made in the governing rules for the appointment of the independent additional trustee or additional independent director, as the case may be; and

25

(d) the governing rules do not allow the additional independent trustee or additional independent director, as the case may be, to exercise a casting vote in any proceedings of the group or board concerned.

30

Definitions

(10) In this section:

“complying superannuation fund” means a complying superannuation fund within the meaning of Part IX of the Income Tax Assessment Act, as in force immediately before the day on which this Act received the Royal Assent;

35

“standard employer-sponsor”, in relation to a standard employer-sponsored fund, includes:

(a) if a standard employer-sponsor is a body corporate—another body corporate that is related to the employer-sponsor; or

40

- (b) if a standard employer-sponsor is an individual—an associate of the employer-sponsor.

Consents to appointments

5 **118.** A person is not eligible for appointment as a trustee of a superannuation entity, or as a director of a corporate trustee of a superannuation entity, unless the person has consented in writing to the appointment.

PART 15—STANDARDS FOR TRUSTEES, CUSTODIANS AND INVESTMENT MANAGERS OF SUPERANNUATION ENTITIES

10 **Object of Part**

119. The object of this Part is to set out rules about the eligibility of trustees, custodians and investment managers of superannuation entities.

Disqualified persons

Individuals

15 **120.(1)** For the purposes of this Part, an individual is a disqualified person if:

(a) at any time (including a time before the commencement of this section):

20 (i) the individual was convicted of an offence against or arising out of a law of the Commonwealth, a State, a Territory or a foreign country, being an offence in respect of dishonest conduct; or

(ii) a civil penalty order was made in relation to the person; or

(b) the person is an insolvent under administration.

25 *Bodies corporate*

(2) For the purposes of this Part, a body corporate is a disqualified person if:

(a) both:

30 (i) a responsible officer of the body is a disqualified person; and

(ii) the responsible officer was a disqualified person at all times during the immediately preceding period of 28 days; or

(b) a receiver, or a receiver and manager, has been appointed in respect of property beneficially owned by the body; or

35 (c) an official manager or deputy official manager has been appointed in respect of the body; or

(d) a provisional liquidator has been appointed in respect of the body; or

(e) the body has begun to be wound up.

Convictions

(3) A reference in this section to a person who has been convicted of an offence includes a reference to a person in respect of whom an order has been made under section 19B of the *Crimes Act 1914*, or under a corresponding provision of a law of a State, a Territory or a foreign country, in relation to the offence. 5

Law on spent convictions does not apply

(4) Division 3 of Part VIIC of the *Crimes Act 1914* does not apply in relation to the disclosure of information about a conviction of the kind mentioned in paragraph (1)(a), if the disclosure is for the purposes of this Part. 10

Disqualified persons not to be trustees of superannuation entities

121.(1) A person must not intentionally be, or act as, a trustee of a superannuation entity if the person is, and knows that the person is, a disqualified person. 15

Penalty: Imprisonment for 2 years.

(2) A body corporate that is a trustee of a superannuation entity must not, without reasonable excuse, permit a disqualified person to be, or act as, a responsible officer of the body corporate if the body corporate knows, or has reasonable grounds to suspect, that: 20

- (a) the person is a disqualified person; and
- (b) the person was a disqualified person at all times during the immediately preceding period of 28 days

Penalty: 600 penalty units.

(3) If a trustee of a superannuation entity is or becomes a disqualified person, the trustee must immediately tell the Commissioner in writing. 25
Penalty for a contravention of this subsection: 50 penalty units.

Investment manager must not appoint or engage custodian without the trustee's consent

122.(1) An investment manager of a superannuation entity must not appoint or engage a custodian of the entity without the written consent of the trustee of the entity. 30

(2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units. 35

Persons who may be appointed to be custodians of superannuation entities

123.(1) A person must not intentionally be the custodian of a superannuation entity (other than an excluded fund) unless:

- (a) the person is a body corporate; and
- (b) either of the following subparagraphs applies:
 - (i) the value of the net tangible assets of the body corporate is not less than the amount prescribed by the regulations;
 - (ii) the trustee of the entity is entitled to the benefit, in respect of the due performance of the body corporate's duties as custodian of the entity, of an approved guarantee of an amount that is not less than the amount prescribed by the regulations.

Penalty: 600 penalty units.

10 (2) Subsection (1) does not prohibit a person from being a custodian of a superannuation entity if:

- (a) the person immediately tells the trustee of the entity and the Commissioner in writing that paragraph (1)(b) does not, or has ceased to, apply; and
- 15 (b) the person is the custodian of the entity during:
 - (i) the 28-day period beginning at whichever is the later of the following times:
 - (A) the time when paragraph (1)(b) ceased to apply to the custodian;
 - 20 (B) the beginning of the entity's 1994-95 year of income;
 - or
 - (ii) such longer period as the Commissioner allows; and
- (c) the trustee of the entity has made, or proposes to make, arrangements for the orderly dismissal of the person as the custodian; and
- 25 (d) the person is taking, or is willing to take, all reasonable steps to assist the trustee in carrying out those arrangements.

(3) If paragraph (1)(b) does not, or ceases to, apply to the custodian of a superannuation entity:

- 30 (a) the custodian must immediately tell the trustee of the entity and the Commissioner in writing; and
- (b) the trustee must make arrangements for the orderly dismissal of the custodian; and
- (c) the trustee must make those arrangements before the end of:
 - (i) the 28-day period beginning at whichever is the later of the following times:
 - 35 (A) the time when paragraph (1)(b) ceased to apply to the custodian;
 - (B) the beginning of the entity's 1994-95 year of income;
 - or
 - 40 (ii) such longer period as the Commissioner allows.

(4) A person who contravenes subsection (3) because of paragraph (a) of that subsection is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

(5) A person who contravenes subsection (3) because of paragraph (b) or (c) of that subsection is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units. 5

Investment managers must be appointed in writing

124.(1) The trustee of a superannuation entity must not make a non-written appointment of an investment manager of the entity.

(2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units. 10

Individuals not to be investment managers of superannuation entities

125. A person must not intentionally be, or act as, an investment manager of a superannuation entity (other than an excluded fund) if the person is not a body corporate. 15

Penalty: Imprisonment for 2 years.

Disqualified persons not to be investment managers of superannuation entities

126.(1) A person must not intentionally be, or act as, an investment manager of a superannuation entity (other than an excluded fund) if the person is, and knows that the person is, a disqualified person. 20

Penalty: Imprisonment for 2 years.

(2) Subsection (1) does not prohibit a person from being or acting as an investment manager of a superannuation entity if: 25

(a) the person immediately tells the trustee of the entity and the Commissioner in writing that the person is, or has become, a disqualified person; and

(b) the person is, or is acting as, the investment manager of the entity during: 30

(i) the 28-day period beginning at whichever is the later of the following times:

(A) the time when the person became a disqualified person;

(B) the beginning of the entity's 1994-95 year of income;

or 35

(ii) such longer period as the Commissioner allows; and

(c) the trustee of the entity has made, or proposes to make, arrangements for the orderly dismissal of the person as the investment manager; and

(d) the person is taking, or is willing to take, all reasonable steps to assist the trustee in carrying out those arrangements.

(3) A body corporate that is an investment manager of a superannuation entity must not permit a disqualified person to be, or act as, a responsible officer of the body corporate if the body corporate knows, or has reasonable grounds to suspect, that the person is a disqualified person.

Penalty: 600 penalty units.

(4) If an investment manager of a superannuation entity is or becomes a disqualified person:

(a) the investment manager must immediately tell the trustee of the entity and the Commissioner in writing; and

(b) the trustee must make arrangements for the orderly dismissal of the investment manager; and

(c) the trustee must make those arrangements before the end of:

(i) the 28-day period beginning at whichever is the later of the following times:

(A) the time when the investment manager became a disqualified person;

(B) the beginning of the entity's 1994-95 year of income;

or

(ii) such longer period as the Commissioner allows.

(5) A person who contravenes subsection (4) because of paragraph (a) of that subsection is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

(6) A person who contravenes subsection (4) because of paragraph (b) or (c) of that subsection is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.

Non-compliance not to invalidate appointment or transaction

127. A failure to comply with a provision of this Part does not affect the validity of an appointment or transaction.

PART 16—ACTUARIES AND AUDITORS OF SUPERANNUATION ENTITIES

Object of Part

128. The object of this Part is to set out special rules about actuaries and auditors of superannuation entities.

Obligations of actuaries and auditors—compliance

When section applies

129.(1) This section applies to a person (the “first person”) in relation to a superannuation entity if:

- (a) the first person forms the opinion that it is likely that a contravention of this Act or the regulations may have occurred, may be occurring, or may occur, in relation to the entity; and
- (b) the first person formed the opinion in the course of, or in connection with, the performance by the first person of actuarial or audit functions under this Act or the regulations in relation to the entity. 5

Section does not apply if the first person believes that his or her opinion is not relevant to the performance of actuarial or audit functions

(2) This section does not apply to the first person if the first person has an honest belief that the opinion is not relevant to the performance of those functions. 10

Trustee to be told about contravention

(3) The first person must tell the trustee of the entity about the matter in writing. However, this rule does not apply if the first person has an honest belief that the trustee has already been told about the matter. 15

Commissioner may be told

(4) The first person may tell the Commissioner about the matter. The first person is not liable in a civil action or civil proceeding in relation to the telling.

Trustee's report 20

(5) If the first person:

- (a) tells the trustee about the matter; and
- (b) does not tell the Commissioner about the matter;

the first person must, as soon as practicable, give the trustee a written notice requesting the trustee to give the first person, before the end of the period specified in the notice, a written report about the action (if any) the trustee has taken, or proposes to take, to deal with the matter. The period specified in the notice must be reasonable. The trustee must comply with the request. 25

Report to Commissioner

(6) If: 30

- (a) the first person makes such a request; and
- (b) either:

- (i) the trustee does not comply with the request; or
- (ii) the trustee complies with the request, but the first person is dissatisfied with: 35

(A) the action taken, or proposed to be taken, by the trustee to deal with the matter concerned; or

(B) the inaction of the trustee in relation to the matter concerned;

the first person must give the Commissioner a written report about the matter as soon as practicable after:

- (c) if subparagraph (b)(i) applies—the expiry of the deadline for the receipt of the report; or
- 5 (d) if subparagraph (b)(ii) applies—the first person becomes dissatisfied as mentioned in that subparagraph.

Offence

- 10 (7) A person who intentionally or recklessly contravenes subsection (3), (5) or (6) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

Obligations of actuaries and auditors—solvency

When section applies

130.(1) This section applies to a person (the “**first person**”) in relation to a superannuation entity if:

- 15 (a) the first person forms the opinion that the financial position of the entity may be, or may be about to become, unsatisfactory; and
- (b) the first person formed the opinion in the course of, or in connection with, the performance by the first person of actuarial or audit functions under this Act or the regulations in relation to the entity.

20 *Trustee to be told about financial position*

(2) The first person must tell the trustee of the entity about the matter in writing. However, this rule does not apply if the first person has an honest belief that the trustee has already been told about the matter.

Commissioner may be told

- 25 (3) The first person may tell the Commissioner about the matter. The first person is not liable in a civil action or civil proceeding in relation to the telling.

Trustee’s report

- 30 (4) If the first person:
 - (a) tells the trustee about the matter; and
 - (b) does not tell the Commissioner about the matter;the first person must, as soon as practicable, give the trustee a written notice requesting the trustee to give the first person, before the end of the period specified in the notice, a written report about the action (if any) the trustee
- 35 has taken, or proposes to take, to deal with the matter. The period specified in the notice must be reasonable. The trustee must comply with the request.

Report to Commissioner

- (5) If:
 - (a) the first person makes such a request; and

- (b) either:
- (i) the trustee does not comply with the request; or
 - (ii) the trustee complies with the request, but the first person is dissatisfied with:
 - (A) the action taken, or proposed to be taken, by the trustee to deal with the matter concerned; 5
 - (B) the inaction of the trustee in relation to the matter concerned;

the first person must give the Commissioner a written report about the matter as soon as practicable after: 10

- (c) if subparagraph (b)(i) applies—the expiry of the deadline for the receipt of the report; or
- (d) if subparagraph (b)(ii) applies—the first person becomes dissatisfied as mentioned in that subparagraph.

Offence 15

(6) A person who intentionally or recklessly contravenes subsection (2), (4) or (5) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

When financial position is unsatisfactory

(7) For the purposes of this section, the financial position of an entity is taken to be unsatisfactory if, and only if, under the regulations, the financial position of the entity is treated as unsatisfactory. 20

Auditors—disqualification orders

Disqualification order

131.(1) The Commissioner may make a written order (“**disqualification order**”) disqualifying a person from being an approved auditor for the purposes of this Act if: 25

- (a) the person has failed, whether within or outside Australia, to carry out or perform adequately and properly:
 - (i) the duties of an auditor under this Act or the regulations; or 30
 - (ii) any duties required by a law of the Commonwealth, a State or a Territory to be carried out or performed by an auditor; or
- (b) the person is otherwise not a fit and proper person to be an approved auditor for the purposes of this Act.

Date of effect 35

(2) A disqualification order takes effect on the day specified in the order. The specified day must be within the 28-day period beginning on the day on which the order was made.

Notification

- (3) The Commissioner must give a copy of the order to the person. 40

Gazettal

(4) The Commissioner must cause to be published in the *Gazette* particulars of:

- (a) the disqualification order; and
- 5 (b) any action taken under section 344 of this Act, or under the *Administrative Appeals Tribunal Act 1975*, in relation to the decision to make the order.

Revocation

10 (5) The Commissioner may revoke a disqualification order. The Commissioner's power to revoke may be exercised:

- (a) on the Commissioner's own initiative; or
- (b) on written application made by the disqualified person.

Revocation—decision on application

15 (6) If an application is made for the revocation of a disqualification order, the Commissioner must decide to:

- (a) revoke the order; or
- (b) refuse to revoke the order.

Revocation—grounds

20 (7) The Commissioner must not revoke a disqualification order unless the Commissioner is satisfied that the person concerned:

- (a) is likely to carry out and perform adequately and properly the duties of an auditor under this Act or the regulations; and
- (b) is otherwise a fit and proper person to be an approved auditor for the purposes of this Act.

25 *Revocation—date of effect*

(8) A revocation of a disqualification order takes effect on the day the revocation is made.

Reasons for revocation

30 (9) If the Commissioner decides to refuse an application for revocation of a disqualification order, the Commissioner must cause to be given to the applicant a written notice setting out the decision and giving the reasons for the decision.

Gazettal

35 (10) The Commissioner must cause to be published in the *Gazette* particulars of the revocation of a disqualification order.

**PART 17—SUSPENSION OR REMOVAL OF TRUSTEE OF
SUPERANNUATION ENTITY**

Object of Part

132. The object of this Part is to provide for the suspension or removal of the trustee of a superannuation entity, and for the appointment of an acting trustee. 5

Suspension or removal of trustee of superannuation entity

Suspension or removal

133.(1) The Commissioner may suspend or remove the trustee, or all of the trustees, of a superannuation entity if: 10

- (a) the trustee, or any of the trustees, is a disqualified person within the meaning of Part 15; or
- (b) it appears to the Commissioner that conduct that has been, is being, or is proposed to be, engaged in by the trustee or any of the trustees may result in the financial position of the entity or of any other superannuation entity becoming unsatisfactory; or 15
- (c) the Commissioner, under section 28, revokes the approval of the trustee, or any of the trustees.

Period of suspension

(2) A suspension of a trustee is to be for such period as the Commissioner determines. 20

Extension of period of suspension

(3) A suspension of a trustee may be extended for such further period or such further periods as the Commissioner determines.

Reasons 25

(4) If the Commissioner makes a decision:

- (a) suspending or removing a trustee; or
- (b) extending the suspension of a trustee;

the Commissioner must cause to be given to the trustee a written notice:

- (c) setting out that decision; and 30
- (d) giving the reasons for that decision.

Written consent of the Minister

(5) The Commissioner must not make either of the following decisions without the written consent of the Minister:

- (a) a decision to suspend or remove a trustee; 35
- (b) a decision to extend the suspension of a trustee.

Commissioner to appoint acting trustee in cases of suspension or removal

Suspension

5 **134.(1)** If the Commissioner suspends a trustee of a superannuation entity, the Commissioner must appoint a constitutional corporation or an individual to act as the trustee during the period of the suspension. The appointee is called the “**acting trustee**”.

Removal

10 **(2)** If the Commissioner removes a trustee of a superannuation entity, the Commissioner must appoint a constitutional corporation or an individual to act as the trustee until the vacancy in the position of trustee is filled. The appointee is called the “**acting trustee**”.

Pension funds

15 **(3)** The Commissioner must not appoint an individual as the acting trustee of a superannuation entity unless the governing rules of the entity provide that the sole or primary purpose of the entity is the provision of old-age pensions.

Groups

20 **(4)** If:
 (a) there is a group of 2 or more individual trustees of a superannuation entity; and
 (b) the Commissioner suspends or removes all of the trustees; and
 (c) the Commissioner is satisfied that any one or more of the persons who were suspended or removed is a fit and proper person to be appointed
25 as the acting trustee;
this Act does not prevent the Commissioner from so appointing that person.

Terms and conditions of appointment of acting trustee

30 **135.(1)** The Commissioner may determine the terms and conditions of the appointment of the acting trustee, including fees. The determination has effect despite anything in:

- (a) any other provision of this Act; and
- (b) the regulations; and
- (c) any other law; and
- (d) the entity’s governing rules.

35 **(2)** Without limiting subsection (1), the Commissioner may make a determination under that subsection to the effect that the acting trustee’s fees are to be paid out of the corpus of the entity concerned.

Termination of appointment of acting trustee

40 **136.** The Commissioner may terminate the appointment of the acting trustee at any time.

Resignation of acting trustee

137. The acting trustee may resign by writing delivered to the Commissioner. The resignation does not take effect until the end of the 7th day after the day on which it was delivered to the Commissioner. (The delay gives the Commissioner time to appoint a fresh acting trustee.) 5

Property vesting orders

138.(1) If a person is appointed as acting trustee, the Commissioner must make a written order vesting the property of the entity concerned in the acting trustee.

(2) If the appointment of the acting trustee comes to an end, the Commissioner must make a written order vesting the property of the entity concerned in: 10

- (a) if there is to be a fresh acting trustee—the fresh acting trustee; or
- (b) if the acting trustee acted during a period of suspension of the actual trustee and the suspension has come to an end—the actual trustee; or 15
- (c) if the acting trustee acted because of a vacancy in the position of actual trustee and the acting trustee’s appointment has come to an end because the vacancy in the position of actual trustee has been filled by a new actual trustee—the actual trustee.

(3) If an order is made by the Commissioner under this section vesting property of a superannuation entity in a person: 20

- (a) if the property was vested in law in the trustee—subject to subsections (4) and (5), the property immediately vests in law in the person named in the order by force of this Act; and
- (b) if the property was vested in equity in the trustee—the property immediately vests in equity in the person named in the order by force of this Act. 25

(4) If:

- (a) the property is of a kind whose transfer or transmission may be registered under a law of the Commonwealth, of a State or of a Territory; and 30

(b) that law enables the registration of such an order; the property does not vest in that person at law until the requirements of the law referred to in paragraph (a) have been complied with.

(5) If: 35

- (a) the property is of a kind whose transfer or transmission may be registered under a law of the Commonwealth, of a State or of a Territory; and

(b) that law enables the person named in the order to be registered as the owner of that property; 40

the property does not vest in that person at law until the requirements of the law referred to in paragraph (a) have been complied with.

Powers of acting trustee

5 **139.** Subject to section 138, while a person is acting as trustee under this Part:

- (a) the person has and may exercise all the rights, title and powers, and must perform all the functions and duties, of the trustee; and
- (b) the entity's governing rules, this Act, the regulations and any other law apply in relation to the person as if the person were the trustee.

10 **Acting trustee to notify appointment to beneficiaries**

140.(1) If a person is appointed under this Part to act as trustee of a superannuation entity, the person must, as soon as practicable, give each beneficiary a notice about the appointment.

(2) The notice is to be in a form approved by the Commissioner.

15 (3) A person who, without reasonable excuse, contravenes this section is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

(4) A contravention of subsection (1) does not affect the validity of the appointment.

20 **Commissioner may give directions to acting trustee**

141.(1) If a person is appointed under this Part to act as trustee of a superannuation entity, the Commissioner may give a written notice to the person directing the person to do, or not to do, one or more specified acts or things in relation to the superannuation entity.

25 (2) A person must not intentionally or recklessly contravene a direction under subsection (1).

Penalty: 100 penalty units.

(3) This section does not affect the validity of a transaction entered into by a person in contravention of the notice.

30 **Commissioner may formulate a scheme for the winding-up or dissolution, or both, of a superannuation entity**

Schemes

35 **142.(1)** If a person is appointed under this Part to act as trustee of a superannuation entity, the Commissioner may, by writing, formulate a scheme for the winding-up or dissolution, or both, of the entity.

Vacancies

(2) Without limiting subsection (1), a scheme may make provision for and in relation to prohibiting the appointment of a person to fill a vacancy in the position of trustee.

Contravention of scheme

(3) A person must not intentionally or recklessly contravene the provisions of a scheme formulated under this section.

Penalty: 100 penalty units.

Notification

5

(4) The Commissioner must give a copy of an instrument under subsection (1) to the acting trustee.

Beneficiaries to be told

(5) Without limiting section 141, the Commissioner may give a direction under that section to the acting trustee requiring the acting trustee to tell beneficiaries in the entity about an instrument under subsection (1).

10

Copies to be supplied

(6) A person whose interests are affected by an instrument under subsection (1) may request the Commissioner to give the person a copy of the instrument. The Commissioner must comply with the request.

15

Advertising

(7) The Commissioner must advertise the making of each instrument under subsection (1) in such newspaper or newspapers as the Commissioner considers reasonable having regard to the likely places of residence of the majority of beneficiaries in the entity. The advertisement is to be in the prescribed form.

