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## CHAPTER 8

# REGULATED SUPERANNUATION FUNDS

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

### *Regulated superannuation funds - clause 19*

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

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

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<sup>57</sup> Sly & Weigall, SIS Sub No 79.

A number of submissions commented adversely on their perception of the need to incorporate under SIS.

Compass Financial Services, SIS Sub No 47

Allanfield Financial Services, SIS Sub No 74

The Committee noted that there is an alternative to incorporation, which involves satisfying the pensions test.

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

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

8.6 In its first report the Committee considered a number of longer term measures needed to strengthen the constitutional base of any enhanced prudential controls. Whilst acknowledging that there would be substantial political difficulties, it was agreed that the most simple and direct regulatory framework would be achieved by the referral by all states to the Commonwealth, as provided by s1 (xxxvii) of the Constitution, of their powers over superannuation. The Committee is still of this opinion.

**Recommendation 8.1:**

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

<sup>58</sup> Australian Law Council, SIS Sub No 28

<sup>59</sup> SIS Sub No 28

<sup>60</sup> Evidence p 149

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***Trustee registration requirements***

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

**Recommendation 8.2:**

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