

APPENDIX H:

ATTORNEY GENERAL'S DEPARTMENT ADVICE ON  
APPLICATION OF CORPORATIONS POWER



Chief General Counsel

OGC95455418

5 May 1993

Mr D B Duval  
Australian Government Actuary  
PO Box 178  
CANBERRA ACT 2601

Dear Mr Duval

CONSTITUTIONALLY PROTECTED SUPERANNUATION FUNDS

I refer to your memorandum dated 22 April 1993 concerning the application of the proposed new superannuation industry supervision legislation to funds which are protected by s.114 of the Constitution from taxation in relation to part of their income.

Background

2. The proposed new supervisory regime will grant 'complying fund' status to a fund for the purposes of tax laws if the fund satisfies one of the following conditions:

- (a) its trustee is a trading or financial corporation within the meaning of s.51(xx) of the Constitution; or
- (b) its rules provide that its sole or dominant purpose is the provision of old-age pensions.

It is intended that funds which meet these conditions will be regulated by Commonwealth legislation under the corporations and pensions powers.

Advice

3. Your questions, and my answers to them, are set out below. For convenience, I have dealt with your third question first.

- (i) *Would a corporation whose sole function was to be trustee of one or more superannuation funds be classified as a trading or financial corporation within the meaning of s.51(xx) of the Constitution?*

4. Yes. In my view, the investment activities of superannuation funds, together with their handling of contributions and payment of pensions, constitute 'financial' activities

sufficient to enable a corporate trustee to be characterised as a 'financial corporation' for constitutional purposes (see *State Superannuation Board v Trade Practices Commission* (1982) 152 CLR 282).

(ii) *If a fund trustee satisfies condition (a) above, is the trustee necessarily subject to Commonwealth regulation under the corporations power?*

5. Subject to the provisions of the Constitution (eg. s.114 - see paragraph 7 below), the corporations power has been held by the High Court to support Commonwealth laws regulating at least the 'trading' and 'financial' activities of the corporations described in s.51(xx) and, in the case of trading corporations, activities undertaken by them for the purposes of trade (*Commonwealth v Tasmania* (the *Tasmanian Dam* case) (1983) 158 CLR 1 at 148-149, 179, 240-241, 269-271). Similarly, in the case of 'financial' corporations, the power would extend to activities undertaken for the purposes of their 'financial' activities. Hence the performance by a corporation of the functions of a fund trustee may be regulated (since they are 'financial' activities), and activities associated with the performance by a corporate trustee of its duties as trustee, even if they are not themselves 'financial' activities, are undertaken for the purposes of 'financial' activities and may also be regulated.

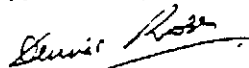
6. The drafting of provisions to bring fund trustees within the scope of the corporations power is a matter for the Office of Parliamentary Counsel (OPC), which is currently working on the proposed legislation.

(iii) *If a trustee satisfies condition (a) above, does it follow that the trustee cannot be an agent or instrumentality of a State and that it is therefore not protected from taxation by s.114?*

7. No. If the trustee was a company incorporated under the Corporations Law, the trustee would probably not be regarded as an agency or instrumentality of a State (cf. para.3 of the advice of 11 September 1992 to which you refer). However, a trustee established by special State legislation could well be both a 'financial' corporation (this would depend on its activities and the purposes for which it was established) and an agency or instrumentality of the State (this would depend on its relationship with the State). In order to induce State schemes to give up the protection of s.114, it would therefore be necessary to make it a condition of 'complying fund' status that a fund's trustee was a trading or financial corporation within the meaning of s.51(xx) of the Constitution and also a corporation formed under the Corporations Law. (I understand, however, that OPC's instructions are that s.271 of the Income Tax Assessment Act 1957 not to be repealed.)

8. I am sending a copy of this advice to Mr Keith Byles of OPC.

Yours sincerely



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