20

Disallowance

(8) An instrument under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

**PART 18—PROHIBITED CONDUCT IN RELATION TO
SUPERANNUATION INTERESTS**

25

Object of Part

143.(1) The object of this Part is to prohibit false and misleading conduct in relation to superannuation interests.

(2) To that end, this Part contains provisions about:

30

(a) criminal liability arising from certain conduct relating to superannuation interests (sections 144 and 145); and

(b) civil liability arising from certain conduct relating to superannuation interests (sections 144, 146, 147 and 148).

Regulated acts

35

144. For the purposes of sections 145 and 146, these are **regulated acts**:

(a) applying for the issue of superannuation interests in a superannuation entity;

- (b) applying to become a standard employer-sponsor of a superannuation entity;
- (c) issuing superannuation interests in a superannuation entity;
- 5 (d) permitting a person to become a standard employer-sponsor of a superannuation entity;
- (e) publishing or broadcasting a statement or advertisement in relation to superannuation interests in a superannuation entity;
- (f) issuing a regulated document in relation to a public offer entity;
- (g) redeeming a superannuation interest in a superannuation entity;
- 10 (h) doing anything preparatory to, or in any other way related to, an act mentioned in any of the above paragraphs.

Fraudulently inducing a person to engage in a regulated act—criminal liability

145. A person must not:

- 15 (a) by making, publishing or broadcasting a statement or advertisement that the person knows to be false or misleading; or
- (b) by dishonestly concealing or withholding material facts; or
- (c) by recording or storing in, or by means of, any mechanical, electronic or other device, information that the person knows to be:
 - 20 (i) false in a material particular; or
 - (ii) materially misleading;

intentionally induce another person to engage in a regulated act.

Penalty: Imprisonment for 5 years.

Misleading conduct in connection with a regulated act—civil liability

25 146.(1) A person must not, in connection with the performance by the person of a regulated act, engage in conduct that is:

- (a) misleading; or
- (b) likely to mislead.

30 (2) A contravention of subsection (1) is not an offence, but it may give rise to civil liability under section 148.

(3) The generality of subsection (1) is not limited by any other provision of this Act.

Misleading conduct by trustees of entities—civil liability

35 147.(1) This section applies if the trustee of a superannuation entity is dealing with:

- (a) a beneficiary of that entity as such a beneficiary; or
- (b) an employer-sponsor, or an associate of an employer-sponsor, of that entity as such an employer-sponsor or associate.

(2) When so dealing with the beneficiary, employer-sponsor or associate, the trustee must not engage in conduct that is:

- (a) misleading; or
- (b) likely to mislead.

(3) A contravention of subsection (2) is not an offence, but it may give rise to civil liability under section 148. 5

Civil liability where section 146 or 147 contravened

148.(1) Subject to subsection (2), if a person (the “**plaintiff**”) suffers loss or damage because of a contravention of section 146 or 147 by another person (the “**primary defendant**”), the plaintiff may recover the amount of the loss or damage by action against: 10

- (a) the primary defendant; or
- (b) a person involved in the contravention.

(2) The person must not begin an action under this section in respect of the contravention if the person could, instead, bring an action under section 162 in respect of the conduct constituting the contravention. 15

(3) The action may be begun even if the defendant has been convicted of an offence in respect of the conduct constituting the contravention.

(4) The action must be begun within 6 years after the day on which the cause of action arose. 20

(5) This section does not affect any liability that the defendant or another person has under any other provision of this Act or under any other law.

Contravention of Part does not affect validity of issue of superannuation interest etc.

149. A contravention of this Part does not affect the validity of the issue of a superannuation interest or of any other act. 25

PART 19—PUBLIC OFFER ENTITIES—PROVISIONS RELATING TO SUPERANNUATION INTERESTS AND DISCLOSURE OF INFORMATION

Division 1—Preliminary 30

Object of Part

150.(1) The object of this Part is to ensure that beneficiaries and standard employer-sponsors of public offer entities, and prospective beneficiaries and standard employer-sponsors of public offer entities, are treated fairly and honestly and are adequately informed. 35

(2) To that end, this Part contains:

- (a) requirements imposed on trustees of public offer entities in connection with dealing with superannuation interests, including, in particular, requirements about issuing or offering superannuation interests (Division 2); and
- 5 (b) requirements imposed on trustees of public offer entities in relation to the disclosure of information about such entities (Divisions 3 and 4); and
- (c) requirements imposed on trustees of public offer entities in relation to money received in respect of applications for the issue of
- 10 superannuation interests (Division 5); and
- (d) provision for a cooling-off period during which superannuation interests issued to a person may be redeemed at the request of the person (Division 6).

15 **Contravention of Part does not affect validity of issue of superannuation interest etc.**

151. A contravention of this Part does not affect the validity of the issue of a superannuation interest or of any other act.

Division 2—Issuing, offering etc. superannuation interests in public offer entities

20 **Limitation on issuing, offering etc. superannuation interests in public offer entities**

152.(1) This section applies to the following conduct:

- (a) issuing superannuation interests in a public offer entity;
- (b) offering to issue superannuation interests in a public offer entity;
- 25 (c) inviting the making of applications for the issue of superannuation interests in a public offer entity.

(2) The trustee of a public offer entity must not, intentionally or recklessly, engage in conduct to which this section applies unless:

- (a) the trustee is an approved trustee and is the only trustee of the entity;
- 30 and
- (b) the entity is constituted by a deed as a trust.

Penalty: Imprisonment for 5 years.

(3) A person, other than the trustee of a public offer entity, must not, intentionally or recklessly, engage in conduct to which this section applies.

35 Penalty: Imprisonment for 5 years.

(4) This section does not prevent the trustee of a public offer entity from engaging or authorising persons to act on behalf of the trustee.

Trustee must not issue interests, or permit persons to become standard employer-sponsors, except pursuant to applications

153.(1) The trustee of a public offer entity must not, intentionally or recklessly, issue a superannuation interest in the entity to a person except pursuant to an application made to the trustee by the person, or by a standard employer-sponsor of the entity on the person's behalf. 5

Penalty: 100 penalty units.

(2) The trustee of a public offer entity must not, intentionally or recklessly, permit a person to become a standard employer-sponsor of the entity except pursuant to an application made by the person to the trustee. 10

Penalty: 100 penalty units.

Commission and brokerage

154.(1) The trustee of a public offer entity must comply with the requirements of the regulations in relation to the payment of commission or brokerage in respect of: 15

- (a) an application for the issue of a superannuation interest in the entity; or
- (b) an application to become a standard employer-sponsor of the entity.

(2) The trustee must not, intentionally or recklessly, contravene subsection (1). 20

Penalty: 100 penalty units.

(3) Requirements specified in regulations for the purposes of subsection (1) must relate to all or any of the following:

- (a) the classes of persons to whom payments of commission or brokerage may be made; 25
- (b) the situations in which payments of commission or brokerage may be made;
- (c) the disclosure of information about payments of commission or brokerage;
- (d) the keeping of records about payments of commission or brokerage. 30

Fair dealing on issue or redemption of a superannuation interest

155.(1) This section applies if:

- (a) the trustee of a public offer entity is considering:
 - (i) issuing a superannuation interest in the entity to a person; or
 - (ii) redeeming a superannuation interest in the entity held by a person; and 35
- (b) either:

- 5
- (i) the trustee believes on reasonable grounds that the price at which, under the governing rules of the entity, the interest would be issued or redeemed would not, in the circumstances, be fair and reasonable as between the person and the beneficiaries of the entity; or
 - (ii) the trustee cannot, for whatever reason, work out the price at which, under the governing rules of the entity, the interest should be issued or redeemed.

10 (2) The trustee must not issue or redeem the interest while subsection (1) applies except at a price that is fair and reasonable as between the person and the beneficiaries of the entity.

(3) If, while this section applies, the trustee issues or redeems the interest at such a price, the trustee is taken to have acted in accordance with the governing rules of the entity.

15 (4) A contravention of subsection (2) is not an offence, but it may give rise to civil liability under section 156.

Civil liability where subsection 155(2) contravened

156.(1) If:

- 20
- (a) the trustee of a public offer entity contravenes subsection 155(2); and
 - (b) a person suffers loss or damage because of the contravention;
- the person may recover the amount of the loss or damage by action against the trustee.

(2) The action must be begun within 6 years after the day on which the cause of action arose.

25 ***Division 3—Provisions relating to information given to prospective beneficiaries etc. of public offer entities***

Subdivision A—Certain information to be given to prospective beneficiaries etc.

30 **Information to be given before superannuation interests issued otherwise than to standard employer-sponsored member**

35 **157.(1)** Subject to subsections (2) and (3), the trustee of a public offer entity must not, intentionally or recklessly, issue a superannuation interest in the entity to a person unless the trustee is satisfied, on reasonable grounds, that the person has received documents issued, or authorised to be issued, by the trustee that:

- (a) contain all the information that the regulations and determinations referred to in section 159 require to be given to the person; and
- (b) comply with the formal requirements specified in those regulations and determinations.

40 **Penalty:** 100 penalty units.

(2) Despite subsection (1), the trustee does not have to be satisfied that the person has received information that relates to an event or change of circumstances that happened after the trustee received the application for the interest.

- (3) Subsection (1) does not apply if: 5
- (a) the public offer entity is a standard employer-sponsored fund; and
 - (b) the person will, if the interest is issued to the person, be a standard employer-sponsored member of the fund.

Information to be given before persons become standard employer-sponsors 10

158.(1) Subject to subsection (2), the trustee of a public offer entity must not, intentionally or recklessly, permit a person to become a standard employer-sponsor of the entity unless the trustee is satisfied, on reasonable grounds, that the person has received documents issued, or authorised to be issued, by the trustee that: 15

- (a) contain all the information that the regulations and determinations referred to in section 159 require to be given to the person; and
- (b) comply with the formal requirements specified in those regulations and determinations.

Penalty: 100 penalty units. 20

(2) Despite subsection (1), the trustee does not have to be satisfied that the person has received information that relates to an event or change of circumstances that happened after the trustee received the person's application to become a standard employer-sponsor of the entity.

Regulations and determinations requiring the giving of information 25

159.(1) For the purposes of sections 157 and 158, the regulations may:

- (a) require that particular information is to be given to persons; and
- (b) specify formal requirements that documents used to give information to persons must comply with.

(2) Subject to subsection (3), the Commissioner may, for the purposes of sections 157 and 158, by written determination: 30

- (a) require that particular information is to be given to persons; and
- (b) specify formal requirements that documents used to give information to persons must comply with.

(3) A determination must not be inconsistent with regulations referred to in subsection (1). 35

(4) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

(5) In this section:

“**formal requirements**” includes, for example, requirements about layout or type size.

Documents taken to contain information referred to

160.(1) If:

(a) a person has received a document (the “**received document**”) issued, or authorised to be issued, by the trustee of a public offer entity; and

(b) the received document refers to particular information (the “**referred information**”) being contained in another document issued, or authorised to be issued, by the trustee; and

(c) the requirements of subsections (2), (3) and (4) are satisfied;

then, for the purposes of sections 157 and 158, the received document is taken to contain the referred information.

(2) The received document must clearly identify:

(a) the other document; and

(b) the nature of the referred information.

(3) The received document must include a statement to the effect that the trustee will provide a copy of the other document, free of charge, to a person who asks for it.

(4) The trustee must not have failed or refused to provide a copy of the other document free of charge when asked by the person for a copy of it.

Subdivision B—Limitations on issuing regulated documents

Regulated documents not to be false or misleading—criminal liability

161. The trustee of a public offer entity must not, intentionally or recklessly, issue, or authorise the issue of, a regulated document in relation to the entity if the trustee knows:

(a) that the document contains a material statement that is false or misleading; or

(b) that there has been a material omission from the document.

Penalty: Imprisonment for 5 years.

Regulated documents not to be false or misleading—civil liability

162.(1) The trustee of a public offer entity must not issue, or authorise the issue of, a regulated document in relation to the entity:

(a) in which there is a material statement that is false or misleading; or

(b) from which there is a material omission.

(2) If:

- (a) the trustee of a public offer entity contravenes subsection (1); and
- (b) a person suffers loss or damage because of the contravention;

the person may recover the amount of the loss or damage by action against the trustee. 5

(3) The action may be begun even if the trustee has been convicted of an offence in respect of the conduct constituting the contravention.

(4) The action must be begun within 6 years after the day on which the cause of action arose.

(5) It is a defence to the action if the trustee proves that, before the person suffered the loss or damage, the person: 10

- (a) if the contravention relates to a false or misleading statement—knew that the statement was false or misleading; or
- (b) if the contravention relates to an omission—was aware of the omitted matter. 15

(6) This section does not affect any liability under any other provision of this Act or under any other law.

Statements by experts

163.(1) The trustee of a public offer entity must not, intentionally or recklessly, issue, or authorise the issue of, a regulated document in relation to the entity that includes a statement made by, or purporting to be based on a statement made by, an expert, unless: 20

- (a) the expert has given written consent to the issue of the document with the statement included in the form and context in which it is included; and 25
- (b) that consent has not been withdrawn before the issue of the document.

Penalty: Imprisonment for 6 months.

(2) The trustee must not, without reasonable excuse, fail to keep the consent, or a copy of it, for the period, and in the manner, required by the regulations. 30

Penalty: 10 penalty units.

Division 4—Stop orders

Order to stop contracts etc. for issue of superannuation interests in public offer entities 35

164.(1) If it appears to the Commissioner that any of the circumstances mentioned in subsection (2) exist in respect of a regulated document in relation to a public offer entity, the Commissioner may, by written order (a

“stop order”) given to the trustee of the entity, direct that no contract or agreement for the issue of superannuation interests in the entity may be entered into while the stop order is in force.

(2) The circumstances are as follows:

- 5 (a) there is a material statement in the document that is false or misleading; or
(b) there is a material omission from the document.

When a stop order is in force

165. A stop order:

- 10 (a) comes into force when it is made, or, if a later time is specified in the order as the time when the order comes into force, at that later time; and
(b) remains in force until it is revoked under section 166.

Revocation of stop order

- 15 166. The Commissioner may, in writing, revoke a stop order if the Commissioner is satisfied, for whatever reason, that the stop order should no longer have effect.

Effect of stop order

- 20 167. While a stop order is in force in relation to a public offer entity, the trustee of the entity must not, intentionally or recklessly, enter into a contract or agreement for the issue of a superannuation interest in the entity.
Penalty: Imprisonment for 2 years.

Division 5—Application money to be held on trust

25 **Situation to which Division applies—application money received but superannuation interest not issued immediately**

- 30 168. This Division applies to money received by the trustee of a public offer entity from a person (the “applicant”) in respect of an application for the issue of a superannuation interest in the entity if the trustee does not, for whatever reason (for example, because the application has not been received), issue the superannuation interest immediately after receiving the money.

Trustee to comply with requirements of the regulations in relation to the money

- 35 169.(1) The Trustee must, subject to subsection (2), hold the money on trust for the applicant in accordance with the regulations.

(2) The trustee must comply with the requirements of the regulations in relation to how the money so held on trust is to be dealt with (including, for example, requirements about the payment to a person of the money and any interest that has accrued).

(3) The trustee must not, intentionally or recklessly, contravene subsection (1) or (2).

Penalty: Imprisonment for 1 year.

Division 6—Cooling-off—redemption of interests

Situation to which Division applies—superannuation interest issued in certain circumstances 5

170. This Division applies if:

- (a) a superannuation interest in a public offer entity, other than a pooled superannuation trust, is issued to a person (the “**applicant**”) pursuant to an application made after the commencement of this section; and 10
- (b) the interest is the first superannuation interest in the entity to be issued to the applicant pursuant to the application; and
- (c) the applicant does not hold the interest as a standard employer-sponsored member of an employer-sponsored fund; and 15
- (d) the applicant has not cancelled the contract for the issue of the interest under section 64 of the *Insurance Contracts Act 1984*, and does not have the right to so cancel the contract.

Governing rules taken to confer right to have interest redeemed

171.(1) The governing rules of the public offer entity are taken to include the provisions described in subsections (2) to (5). 20

(2) A provision that entitles the applicant, by written notice given to the trustee of the entity within 14 days after the issue of the interest, to request the trustee to redeem the interest.

(3) A provision that requires the trustee to comply with such a request by redeeming the interest, as soon as practicable after receiving the request, at a price (the “**redemption price**”) calculated under the provisions of the governing rules relevant to the redemption of superannuation interests. 25

(4) A provision that requires the trustee to pay to the applicant when redeeming the interest (in addition to the redemption price) the amount worked out as follows: 30

- (a) work out the amount a person would have to pay, at the time of redemption, for the issue to the person of an interest in the entity of the same kind as that issued to the applicant: this amount is called the “**issue price**”; 35

(b) if the redemption price was calculated taking into account tax (including, for example, stamp duty) that the trustee has paid, or is or may become liable to pay, because of the issue of the interest to the applicant—work out the amount by which the redemption price is less than it would have been if that tax had not been so taken into account: this amount is called the “**tax reduction**”;

(c) if there is no tax reduction, the amount the trustee is liable to pay (in addition to the redemption price) is the amount (if any) by which the issue price exceeds the redemption price;

(d) if there is a tax reduction, the amount the trustee is liable to pay (in addition to the redemption price) is the amount (if any) by which the issue price, reduced by the amount of the tax reduction, exceeds the redemption price.

(5) A provision that prohibits the trustee from being indemnified out of the assets of the entity for an amount payable to the applicant under the provision described in subsection (4).

(6) The provision referred to in subsection (5) has effect in spite of section 56.

Consequences of contravening provisions taken to be included in governing rules

172.(1) A person must not contravene a provision taken to be included in the governing rules of a public offer entity under section 171.

(2) A contravention of subsection (1) is not an offence.

(3) A person who suffers loss or damage as a result of conduct of another person that was engaged in in contravention of subsection (1) may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(4) An action under subsection (3) must be begun within 6 years after the day on which the cause of action arose.

PART 20—PUBLIC OFFER ENTITIES—INSIDER TRADING

Division 1—Preliminary

Object of Part

173. The object of this Part is to stop people from unfairly taking advantage of information that is not generally available in connection with applications for the issue of superannuation interests in public offer entities.

Superannuation interest means interest in public offer entity

174. This Part only applies in relation to superannuation interests in public offer entities. The expression “**superannuation interest**”, when used in this Part, is limited to a superannuation interest in a public offer entity.

Division 2—Interpretation

Definitions

175. In this Part:

“**information**” includes:

- (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; or 5
- (b) matters relating to the intentions, or the likely intentions, of a person;

“**officer**”, in relation to a body corporate, means:

- (a) an executive officer of the body corporate; or
- (b) an employee of the body corporate. 10

When information is generally available

176.(1) For the purposes of this Part, information is generally available if:

- (a) it is readily observable; or
- (b) both of the following apply: 15
 - (i) it has been made known in a way that would, or would be likely to, bring it to the attention of persons who commonly invest in superannuation interests of a kind whose price or value might be affected by the information;
 - (ii) after it was so made known, a reasonable period for it to be disseminated among such persons has elapsed; or 20
- (c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
 - (i) information that is readily observable;
 - (ii) information made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in superannuation interests of a kind whose price or value might be affected by the information. 25

(2) Nothing in subsection (1) limits anything else in it.

When information has a material effect on price or value of superannuation interests 30

177. For the purposes of this Part, a reasonable person would be taken to expect information to have a material effect on the price or value of superannuation interests (the “**first interests**”) if the information would, or would be likely to, influence persons who commonly invest in superannuation interests in deciding whether or not to apply for the issue of the first interests. 35

Information in possession of officer of body corporate

178.(1) For the purposes of this Part, a body corporate is taken to possess any information which: 40

- (a) is in the possession of an officer of the body corporate; and
- (b) came into the officer's possession in the course of performing duties as such an officer.

5 (2) For the purposes of this Part, it is presumed that a body corporate knows, or ought reasonably to know, anything that one of its officers knows, or ought reasonably to know, through being one of its officers.

Division 3—Insider trading rules

When a person contravenes the insider trading rules in relation to superannuation interests

10 **179.(1)** For the purposes of this Part, a person (the “insider”) contravenes the insider trading rules if:

- (a) the insider possesses information that is not generally available; and
- (b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of
15 superannuation interests; and
- (c) the insider knows, or ought reasonably to know, that:
 - (i) the information is not generally available; and
 - (ii) if it were generally available, it might have a material effect on the price or value of those interests; and
- 20 (d) the insider, whether as principal or agent:
 - (i) applies for, or enters into an agreement to apply for, the issue of any such interests; or
 - (ii) procures another person to apply for, or to enter into an agreement to apply for, the issue of any such interests.

25 (2) The remaining provisions of this Division provide for special cases in which a person is taken not to have contravened the insider trading rules.

(3) The consequences of contravening the insider trading rules are set out in Division 4 (which deals with criminal liability), Divisions 5 and 6 (which deal with civil liability) and Division 7 (which deals with orders by the
30 Court).

Exception to insider trading rules—Chinese wall arrangements by bodies corporate

35 **180.** A body corporate does not contravene the insider trading rules by entering into a transaction or agreement at a particular time merely because of information in the possession of an officer of the body corporate if:

- (a) the decision to enter into the transaction or agreement was taken on behalf of the body corporate by a person or persons other than that officer; and

- (b) the body corporate had in operation at that time arrangements that could reasonably be expected to ensure that:
 - (i) the information was not communicated to the person or persons who made the decision; and
 - (ii) no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and
- (c) the information was not so communicated and no such advice was given.

