



Senate Select Committee on Superannuation and Financial Services

Main Inquiry Reference (a)

Submission No. 225

(Supplementary to Submission Nos. 88, 90, 95, 121
& 216)

Submittor: Australian Prudential Regulation
Authority
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13 July 2001

Ms Sue Morton
Committee Secretary
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Ms Morton

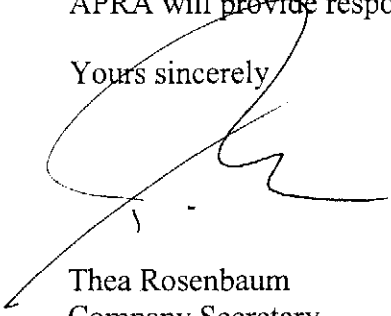
QUESTIONS ON NOTICE ARISING OUT OF PUBLIC HEARINGS IN JUNE 2001

Thank you for your letter of 29 June 2001.

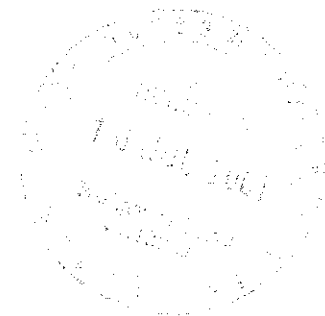
Attached are partial responses to Questions on Notice taken before the Committee when APRA appeared before it on 12 and 25 June 2001.

APRA will provide responses to the outstanding questions shortly.

Yours sincerely



Thea Rosenbaum
Company Secretary



QUESTION 1

**QUESTIONS ON NOTICE ARISING FROM 12 JUNE
PUBLIC HEARING**

- 1. Resumption of payment of allocated pension**
- 2. Obligation for registered company auditors to report problems to the Regulator or Shareholders**
- 3. Proposition for an Insurance Type Fund to meet losses in smaller funds where failures have occurred through fraud or theft**
- 4. Investment by APRA Approved Trustees in non-APRA-supervised trusts**

1. Resumption of payment of allocated pension

Transcript pages 1173-4

The resumption of payment of pensions at the earliest possible time was one of the priorities of the acting trustee. APRA apologises for its oversight in not including this information in its earlier submission.

We have set out the following matters relating to CNA where progress has been made:

Mr Anthony McGrath of KPMG was appointed as an "Inspector" under the Superannuation Industry (Supervision) Act, at APRA's expense, to examine all of the transactions the small APRA funds had with the Enhanced Cash Management Trust.

There are currently three on-going investigations into transactions entered into by CNA, both as trustee of superannuation funds, and as trustee of unit trusts. Oak Breeze Pty Ltd as acting trustee of the small APRA funds is currently looking at any "suspect" transactions that they find as they work through the accounting and compliance issues of each fund. Ferrier Hodgson as acting trustee of the Enhanced Cash Management Trust and Enhanced Equity Fund is also looking at any "irregular and suspect transactions" they encounter. KPMG is undertaking its investigation into the relationship of each superannuation fund that had dealings with the Enhanced Cash Management Trust.

The acting trustee, Oak Breeze Pty Ltd is in the process of working with each fund that is currently not complying with the SIS legislation to ensure that it does comply by 31 October 2001. It is intended that, subject to no unforeseen circumstances arising, Oak Breeze Pty Ltd will retire as trustee of each small APRA fund on 31 October 2001 to be replaced by a trustee of the members' choice.

All trustees, together with APRA representatives and legal representatives, attend a weekly meeting designed to update each party and co-ordinate recovery action.

APRA has briefed counsel and is about to commence formal examination of directors, officers and employees of CNA to assist APRA in putting together its case for recovery on behalf of superannuation fund members.

The results of these investigations will determine the direction of APRA's recovery action on behalf of fund members and also allow APRA to pass on to ASIC any evidence that may assist ASIC in its investigations.

2. Obligation for registered company auditors to report problems to the Regulator or Shareholders

Transcript pages 1174-5

Under the current legislation, if an auditor considers that a contravention of the SIS legislation may have occurred, the auditor must inform the trustee in writing of the matter. If the trustee fails to comply with the auditor's request, or the auditor is dissatisfied with the action taken by the trustee, the auditor is required to provide a written report to the Regulator. (Section 129 of the SIS Act).