Exception to insider trading rules—knowledge of person’s own intentions or activities 10

181. An individual does not contravene the insider trading rules by entering into a transaction or agreement in relation to superannuation interests in a particular superannuation entity merely because the individual is aware that he or she proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to superannuation interests in the same entity. 15

Exceptions to insider trading rules—special rules relating to bodies corporate

182.(1) A body corporate does not contravene the insider trading rules by entering into a transaction or agreement in relation to superannuation interests in a particular superannuation entity merely because the body corporate is aware that it proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to superannuation interests in the same entity. 20

(2) A body corporate does not contravene the insider trading rules by entering into a transaction or agreement in relation to superannuation interests in a particular superannuation entity merely because:

- (a) an officer of the body corporate is aware that the body corporate proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to superannuation interests in the same entity; and 30
- (b) the officer became aware of the matters referred to in paragraph (a) in the course of the performance of duties as such an officer. 40

Exception to insider trading rules—officers or agents of bodies corporate 35

183. A person does not contravene the insider trading rules by entering into a transaction or agreement on behalf of a body corporate in relation to superannuation interests in a particular superannuation entity merely because: 40

- 5
- (a) the person is aware that the body corporate proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to superannuation interests in the same entity; and
 - (b) the person became aware of the matters mentioned in paragraph (a) in the course of the performance of duties as an officer of the body corporate or in the course of acting as an agent of the body corporate.

Division 4—Offence of contravening the insider trading rules

Offence of contravening the insider trading rules

10 **184.(1)** A person must not, intentionally or recklessly, contravene the insider trading rules.

Penalty: Imprisonment for 5 years.

(2) In a prosecution under this section:

- 15
- (a) it is not necessary for the prosecution to prove the non-existence of facts or circumstances described in sections 180 to 183; and
 - (b) it is a defence if the defendant proves that the facts or circumstances existed.

20 (3) In a prosecution brought against a person for an offence against this section because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the defendant's possession:

- 25
- (a) it is a defence if the defendant proves that the information came into the defendant's possession solely as a result of the information having been made known in a way that would, or would be likely to, bring it to the attention of persons who commonly invest in superannuation interests of a kind whose price or value might be affected by the information; and
 - (b) it is a defence if the defendant proves that the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.

30 ***Division 5—Civil liability for contravention of the insider trading rules—recovery of loss or damage***

Civil liability where plaintiff suffers loss or damage because of a contravention of the insider trading rules

35 **185.(1)** If a person (the “**plaintiff**”) suffers loss or damage by the conduct of another person (the “**primary defendant**”) that was engaged in in contravention of the insider trading rules, the plaintiff may recover the amount of the loss or damage by action against:

- (a) the primary defendant; or

(b) any person involved in the contravention.

(2) An action may be begun even if the defendant has been convicted of an offence in respect of the contravention.

(3) An action must be begun within 6 years after the day on which the cause of action arose. 5

(4) This section does not affect any liability that a person has under any other provision of this Act or under any other law.

Division 6—Civil liability for contravention of the insider trading rules—recovery of price differential

Civil liability—trustee may recover price differential 10

186.(1) If a person (the “insider”) contravenes the insider trading rules in relation to particular superannuation interests, the trustee of the public offer entity concerned may recover the amount described in subsection (2) by action against:

(a) in any case—the insider; or 15

(b) if the insider’s contravention relates to the procurement of another person to apply for, or to enter into an agreement to apply for, superannuation interests—that other person; or

(c) any other person involved in the contravention.

(2) The trustee may recover the amount (if any) by which: 20

(a) the price at which the superannuation interests were applied for, or agreed to be applied for, by the insider or by the other person mentioned in paragraph (1)(b);

was less than:

(b) the price at which the superannuation interests would have been likely to have been applied for if the information had been generally available. 25

(3) An action may be begun even if the defendant has been convicted of an offence for a contravention of the insider trading rules.

(4) An action must be begun within 6 years after the day on which the cause of action arose. 30

(5) This section does not affect any liability that a person has under any other provision of this Act or under any other law.

Commissioner may bring an action in the name of a trustee

187. If the Commissioner thinks that it is in the public interest to do so, the Commissioner may bring an action under this Division in the name, and for the benefit of, a trustee for the recovery of an amount that the trustee is entitled to recover under this Division. 35

Special defence where information made known in a certain manner

5 **188.(1)** This section applies to an action brought against a person (the “defendant”) under this Division because the defendant entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the defendant’s possession.

(2) It is a defence if the defendant proves that the information came into the defendant’s possession solely as a result of the information having been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in superannuation interests of a kind whose price or value might be affected by the information.

Amounts recovered to be held on trust for certain interest-holders

189. An amount recovered in an action under this Division in respect of an application for, or agreement to apply for, particular superannuation interests:

- 15 (a) is to be held by the trustee of the superannuation entity concerned on behalf of the persons who, at the time of the application or agreement, had superannuation interests in the entity; and
- (b) is to be held on their behalf in the respective proportions that, at that time, their individual interests bore to the total of those interests.

20 **Offset of amounts recovered in other proceedings**

190.(1) The amount recoverable from a person under this Division in respect of a particular act or transaction is to be reduced by any amount recovered from, or ordered to be paid by, the person in proceedings instituted under another provision of this Act or under the Corporations Law in respect of the same act or transaction.

(2) The burden of proving that those proceedings related to the same act or transaction is on the defendant.

*Division 7—Special powers of Court to make orders in cases of
contravention of the insider trading rules*

30 **Special powers of Court**

191.(1) If, in a proceeding under, or arising out of, this Act, the Court finds that a contravention of the insider trading rules has occurred, the Court may make such order or orders as it thinks just in addition to any other orders that it may make under any other provision of this Act.

- 35 (2) The orders which may be made include, but are not limited to:
- (a) an order restraining the exercise of any rights attached to superannuation interests;
- (b) an order restraining the issue of superannuation interests;

- (c) an order restraining an application for superannuation interests;
- (d) an order directing the redemption of superannuation interests;
- (e) an order cancelling an agreement for the issue of superannuation interests;
- (f) for the purpose of securing compliance with any other order made under this section—an order directing a person to do, or refrain from doing, a specified act. 5

PART 21—CIVIL AND CRIMINAL CONSEQUENCES OF CONTRAVENING CIVIL PENALTY PROVISIONS

Division 1—Preliminary 10

Object of Part

192. The object of this Part is to specify the consequences of contravening a civil penalty provision.

Civil penalty provisions

193. Each of the following provisions of this Act is a civil penalty provision: 15

- (a) subsection 62(1);
- (b) subsection 65(1);
- (c) subsection 67(1);
- (d) subsection 84(1); 20
- (e) subsection 85(1);
- (f) subsection 95(1);
- (g) subsection 97(1);
- (h) section 98;
- (i) subsection 106(1); 25
- (j) subsection 109(1);
- (k) subsection 117(3).

Person involved in contravening a provision taken to have contravened the provision

194. For the purposes of this Part, a person who is involved in a contravention of a particular provision of this Act is taken to have contravened that provision. 30

When a court is taken to find a person guilty of an offence

195. For the purposes of this Part, an Australian court is taken to find a person guilty of an offence if, and only if: 35

- (a) the court convicts the person of the offence; or

- (b) the person is charged before the court with the offence and is found by the court to have committed the offence, but the court does not proceed to convict the person of the offence.

Division 2—Civil penalty orders

5 **Court may make civil penalty orders**

196.(1) This section applies if the Court is satisfied that a person has contravened a civil penalty provision, whether or not the contravention also constitutes an offence because of section 202.

10 Note: Section 220 provides that a certificate by a court that the court has declared a person to have contravened a civil penalty provision is conclusive evidence of the contravention.

(2) The Court is to declare that the person has, by a specified act or omission, contravened that provision in relation to a specified superannuation entity, but need not so declare if such a declaration is already in force under Division 4.

15 (3) The Court may also make against the person an order that the person pay to the Commonwealth a monetary penalty of an amount specified in the order that does not exceed 2,000 penalty units.

(4) The Court is not to make an order under subsection (3) unless it is satisfied that the contravention is a serious one.

20 (5) The Court is not to make an order under subsection (3) if it is satisfied that an Australian court has ordered the person to pay damages in the nature of punitive damages because of the act or omission constituting the contravention.

Who may apply for civil penalty order

25 **197.(1)** An application for a civil penalty order may only be made by the Commissioner or a person to whom the Commissioner has delegated the power to make applications for civil penalty orders.

30 (2) A delegation for the purposes of subsection (1) may relate to applications in relation to specified contraventions, or all contraventions, of civil penalty provisions.

(3) This section does not affect the operation of the *Director of Public Prosecutions Act 1983*.

Time limit for application

35 **198.** An application for a civil penalty order may be made within 6 years after the contravention.

Application for civil penalty order is a civil proceeding

199.(1) In hearing and determining an application for a civil penalty order, the Court is to apply the rules of evidence and procedure that it applies in hearing and determining civil matters.

(2) Subsection (1) has effect subject to the rules of the Court.

Enforcement of order to pay monetary penalty

200. If the Court makes under subsection 196(3) an order that a person pay a monetary penalty:

- (a) the penalty is payable to the Commissioner on the Commonwealth's behalf; and 5
- (b) the Commissioner or the Commonwealth may enforce the order as if it were a judgment of the Court.

Commissioner may require a person to give assistance in connection with application for civil penalty order 10

201.(1) This section applies if it appears to the Commissioner that a person may have contravened a civil penalty provision.

(2) If the Commissioner, on reasonable grounds, suspects or believes that a person can give information relevant to an application for a civil penalty order in relation to the contravention (whether or not such an application has been made), the Commissioner may, by writing given to the person, require the person to give all reasonable assistance in connection with such an application. 15

- (3) Subsection (2) does not apply in relation to:
 - (a) the person referred to in subsection (1); or 20
 - (b) a person who is or has been that person's lawyer.

- (4) If a person fails to give assistance as required under subsection (2):
 - (a) the person is guilty of an offence punishable on conviction by a fine not exceeding 5 penalty units; and
 - (b) the Court may, on the application of the Commissioner, order the person to comply with the requirement as specified in the order. 25

(5) Paragraph (4)(b) does not affect any penalty for an offence referred to in paragraph (4)(a).

Division 3—Criminal proceedings

When contravention of civil penalty provisions is an offence 30

202.(1) If a person contravenes a civil penalty provision:

- (a) knowingly, intentionally or recklessly; and
- (b) either:
 - (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or 35
 - (ii) intending to deceive or defraud someone;

the person is guilty of an offence punishable on conviction by imprisonment for not more than 5 years.

(2) A person who contravenes a civil penalty provision is not guilty of an offence except as provided by subsection (1).

(3) The Federal Court of Australia does not have jurisdiction with respect to criminal proceedings for an offence constituted by a contravention of a civil penalty provision.

Application for civil penalty order precludes later criminal proceedings

203. Criminal proceedings for an offence constituted by a contravention of a civil penalty provision cannot be begun if a person has already applied for a civil penalty order in relation to the same contravention, even if the application has been finally determined or otherwise disposed of.

Division 4—Effect of criminal proceedings on application for civil penalty order

When Division applies

204. This Division applies if criminal proceedings are begun against a person for an offence constituted by a contravention of a civil penalty provision.

Effect during criminal proceedings

205.(1) An application may be made for a civil penalty order against the person in relation to the same contravention.

(2) However, such an application is stayed, because of this subsection, until:

(a) the criminal proceedings; and

(b) all appeals and applications for review (including appeals and applications for review under this Division) arising out of the criminal proceedings;

have been finally determined or otherwise disposed of.

Final outcome precluding applications for civil penalty order

206. When the criminal proceedings, appeals and applications for review are finally determined or otherwise disposed of:

(a) an application for a civil penalty order in relation to the same contravention cannot be made (except under this Division); and

(b) such an application that was stayed because of subsection 205(2) is, because of this section, dismissed;

if the result of the criminal proceedings, appeals and applications for review is:

(c) a court finding the person guilty of the offence; or

Note: Section 195 defines when a court is taken to find a person guilty of an offence.

- (d) the person being acquitted of the offence, unless there is in force a declaration that the person committed the contravention; or

Note: This kind of declaration is made under section 209, 210 or 211.

- (e) a declaration by a court that the evidence in a committal proceeding for the offence could not satisfy the Court, on an application for a civil penalty order, that the person committed the contravention; or 5

Note: This kind of declaration is made under section 208.

- (f) a declaration by a court that the person committed the contravention; or

Note: This kind of declaration is made under section 209 or 211. 10

- (g) an order by a court prohibiting an application for a civil penalty order in relation to the contravention from being made or from proceeding; or

Note: This kind of declaration is made under section 212.

- (h) the Court, on an appeal or review, affirming, varying or substituting a declaration that the person committed the contravention. 15

Note: Section 213 applies in this case.

Final outcome not precluding application for civil penalty order

207. If the result of the criminal proceedings, appeals and applications for review being finally determined or otherwise disposed of is: 20

- (a) a declaration by a court (other than the Court) that the person committed the contravention; or

Note: This kind of declaration is made under section 209, 210 or 211.

- (b) none of the results referred to in section 206;

then: 25

- (c) if an application for a civil penalty order in relation to the contravention was stayed because of subsection 205(2)—the application may proceed; or

(d) otherwise—such an application may be made and may proceed; as if the criminal proceedings had never begun. 30

After unsuccessful committal proceeding, court may preclude application for civil penalty order

208.(1) If:

- (a) a proceeding in a court for the commitment of the person for trial for the offence is finally determined or otherwise disposed of without the person being committed for trial for the offence; and 35

- (b) that court is satisfied that the evidence in the proceeding could not satisfy the Court, on an application for a civil penalty order in relation to the contravention, that the person committed the contravention;

the court may declare that it is so satisfied.

(2) A declaration under subsection (1) is subject to appeal or review in the same way as any other order or decision made in the proceeding.

Application for civil penalty order based on alternative verdict at jury trial

209.(1) This section applies if the person is tried on indictment for the offence and the jury is satisfied beyond reasonable doubt that the person committed the contravention, but is not satisfied beyond reasonable doubt that the person did so as mentioned in subsection 202(1).

(2) The jury may find the person not guilty of the offence, but guilty of the contravention.

(3) If the jury does so, the court is to declare that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified superannuation entity.

(4) If the court is the Court, it may then proceed to make an order under subsection 196(3) on the application of the prosecutor or someone else who has power under section 197 to apply for a civil penalty order in relation to the contravention.

(5) Subsection (4) has effect despite section 198.

(6) A declaration under subsection (3) is subject to appeal or review as if it were a conviction by the court for an offence constituted by the contravention.

Application for civil penalty order based on alternative finding by court of summary jurisdiction

210.(1) This section applies if, on the hearing of a proceeding for the summary conviction of the person for the offence, the court is satisfied beyond reasonable doubt that the person committed the contravention but is not satisfied beyond reasonable doubt that the person did so as mentioned in subsection 202(1).

(2) The court may find the person not guilty of the offence, but guilty of the contravention.

(3) If the court does so, it is to declare that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified superannuation entity.

(4) A declaration under subsection (3) is subject to appeal or review as if it were a conviction by the court for an offence constituted by the contravention.

Application for civil penalty order based on alternative finding by appeal court

211.(1) This section applies if:

- (a) a court finds the person guilty of the offence; and
- (b) on appeal or review, a court makes an order determining the criminal proceedings for the offence in a way that does not involve convicting the person of that or any other offence; and
- (c) the court is satisfied beyond reasonable doubt that the person committed the contravention.

(2) The court may declare that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified superannuation entity. 10

(3) If the court is the Court, it may then proceed to make an order under subsection 196(3) on the application of the prosecutor or someone else who has power under section 197 to apply for a civil penalty order in relation to the contravention. 15

(4) Subsection (3) has effect despite section 198.

(5) A declaration under subsection (2) is subject to appeal or review in the same way as any other order or decision that was made on the appeal or review or might have been made. 20

After setting aside declaration, court may preclude application for civil penalty order

212. If a court sets aside a declaration made under section 209, 210 or 211, the court may, by order, prohibit an application for a civil penalty order in relation to the contravention from being made or from proceeding. 25

On unsuccessful appeal against declaration, Court may make civil penalty orders

213.(1) This section applies if, on an appeal from, or review of, a declaration made under section 209, 210 or 211 by a court other than the Court, the Court determines the appeal or review by: 30

- (a) affirming or varying the declaration; or
- (b) substituting another declaration for the first-mentioned declaration.

(2) The Court may then proceed to make orders under subsection 196(3) on the application of the prosecutor or someone else who has power under section 197 to apply for a civil penalty order in relation to the contravention. 35

(3) Subsection (2) has effect despite section 198.

Appeals under this Division

214. For the purposes of an appeal or review under subsection 208(2), 209(6), 210(4) or 211(5), a law about appeals or reviews has effect with such modifications as the circumstances require. 40

Division 5—Compensation for loss suffered by superannuation entity

On application for civil penalty order, Court may order compensation

5 **215.(1)** If, on an application for a civil penalty order against a person in relation to a contravention, the Court is satisfied that:

- (a) the person committed the contravention; and
- (b) the superannuation entity in relation to which the contravention was committed has suffered loss or damage as a result of the act or omission constituting the contravention;

10 the Court may (whether or not it makes an order under subsection 196(3)) order the person to pay to the trustee of the entity or, if the person is the trustee, to pay to the entity compensation of such amount as the order specifies.

15 **(2)** The trustee of a superannuation entity may intervene in an application for a civil penalty order against a person in relation to a contravention, unless the application was made under Division 4.

(3) The trustee of a superannuation entity that so intervenes is entitled to be heard:

- (a) only if the Court is satisfied that the person committed the contravention in relation to that entity; and
- (b) only on the question whether the Court should order the person to pay compensation to the trustee because of the contravention.

Criminal court may order compensation

216.(1) If:

- (a) a court finds a person guilty of an offence constituted by a contravention of a civil penalty provision in relation to a superannuation entity; and
- (b) the court is satisfied that the superannuation entity has suffered loss or damage as a result of the act or omission constituting the contravention;

30 the court may (whether or not it imposes a penalty) order the person to pay to the trustee or, if the person is the trustee, to pay to the entity compensation of such amount as the order specifies.

Note: Section 195 defines when a court is taken to find a person guilty of an offence.

35 **(2)** If:

- (a) a court declares under Division 4 that a person has, by an act or omission, contravened a civil penalty provision in relation to a superannuation entity; and
- (b) the court is satisfied that the superannuation entity has suffered loss or damage as a result of that act or omission;

the court may (whether or not it makes an order under subsection 196(3)) order the person to pay to the trustee or, if the person is the trustee, to pay to the entity compensation of such amount as the order specifies.

Enforcement of order under section 215 or 216

217. An order to pay compensation that a court makes under section 215 or 216 may be enforced as if it were a judgment of the court. 5

Recovery of profits, and compensation for loss, resulting from contravention

218.(1) If a civil penalty provision in relation to a superannuation entity is contravened by a person other than the trustee, the trustee may, by proceedings in a court of competent jurisdiction, recover from the person, as a debt due to the trustee: 10

(a) if that or another person has made a profit because of the act or omission constituting the contravention—an amount equal to the amount of that profit; and 15

(b) if the entity has suffered loss or damage as a result of that act or omission—an amount equal to the amount of that loss or damage;

whether or not:

(c) the first-mentioned person has been convicted of an offence in relation to the contravention; or 20

(d) a civil penalty order has been made against the first-mentioned person in relation to the contravention.

(2) Proceedings under this section may only be begun within 6 years after the contravention.

Effect of sections 215, 216 and 218 25

219. Sections 215, 216 and 218:

(a) have effect in addition to, and not in derogation of, any rule of law about the duty or liability of a person because of the person's office or employment in relation to a superannuation entity; and

(b) do not prevent proceedings from being instituted in respect of a breach of such a duty or in respect of such a liability. 30

Certificates evidencing contravention

220. For the purposes of this Part, a certificate that:

(a) purports to be signed by the Registrar or other proper officer of an Australian court; and 35

(b) states:

(i) that the court has declared that a specified person has, by a specified act or omission, contravened a specified civil penalty provision in relation to a specified superannuation entity; or

- (ii) that a specified person was convicted by that court of an offence constituted by a specified contravention of a civil penalty provision in relation to a specified superannuation entity; or
- 5 (iii) that a specified person charged before that court with such an offence was found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

10 is, unless it is proved that the declaration, conviction or finding was set aside, quashed or reversed, conclusive evidence:

- (c) that the declaration was made, that the person was convicted of the offence, or that the person was so found, as the case may be; and
- (d) that the person committed the contravention.

Division 6—Miscellaneous

15 **Relief from liability for contravention of civil penalty provision**

221.(1) In this section:

20 “**eligible proceedings**” means proceedings for a contravention of a civil penalty provision (including proceedings under section 218) but does not include proceedings for an offence (except so far as the proceedings relate to the question whether the court should make an order under section 216).

(2) If, in eligible proceedings against a person, it appears to the court that the person has, or may have, contravened a civil penalty provision but that:

- (a) the person has acted honestly; and
- 25 (b) having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention;

the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.

30 (3) If a person thinks that eligible proceedings will or may be begun against him or her, he or she may apply to the Court for relief.

(4) On the application under subsection (3), the Court may grant relief under subsection (2) as if the eligible proceedings had been begun in the Court.

35 (5) For the purposes of subsection (2) as applying for the purposes of a case tried by a judge with a jury:

- (a) a reference in that subsection to the court is a reference to the judge; and
- 40 (b) the relief that may be granted includes withdrawing the case in whole or in part from the jury and directing judgment to be entered for the defendant on such terms as to costs as the judge thinks appropriate.

(6) Section 323 provides for additional relief from liability.

Part does not limit power to award punitive damages

222. Nothing in this Part limits a court's power to order someone to pay damages in the nature of punitive damages because of an act or omission constituting a contravention of a civil penalty provision.

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PART 22—UNCLAIMED MONEY

Object of Part

223. The object of this Part is to set out a procedure for dealing with unclaimed superannuation money.

Definition of "fund"

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224. In this Part:

"fund" means a regulated superannuation fund or an approved deposit fund.

Trustee to pay unclaimed money to the Commissioner

Meaning of "unclaimed money"

225.(1) If:

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(a) a beneficiary in a fund has reached the eligibility age for an age pension; and

(b) the trustee determines that, under the governing rules of the fund, a benefit (other than a pension) is immediately payable in respect of the beneficiary; and

20

(c) the beneficiary has not applied to the trustee to have the amount of his or her benefits in the fund paid to him or her; and

(d) the trustee is unable to pay those benefits to the beneficiary because the trustee, after making reasonable efforts to find the beneficiary, is unable to do so;

25

the amount payable to the beneficiary is taken to be unclaimed money.

Statement of unclaimed money

(2) The trustee of a fund must, within 28 days after the end of each half-year, give to the Commissioner a statement in the approved form of all unclaimed money in the fund as at the end of that half-year.

30

Statement may require tax file number

(3) If a beneficiary to whom the statement relates has quoted his or her tax file number to the trustee of the fund, the approved form of statement may require the tax file number to be set out in the statement.

Beneficiary may quote tax file number

(4) A beneficiary may quote the beneficiary's tax file number to the trustee of a fund in connection with the operation, or the possibility of the future operation, of this section. A beneficiary is taken to have quoted the beneficiary's tax file number to the trustee under this subsection if the beneficiary has already quoted that number to the trustee under:

- (a) Part 24 of this Act; or
- (b) a provision of the *Income Tax Assessment Act 1936*; or
- (c) a provision of the repealed Part IIIA of the *Occupational Superannuation Standards Act 1987* (including a provision as it continues to apply because of the *Taxation Laws Amendment (Superannuation) Act 1992*).

Payment of unclaimed money to Commissioner

(5) The trustee must pay to the Commissioner, when the statement is given, the total amount of unclaimed money shown in the statement.

Payment where money later claimed

- (6) If:
 - (a) any unclaimed money has been paid to the Commissioner under this section; and
 - (b) the Commissioner is satisfied on application made by a person in the approved form that, if this section had not been enacted, that person would have been paid that unclaimed money by the trustee by whom it was paid to the Commissioner;

the Commissioner must pay that unclaimed money to that person.

Refund of excess payments

(7) If the trustee of a fund, after paying an amount to the Commissioner under this section, satisfies the Commissioner that the amount so paid exceeds the amount that would have been paid to the person concerned, the Commissioner must refund to the trustee the amount of the excess.

Discharge of trustee from liability

(8) The trustee is, upon payment to the Commissioner of an amount as required by this section, discharged from further liability in his or her capacity as trustee in respect of that amount.

No obligation on trustee if alternative State/Territory scheme

(9) The trustee of a fund is not required to comply with subsections (2) and (5) if a law of a State or Territory requires the trustee to:

- (a) pay unclaimed money to, or to an authority of, a State or Territory;
- or

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- (b) lodge a return relating to unclaimed money with, or with an authority of, a State or Territory.

Appropriation of Consolidated Revenue Fund

(10) The Consolidated Revenue Fund is appropriated for the purposes of this section. 5

Trustee not to contravene section

(11) The trustee of a fund must not intentionally or recklessly contravene this section.

Penalty: 100 penalty units.

Register of unclaimed money 10

226. The Commissioner must keep a register that contains:

- (a) particulars of unclaimed money paid by a trustee of a fund to the Commissioner under this Part; and
(b) particulars of the persons to whom, if this section had not been enacted, the money would have been payable by the trustee, which may include the tax file numbers of those persons. 15

PART 23—FINANCIAL ASSISTANCE TO CERTAIN FUNDS

Division 1—Preliminary

Object of Part

227. The object of this Part is to make provision for the grant of financial assistance for certain superannuation entities that have suffered loss as a result of fraudulent conduct or theft. 20

Interpretation

228. In this Part:

“**fund**” means a regulated superannuation fund or an approved deposit fund but does not include an excluded fund; 25

“**levy**” means the levy imposed by the *Superannuation (Financial Assistance Funding) Levy Act 1993*;

“**loss**”, in relation to a fund, does not include an amount that the fund did not receive because of the failure of a person to pay contributions to the fund. 30

Application for assistance

229.(1) If:

- (a) a fund suffers a loss as a result of fraudulent conduct or theft that occurs after the commencement of this Part; and

(b) the loss has caused substantial diminution of the fund leading to difficulties in the payment of benefits;

the trustee may apply to the Minister for a grant of financial assistance for the fund.

5 (2) The application must be in writing and be accompanied by such information as the Minister determines.

Minister may request additional information

10 **230.** The Minister may request the trustee to give such additional information as the Minister considers necessary to enable the application to be determined.

Division 2—Determination of applications for financial assistance

Minister may grant financial assistance

15 **231.(1)** If, after considering the application and any additional information given by the trustee, the Minister is satisfied that the fund has suffered loss as mentioned in subsection 229(1), the Minister is to determine in writing:

(a) whether the public interest requires that a grant of financial assistance should be made to the trustee for the purposes of the fund; and

(b) if so, the amount of the assistance.

20 (2) Financial assistance payable to the trustee of a fund is to be paid in such amounts, at such times, and in such manner, as the Minister determines.

Maximum amount of financial assistance

25 **232.** The amount of financial assistance to be granted to the trustee in respect of the fund must not be greater than the amount that the Minister determines to be the loss suffered by the fund.

Financial assistance to be subject to conditions

233. The payment to the trustee of a fund of a grant of financial assistance is subject to the following conditions:

30 (a) a condition that the amount of financial assistance granted will be deposited in the corpus of the fund;

(b) a condition that the amount will be applied, within a period determined by the Minister:

(i) in making payments to beneficiaries in the fund; or

35 (ii) for the benefit of the beneficiaries in such other manner as the Minister approves in writing;

(c) a condition that the trustee will prepare and give to the Minister such reports on the application of the amount as are required by the Minister;

- (d) such other conditions (if any) as the Minister determines and notifies in writing to the trustee.

Division 3—How financial assistance is to be paid

Superannuation Protection Account

234.(1) An account called the Superannuation Protection Account is established. 5

(2) The Account is a trust account for the purposes of section 62A of the *Audit Act 1901*.

(3) So far as practicable, money in the Account that is not required for the purpose of making payments out of the Account must be invested in accordance with section 62B of the *Audit Act 1901*. 10

(4) There must be paid into the Account amounts equal to income derived from the investment of money in the Account.

(5) The Consolidated Revenue Fund is appropriated for the purposes of subsection (4). 15

Minister to decide the source from which financial assistance is to be paid

235.(1) If the Minister determines that a grant of financial assistance is to be made to the trustee of a fund, the Minister is also to determine in writing whether: 20

- (a) the assistance is to be paid out of the Consolidated Revenue Fund; or
(b) the assistance is to be paid out of the Superannuation Protection Account.

(2) If the Minister determines that the assistance is to be paid out of the Consolidated Revenue Fund, the Consolidated Revenue Fund is appropriated accordingly. 25

Purposes of Account

236. The purposes of the Account are to make payments of financial assistance that are payable out of the Account pursuant to a determination by the Minister under paragraph 235(1)(b) and to apply any excess referred to in subsection 237(2) in accordance with that subsection. 30

Separate notional accounts to be kept within the Account

237.(1) A separate notional account is to be kept within the Account in respect of each levy.

(2) If the total of the amounts paid by funds into the Account in respect of a levy that was imposed because of a determination made by the Minister to grant financial assistance to a fund exceeds the amount of that financial assistance, the excess is to be applied in such manner as the Minister determines. 35

Financial assistance to be repaid in certain circumstances

5 **238.(1)** The trustee of a fund for which a grant of financial assistance has been made is liable to repay to the Commonwealth the amount of the financial assistance or such part of that amount as the Minister determines if:

- (a) a condition to which the grant of the financial assistance was subject has been contravened; or
- (b) the grant of the financial assistance is subject to a condition that a particular event does not occur and that event has occurred.

10 **(2)** The Minister is to determine the manner in which repayments of financial assistance are to be made.

(3) If the trustee of a fund is liable to pay an amount to the Commonwealth under subsection (1), the Commonwealth may recover the amount as a debt.

15 **Minister may remit liability**

239. The Minister may remit the whole or a part of the liability of the trustee of a fund under section 238.

Repayable grant to have priority over other debts

20 **240.** Despite any other law of the Commonwealth or any law of a State or Territory, an amount payable to the Commonwealth by the trustee of a fund under section 238 has priority over all other debts (whether preferential, secured or unsecured).

PART 24—ROLLOVER OF CERTAIN BENEFITS BETWEEN FUNDS

25 **Object of Part**

241. The object of this Part is to provide for the automatic rollover of certain benefits between funds.

Interpretation

242. In this Part:

30 **“eligible rollover fund”** means a fund in respect of which a declaration by the Commissioner under section 243 is in force;

“fund” means a regulated superannuation fund or an approved deposit fund;

35 **“report”**, in relation to a fund, means a report that the trustee of the fund is required by the regulations to send to members of, or beneficiaries in, the fund.

Declaration of eligible funds

243. If a fund satisfies such conditions as are prescribed by the regulations, the Commissioner may declare the fund to be a fund that is eligible to receive rolled-over benefits from other funds in accordance with this Part. 5

Rollover of benefits from superannuation fund

244.(1) If:

- (a) the trustee of a standard employer-sponsored fund determines that, under the governing rules of the fund, a benefit (other than a pension) is immediately payable to:
 - (i) a member; or
 - (ii) the trustee of another fund in respect of a member; or
 - (iii) another person in respect of a member; and10
- (b) the member is or was a standard employer-sponsored member of the first-mentioned fund; and 15
- (c) a period of 90 days has elapsed since the benefit became payable or this Part commenced, whichever is the later; and
- (d) the benefit has not been paid;

the trustee may pay the benefit to an eligible rollover fund.

(2) Subsection (1) empowers the trustee of a fund to pay the benefit despite anything in the governing rules of the fund. 20

(3) Subject to section 248, if:

- (a) subsection (1) applies in relation to a benefit that is payable in respect of a member of a standard employer-sponsored fund; and
- (b) the trustee of the fund is satisfied that at least 2 consecutive prescribed reports to members of the fund have not been received by the member; 25

the trustee must pay the benefit to an eligible rollover fund.

(4) A person who intentionally or recklessly contravenes this section is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units. 30

Trustee to give information to eligible rollover fund

245.(1) If the trustee of a standard employer-sponsored fund pays a benefit to an eligible rollover fund under section 244 in respect of a member or beneficiary, the trustee must also give the prescribed information in the trustee's possession relating to the member or beneficiary to the trustee of the eligible rollover fund. 35

(2) A beneficiary or member of a standard employer-sponsored fund may quote his or her tax file number to the trustee of the fund in connection with the operation, or the possibility of the future operation, of this Part. A 40

beneficiary or member is taken to have quoted his or her tax file number to the trustee under this subsection if he or she has already quoted that number to the trustee under:

- (a) Part 22 of this Act; or
- 5 (b) a provision of the *Income Tax Assessment Act 1936*; or
- (c) a provision of the repealed Part IIIA of the *Occupational Superannuation Standards Act 1987* (including a provision as it continues to apply because of the *Taxation Laws Amendment (Superannuation) Act 1992*).

10 (3) If the member or beneficiary to whom the benefit relates has quoted his or her tax file number to the trustee of the standard employer-sponsored fund concerned, regulations made for the purposes of subsection (1) may prescribe that tax file number.

15 (4) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.

Reports to include reports sent before commencement of Part

20 **246.** A reference in section 244 to a report to members of, or beneficiaries in, a fund includes a reference to such a report that was sent before the commencement of this Part.

Notice to members and beneficiaries of circumstances in which benefits may be rolled-over

247.(1) The trustee of a standard employer-sponsored fund must give to each member of the fund:

- 25 (a) in the case of a member who becomes a member after the commencement of this Part—when he or she becomes a member; and
- (b) in any case—at least once in each year;

a written notice:

- 30 (c) setting out the circumstances in which the member's benefits may be paid to an eligible rollover fund or otherwise dealt with under this Part; and
- (d) specifying the name and address of the place of business of the eligible rollover fund to which any such benefits will be paid in those circumstances.

35 (2) The trustee may by written notice to the member or beneficiary, as the case may be, change the eligible rollover fund to which it proposes to pay benefits under this Part.

40 (3) The failure of a trustee to notify a member or beneficiary under subsection (1) does not affect the rights and obligations of the trustee under section 244.

(4) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

What happens if benefits are below minimum amount

248. If: 5

(a) the trustee of a fund would, apart from this section, be required to pay an amount in respect of a member or beneficiary to an eligible rollover fund; and

(b) the amount concerned is less than the minimum amount in respect of which standards are prescribed in relation to preservation and portability of benefits; 10

the trustee may, instead of paying that amount to an eligible rollover fund, deal with the amount under Part 22 as if it were unclaimed money.

Trustee of eligible rollover fund to notify Commissioner of receipt of payments 15

Section applies to payments from other funds

249.(1) This section applies if a trustee of an eligible rollover fund receives a payment from another fund in respect of benefits of a member of, or beneficiary in, that other fund.

Trustee to give notice 20

(2) The trustee must give to the Commissioner, within 28 days after the end of the half-year in which the payment was received, written notice of the amount concerned. The notice must also set out such information as is prescribed by the regulations.

Where tax file number quoted 25

(3) If the member or beneficiary has quoted his or her tax file number to the trustee of the eligible rollover fund, regulations made for the purposes of subsection (2) may require the tax file number to be set out in the notice.

Entitlement to quote tax file number

(4) A member of, or beneficiary in, that other fund may quote his or her tax file number to the trustee of the eligible rollover fund. 30

Deemed quotation of tax file number

(5) For the purposes of this Act, if the tax file number of the member or beneficiary is given to the trustee of the eligible rollover fund under section 245, the member or beneficiary is taken to have quoted that tax file number to the trustee of the eligible rollover fund. 35

Offence

(6) A person who intentionally or recklessly contravenes subsection (2) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units.

5 **Register of rolled-over benefits**

250.(1) The Commissioner must keep a register that contains particulars of which notice has been given to the Commissioner under section 249.

(2) Any person may request the Commissioner to tell the person whether any particulars in relation to that person are contained in the register.

10 (3) The Commissioner may require the person to quote the person's tax file number for the purpose of enabling the Commissioner to answer the request.

Rights of beneficiary to rolled-over benefits

15 251. If a fund pays in accordance with this Part to an eligible rollover fund an amount equal to the benefits of a beneficiary in the first-mentioned fund:

(a) the beneficiary ceases to have any rights against the first-mentioned fund in respect of those benefits; but

20 (b) has the corresponding rights against the eligible rollover fund in respect of those benefits.

Claims to rolled-over benefits

252.(1) A person who considers that he or she is entitled to benefits held by an eligible rollover fund may apply in the approved form to the trustee of that fund for payment of the benefits.

25 (2) The approved form of application may require the tax file number of the applicant to be set out in the application.

**PART 25—MONITORING AND INVESTIGATING
SUPERANNUATION ENTITIES**

Division 1—Objects of Part

30 **Objects of Part**

253. The objects of this Part are:

(a) to ensure that the Commissioner has sufficient power to monitor superannuation entities (Division 2); and

35 (b) to empower the Commissioner to require the trustee of a superannuation entity to appoint an individual, or a committee, to investigate the financial position of the entity (Division 3); and

- (c) to authorise the Commissioner to conduct an investigation of the whole or a part of the affairs of a superannuation entity (Divisions 4, 5, 6, 7, 8 and 9).

Division 2—Monitoring superannuation entities

Information to be given to Commissioner

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254.(1) The trustee of a superannuation entity established after the commencement of this section must, within the prescribed period after the establishment of the entity, give the prescribed information to the Commissioner.

(2) For the purposes of this Act, the Commissioner or an authorised person may, by written notice to the trustee of a superannuation entity, require the trustee, within a specified period, to give to the Commissioner or to an authorised person in relation to a specified year of income of the entity such information, or a report on such matters, as are set out in the notice. 10

(3) If the trustee of a superannuation entity gives information to the Commissioner or an authorised person as required by subsection (1), the Commissioner or authorised person must give to the trustee a written statement that the Commissioner or authorised person has received the information. 15

(4) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 50 penalty units. 20

Commissioner may require production of books

255.(1) For the purposes of this Act, the Commissioner or an authorised person may by written notice to a relevant person in relation to a superannuation entity, require the relevant person to produce to the Commissioner or an authorised person, at such reasonable time and reasonable place as are specified in a notice, any books relating to the affairs of the entity. 25

(2) If any book produced to the Commissioner or an authorised person under subsection (1) is not in writing in the English language, the Commissioner or an authorised person may require the relevant person to produce to the Commissioner or an authorised person a version of the book that is in writing in the English language. 30

(3) The Commissioner or an authorised person may inspect, take extracts from and make copies of any book, or of any version of any book, produced to the Commissioner or an authorised person under this section. 35

Access to premises

256.(1) For the purposes of this Act, an authorised person may enter, at any reasonable time, any premises at which the person has reason to believe books relating to the affairs of a superannuation entity are kept and may:

5 (a) inspect any book found on the premises that relates to those affairs or that the authorised person believes on reasonable grounds to relate to those affairs; and

(b) make copies of, or take extracts from, any such book.

10 (2) An authorised person may not, under subsection (1), enter premises unless the occupier of the premises has consented to the entry.

Division 3—Commissioner may require trustee of superannuation entity to appoint an individual, or a committee, to investigate the financial position of the entity

Investigation of financial position of superannuation entity

15 257. The Commissioner may, by written notice given to the trustee of a superannuation entity, require the trustee to appoint an individual, or a committee of individuals, to:

20 (a) carry out an investigation of the whole or a specified part of the financial position of the entity as at a specified time or in relation to a specified period; and

(b) make a report on that investigation.

Qualifications of investigator or investigators

25 258.(1) If the Commissioner's notice requires the appointment of a single person, the notice may specify qualifications (whether academic, professional or by way of experience) that must be held by the person.

(2) If the Commissioner's notice requires the appointment of a committee of persons, the notice may require that the committee consist of persons holding such respective qualifications (whether academic, professional or by way of experience) as are specified in the notice.

30 (3) If the Commissioner's notice includes a requirement of a kind mentioned in subsection (1) or (2), the person or persons appointed must hold the qualifications required by the notice.

Commissioner may veto appointment of investigator or investigators

35 259.(1) The trustee must, within 7 days after the date on which the notice was given, advise the Commissioner, in writing, of the name of the person or persons appointed.

(2) If the Commissioner notifies the trustee that the person is, or any or all of the persons are, not acceptable to the Commissioner, the trustee must, within 7 days after the date on which the notice was given:

- (a) appoint a different individual or individuals; and
- (b) advise the Commissioner, in writing, of the name of the individual or individuals so appointed.

(3) The Commissioner may, within 7 days after the advice was given under subsection (1) or (2), notify the trustee, in writing, that the person is, or that any or all of the persons are, not acceptable to the Commissioner. 5

Deadline for receipt of report

260.(1) The Commissioner's notice under section 257 must specify a date as the deadline for the receipt of the report.

(2) The trustee must cause the person's report or the committee's report, as the case may be, to be given to the Commissioner: 10

- (a) before the expiry of deadline; or
- (b) within such further time as the Commissioner, by written notice, allows.

Contents of report etc.

261.(1) The Commissioner's notice under section 257 may require the report to contain a statement of the person's opinion or the committee's opinion, as the case may be, about such matters as are specified in the notice. 15

(2) Subject to subsection (3), if the Commissioner's notice under section 257 includes a requirement of a kind mentioned in subsection (1) of this section, the person's report or the committee's report must contain a statement of the person's opinion or the committee's opinion, as the case may be, about the matters specified in the notice. 20

(3) If the members of a committee are divided:

- (a) if the division relates to the content of a statement of the committee's opinion about a particular matter—the committee's report must contain statements of the respective members' opinions about that matter; or 25
- (b) in any other case—the committee's report is to be divided accordingly. 30

(4) The report must be signed by the person or persons appointed.

Trustee must comply with this Division

262. A trustee who intentionally or recklessly contravenes this Division is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units. 35

Division 4—Investigations by Commissioner

Investigation of superannuation entity

263.(1) If it appears to the Commissioner that:

- (a) a contravention of this Act or the regulations may have occurred or be occurring in relation to a superannuation entity; or
- (b) the financial position of a superannuation entity may be unsatisfactory; or
- 5 (c) the trustee of a regulated superannuation fund or an approved deposit fund has refused or failed to give effect to a determination of the Superannuation Complaints Tribunal under section 37 of the *Superannuation (Resolution of Complaints) Act 1993*;

10 the Commissioner may, by written notice to the trustee of the entity, tell the trustee that the Commissioner proposes to conduct an investigation of the whole or a part of the affairs of the entity.

(2) If a notice is given under subsection (1) to the trustee of a superannuation entity, the following provisions of this Division apply in relation to the entity.

15 **Power of Commissioner to obtain information or freeze assets**

Commissioner may act to preserve values of interests

20 **264.(1)** If it appears to the Commissioner that conduct that has been or is being engaged in by the trustee or an investment manager of a superannuation entity is likely to affect adversely the values of the interests of beneficiaries, the Commissioner may do any one or more of the things set out in subsections (2) to (4).

Direction to provide information

25 (2) The Commissioner may, by written notice given to the trustee or investment manager, direct that person to give to the Commissioner, within the period set out in the notice (not being less than 7 days after the notice is given), such written information about matters relating to the affairs of the entity as is set out in the notice.

Direction to trustee or manager freezing assets

30 (3) The Commissioner may, by written notice given to the trustee or investment manager, direct that person not to dispose of or remove from Australia:

- (a) any of the assets of the entity in Australia; or
- (b) any assets of the entity in Australia included in a specified class of assets; or

35 (c) a specified asset or assets of the entity in Australia; during such period (not being more than 6 months) after the notice is given as is set out in the notice.