A similar notification obligation arises if the auditor forms the opinion that the financial position of the superannuation entity may be, or may be about to become unsatisfactory. (Section 130 of the SIS Act).

3. Proposition for an Insurance Type Fund to meet losses in smaller funds where failures have occurred through fraud or theft

Transcript page 1175

Part 23 of the SIS Act covers the Provision of Financial Assistance to Certain Funds.

In particular SIS Section 235 indicates that the Minister has two options where the payment of assistance can be made:

1. A Special Reserve; or
2. Consolidated Revenue.

Where the Minister determines that assistance will be paid from a Reserve, then those monies are raised via an imposition of an additional levy on funds (on top of the current annual levy paid) up to an amount of 0.05% of total assets for each fund.

While SIS Section 229 has not to date been activated it has, through the ability to levy the industry, the usual feature of an insurance scheme. Where amounts are too small to warrant the collection costs of imposing a levy on the superannuation industry the option is available of payment being made from Consolidated Revenue.

However, the extension of such a compensation scheme to cover losses that were more broadly defined than “fraud or theft” would be a major change in Government policy. For example there is no such insurance scheme for deposit-taking institutions.

4. Investment by APRA Approved Trustees in non-APRA-supervised trusts

Transcript page 1177

APRA authorises trustees to accept public superannuation monies (an approved Trustee). APRA does not authorise the investments into which those superannuation funds invest.

APRA has not prepared any policy papers on such limits and is not directly aware of where any objection might emanate from, however, according to our statistics, as at December 2000 public offer funds directly invested 16 per cent of assets in unit trusts. Such trusts include listed and unlisted trusts. It is also noted that 65 per cent of assets were invested via life insurance companies and 12 per cent assets were invested in Pooled Superannuation Trusts. The latter investments are pooled investments of which the trustee/manager is regulated by APRA (ie, life insurer or approved trustee), however, a large proportion of these assets would be subsequently invested in unit trusts not managed by APRA-regulated institutions.

With unit trusts being used so extensively in the industry it would be extremely difficult and disruptive to prohibit investment by Approved Trustees in other trusts. For the most part these unit trusts provide an efficient mechanism for pooling the equity, or property, or international component of the various superannuation funds for which they are the trustee, with consequent administrative savings.

The alternative to placing prohibitions and requiring investment in other regulated investment vehicles is greater scrutiny and investigation of the underlying assets by regulators, including APRA, and also a greater onus on investors. APRA has begun placing a greater emphasis on assessing the risk of underlying investments while conducting on-site reviews of Approved Trustees and superannuation funds.

**QUESTION 2 ADDITIONAL QUESTION ON COMMERCIAL
NOMINEES AUSTRALIA LTD**

- 1. Size of problem**
- 2. APRA's regulation and Attachment A**
- 3. ECMT**
- 4 Competence of the Auditors**
- 5. Protocols and guidelines**
- 6. Replacement trustees and Attachment B**
- 7. Consumer protection and Attachment C and Attachment D**
- 8. Redress for victims**
- 9. Mr Trimmer's Client and Mrs Lawrence's payments**

1. Size of problem

- (1) *What is the estimated loss resulting from the collapse of CNAL? What is the breakdown by funds (eg the Enhanced Cash Management Trust (ECMT) and others)? What is the total number of investors that have been affected?*

CNA was trustee for 22 corporate and public offer superannuation funds and close to 500 small funds. The total assets of these superannuation funds were around \$300m. CNA was also trustee for 13 non-superannuation trusts with assets of around \$100m.

The acting trustees, Oak Breeze Pty Ltd and ACT Super Management Pty Ltd, have provided the following figures:

CNA Analysis of Anticipated Losses as at 30 June 2001, as provided by the acting trustees of the superannuation Funds.