Direction to other persons freezing assets

(4) The Commissioner may, by written notice given to a person (not being the trustee or investment manager) who has possession, custody or control of an asset or assets of the entity in Australia, direct the person not to dispose of or remove that asset or assets from Australia during such period (not being more than 6 months) after the notice is given as is set out in the notice. 5

Effect of direction on validity of transactions

(5) Subsection (3) or (4) does not affect the validity of a transaction entered into by a person in contravention of a notice given under that subsection. 10

Written consent of the Minister

(6) The Commissioner must not give a notice under this section without the written consent of the Minister.

Inspectors

15

265.(1) The Commissioner may, by signed writing, appoint a member of the staff of the Commissioner to be an inspector for the purposes of the conduct of investigations under this Division in relation to the affairs of superannuation entities.

(2) The Commissioner must cause to be issued to each person appointed under subsection (1) an identity card that sets out the name and appointment of the person and to which is attached a recent photograph of the person. 20

(3) A person who was appointed under subsection (1) must not, upon ceasing to be an inspector, fail, without reasonable excuse, to return to the Commissioner the identity card issued to him or her under this section. 25
Penalty for a contravention of this subsection: One penalty unit.

Delegation by inspector

266.(1) An inspector may, by signed writing, delegate to a member of the staff of the Commissioner any of the inspector's powers under this Part.

(2) A delegate must, on the request of a person in relation to whom the delegated powers are exercisable or of a person affected by the exercise of those powers, produce the instrument of delegation, or a copy of the instrument, for inspection. 30

(3) A reference in this Part to an inspector includes a reference to a delegate of an inspector. 35

Commissioner may exercise powers of inspector

5 **267.** The Commissioner may exercise any of the powers of an inspector under this Part and, if he or she does so, then, for the purposes of the exercise of those powers by the Commissioner, a reference in this Part to an inspector is taken to be a reference to the Commissioner.

Inspector may enter premises for purposes of an investigation

10 **268.** If an inspector believes on reasonable grounds that it is necessary to enter premises for the purposes of an investigation of the whole or a part of the affairs of a superannuation entity, the inspector may, at any reasonable time, enter the premises and:

- (a) inspect any book found on the premises that relates to the affairs of the entity or that he or she believes on reasonable grounds to relate to those affairs; and
- (b) make copies of, or take extracts from, any such book.

15 **Inspector may require production of books**

20 **269.** For the purposes of an investigation of the whole or a part of the affairs of a superannuation entity, an inspector may, by written notice given to a person who:

- (a) is a relevant person in relation to the entity; or
- (b) the inspector believes on reasonable grounds has the custody or control of any books relating to those affairs;

require the person to produce all or any of those books to the inspector.

Powers of inspector to require assistance from, and examine, relevant persons

25 **270.** An inspector, by written notice given to a person who is a relevant person in relation to a superannuation entity whose affairs or a part of whose affairs the Commissioner is investigating, may require that person to do either or both of the following:

- 30 (a) to give to the inspector all reasonable assistance in connection with the investigation;
- (b) to appear before the inspector for examination concerning matters relevant to the investigation.

Application for warrant to seize books not produced

35 **271.(1)** If an inspector has reasonable grounds to suspect that there are, or may be within the next 3 days, on particular premises, books:

- (a) whose production has been required under this Part; and
- (b) that have not been produced in compliance with that requirement;

he or she may:

(c) lay before a magistrate an information or complaint on oath setting out those grounds; and

(d) apply for the issue of a warrant to search the premises for those books.

(2) On an application under this section, the magistrate may require further information to be given, either orally or by affidavit, in connection with the application. 5

Grant of warrant

Section applies if magistrate satisfied of certain things

272.(1) This section applies if, on an application under section 271, the magistrate is satisfied that there are reasonable grounds to suspect that there are, or may be within the next 3 days, on particular premises, particular books: 10

(a) whose production has been required under this Part; and

(b) that have not been produced in compliance with that requirement.

Issue of warrant 15

(2) The magistrate may issue a warrant authorising:

(a) a member of the Australian Federal Police named in the warrant; or

(b) that member together with the inspector who applied for the issue of the warrant;

with such assistance, and by such force, as is necessary and reasonable, to do the acts set out in subsection (3). 20

Acts authorised by warrant

(3) The acts are:

(a) entering on or into the premises; and

(b) searching the premises; and 25

(c) breaking open and searching anything, whether a fixture or not, in or on the premises; and

(d) taking possession of, or securing against interference, books that appear to be any or all of those books.

Grounds for issuing warrant to be set out 30

(4) If the magistrate issues such a warrant, he or she must set out on the information or complaint laid before him or her under subsection 271(1) for the purposes of the application:

(a) which of the grounds set out in the information; and

(b) particulars of any other grounds; 35

he or she has relied on to justify the issue of the warrant.

Contents of warrant

(5) A warrant under this section must:

- 5
- (a) specify the premises and books referred to in subsection (1); and
 - (b) state whether entry is authorised to be made at any time of the day or night or only during specified hours; and
 - (c) state that the warrant ceases to have effect on a specified day that is not more than 7 days after the day of issue of the warrant.

Powers if books produced or seized

Section applies if books produced, seized etc.

273.(1) This section applies if:

- 10
- (a) books are produced to a person under a requirement made under this Part; or
 - (b) under a warrant issued under section 272, a person:
 - (i) takes possession of books; or
 - (ii) secures books against interference; or
 - (c) because of a previous application of subsection (8) of this section,
- 15 books are delivered into a person's possession.

Possession in (1)(a) case

(2) If paragraph (1)(a) applies, the person may take possession of any of the books.

Power to inspect etc.

20 (3) The person may inspect, and may make copies of, or take extracts from, any of the books.

Power to use for proceedings

(4) The person may use, or permit the use of, any of the books for the purposes of a proceeding.

25 *Retaining possession*

(5) The person may retain possession of any of the books for so long as is necessary:

- 30
- (a) for the purposes of exercising a power conferred by this section (other than this subsection and subsection (7)); or
 - (b) for the purposes of the investigation; or
 - (c) for a decision to be made about whether or not a proceeding to which the books concerned would be relevant should be begun; or
 - (d) for such a proceeding to be begun and carried on.

Claims or liens

35 (6) No-one is entitled, as against the person, to claim a lien on any of the books, but such a lien is not otherwise prejudiced.

Right of inspection

(7) While the books are in the person's possession, the person must permit another person to inspect at all reasonable times such (if any) of the books as the other person would be entitled to inspect if they were not in the first-mentioned person's possession. 5

Delivery into possession of Commissioner etc.

(8) Unless subparagraph (1)(b)(ii) applies, the person may deliver any of the books into the possession of the Commissioner or of a person authorised by the Commissioner to receive them.

Explanation of matters relating to books 10

(9) If paragraph (1)(a) or (b) applies, the person, or a person into whose possession the person delivers any of the books under subsection (8), may require:

- (a) if paragraph (1)(a) applies—a person who so produced any of the books; or 15
- (b) in any case—a person who was a party to the compilation of any of the books;

to explain to the best of his or her knowledge and belief any matter about the compilation of any of the books or to which any of the books relate.

Powers if books not produced 20

274. If a person fails to produce particular books in compliance with a requirement made by another person under this Part, the other person may require the first-mentioned person to state, to the best of his or her knowledge and belief:

- (a) where the books may be found; or 25
- (b) who last had possession, custody or control of the books and where that person may be found.

Power to require person to identify property of superannuation entity

275. A person who has power under this Part to require another person to produce books relating to affairs of a superannuation entity may, whether or not that power is exercised, require the other person, so far as the other person can do so: 30

- (a) to identify property of the entity; and
- (b) to explain how the trustee or an investment manager of the entity has kept account of that property. 35

Division 5—Examinations

Application of Division

276. This Division applies if, pursuant to a requirement made under paragraph 270(b), a person (the "examinee") appears before an inspector.

Requirements made of an examinee

277.(1) The inspector may examine the examinee on oath or affirmation and may, for that purpose:

- (a) require the examinee either to take an oath or make an affirmation; and
- (b) administer an oath or affirmation to the examinee.

(2) The oath or affirmation to be taken or made by the examinee for the purposes of the examination is an oath or affirmation that the statements that the examinee will make will be true.

(3) The inspector may require the examinee to answer a question that is put to the examinee at the examination and is relevant to a matter that the Commissioner is investigating, or is to investigate.

Examination to be in private

278.(1) The examination is to take place in private and the inspector may give directions about who may be present during it, or during a part of it.

- (2) A person must not be present at the examination unless he or she:
 - (a) is the inspector or the examinee; or
 - (b) is a member of the staff of the Commissioner authorised by the Commissioner to attend the examination; or
 - (c) is entitled to be present under:
 - (i) a direction under subsection (1); or
 - (ii) subsection 279(1).

(3) A person who knowingly contravenes subsection (2) is guilty of an offence punishable on conviction by a fine not exceeding 10 penalty units.

Examinee's lawyer may attend

279.(1) The examinee's lawyer may be present at the examination and may, at such times during it as the inspector determines:

- (a) address the inspector; and
- (b) examine the examinee;

about matters about which the inspector has examined the examinee.

(2) If, in the inspector's opinion, a person is trying to obstruct the examination by exercising rights under subsection (1), the inspector may require the person to stop addressing the inspector, or examining the examinee, as the case requires.

Record of examination

280.(1) The inspector must cause a written record to be made of statements made at the examination.

(2) The inspector may require the examinee to read the written record, or to have it read to him or her, and may require him or her to sign it.

(3) The inspector must give to the examinee a copy of the written record, without charge, but subject to such conditions (if any) as the inspector imposes.

5

Giving copies of record to other persons

Copies for proceedings

281.(1) If a person's lawyer satisfies the Commissioner that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related, the Commissioner may give the lawyer:

- (a) a copy of a written record of the examination; or
- (b) a copy of that record together with a copy of any related book.

Copies to be used only for proceedings

(2) If the Commissioner gives a copy to a person under subsection (1), the person, or any other person who has possession, custody or control of the copy or a copy of it, must not, except in connection with preparing, beginning or carrying on, or in the course of, a proceeding, intentionally:

- (a) use the copy or a copy of it; or
- (b) publish, or communicate to a person, the copy, a copy of it, or any part of the copy's contents.

Penalty: Imprisonment for 6 months.

Copies given subject to conditions

282.(1) If a copy is given to a person under subsection 280(3) subject to conditions, the person, and any other person who has possession, custody or control of the copy or a copy of it, must comply with the conditions.

(2) A person who intentionally or recklessly contravenes this section is guilty of an offence punishable on conviction by imprisonment for a period not exceeding 6 months.

Record to accompany report

283.(1) When a report about the investigation is prepared under section 284, each record (if any) of the examination is to accompany the report.

(2) If:

- (a) in the Commissioner's opinion, a statement made at an examination is relevant to any other investigation under Division 4; and
 - (b) a record of the statement was made under section 280; and
 - (c) a report about the other investigation is prepared under section 284;
- a copy of the record must accompany the report.

- (b) if a book relating to that matter is in a particular State or Territory—take or send the book out of that State or Territory or out of Australia.

Penalty: Imprisonment for 6 months.

Self-incrimination

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Self-incrimination not a reasonable excuse

287.(1) For the purposes of this Part, it is not a reasonable excuse for a person to refuse or fail:

- (a) to give information; or
- (b) to sign a record; or
- (c) to produce a book;

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in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

Self-incrimination as grounds for inadmissibility

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(2) Subsection (3) applies if:

(a) before:

- (i) making an oral statement giving information; or
- (ii) signing a record; or
- (iii) producing a book;

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as required under this Part, a person claims that the statement, signing the record, or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

- (b) the statement, signing the record, or production of the book, as the case may be, might in fact tend to incriminate the person or make the person liable to a penalty.

25

Inadmissibility of statements etc.

(3) Subject to subsection (4), none of the following:

- (a) the statement;
- (b) the fact that the person has signed the record or produced the book, as the case may be;
- (c) in the case of the making of a statement or the signing of a record—any information, document or other thing obtained as a direct or indirect consequence of the person making the statement or signing the record, as the case may be;

35

is admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty.

Exceptions

(4) Subsection (3) does not apply to admissibility in proceedings in respect of:

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- (a) in the case of the making of a statement—the falsity of the statement; or
- (b) in the case of the signing of a record—the falsity of any statement contained in the record.

5 **Legal professional privilege**

288.(1) This section applies if:

- (a) under this Act, a person requires a lawyer:
 - (i) to give information; or
 - (ii) to produce a book; and
- 10 (b) giving the information would involve disclosing, or the book contains, as the case may be, a privileged communication made by, on behalf of or to the lawyer in his or her capacity as a lawyer.

(2) The lawyer is entitled to refuse to comply with the requirement unless:

- 15 (a) if the person to whom, or by or on behalf of whom, the communication was made is a body corporate that is under official management or being wound up—the official manager or liquidator of the body; or
- (b) otherwise—the person to whom, or by or on behalf of whom, the communication was made;

20 consents to the lawyer complying with the requirement.

(3) If the lawyer so refuses, he or she must, as soon as practicable, give to the person who made the requirement a written notice setting out:

- 25 (a) if the lawyer knows the name and address of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and
- (b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and
- 30 (c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the book, or the part of the book, containing the communication.

(4) A person who intentionally or recklessly contravenes this section is guilty of an offence punishable on conviction by a fine not exceeding 30 penalty units.

35 **Powers of Court where non-compliance with this Act**

289.(1) This section applies if the Commissioner is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Act.

- (2) The Commissioner may by writing certify the failure to the Court.

(3) If the Commissioner does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

Division 8—Evidentiary use of certain material

Statements made at an examination: proceedings against examinee 5

Admissibility of statements made at examination

290.(1) Subject to this section, a statement that a person makes at an examination of the person is admissible in evidence against the person in a proceeding.

Self-incrimination exception 10

(2) The statement is not admissible if:

(a) the proceeding is:

(i) a criminal proceeding; or

(ii) a proceeding for the imposition of a penalty;

other than a proceeding in respect of the falsity of the statement; and 15

(b) before making the statement, the person claimed that it might tend to incriminate the person or make the person liable to a penalty.

Irrelevant statement exception

(3) The statement is not admissible if it is not relevant to the proceeding and the person objects to the admission of evidence of the statement. 20

Related statement exception

(4) The statement (the “**subject statement**”) is not admissible if:

(a) it is qualified or explained by some other statement made at the examination; and

(b) evidence of the other statement is not tendered in the proceeding; and 25

(c) the person objects to the admission of evidence of the subject statement.

Legal professional privilege exception

(5) The statement is not admissible if:

(a) it discloses matter in respect of which the person could claim legal professional privilege in the proceeding if subsection (1) did not apply in relation to the statement; and 30

(b) the person objects to the admission of evidence of the statement.

Joint proceedings

(6) Subsection (1) applies in relation to a proceeding against a person even if it is heard together with a proceeding against another person. 35

Record is prima facie evidence

5 (7) If a written record of an examination of a person is signed by the person under subsection 280(2) or authenticated in any other prescribed manner, the record is, in a proceeding, *prima facie* evidence of the statements it records.

Admissibility of other evidence

(8) This Part does not limit or affect the admissibility in the proceeding of other evidence to statements made at the examination.

Statements made at an examination: other proceedings

10 *Admissibility of absent witness evidence*

15 **291.(1)** If direct evidence by a person (the “**absent witness**”) of a matter would be admissible in a proceeding, a statement that the absent witness made at an examination of the absent witness and that tends to establish that matter is admissible in the proceeding as evidence of that matter in accordance with subsection (2).

Requirement for admissibility

(2) The statement is admissible:

(a) if it appears to the court or tribunal that:

- 20 (i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness; or
- (ii) the absent witness is outside the State or Territory in which the proceeding is being heard and it is not reasonably practicable to secure his or her attendance; or
- 25 (iii) all reasonable steps have been taken to find the absent witness but he or she cannot be found; or

(b) if it does not so appear to the court or tribunal—unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness.

30 **Weight of evidence admitted under section 291**

292.(1) This section applies if evidence of a statement made by a person at an examination of the person is admitted under section 291 in a proceeding.

35 (2) In deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:

- (a) how long after the matters to which it related the statement was made; and
- (b) any reason the person may have had for concealing or misrepresenting a material matter; and

(c) any other circumstances from which it is reasonable to draw an inference about how accurate the statement is.

(3) If the person is not called as a witness in the proceeding:

(a) evidence that would, if the person had been so called, have been admissible in the proceeding for the purpose of destroying or supporting his or her credibility is so admissible; and 5

(b) evidence is admissible to show that the statement is inconsistent with another statement that the person has made at any time.

(4) However, evidence of a matter is not admissible under this section if, had the person been called as a witness in the proceeding and denied the matter in cross-examination, evidence of the matter would not have been admissible if adduced by the cross-examining party. 10

Objection to admission of statements made at examination

Notice of intention to apply to admit evidence and statements

293.(1) A party (the “**adducing party**”) to a proceeding may, not less than 14 days before the first day of the hearing of the proceeding, give to another party to the proceeding written notice that the adducing party: 15

(a) will apply to have admitted in evidence in the proceeding specified statements made at an examination; and

(b) for that purpose, will apply to have evidence of those statements admitted in the proceeding. 20

Notice to set out etc. statements

(2) A notice under subsection (1) must set out, or be accompanied by writing that sets out, the specified statements.

Notice of objection

(3) Within 14 days after a notice is given under subsection (1), the other party may give to the adducing party a written notice: 25

(a) stating that the other party objects to specified statements being admitted in evidence in the proceeding; and

(b) specifying, in relation to each of those statements, the grounds of objection. 30

Extension of objection period

(4) The period prescribed by subsection (3) may be extended by the court or tribunal or by agreement between the parties concerned.

Notice etc. to be given to court or tribunal

(5) On receiving a notice given under subsection (3), the adducing party must give to the court or tribunal a copy of: 35

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- (a) the notice under subsection (1) and any writing that subsection (2) requires to accompany that notice; and
- (b) the notice under subsection (3).

Action by court or tribunal

- 5 (6) If subsection (5) is complied with, the court or tribunal may either:
- (a) determine the objections as a preliminary point before the hearing of the proceeding begins; or
 - (b) defer determination of the objections until the hearing.

Right to object to admission of statement

- 10 (7) If a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence in the proceeding unless:
- 15 (a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or
- (b) the court or tribunal gives the other party leave to object to the statement being so admitted.

Copies of, or extracts from, certain books

20 294.(1) A copy of, or an extract from, a book relating to affairs of a superannuation entity is admissible in evidence in a proceeding as if the copy were the original book, or the extract were the relevant part of the original book, as the case may be, whether or not the copy or extract was made under section 273.

25 (2) A copy of, or an extract from, a book is not admissible in evidence under subsection (1) unless it is proved that the copy or extract is a true copy of the book, or of the relevant part of the book, as the case may be.

 (3) For the purposes of subsection (2), a person who has compared:

- (a) a copy of a book with the book; or
 - (b) an extract from a book with the relevant part of the book;
- 30 may give evidence, either orally or by an affidavit or statutory declaration, that the copy or extract is a true copy of the book or relevant part, as the case may be.

Report under Division 6

35 295. Subject to section 296, if a copy of a report under Division 6 purports to be certified by the Commissioner as a true copy of such a report, the copy is admissible in a proceeding (other than a criminal proceeding) as *prima facie* evidence of any facts or matters that the report states an inspector to have found to exist.

Exceptions to admissibility of report

296.(1) This section applies if a party to a proceeding tenders a copy of a report as evidence against another party.

(2) The copy is not admissible under section 295 in the proceeding as evidence against the other party unless the court or tribunal is satisfied that: 5

- (a) a copy of the report has been given to the other party; and
- (b) the other party, and the other party's lawyer, have had a reasonable opportunity to examine that copy and to take its contents into account in preparing the other party's case.

(3) Before or after the copy referred to in subsection (1) is admitted in evidence, the other party may apply to cross-examine, in relation to the report, a specified person who, or 2 or more specified persons each of whom: 10

- (a) was concerned in preparing the report or making a finding about a fact or matter that the report states the inspector to have found to exist; or 15
- (b) whether or not pursuant to a requirement made under this Part, gave information, or produced a book, on the basis of which, or on the basis of matters including which, such a finding was made.

(4) The court or tribunal must grant an application made under subsection (3) unless it considers that, in all the circumstances, it is not appropriate to do so. 20

(5) If:

- (a) the court or tribunal grants an application or applications made under subsection (3); and
- (b) a person to whom the application or any of the applications relates, or 2 or more such persons, is or are unavailable, or does not or do not attend, to be cross-examined in relation to the report; and 25
- (c) the court or tribunal is of the opinion that to admit the copy under section 295 in the proceeding as evidence against the other party without the other party having the opportunity so to cross-examine 30
the person or persons would unfairly prejudice the other party;

the court or tribunal must refuse so to admit the copy, or must treat the copy as not having been so admitted, as the case requires.

Material otherwise admissible

297. Nothing in this Division renders evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding if this Division had not been enacted. 35

Division 9—Miscellaneous

Commissioner may cause civil proceeding to be begun

5 **298.** If, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part), it appears to the Commissioner to be in the public interest for a person to begin and carry on a proceeding for:

(a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or

10 (b) recovery of property of the person;
the Commissioner:

(c) if the person is a body corporate—may cause; or

(d) otherwise—may, with the person’s written consent, cause:
such a proceeding to be begun and carried on in the person’s name.

15 **Person complying with requirement not to incur liability to another person**

299. A person who complies with a requirement made of the person under this Part does not incur any liability to any other person merely because of that compliance.

20 **PART 26—OFFENCES RELATING TO STATEMENTS, RECORDS ETC.**

Object of Part

25 **300.** The object of this Part is to protect the integrity of the system of supervision provided for by this Act by penalising the making of false or misleading statements, the keeping of incorrect records and the falsification or concealment of identity.