Enhanced Cash Management Trust (ECMT) - Unit Trust		
Superannuation Fund	No. of Members	Estimated Loss \$
Network Superannuation Fund	2,500 ⁽¹⁾	41,539
Aust. Workforce ERF (AWERF)	21,152 ⁽¹⁾	635,449
Small APRA Funds	191	9,949,718
Total		10,626,706

Enhanced Equity Fund (EEF) - Unit Trust		
Superannuation Fund	No. of Members	Estimated Loss \$
Network Superannuation Fund	2,500 ⁽¹⁾	2,077,125
Miden/Midas Super Fund	288	1,752,363
Aust. Workforce ERF (AWERF)	21,152 ⁽¹⁾	6,874,365
Total		10,703,853

Confidens - Unit Trust		
Superannuation Fund	No. of Members	Estimated Loss \$
Small APRA Funds	86	1,922,647

Strategic Income Trust - Unit Trust ⁽²⁾		
Superannuation Fund	No. of Members	Estimated Loss \$
Small APRA Funds	158	60,356

Enhanced Income Trust - Unit Trust (2)		
Superannuation Fund	No. of Members	Estimated Loss \$
Small APRA Funds	176	1,384,763

Global Account (2)		
Superannuation Fund	No. of Members	Estimated Loss \$
Small APRA Funds	206	980,000

	No. of Members	Estimated Loss \$
Total Estimated Loss	24,811	25,678,325

Notes

1. There are approximately 46,000 members Australian Workforce ERF (AWERF) but these are the members with exposures to the impaired assets. The members in AWERF and the Network Super Fund that have an exposure to ECMT (Enhanced Cash Management Trust) are the same members that have an exposure to EEF (Enhanced Equity Fund).
2. These exposures were incurred before these funds transferred their trusteeship from ESP Nominees to CNA on 31 March 2000.

2. APRA's regulation

- (1) *What criteria does APRA apply in determining who is an Approved Trustee? On what basis was CNA approved?*

Attachment A contains the Approved Trustee application forms, which sets out the criteria used by APRA.

CNA applied to be licensed as an Approved Trustee in February 1994 and was approved in May 1994. The approval was conditional on the appointment of a majority of directors who were independent of the company that was to be the administrator for the Approved Trustee.

In the first instance APRA supervision teams assess whether APRA considers the applicant meets the relevant requirements and would have the capacity to manage superannuation monies. Since September 1999 an APRA Licencing Committee reviews all applications for new licences across all the legislation that APRA administers including the licencing of Approved Trustees. This process is designed to ensure a consistent and rigorous approach to the granting of new licences.

- (2) *Were you aware that some of CNA's investments were not made at arms' length? What did you do about it?*

Both the ISC (APRA's predecessor organisation) and APRA were aware that CNA was trustee of entities other than superannuation funds. Within the superannuation industry it is common for trustees of superannuation funds to also be trustees of other entities into which superannuation monies are invested. Supervision by the ISC from 1994 to 1998 and by APRA from 1 July 1998, which included at times reviewing the due diligence of the board of trustees, did not uncover proof of investments not being made at arms' length.

The Enhanced Cash Management Trust was set up in the second half of 1998 and the first indication to APRA of the nature of its investment profile was in March 2000 when the new directors of CNA approached APRA and detailed the investments of the Enhanced Equity Fund and the Enhanced Cash Management Fund.

The assets of the Enhanced Cash Management Trust included loans to former directors and loans to related party trusts which raised the obvious concern that these transactions may not have been negotiated on an arms' length basis. The new directors of CNA expressed a commitment to recovering these exposures and an Investigator was appointed to three of the larger funds with exposures to the two trusts. It was anticipated that attempts to recover these loans from the related parties coupled with the enquiries of the Investigator would produce the required evidence if in fact these transactions had been undertaken on an other than arms' length basis.

This process produced reports of suspicious transactions but proof of these transactions being conducted on a non-arms' length basis was not available to APRA before CNA's status as an Approved Trustee was revoked, at which time the new trustees were appointed to the superannuation funds, the Enhanced Cash Management Trust and the Enhanced Equity Fund, as well as an Inspector appointed to the small funds with an exposure to the Enhanced Cash Management Trust. APRA is coordinating the evidence the new trustees and the Inspector can provide with the objective of taking recovery actions on behalf of fund members. Investigations include whether transactions were conducted at arms' length.