Interpretation

301. In this Part:

30 **“SIS officer”** means a person exercising powers or performing functions under or in relation to this Act or the regulations;

“statement made to an SIS officer” means a statement made to an SIS officer orally, in writing, in a data processing device or in any other form and, without limiting the generality of the foregoing, includes a statement:

35 (a) made in an application, notification, return or other document made, prepared, given or purporting to be made, prepared or given, under this Act or the regulations; or

(b) made in answer to a question asked of a person under this Act or the regulations; or

- (c) made in any information given, or purporting to be given, under this Act or the regulations; or
- (d) made in a document given to an SIS officer otherwise than under this Act or the regulations;

but does not include a statement made in a document produced under subsection 255(1) or 260(2) or section 269. 5

False or misleading statements

302.(1) A person who:

- (a) makes a statement to an SIS officer that is false or misleading in a material particular; or 10
- (b) omits from a statement made to an SIS officer any matter or thing without which the statement is misleading in a material particular;

is guilty of an offence punishable on conviction by a fine not exceeding 40 penalty units.

(2) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that the person: 15

- (a) did not know; and
- (b) could not reasonably be expected to have known;

that the statement to which the prosecution relates was false or misleading.

(3) For the purposes of paragraph (1)(b), a person shall not be taken to have omitted a matter or thing from a statement made to an SIS officer merely because the person has, in making the statement, failed to quote the person's tax file number. 20

Incorrectly keeping records etc.

303.(1) Where: 25

- (a) a person who is required under this Act or the regulations to keep any accounts, accounting records or other records keeps them in such a way that they do not correctly record and explain the matters, transactions, acts or operations to which they relate; or
- (b) a person who is required under this Act or the regulations to make a record of any matter, transaction, act or operation makes it in such a way that it does not correctly record the matter, transaction, act or operation; 30

the person is guilty of an offence punishable on conviction by a fine not exceeding 40 penalty units. 35

(2) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that the person:

- (a) did not know; and
- (b) could not reasonably be expected to have known;

that:

- 5 (c) in the case of a prosecution for an offence against subsection (1) by virtue of paragraph (a)—the accounts, accounting records or other records to which the prosecution relates did not correctly record and explain the matters, transactions, acts or operations to which they relate; or
- 10 (d) in the case of a prosecution for an offence against subsection (1) by virtue of paragraph (b)—the record to which the prosecution relates did not correctly record the matter, transaction, act or operation to which the record relates.

Recklessly making false or misleading statements

304. A person who recklessly:

- 15 (a) makes a statement to an SIS officer that is false or misleading in a material particular; or
- (b) omits from a statement made to an SIS officer any matter or thing without which the statement is misleading in a material particular;
- is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 12 months.

Intentionally making false or misleading statements

20 **305.** A person who intentionally:

- (a) makes a statement to an SIS officer that is false or misleading in a material particular; or
- (b) omits from a statement made to an SIS officer any matter or thing without which the statement is misleading in a material particular;
- 25 is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 12 months.

Intentionally or recklessly incorrectly keeping records etc.

306. If:

- 30 (a) a person who is required under this Act or the regulations to keep any accounts, accounting records or other records recklessly or intentionally keeps them in such a way that they do not correctly record and explain the matters, transactions, acts or operations to which they relate; or
- 35 (b) a person who is required under this Act or the regulations to make a record of any matter, transaction, act or operation recklessly or intentionally makes it in such a way that it does not correctly record the matter, transaction, act or operation;

the person is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 12 months.

Incorrectly keeping records with intention of deceiving or misleading etc.

307.(1) A person is guilty of an offence if the person:

(a) keeps any accounts, accounting records or other records in such a way that they: 5

(i) do not correctly record and explain the matters, transactions, acts or operations to which they relate; or

(ii) are (whether in whole or in part) illegible, indecipherable, incapable of identification or, if they are kept in the form of a data processing device, incapable of being used to reproduce information; or 10

(b) makes a record of any matter, transaction, act or operation in such a way that it does not correctly record the matter, transaction, act or operation; or

(c) alters, defaces, mutilates, falsifies, damages, removes, conceals or destroys any accounts, accounting records or other records (whether in whole or in part); or 15

(d) does or omits to do any other act or thing to any accounts, accounting records or other records;

with any of the following intentions (whether or not the person had any other intention): 20

(e) deceiving or misleading the Commissioner or a particular SIS officer;

(f) hindering or obstructing the Commissioner or a particular SIS officer (otherwise than in the investigation of an offence against, or arising out of, this Act or the regulations); 25

(g) hindering or obstructing the investigation of an offence against, or arising out of, this Act or the regulations;

(h) hindering, obstructing or defeating the administration, execution or enforcement of this Act or the regulations; 30

(i) defeating the purposes of this Act or the regulations.

(2) The offence is punishable on conviction by imprisonment for a term not exceeding 2 years.

Falsifying or concealing identity with intention of deceiving or misleading etc.

35

308.(1) A person is guilty of an offence if the person:

(a) falsifies or conceals the identity of, or the address or location of a place of residence or business of, the person or another person; or

- (b) does or omits to do any act or thing the doing or omission of which facilitates the falsification or concealment of the identity of, or the address or location of a place of residence or business of, the person or another person;

5 with any of the following intentions (whether or not the person had any other intention):

- (c) deceiving or misleading the Commissioner or a particular SIS officer;

10 (d) hindering or obstructing the Commissioner or a particular SIS officer (otherwise than in the investigation of an offence against, or arising out of, this Act or the regulations);

- (e) hindering or obstructing the investigation of an offence against, or arising out of, this Act or the regulations;

15 (f) hindering, obstructing or defeating the administration, execution or enforcement of this Act or the regulations;

- (g) defeating the purposes of this Act or the regulations.

(2) The offence is punishable on conviction by imprisonment for a term not exceeding 2 years.

PART 27—POWERS OF COURT

20 **Object of Part**

309. The object of this Part is to set out rules about the power of the courts to deal with matters arising under this Act.

Power to grant relief

Court may relieve liability for misconduct

25 **310.(1)** If, in a civil proceeding against a superannuation official for official misconduct in a capacity as such a person, it appears to the court that the official is or may be liable in respect of the official misconduct, the court may, if subsection (2) is satisfied, relieve the official either wholly or partly from the liability, on such terms as the court thinks fit.

30 *Basis for granting relief*

(2) The court may only relieve the official from the liability if it appears to the court that:

- (a) the official has acted honestly; and

35 (b) having regard to all the circumstances of the case, including those connected with the official's appointment, he or she ought fairly to be excused for the official misconduct.

Withdrawal of case from jury

(3) If:

- (a) the case is being tried by a judge with a jury; and

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- (b) after hearing the evidence, the judge is satisfied that relief ought to be given under subsection (1);

the judge may withdraw the case in whole or in part from the jury and immediately direct judgement to be entered for the superannuation official on such terms as to costs or otherwise as the judge thinks proper. 5

Where claim yet to be made

(4) If a superannuation official has reason to believe that a claim will or might be made against the official in respect of any official misconduct in a capacity as such a person:

- (a) the official may apply to the Court for relief; and 10
(b) the Court has the same power to grant relief as it would have under subsection (1) if it had been a court before which proceedings against the official for official misconduct had been brought.

Definitions

(5) In this section: 15

“**officer**”, in relation to a corporate trustee, means:

- (a) a responsible officer or employee of the corporate trustee; or
(b) a receiver, or receiver and manager, of property of the body, where the property is beneficially owned by the corporate trustee; or
(c) an official manager or deputy official manager of the corporate trustee; or 20
(d) a liquidator or provisional liquidator of the corporate trustee; or
(e) a trustee or other person administering a compromise or arrangement made between the corporate trustee and another person or other persons; 25

“**official misconduct**” means negligence, default, breach of trust or breach of duty;

“**superannuation official**” means:

- (a) a trustee of a superannuation entity; or
(b) an officer of a corporate trustee of a superannuation entity; or 30
(c) an auditor of a superannuation entity; or
(d) an actuary of a superannuation entity.

Special meaning of “employee”

(6) The meaning of the expression “**employee**”, when used in this section, is to be determined as if subsections 12(3) and (8) of the *Superannuation Guarantee (Administration) Act 1992* had not been enacted. 35
(Those subsections deem certain contractors to be employees.)

Power of Court to give directions with respect to meetings ordered by the Court

5 **311.** If, under this Act, the Court orders a meeting to be convened, the Court may, subject to this Act, give such directions with respect to the convening, holding or conduct of the meeting, and such ancillary or consequential directions in relation to the meeting, as it thinks fit.

Irregularities

Definitions

10 **312.(1)** In this section: “**procedural irregularity**” includes:

- (a) the absence of a quorum at a meeting of:
 - (i) trustees of a superannuation entity; or
 - (ii) directors of a corporate trustee of a superannuation entity; or
 - (iii) beneficiaries in a superannuation entity; or
 - 15 (iv) members of a policy committee of an employer-sponsored fund; or
- (b) a defect, irregularity or deficiency of notice or time;

“**proceeding under this Act**” means any proceeding, whether a legal proceeding or not, under this Act.

20 *Effect of irregularities on proceedings*

(2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court:

- (a) is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court; and
- 25 (b) by order declares the proceeding to be invalid.

Effect of failure to give notice etc. on meetings

(3) Subject to subsection (4), none of the following:

- (a) a meeting held for the purposes of this Act;
- 30 (b) a meeting of which notice is required to be given in accordance with this Act;
- (c) any proceeding at such a meeting;

is invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting.

35 *Court may declare proceedings at meeting void*

(4) In spite of subsection (3), the Court may declare proceedings at the meeting to be void on application of:

- (a) the person concerned; or

- (b) a person entitled to attend the meeting; or
- (c) the Commissioner.

Court may make certain orders

(5) Subject to the remainder of this section, but without limiting any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders (either unconditionally or subject to any conditions imposed by the Court): 5

- (a) an order declaring that:
 - (i) any act, matter or thing purporting to have been done; or
 - (ii) any proceeding purporting to have been instituted or taken; 10
under this Act or in relation to a superannuation entity is not invalid because of any contravention of a provision of:
 - (iii) this Act; or
 - (iv) the governing rules of a superannuation entity;
- (b) an order relieving a person in whole or in part from any civil liability in respect of a contravention mentioned in paragraph (a); 15
- (c) an order:
 - (i) extending the period for doing any act, matter or thing or for instituting or taking any proceeding under this Act or in relation to a superannuation entity (including extending a period if it ended before the application for the order was made); or 20
 - (ii) shortening the period for doing such an act, matter or thing or for instituting or taking such a proceeding.

Consequential and ancillary orders 25

(6) The Court may also make any consequential or ancillary order that it thinks fit.

Orders where offence

(7) An order may be made under paragraph (5)(a) or (b) even though the contravention referred to in the paragraph concerned resulted in the commission of an offence. 30

Restrictions on making orders

(8) The Court must not make an order under this section unless it is satisfied:

- (a) in the case of an order referred to in paragraph (5)(a): 35
 - (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature; or
 - (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

- (iii) that it is in the public interest that the order be made; and
- (b) in the case of an order referred to in paragraph (5)(b)—that the person subject to the civil liability concerned acted honestly; and
- (c) in every case—that no substantial injustice has been or is likely to be caused to any person.

5

Power of Court to prohibit payment or transfer of money or property

Court's power to protect interests of certain creditors etc.

313.(1) If:

(a) any of the following applies:

10

(i) an investigation is being carried out under this Act in relation to an act or omission by a person (the “**contravening person**”), being an act or omission that constitutes or may constitute a contravention of this Act; or

15

(ii) a prosecution has begun against a person (also the “**contravening person**”) for a contravention of this Act; or

(iii) a civil proceeding has begun against a person (also the “**contravening person**”) under this Act; and

(b) the Commissioner or a person (an “**aggrieved person**”) to whom the contravening person is liable, or may become liable:

20

(i) to pay money (whether in respect of a debt, by way of damages or compensation or otherwise); or

(ii) to account for property;

applies to the Court; and

25

(c) the Court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person;

the Court may make one or more of the orders specified in subsection (2).

Orders that Court may make

(2) The orders that the Court may make are:

30

(a) an order prohibiting a person who is indebted to the contravening person or to an associate of the contravening person from making a payment in total or partial discharge of the debt to:

(i) the contravening person or associate; or

(ii) another person at the direction or request of the contravening person or associate;

35

(b) an order prohibiting a person holding money or property on behalf of the contravening person or of an associate of the contravening person from:

(i) paying all or any of the money; or

(ii) transferring or otherwise parting with possession of the property;

40

to:

- (iii) the contravening person or associate; or
- (iv) another person at the direction or request of the contravening person or associate;
- (c) an order prohibiting the taking or sending out of Australia by a person of money of the contravening person or of an associate of the contravening person; 5
- (d) an order prohibiting the taking, sending or transfer by a person of property of the contravening person, or of an associate of the contravening person from a place in Australia to a place outside Australia (including the transfer of interests from a register in Australia to a register outside Australia); 10
- (e) an order appointing:
 - (i) if the contravening person is an individual—a receiver or trustee, having such powers as the Court orders, of the property or of part of the property of that person; or 15
 - (ii) if the contravening person is a body corporate—a receiver or receiver and manager, having such powers as the Court orders, of the property or of part of the property of that person;
- (f) if the contravening person is an individual—an order requiring that person to deliver up to the Court his or her passport and such other documents as the Court thinks fit; 20
- (g) if the contravening person is an individual—an order prohibiting that person from leaving Australia without the consent of the Court.

“Property” in (2)(d) or (e) 25

(3) A reference in paragraph (2)(d) or (e) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example:

- (a) as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or 30
- (b) in a fiduciary capacity.

Purpose of subsection (3)

(4) Subsection (3) is to avoid doubt, is not to limit the generality of anything in subsection (1) and is not to affect by implication the interpretation of any other provision of this Act. 35

Absolute or conditional orders

(5) An order under subsection (1) prohibiting conduct may prohibit the conduct either absolutely or subject to conditions.

Interim orders

5 (6) If an application is made to the Court for an order under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order (being an order of the kind applied for that is expressed to have effect pending the determination of the application).

Damages undertakings

10 (7) On an application under subsection (1), the Court must not require the applicant or any other person, as a condition of granting an interim order under subsection (6), to give an undertaking as to damages.

Further orders

15 (8) If the Court has made an order under this section on a person's application, the Court may, on application by that person or by any person affected by the order, make a further order discharging or varying the first-mentioned order.

Period of order

(9) An order made under subsection (1) or (6) may be expressed to operate for a specified period or until the order is discharged by a further order under this section.

20 *Court's other powers not affected*

(10) This section does not affect the powers that the Court has apart from this section.

Section subject to Bankruptcy Act

(11) This section has effect subject to the *Bankruptcy Act 1966*.

25 *Offence to contravene orders*

(12) A person who intentionally or recklessly contravenes an order by the Court under this section that is applicable to the person is guilty of an offence punishable on conviction by imprisonment for a term of not more than 6 months.

30 **Court may order the disclosure of information or the publication of advertisements—contravention of provisions relating to issue of superannuation interests etc.**

35 **314.(1)** If a person (the “**alleged offender**”) has engaged, is engaging or is proposing to engage in conduct in contravention of Part 18, 19 or 20, the Court may, on the Commissioner's application, make an order or orders under either or both of subsections (2) and (3).

(2) The Court may make an order:

- (a) requiring the alleged offender, or a person involved in the contravention, to disclose information to:
 - (i) the public; or
 - (ii) a specified person; or
 - (iii) persons included in a specified class of persons; and 5
- (b) specifying the information, or the kind of information, that is to be disclosed, being information:
 - (i) in the possession of the person to whom the order is directed; or
 - (ii) to which that person has access; and 10
- (c) specifying the way in which it is to be disclosed.
- (3) The Court may make an order:
 - (a) requiring the alleged offender, or a person involved in the contravention, to publish advertisements and pay the expenses; and
 - (b) specifying the terms of the advertisements, or the way in which the terms of the advertisements are to be determined; and 15
 - (c) specifying the way in which, and times at which, the advertisements are to be published.
- (4) A person who intentionally or recklessly contravenes an order under subsection (2) or (3) is guilty of an offence punishable on conviction by imprisonment for a term of not more than 6 months. 20

Injunctions

Restraining injunctions

- 315.(1)** If a person (the “**perpetrator**”) has engaged, is engaging or is proposing to engage, in conduct that constituted, constitutes or would constitute: 25
- (a) a contravention of this Act; or
 - (b) attempting to contravene this Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or 30
 - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
 - (f) conspiring with others to contravene this Act; 35
- the Court may grant an injunction in accordance with subsection (2).

Nature of injunction

- (2) If granted, the injunction:
 - (a) is to restrain the perpetrator from engaging in the conduct; and

- (b) if in the opinion of the Court it is desirable to do so, may also require that person to do any act or thing.

5 The Court may only grant the injunction on the application of the Commissioner, or of a person whose interests have been, are, or would be, affected by the conduct and may grant it on such terms as the Court thinks appropriate.

Performance injunctions

10 (3) If a person (the “**unwilling person**”) has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Act to do, the Court may, on the application of:

(a) the Commissioner; or

(b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing;

15 grant an injunction, on such terms as the Court thinks appropriate, requiring the unwilling person to do that act or thing.

Consent injunctions

20 (4) If an application for an injunction under subsection (1) or (3) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that that subsection applies.

Interim injunctions

25 (5) If in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

Variation or discharge of injunctions

(6) The Court may discharge or vary an injunction granted under subsection (1), (3) or (5).

Restraining injunctions

30 (7) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and

(b) whether or not the person has previously engaged in conduct of that kind; and

35 (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

Performance injunctions

40 (8) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:

- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
- (b) whether or not the person has previously refused or failed to do that act or thing; and 5
- (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

Damages undertakings

(9) If the Commissioner applies to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages. 10

Section 313 orders

(10) In proceedings under this section against a person the Court may make an order under section 313 in respect of the person. 15

Damages orders

(11) If the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person. 20

Definition

(12) In this section:
“do an act or thing” includes: 25

- (a) give effect to a determination made by the Superannuation Complaints Tribunal; or
- (b) reconsider a matter in accordance with the directions of the Superannuation Complaints Tribunal.

Effect of sections 313, 314 and 315 30

316. Nothing in any one of section 313, 314 or 315 limits the generality of anything else in any other of those sections.

Power of Court to punish for contempt of court

317. Nothing in a provision of this Act that provides: 35

- (a) that a person must not contravene an order of the Court; or
- (b) that a person who contravenes an order of the Court contravenes a provision of this Act or is guilty of an offence;

affects the powers of the Court in relation to the punishment of contempts of the Court.

Court may resolve transitional difficulties

318.(1) If any difficulty:

(a) arises in applying a provision of this Act in relation to a particular case in relation to which, if this Act had not been enacted, a provision of another law corresponding to the first-mentioned provision would have applied; or

(b) arises, because of a provision of this Act, in applying, in relation to a particular case, another provision of this Act or a provision of another law corresponding to another provision of this Act;

the Court may, on the application of an interested person, make such order as it thinks proper to remove the difficulty.

(2) An order under this section has effect despite anything in a provision of this Act.

(3) This section has effect subject to the Constitution.

PART 28—PROCEEDINGS

Object of Part

319. The object of this Part is to set out various rules about court proceedings.

Power of Commissioner to intervene in proceedings

320.(1) The Commissioner may intervene in any proceeding relating to a matter arising under this Act.

(2) If the Commissioner intervenes in a proceeding referred to in subsection (1), the Commissioner is taken to be a party to the proceeding and, subject to this Act, has all the rights, duties and liabilities of such a party.

(3) Without limiting the generality of subsection (2), the Commissioner may appear and be represented in any proceeding in which he or she wishes to intervene under subsection (1):

(a) by a member of the staff of the Commissioner; or

(b) by an individual to whom, or by an officer or employee of a person or body to whom or to which, the Commissioner has delegated his or her functions and powers under this Act or such of those functions and powers as relate to a matter to which the proceeding relates; or

(c) by solicitor or counsel.

Civil proceedings not to be stayed

321. No civil proceedings under this Act are to be stayed merely because the proceeding discloses, or arises out of, the commission of an offence.

Standard of proof

Where subsection (2) applies

322.(1) Subsection (2) applies if, in proceedings other than proceedings for an offence, it is necessary to establish, or for the Court to be satisfied, for any purpose relating to a matter arising under this Act, that:

- (a) a person has contravened a provision of this Act; or
- (b) default has been made in complying with a provision of this Act; or
- (c) an act or omission was unlawful under a provision of this Act; or
- (d) a person has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to a contravention of, or a default in complying with, a provision of this Act.

Matters to be established etc. on balance of probabilities

(2) It is sufficient if the matter referred to in paragraph (1)(a), (b), (c) or (d) is established, or the Court is so satisfied, as the case may be, on the balance of probabilities.

Relief from civil liability for contravention of certain provisions

Proceedings to which this section applies

323.(1) This section applies to:

- (a) eligible proceedings (within the meaning of section 221); and
- (b) proceedings under subsection 55(3), 148(1), 162(2), 172(3) or 185(1).

Defences

(2) Subject to subsection (4), in proceedings against a person (the “defendant”) in respect of a contravention, it is a defence if the defendant establishes:

- (a) that the contravention was due to reasonable mistake; or
- (b) that the contravention was due to reasonable reliance on information supplied by another person; or
- (c) that:
 - (i) the contravention was due to:
 - (A) the act or default of another person; or
 - (B) an accident; or
 - (C) some other cause beyond the defendant’s control; and
 - (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

Meaning of “another person”

(3) For the purposes of the application of subsection (2) to the defendant, a reference to another person does not include a person who was, at the time when the contravention occurred:

- (a) in any case—a servant or agent of the defendant; or
- (b) if the defendant is a body corporate—a director, servant or agent of the defendant.

Notice to be given about reliance on defence

5 (4) If a defence provided by subsection (2) involves an allegation that a contravention was due to:

- (a) reliance on information supplied by another person; or
- (b) the act or default of another person;

the defendant is not entitled to rely on that defence unless:

- 10 (c) the court grants leave; or
(d) both:

(i) the defendant has served on the person by whom the proceedings were instituted a written notice giving such information:

15 (A) that would identify, or assist in the identification of, the other person; and

(B) as was then in the defendant's possession; and

(ii) that notice is served not later than 7 days before the day on which the hearing of the proceedings begins.

20 **Evidence of contravention**

324. For the purposes of this Act, a certificate that:

(a) purports to be signed by the Registrar or other proper officer of an Australian court; and

(b) states that:

25 (i) a person was convicted by that court on a specified day of a specified offence; or

(ii) a person charged before that court with a specified offence was, on a specified day, found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

30

is, unless it is proved that the conviction was quashed or set aside, or that the finding was set aside or reversed, as the case may be, conclusive evidence:

(c) if subparagraph (b)(i) applies—that the person was convicted of the offence on that day; and

35 (d) if the offence was constituted by a contravention of a provision of a law—that the person contravened that provision.

Vesting of property

325.(1) If an order is made by a court under this Act vesting property in a person:

- (a) subject to subsections (2) and (3), the property immediately vests in law and in equity in the person named in the order by force of this Act; and
 - (b) if the order is made by a court—the person who applied for the order must, within 7 days after the entering of the order, lodge an office copy of the order with such person (if any) as is specified in the order. 5
- (2) If:
- (a) the property is of a kind whose transfer or transmission may be registered under a law of the Commonwealth, of a State or of a Territory; and 10
 - (b) that law enables the registration of such an order;
- the property does not vest in that person at law until the requirements of the law referred to in paragraph (a) have been complied with.
- (3) If:
- (a) the property is of a kind whose transfer or transmission may be registered under a law of the Commonwealth, of a State or of a Territory; and 15
 - (b) that law enables the person named in the order to be registered as the owner of that property;
- the property does not vest in that person at law until the requirements of the law referred to in paragraph (b) have been complied with. 20

PART 29—EXEMPTIONS AND MODIFICATIONS

Object of Part

326.(1) The object of this Part is to empower the Commissioner to grant exemptions from, and make modifications of, certain provisions of this Act and the regulations. 25

- (2) Those provisions are divided into:
- (a) modifiable provisions (as defined in section 327) in relation to which the power of exemption or modification may be exercised at any time; and 30
 - (b) temporarily modifiable provisions (as defined in section 327) in relation to which an exemption or modification has no effect after 30 June 1996.

Interpretation

327. In this Part: 35

“modifiable provision” means a provision of:

- (a) section 54; or
- (b) Part 3, 9, 19, 22 or 24; or

(c) regulations made for the purposes of that section or of a provision of any of those Parts;

“temporarily modifiable provision” means a provision of:

(a) Division 2 of Part 1; or

5 (b) Part 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17 or 18; or

(c) regulations made for the purposes of a provision of that Division or of any of those Parts.

Commissioner’s powers of exemption—modifiable provisions

10 **328.** The Commissioner may, in writing, exempt a particular person or class of persons from compliance with any or all of the modifiable provisions.

Commissioner’s powers of exemption—temporarily modifiable provisions

15 **329.(1)** The Commissioner may, in writing, exempt a particular person or class of persons from compliance with any or all of the temporarily modifiable provisions.

(2) An exemption has no effect after 30 June 1996.

Commissioner’s powers of exemption—general issues

20 **330.(1)** An exemption under this Part may be made either generally or as otherwise provided in the exemption.

(2) An exemption under this Part may be unconditional or subject to conditions specified in the exemption.

(3) Without limiting this section, an exemption under this Part may relate to a particular superannuation entity or class of superannuation entities.

25 **Enforcement of conditions to which exemption is subject**

331.(1) A person must not, without reasonable excuse, contravene a condition of an exemption under this Part.

Penalty: 5 penalty units.

30 (2) If a person has contravened a condition of an exemption under this Part, the Court may, on the application of the Commissioner, order the person to comply with the condition.

Commissioner’s powers of modification—modifiable provisions

35 **332.** The Commissioner may, in writing, declare that a modifiable provision is to have effect, in relation to a particular person or class of persons, as if it were modified as specified in the declaration.

Commissioner's powers of modification—temporarily modifiable provisions

333.(1) The Commissioner may, in writing, declare that a temporarily modifiable provision is to have effect, in relation to a particular person or class of persons, as if it were modified as specified in the declaration. 5

(2) A declaration has no effect after 30 June 1996.

Commissioner's powers of modification—general issues

334.(1) A declaration under this Part may have effect either generally or as otherwise provided in the declaration.

(2) Without limiting this section, a declaration under this Part may relate to a particular superannuation entity or class of superannuation entities. 10

Revocation of exemptions and modifications

335. The Commissioner may, in writing, revoke an exemption or declaration under this Part.

Publication of exemptions and modifications etc. 15

336. The Commissioner must cause a copy of an exemption or declaration under this Part, or a revocation of such an exemption or declaration, to be published in the *Gazette*.

PART 30—MISCELLANEOUS

Object of Part 20

337. The object of this Part is to set out miscellaneous rules about various matters relating to the operation of this Act.

Conduct by directors, servants and agents

State of mind of body corporate

338.(1) If, in proceedings for an offence against this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show: 25

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of actual or apparent authority; and
- (b) that the director, servant or agent had the state of mind. 30

Conduct of director, servant or agent

(2) Subject to subsection (3), any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate. 35

Exception to (2)

(3) Subsection (2) does not apply if the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

5 *State of mind of individual*

(4) If, in proceedings for an offence against this Act, it is necessary to establish the state of mind of an individual in relation to particular conduct, it is sufficient to show:

- 10 (a) that the conduct was engaged in by a servant or agent of the individual within the scope of actual or apparent authority; and
(b) that the servant or agent had the state of mind.

Conduct of servant or agent

15 (5) Subject to subsection (6), any conduct engaged in on behalf of an individual by a servant or agent of the individual within the scope of his or her actual or apparent authority is taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the individual.

Exception to (5)

20 (6) Subsection (5) does not apply if the individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

No imprisonment in (4) or (5) cases

(7) If:

- 25 (a) an individual is convicted of an offence; and
(b) the individual would not have been convicted of the offence if subsections (4) and (5) had not been enacted;
the individual is not liable to imprisonment for that offence.

Reference to "state of mind"

30 (8) A reference in subsection (1) or (4) to the state of mind of a person includes a reference to:

- (a) the knowledge, intention, opinion, belief or purpose of the person; and
(b) the person's reasons for the intention, opinion, belief or purpose.

Reference to "director"

35 (9) A reference in this section to a director of a body corporate includes a reference to a constituent member of, or to a member of a board or other group of persons administering or managing the affairs of, a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

Reference to “engaging in conduct”

(10) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

Reference to “offence against this Act”

(11) A reference in this section to an offence against this Act includes a reference to: 5

- (a) an offence created by the regulations; and
- (b) an offence created by section 5, 6, 7 or 7A, or subsection 86(1), of the *Crimes Act 1914*, being an offence that relates to this Act or the regulations. 10

Conviction does not relieve defendant from civil liability

339.(1) A person is not relieved from any liability to any other person merely because the person has been convicted of an offence against this Act.

(2) This section does not apply in relation to a contravention of a civil penalty provision. 15

(3) In this section:

“**offence against this Act**” has the same meaning as in section 338.

Liability for damages

340. None of the following:

- (a) the Commissioner; 20
- (b) a member of the staff of the Commissioner;
- (c) an authorised person;
- (d) an inspector;
- (e) a person to whom the Commissioner or an inspector has delegated a function or power under this Act; 25

is liable to an action or other proceeding for damages for or in relation to an act done or omitted to be done in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, conferred by this Act or the regulations.

Civil immunity where defendant was complying with this Act 30

341. A person is not liable in a civil action or civil proceeding in relation to an act done in fulfilment of an obligation imposed by this Act or the regulations.

Pre-1 July 88 funding credits and debits

342.(1) The trustee of a fund may apply to the Commissioner for a pre-1 July 88 funding credit. 35

(2) If an application is made for a pre-1 July 88 funding credit, the Commissioner must give a written notice to the applicant granting a pre-1 July 88 funding credit of a specified amount if the Commissioner is satisfied that:

- 5 (a) the amount consists of, or is the total of, amounts that, under the regulations, are treated as pre-1 July 88 funding amounts; and
(b) paragraph 23(jaa) or section 23FC of the Income Tax Assessment Act, as in force immediately before the commencement of the
10 *Taxation Laws Amendment Act (No. 2) 1989*, would have applied to the fund in relation to the 1987-88 year of income, if the amendments made by that last-mentioned Act had not been made.

(3) An application:

- (a) must be in the approved form; and
(b) must be made on or before the prescribed day; and
15 (c) must contain such information relating to the fund as is required by the form to be provided; and
(d) must be accompanied by:
(i) such certificates and other documents as the form requires; and
(ii) the prescribed application fee.

20 (4) If:

- (a) a prescribed event has occurred (whether before or after the commencement of this section) in relation to a fund, being an event that relates to:
(i) the membership of the fund; or
25 (ii) benefits provided by the fund; and
(b) the trustee of the fund fails to notify the Commissioner of the event within the time and in the manner prescribed;

the Commissioner must give written notice to the trustee of the fund accordingly.

30 (5) Regulations made for the purposes of paragraph (4)(b) may:

- (a) require a notification to be accompanied by such information as is prescribed; and
(b) enable the Commissioner to grant an extension of time for lodging a notification.

35 (6) If:

- (a) an event prescribed for the purposes of paragraph (4)(a) has occurred (whether before or after the commencement of this section) in relation to a fund; and
(b) the trustee of the fund notifies the Commissioner of the event as and
40 when required by regulations made for the purposes of paragraph (4)(b); and

- (c) the Commissioner is satisfied that, in accordance with the regulations, a pre-1 July 88 funding debit of a particular amount should arise in relation to the fund;

the Commissioner may give to the trustee of the fund a written notice granting the trustee of the fund a pre-1 July 88 funding debit of that amount. 5

(7) The regulations may make provision for and in relation to the transfer of pre-1 July 88 funding credits between funds.

(8) Without limiting the generality of subsection (7), the regulations made for the purposes of that subsection must make provision for:

- (a) the giving by the Commissioner of a notice approving the transfer of a pre-1 July 88 funding credit of a fund to another fund; and 10
(b) the revocation of such a notice; and
(c) requiring notification of such a revocation and of the reasons for the revocation.

(9) If: 15

- (a) the Commissioner has, under subsection (2) or (6), given a notice to the trustee of a fund; and
(b) the Commissioner, after considering information that was not previously considered by the Commissioner, ceases to be satisfied as mentioned in the subsection concerned; 20

the Commissioner must give written notice to the trustee of the fund revoking the notice.

(10) If the Commissioner refuses an application under subsection (1), the Commissioner must give written notice to the applicant of the refusal.

(11) A notice under subsection (9) or (10) must set out the reasons for the revocation or refusal, as the case requires. 25

(12) The Commissioner must give to the Commissioner of Taxation particulars of all notices given under this section or under regulations made for the purposes of subsection (7).

(13) In this section: 30

“**fund**” means a superannuation fund.

Rules against perpetuities not to apply to superannuation entity

343. The rules of law relating to perpetuities do not apply, and are taken never to have applied, to the trusts of any superannuation entity, whether the entity was established before, or is established after, the commencement of this section. 35

Review of certain decisions

Request for review

5 **344.(1)** A person who is affected by a reviewable decision of the Commissioner may, if dissatisfied with the decision, request the Commissioner to reconsider the decision.

How request must be made

10 **(2)** The request must be made by written notice given to the Commissioner within the period of 21 days after the day on which the person first receives notice of the decision, or within such further period as the Commissioner allows.

Request must set out reasons

(3) The request must set out the reasons for making the request.

Commissioner to reconsider decision

15 **(4)** Upon receipt of the request, the Commissioner must reconsider the decision and may, subject to subsection (5), confirm or revoke the decision or vary the decision in such manner as the Commissioner thinks fit.

Deemed confirmation of decision if delay

20 **(5)** If the Commissioner does not confirm, revoke or vary a decision before the end of the period of 60 days after the day on which the Commissioner received the request under subsection (1) to reconsider the decision, the Commissioner is taken, at the end of that period, to have confirmed the decision under subsection (4).

Notice of Commissioner's action

25 **(6)** If the Commissioner confirms, revokes or varies a decision before the end of the period referred to in subsection (5), the Commissioner must give written notice to the person telling the person:

- (a) the result of the reconsideration of the decision; and
- (b) the reasons for confirming, varying or revoking the decision, as the case may be.

30 *Notice to Commissioner of Taxation*

(7) If the Commissioner gives a notice to a person under subsection (6) telling the person that a decision under section 40 has been revoked or varied, the Commissioner must give to the Commissioner of Taxation particulars of the notice.

35 *AAT review of Commissioner's decisions*

(8) Applications may be made to the Administrative Appeals Tribunal for review of decisions of the Commissioner that have been confirmed or varied under subsection (4).

Period for making certain AAT applications

(9) If a decision is taken to be confirmed because of subsection (5), section 29 of the *Administrative Appeals Tribunal Act 1975* applies as if the prescribed time for making application for review of the decision were the period of 28 days beginning on the day on which the decision is taken to be confirmed. 5

Section 41 of AAT Act

(10) If a request is made under subsection (1) in respect of a reviewable decision, section 41 of the *Administrative Appeals Tribunal Act 1975* applies as if the making of the request were the making of an application to the Administrative Appeals Tribunal for a review of that decision. 10

Hearings in private

(11) The hearing of a proceeding relating to a reviewable decision is to take place in private and the Administrative Appeals Tribunal may, by order:

- (a) give directions as to the persons who may be present; and 15
- (b) give directions of a kind referred to in paragraph 35(2)(b) or (c) of the *Administrative Appeals Tribunal Act 1975*.

Only trustees affected by certain reviewable decisions

(12) For the purposes of this section and section 345, a person is taken not to be affected by a reviewable decision (other than a reviewable decision covered by paragraph (c), (d), (q), (r), (s) or (t) of the definition of “reviewable decision” in section 10) unless the person is the trustee of a superannuation entity that is affected by the decision. 20

Statements to accompany notification of decisions

345.(1) If a written notice is given to a person affected by a reviewable decision telling the person that the reviewable decision has been made, that notice is to include a statement to the effect that: 25

- (a) the person may, if dissatisfied with the decision, seek a reconsideration of the decision by the Commissioner in accordance with subsection 344(1); and 30
- (b) the person may, subject to the *Administrative Appeals Tribunal Act 1975*, if dissatisfied with a decision made by the Commissioner upon that reconsideration confirming or varying the first-mentioned decision, make application to the Administrative Appeals Tribunal for review of the decision so confirmed or varied. 35

(2) If the Commissioner confirms or varies a reviewable decision under subsection 344(4) and gives to the person written notice of the confirmation or variation of the decision, that notice is to include a statement to the effect

that the person may, subject to the *Administrative Appeals Tribunal Act 1975*, if dissatisfied with the decision so confirmed or varied, make application to the Administrative Appeals Tribunal for review of the decision.

- 5 (3) A failure to comply with the requirements of subsections (1) and (2) in relation to a reviewable decision or a decision under subsection 344(4) does not affect the validity of that decision.

Secrecy

Meaning of "this Act"

- 10 **346.(1)** In this section:
"this Act" includes the regulations.

Superannuation standards officers not to disclose information

- 15 (2) Subject to this section, a person who is or has been a superannuation standards officer must not, except for the purposes of this Act, directly or indirectly:

- (a) disclose to any person, or to a court, any protected information acquired by the first-mentioned person in the course of his or her duties as a superannuation standards officer; or
- (b) produce to any person, or to a court, a protected document.

20 *Exceptions—public contact information*

- (3) Subsection (2) does not prohibit the Commissioner from disclosing:
(a) the names of:

- 25 (i) superannuation funds, approved deposit funds and pooled superannuation trusts that are superannuation entities for the purposes of this Act; or

- 30 (ii) superannuation entities that are non-complying superannuation funds or non-complying approved deposit funds, or are not pooled superannuation trusts, as the case may be, in relation to a specified year of income for the purposes of Part IX of the *Income Tax Assessment Act*; or

- 30 (iii) superannuation funds and approved deposit funds that are eligible rollover funds for the purposes of Part 24; and

- (b) the addresses at which business relating to funds or trusts referred to in paragraph (a) is conducted; and

- 35 (c) particulars of names of beneficiaries and amounts set out in a statement of unclaimed money given to the Minister under section 225; and

- 40 (d) particulars of names of beneficiaries and amounts, and the name or names of the eligible rollover fund or funds, set out in a notice given to the Commissioner under section 249; and

- (e) any other information that is reasonably necessary to enable members of the public to contact a person who performs functions in relation to a superannuation entity.

Exceptions—compliance information

- (4) Subsection (2) does not prevent the Commissioner from disclosing any or all of the following information about a fund, scheme or trust: 5
 - (a) whether or not the trustee of the fund, scheme or trust has lodged a return under section 36 in respect of a particular year of income;
 - (b) whether or not a decision has been made by the Commissioner to give a notice, or a particular kind of notice, in relation to the fund, scheme or trust under section 40 in respect of a particular year of income; 10
 - (c) whether or not a notice, or a particular kind of notice, has been given by the Commissioner under section 40 or 254 in relation to the fund, scheme or trust in respect of a particular year of income;
 - (d) in the case of a superannuation fund—whether or not the trustee of the fund has told the Commissioner that the trustee is willing to accept a particular kind of contribution. 15

Exception—consent to disclosure

- (5) Subsection (2) does not prohibit a superannuation standards officer from disclosing information, or producing a document (other than a report of an inspector), relating to the affairs of a superannuation entity if the trustee of the entity agrees in writing to the disclosure of the information or the production of the document, as the case may be. 20

Exceptions—disclosure to specified persons or bodies

- (6) Subsection (2) does not prohibit a superannuation standards officer from disclosing protected information, or producing a protected document (other than a report of an inspector), to: 25
 - (a) the Commissioner of Taxation or a taxation officer authorised by the Commissioner of Taxation for the purposes of this section; or
 - (b) the Minister, the Secretary of the Department or an officer of the Department authorised by the Secretary of the Department for the purposes of this section; or 30
 - (c) a court for the purposes of this Act; or
 - (d) the Australian Securities Commission for the purposes of the performance of any of its functions or the exercise of any of its powers; or 35
 - (e) if the Minister states in writing that, in his or her opinion, it is in the public interest that the information be disclosed or the document be produced to a particular person—that person.

Disclosure to court

5 (7) A person who is or has been a superannuation standards officer cannot be required to disclose to a court any protected information, or to produce in a court any protected document, except when it is necessary to do so for the purposes of this Act.

Application of tax secrecy provisions

10 (8) If protected information is disclosed, or a protected document is produced, under paragraph (6)(a) to the Commissioner of Taxation or to a taxation officer, the information, or the information contained in the document, is taken, for the purposes of section 16 of the Income Tax Assessment Act, to be information acquired by the Commissioner of Taxation or taxation officer in the manner mentioned in the definition of “officer” in subsection 16(1) of that Act.

Department to observe secrecy requirements

15 (9) If protected information is disclosed, or a protected document is produced, under paragraph (6)(b) to the Secretary of the Department or to an officer of the Department, the Secretary or officer must not, except for the purpose of advising the Minister in connection with the administration of this Act, directly or indirectly make a record of, or disclose to any person, the information, or the information contained in the document, as the case may be.

Application of FOI Act

25 (10) A protected document or a document containing protected information is an exempt document for the purposes of section 38 of the *Freedom of Information Act 1982*.

Meaning of “court”

(11) In this section:
“**court**” includes a tribunal, authority or person having the power to require the production of documents or the answering of questions.

30 **How information may be given to the Commissioner of Taxation**

347. If a provision of this Act requires or authorises the Commissioner or a superannuation standards officer to give information to the Commissioner of Taxation or a taxation officer, the information may be given by means of a data processing device.

35 **Commissioner may publish statistical information**

348.(1) Subject to subsection (2), the Commissioner may arrange for the publication of statistical information relating to superannuation entities or relating to payments made to persons.

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(2) The Commissioner must not arrange for the publication of statistical information in a form that would:

- (a) identify a superannuation entity and disclose information relating to the entity; or
- (b) identify a person to whom a payment has been made.

5

This Act and the regulations have effect subject to the *Crimes (Superannuation Benefits) Act 1989*

349. This Act and the regulations apply in relation to a regulated superannuation fund subject to the effect of any superannuation order within the meaning of the *Crimes (Superannuation Benefits) Act 1989* that is made in respect of any member of the fund.

10

Concurrent operation of State/Territory laws

350. It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

15

Delegation

351. The Commissioner may, by signed writing, delegate to a member of the staff of the Commissioner all or any of the Commissioner's powers under this Act or the regulations (other than section 352).

Annual reports

20

352.(1) The Commissioner must, within 3 months after each year ending on 30 June, prepare and give to the Minister a report on the working, during the year, of this Act.

(2) Without limiting the generality of subsection (1), a report under that subsection must set out information about the exercise during the year of the Commissioner's powers under Part 29.

25

(3) The Minister must cause a copy of a report given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report.

Regulations

30

353. The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act;

and without limiting the generality of the above, may make regulations:

35

- (c) prescribing fees in respect of any matter under this Act; and
- (d) subject to subsection 376(6), prescribing penalties not exceeding 10 penalty units in respect of offences against the regulations.

PART 31—TRANSITION TO SCHEME PROVIDED FOR IN THIS ACT

Division 1—Object of Part

Object of Part

5 **354.** The object of this Part is to make provisions relating to the transition to the scheme provided for in this Act.

Division 2—Entities that have a management company and a trustee

Subdivision A—General

Entity to which Division applies

10 **355.(1)** This Division applies to a fund or trust in relation to which the conditions specified in subsection (2):

- (a) are satisfied on the commencement of this Part; or
- (b) become satisfied after that commencement and before 1 July 1994.

(2) These are the conditions:

- 15 (a) the fund or trust is:
- (i) a complying superannuation fund within the meaning of Part IX of the Income Tax Assessment Act; or
 - (ii) an approved deposit fund within the meaning of the *Occupational Superannuation Standards Act 1987*; or
 - 20 (iii) a pooled superannuation trust within the meaning of the *Occupational Superannuation Standards Act 1987*;
- (b) interests in the fund or trust are prescribed interests, within the meaning of the Corporations Law of a State or internal Territory, to which Division 5 of Part 7.12 of that Law applies;
- 25 (c) there is a trustee of the fund or trust;
- (d) there is a management company, within the meaning of the Corporations Law referred to in paragraph (b), in relation to the prescribed interests referred to in that paragraph;
- 30 (e) the trustee and the management company are constitutional corporations.

(3) For the purposes of the application of this Division in relation to the fund or trust, the fund or trust is called the “**Part 31 entity**”.

35 (4) The fact that the fund or trust is the Part 31 entity for the purposes of the application of this Division in relation to it does not prevent another fund or trust from being the Part 31 entity for the purposes of the application of this Division in relation to the other fund or trust.

Interpretation

356. In this Division:

“existing management company” means the constitutional corporation that is the management company of the Part 31 entity on the starting day;

“existing trustee” means the constitutional corporation that is the trustee of the Part 31 entity on the starting day; 5

“management company” means a body corporate:

(a) that is, within the meaning of the Corporations Law of a State or internal Territory, the management company in relation to interests in the Part 31 entity that are prescribed interests within the meaning of that Law; or 10

(b) that would, if interests in the Part 31 entity were prescribed interests within the meaning of the Corporations Law of a State or internal Territory, be the management company in relation to those interests within the meaning of that Law; 15

“Part 31 entity” has the meaning given by subsection 355(3);

“starting day” means:

(a) if paragraph 355(1)(a) applies—the day on which this Part commences; or

(b) if paragraph 355(1)(b) applies—the day on which the conditions specified in subsection 355(2) become satisfied. 20

Subdivision B—Existing management company may retire

Existing management company may give notice of retirement

357.(1) Subject to section 358, the existing management company may retire from the office of management company of the Part 31 entity by giving written notice to the existing trustee in accordance with this section. 25

(2) A notice must specify a date of effect that is:

(a) a least 3 months after it is given to the existing trustee; and

(b) after 30 June 1994.

(3) The existing management company cannot give a notice if the existing trustee has already given the existing management company a notice under section 363. 30

(4) If the existing management company gives the existing trustee a notice, the existing management company must give a copy of the notice to the Commissioner. 35

(5) The existing management company must not intentionally or recklessly contravene subsection (4).

Penalty: 250 penalty units.

(6) A notice cannot be revoked.

Effect of notice under section 357

358.(1) If:

(a) the existing management company gives the existing trustee a notice under section 357; and

5 (b) the Part 31 entity is a superannuation entity on the date of effect specified in the notice;

the retirement of the existing management company takes effect on that date.

(2) If the retirement of the existing management company so takes effect, the following provisions apply for so long as the Part 31 entity remains a superannuation entity:

10

(a) no new management company of the entity can be appointed;

(b) the governing rules of the entity have effect as if references in them to the management company of the entity were instead references to the trustee of the entity;

15

(c) subject to subsections (4) and (5), the trustee of the entity has power to amend any trust instrument that constitutes, or is part of, those governing rules for the purposes of removing references to the management company of the entity and making other changes consequential on the removal of those references.

20

(3) An appointment in contravention of paragraph (2)(a) is ineffective.

(4) An amendment under paragraph (2)(c) must be one that the trustee of the Part 31 entity reasonably believes will not adversely affect the rights of the members of the entity.

(5) The regulations may do either or both of the following:

25

(a) require the trustee of the Part 31 entity to comply with specified formal requirements when making amendments under paragraph (2)(c);

(b) require the trustee of the Part 31 entity to notify specified persons of amendments made under paragraph (2)(c).

30

(6) A notice under section 357 has no effect except as provided in this Division.

Action to be taken by existing trustee on receipt of notice under section 357

35

359.(1) If the existing trustee receives a notice under section 357, the existing trustee must take action under subsection (2) or (3) within 2 months after receiving the notice.

(2) Subject to section 361, the existing trustee may retire from the office of trustee of the Part 31 entity by giving written notice to the Commissioner.

40

(3) The existing trustee may give written notice to the Commissioner to the effect that it is not going to retire.

(4) If the existing trustee gives the Commissioner a notice under subsection (3), the existing trustee must give a copy of the notice to each member of the Part 31 entity.

(5) The existing trustee must not intentionally or recklessly contravene subsection (1) or (4). 5

Penalty: 250 penalty units.

Commissioner to appoint new trustee if receives notice under subsection 359(2)

360.(1) If the Commissioner receives a notice under subsection 359(2) from the existing trustee, the Commissioner must appoint a constitutional corporation as the new trustee of the Part 31 entity. 10

(2) The appointment of the new trustee does not take effect except as provided in subsection 361(2).

Effect of notice under subsection 359(2)

361.(1) If: 15

(a) the existing trustee gives the Commissioner a notice under subsection 359(2); and

(b) the Part 31 entity is a superannuation entity on the date of effect specified in the notice given by the existing management company under section 357; 20

the retirement of the existing trustee takes effect on that date.

(2) If the retirement of the existing trustee so takes effect:

(a) the appointment under section 360 of the new trustee of the Part 31 entity takes effect at the time (the “**retirement time**”) when the retirement takes effect; and 25

(b) property of the entity vests in the new trustee in accordance with subsections (3), (4) and (5).

(3) Subject to subsection (5), property of the Part 31 entity that was vested in law in the existing trustee immediately before the retirement time vests in law in the new trustee at that time. 30

(4) Property of the Part 31 entity that was vested in equity in the existing trustee immediately before the retirement time vests in equity in the new trustee at that time.

(5) If:

(a) property to which subsection (3) applies is of a kind whose transfer or transmission may be registered under a law (the “**transfer law**”) of the Commonwealth, of a State or of a Territory; and 35

(b) the transfer law enables the new trustee to be registered as the owner of the property;

the property does not vest in law in the new trustee until the requirements of the transfer law have been complied with.

5 (6) The former trustee (being the body corporate that was the existing trustee before its retirement) must do all things within its power, in relation to property to which subsection (5) applies, that are necessary to enable the registration of the new trustee as the owner of the property under the transfer law.

(7) The former trustee must not intentionally or recklessly contravene subsection (6).

10 Penalty: 500 penalty units.

(8) A notice under subsection 359(2) has no effect except as provided in this section.

What happens if existing trustee fails to give a notice under subsection 359(2) or (3)

15 **362.(1)** If the existing trustee fails to take action as required by subsection 359(1), the existing trustee is taken to have given the Commissioner a notice under subsection 359(3).

20 (2) Subsection (1) does not have effect for the purposes of a prosecution for an offence against subsection 359(5) that relates to a contravention of subsection 359(1).

(3) If the existing trustee is taken by subsection (1) to have given the Commissioner a notice, subsection 359(4) does not apply in relation to the notice.

Subdivision C—Existing trustee may retire

25 **Existing trustee may give notice of retirement**

363.(1) Subject to section 366, the existing trustee may retire from the office of trustee of the Part 31 entity by giving written notice to the existing management company in accordance with this section.

(2) A notice must specify a date of effect that is:

- 30 (a) at least 3 months after it is given to the existing management company; and
(b) after 30 June 1994.

(3) The existing trustee cannot give a notice if the existing management company has already given the existing trustee a notice under section 357.

35 (4) If the existing trustee gives a notice to the existing management company at the same time as the existing management company gives the existing trustee a notice under section 357, the notice given by the existing trustee has no effect.

(5) If the existing trustee gives the existing management company a notice, the existing trustee must give a copy of the notice to the Commissioner.

(6) The existing trustee must not intentionally or recklessly contravene subsection (5). 5

Penalty: 250 penalty units.

(7) A notice cannot be revoked.

Action to be taken by existing management company on receipt of notice under section 363

364.(1) If the existing management company receives a notice under section 363, the existing management company must take action under subsection (2) or (3) within 2 months after receiving the notice. 10

(2) Subject to section 367, the existing management company may retire from the office of management company of the Part 31 entity, and refuse to be appointed as its trustee, by giving written notice to the Commissioner. 15

(3) Subject to section 367, the existing management company may retire from the office of management company of the Part 31 entity, and agree to being appointed as its trustee, by giving written notice to the Commissioner.

(4) The existing management company must not intentionally or recklessly contravene subsection (1). 20

Penalty: 250 penalty units.

Commissioner to appoint new trustee

365.(1) Subject to subsections (2) and (3), if the Commissioner receives a notice under section 363, the Commissioner must appoint a constitutional corporation as the new trustee of the Part 31 entity. 25

(2) If the Commissioner also receives a notice under subsection 364(2), the Commissioner must not appoint the existing management company as the new trustee.

(3) If the Commissioner also receives a notice under subsection 364(3), the Commissioner must appoint the existing management company as the new trustee. 30

(4) The appointment of the new trustee does not take effect except as provided in section 366.

Effect of notice under section 363 on trustee

366.(1) This section applies if: 35

(a) the existing trustee gives the existing management company a notice under section 363; and

(b) the Part 31 entity is a superannuation entity on the date of effect specified in the notice.

(2) The retirement of the existing trustee takes effect on the specified date.

5 (3) If the retirement of the existing trustee so takes effect:

(a) the appointment under section 365 of the new trustee of the Part 31 entity takes effect at the time (the “**retirement time**”) when the retirement takes effect; and

10 (b) property of the entity vests in the new trustee in accordance with subsections (4), (5) and (6).

(4) Subject to subsection (6), property of the Part 31 entity that was vested in law in the existing trustee immediately before the retirement time vests in law in the new trustee at that time.

15 (5) Property of the Part 31 entity that was vested in equity in the existing trustee immediately before the retirement time vests in equity in the new trustee at that time.

(6) If:

20 (a) property to which subsection (4) applies is of a kind whose transfer or transmission may be registered under a law (the “**transfer law**”) of the Commonwealth, of a State or of a Territory; and

(b) the transfer law enables the new trustee to be registered as the owner of the property;

the property does not vest in law in the new trustee until the requirements of the transfer law have been complied with.

25 (7) The former trustee (being the body corporate that was the existing trustee before its retirement) must do all things within its power, in relation to property to which subsection (6) applies, that are necessary to enable the registration of the new trustee as the owner of the property under the transfer law.

30 (8) The former trustee must not intentionally or recklessly contravene subsection (7).

Penalty: 500 penalty units.

Effect of notice under section 363 on management company

35 **367.(1)** If the retirement of the existing trustee takes effect under section 366 and the existing management company has given the Commissioner a notice under subsection 364(2) or (3), the existing management company’s retirement from the office of management company of the Part 31 entity takes effect at the same time as the retirement of the existing trustee.

(2) If the existing management company's retirement takes effect, the following provisions apply for so long as the entity remains a superannuation entity:

- (a) no new management company of the entity can be appointed;
- (b) the governing rules of the entity have effect as if references in them to the management company of the entity were instead references to the trustee of the entity; 5
- (c) subject to subsections (4) and (5), the trustee of the entity has power to amend any trust instrument that constitutes, or is part of, those governing rules for the purposes of removing references to the management company of the entity and making other changes consequential on the removal of those references. 10

(3) An appointment in contravention of paragraph (2)(a) is ineffective.

(4) An amendment under paragraph (2)(c) must be one that the trustee of the Part 31 entity reasonably believes will not adversely affect the rights of the members of the entity. 15

(5) The regulations may do either or both of the following:

- (a) require the trustee of the Part 31 entity to comply with specified formal requirements when making amendments under paragraph (2)(c); 20
- (b) require the trustee of the Part 31 entity to notify specified persons of amendments made under paragraph (2)(c).

Notices under sections 363 and 364 have no effect except as provided in this Division

368. A notice under section 363 or 364 has no effect except as provided in this Division. 25

What happens if existing management company fails to give a notice under subsection 364(2) or (3)

369.(1) If the existing management company fails to take action as required by subsection 364(1), the existing management company is taken to have given the Commissioner a notice under subsection 364(3). 30

(2) Subsection (1) does not have effect for the purposes of a prosecution for an offence against subsection 364(4).

Subdivision D—What happens if existing management company or existing trustee stops holding office otherwise than under this Division 35

Existing management company ceases to hold office first

370.(1) This section applies if:

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(a) the existing management company, on or after 1 July 1994, ceases to hold office as the management company of the Part 31 entity otherwise than because of this Division; and

5 (b) at the time (the “**cessation time**”) when the existing management company ceases to hold office:

(i) the existing trustee still holds office (otherwise than because of section 372) as the trustee of the entity; and

(ii) the entity is a superannuation entity.

(2) This Division applies as if:

10 (a) the existing management company had given the existing trustee a notice under section 357 that specified as the date of effect the day in which the cessation time occurs; and

(b) the existing trustee had given the Commissioner a notice under subsection 359(3).

15 (3) Subsection 359(4) does not apply for the purposes of this Division as it applies because of subsection (2) of this section.

(4) Any notices:

(a) actually given under Subdivision B or C by the existing management company or the existing trustee; or

20 (b) taken by subsection 362(1) or 369(1) to have been given by the existing trustee or the existing management company;

have no effect.

Existing trustee ceases to hold office first

371.(1) This section applies if:

25 (a) the existing trustee, on or after 1 July 1994, ceases to hold office as the trustee of the Part 31 entity otherwise than because of this Division; and

(b) at the time (the “**cessation time**”) when the existing trustee ceases to hold office:

30 (i) the existing management company still holds office as the management company of the entity; and

(ii) the entity is a superannuation entity.

(2) This Division applies as if:

35 (a) the existing trustee had given the existing management company a notice under subsection 363(1) that specified as the date of effect the day in which the cessation time occurs; and

(b) the existing management company had given the Commissioner a notice under subsection 364(3); and

40 (c) the Commissioner had, under section 365, appointed the existing management company as the new trustee of the Part 31 entity.

- (3) Any notices:
- (a) actually given under Subdivision B or C by the existing management company or the existing trustee; or
 - (b) taken by subsection 362(1) or 369(1) to have been given by the existing trustee or the existing management company;
- 5
have no effect.

Existing trustee cannot cease to hold office at same time as existing management company

372.(1) This section applies if:

- (a) the existing trustee and the existing management company, on or after 1 July 1994, would, but for this section, cease, at the same time (the “cessation time”), to hold office as the trustee and management company, respectively, of the Part 31 entity otherwise than because of this Division; and 10
 - (b) the entity is a superannuation entity at the cessation time. 15
- (2) By force of this section, the existing trustee does not cease, at the cessation time, to hold office as the trustee of the Part 31 entity.

(3) This Division applies as if:

- (a) the existing management company had given the existing trustee a notice under section 357 that specified as the date of effect the day in which the cessation time occurs; and 20
 - (b) the existing trustee had given the Commissioner a notice under subsection 359(3).
- (4) Subsection 359(4) does not apply for the purposes of this Division as it applies because of subsection (3) of this section. 25

(5) Any notices:

- (a) actually given under Subdivision B or C by the existing management company or the existing trustee; or
 - (b) taken by subsection 362(1) or 369(1) to have been given by the existing trustee or the existing management company;
- 30
have no effect.

Subdivision E—Special provisions in relation to the transitional period

Interpretation

373. In this Subdivision:

- “transitional period” means the period after 30 June 1994 when: 35
- (a) the Part 31 entity is a superannuation entity; and
 - (b) the existing trustee and existing management company continue to hold office as the trustee, and management company, respectively, of the entity.

Existing trustee taken to be an approved trustee

374. For the purposes of this Act as it applies to the Part 31 entity during the transitional period, the existing trustee is taken to have been approved as a trustee under section 26 on 1 July 1994.

5 **Application of section 153 during the transitional period**

375. Section 153 applies in relation to the Part 31 entity during the transitional period as if subsection (1) were amended by omitting all the words from and including “except” to and including “behalf.” and substituting the following:

10 “unless:

(a) the issue is pursuant to an application made to the trustee by the person, or by a standard employer-sponsor of the entity on the person’s behalf; and

(b) either:

15 (i) if the application was made by the person—the person was a member of the entity on 1 July 1994; or

(ii) if the application was made by a standard employer-sponsor—the standard employer-sponsor was a standard employer-sponsor of the entity on 1 July 1994.”.

20 **Regulations may modify application of Act and apply provisions of the Corporations Law etc.**

376.(1) The regulations may modify:

(a) this Act (other than this Part); and

(b) the regulations made under this Act (other than this Part);

25 as they apply in relation to the Part 31 entity during the transitional period.

(2) A modification under subsection (1) must not:

(a) change the penalty for an offence; or

(b) be inconsistent with section 375.

(3) The regulations may provide that some or all of the provisions of:

30 (a) Division 5 of Part 7.12 of the Corporations Law of the Australian Capital Territory as in force at the commencement of this Part; and

(b) Part 7.12 of the Corporations Regulations of the Australian Capital Territory as then in force;

35 apply, with such modifications as are prescribed, in relation to the Part 31 entity during the transitional period.

(4) The provisions so applied (the “**applied provisions**”) have effect as if:

(a) they were provisions of this Act; and

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(b) interests in the Part 31 entity were prescribed interests for the purposes of the applied provisions.

(5) Subject to subsection (6), the regulations may provide penalties for offences against the applied provisions not exceeding 10 penalty units.

(6) If:

(a) the regulations create an offence against an applied provision; and

(b) the maximum pecuniary penalty for an offence against the corresponding provision of the Corporations Law or Corporations Regulations of the Australian Capital Territory exceeds the penalty that, by subsection (5), could be imposed for an offence against the applied provision;

the regulations may provide a maximum penalty for an offence against the applied provision not exceeding the maximum pecuniary penalty referred to in paragraph (b), but nothing in this subsection enables the regulations to provide penalties of imprisonment.

(7) Regulations made for the purposes of this section may be expressed to apply to any fund or trust that is, for the purposes of the application of this Division in relation to the fund or trust, the Part 31 entity.

(8) In this section:

“**modifications**” includes additions, omissions and substitutions.

Subdivision F—Miscellaneous

New trustee to notify appointment to members

377.(1) If a body corporate becomes the trustee of the Part 31 entity under this Division, the body corporate must, as soon as practicable, give each member of the entity a notice about the appointment.

(2) The notice is to be in a form approved by the Commissioner.

(3) The body corporate must not, without reasonable excuse, contravene this section.

Penalty: 250 penalty units.

(4) A contravention of subsection (1) does not affect the validity of the appointment.

Civil immunity for actions under Division

378. A person is not liable in a civil action or civil proceeding in relation to an act done under this Division.

Division has effect despite anything in any other Part of this Act etc.

379. This Division (including regulations made for the purposes of section 376) has effect despite anything in:

- (a) any other Part of this Act; or
- (b) the Corporations Law or Corporations Regulations of a State or internal Territory; or
- (c) any other law; or
- 5 (d) the governing rules of the Part 31 entity.

Division 3—Regulations may make other transitional provisions

Regulations may make other transitional provisions

380. The regulations may make provisions, not inconsistent with Division 2, relating to the transition to the scheme provided for in this Act.

10 **PART 32—ADDITIONAL TRANSITIONAL PROVISIONS—TAX
FILE NUMBERS**

Object of Part

15 **381.** The object of this Part is to allow a member of a fund, scheme or trust to quote his or her tax file number to the trustee before the commencement of Parts 22 and 24. Those Parts commence on 1 July 1994.

Quotation of tax file number

20 **382.(1)** A member or beneficiary of a fund, scheme or trust may quote his or her tax file number to the trustee of the fund, scheme or trust in connection with the possibility of the future operation of section 225 or Part 24, or both.

(2) Subsection (1) ceases to have effect on 1 July 1994.

Pre-1 July 1994 quotation of tax file number to be treated as if made under provisions commencing on 1 July 1994

25 **383.(1)** This section applies if a beneficiary or member of a fund, scheme or trust quotes his or her tax file number to the trustee under section 382.

(2) This Act has effect, after 30 June 1994, as if the beneficiary or member had quoted that tax file number to the trustee under subsections 225(4) and 245(2) immediately after the beginning of 1 July 1994.

30 **Pre-1 July 1994 quotation of tax file number—request for quotation, or recording, of number not prohibited by the *Taxation Administration Act 1953***

35 **384.(1)** Section 8WA of the *Taxation Administration Act 1953* does not prohibit a person from requesting another person to quote the other person's tax file number if provision is made by section 382 of this Act for the quotation of the number.

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(2) If a beneficiary or member of a fund, scheme or trust quotes his or her tax file number to the trustee under section 382 of this Act, section 8WB of the *Taxation Administration Act 1953* does not prohibit the trustee from:

- (a) recording that tax file number or maintaining such a record; or
- (b) using that tax file number in a manner connecting it with the identity of the beneficiary or member; 5

in connection with the possibility that the trustee may be required to exercise powers or perform functions under or in relation to Part 22 or 24, or both, of this Act on or after 1 July 1994.

- (3) Subsections (1) and (2) cease to have effect on 1 July 1994. 10

Pre-1 July 1994 quotation of tax file number—objects of tax file number system

385.(1) Section 202 of the *Income Tax Assessment Act 1936* has effect as if the facilitation of the future administration of Parts 22 and 24 of this Act were an object of Part VA of that Act. 15

- (2) Subsection (1) ceases to have effect on 1 July 1994.

[*Minister's second reading speech made in—
House of Representatives on 27 May 1993
Senate on 19 October 1993*]