- (3) *Under S106 of the SIS Act, trustees have a duty to notify APRA of events that might have a significant adverse effect on the financial position of the entity. Did the CNA trustees notify APRA? If so what did APRA do about it?*

The new directors of CNA came to APRA in March 2000 to express their concerns about the types of investments undertaken by the Enhanced Cash Management Trust and the Enhanced Equity Fund and their plans for recovering these exposures. They also expressed a clear understanding of the need to keep new superannuation money quarantined from these exposures in case their recovery actions were not successful. An Investigator was appointed to three of the funds.

This process led to the replacement of CNA as trustee of the three funds to which the Investigator had been appointed and to the revocation of CNA's licence as an Approved Trustee. As set out in APRA's submission to the Committee for the 12 June Hearing, while CNA ceased placing new superannuation money from the three funds to which the Investigator was appointed into the Enhanced Cash Management Trust and the Enhanced Equity Fund, it did not cease putting new superannuation money from the small funds into the Enhanced Cash Management Trust.

3. ECMT

(1) How is it that the ECMT was not regulated by APRA?

APRA authorises trustees to accept public superannuation monies (an approved Trustee). APRA does not authorise the investments that those funds make. For example the fund may invest in shares or property, and such assets are clearly not supervised by APRA. Alternatively the fund may invest in similar assets via a unit trust, eg, a property trust or managed funds.

Where such trusts accept public monies from the retail sector they are subject to the disclosure requirements of Corporations Law. ECMT is an excluded offer trust. These entities accept funds from “wholesale markets” or from “professional investors” who are deemed to have a high level of knowledge and understanding of financial markets and who are able to appropriately assess the risk associated with investments they are making and therefore are not afforded the normal degree of consumer protection. Neither APRA nor ASIC regulate this type of trust as it is restricted for use by professional investors. In this instance CNA was the professional investor when it undertook investments as trustee on behalf of the superannuation funds. CNA as the investor met the criteria of a professional investor.

The fact that CNA was simultaneously the trustee of the superannuation funds and trustee of the Enhanced Cash Management Trust did not provide APRA with the power to regulate the Enhanced Cash Management Trust but it did give APRA the capacity through its reviews of the Approved Trustee to find out about the nature of the ECMT and the nature of its investments. The reviews conducted had not identified the Enhanced Cash Management Trust as a source of potential problems prior to the advice from the new directors in March 2000. The ECMT was established in the second half of 1998 and was one of 13 non-superannuation trusts of which CNA was the trustee.

It is this type of experience which has convinced APRA that in its reviews of superannuation funds and Approved Trustees it needs to place more emphasis on establishing the nature of underlying investments, the methods by which the investments are valued and the discipline which trustees have applied in determining the investment strategy. Matters of governance of the superannuation fund or the Approved Trustee remain critically important but it is inappropriate investments that produce losses to fund members.

(2) Why was APRA receiving fees from CNA investors that it was not providing any regulation?

Levies collected by APRA are to cover its regulation of the superannuation funds only, not the vehicles in which the superannuation funds invest. Some superannuation funds had all their money in the ECMT but in other cases the ECMT was only one part of the investment portfolio the superannuation funds for which CNA was the trustee. As noted above APRA does not regulate the vehicles into which superannuation funds invest unless those vehicles are Pooled Superannuation Trusts which ECMT was not.

(3) *What proportion/number of funds managed by APRA-approved trustees fall outside of APRA's regulatory control?*

APRA regulates superannuation funds, Approved Trustees and Pooled Superannuation Trusts. It does not regulate the entities in which superannuation funds invest unless those entities are Pooled Superannuation Trusts (or life offices or deposit-taking institutions that APRA regulates through other legislation). Large amounts of superannuation money are invested in listed, unlisted and wholesale trusts. APRA does not collate information on the exact amounts held in unit trusts that are managed by Approved Trustees, yet fall outside of APRA's regulatory control.

As at December 2000 public offer funds directly invested 16% of assets in unit trusts. Such trusts include listed and unlisted trusts, these trusts are not necessarily managed by APRA regulated institutions. It is also noted that 65% of assets were invested via life insurance companies and 12% of assets were invested in Pooled Superannuation Trusts. The latter investments are pooled investments of which the trustee/manager is regulated by APRA (ie, life insurer or approved trustee), however, a large proportion of these assets would be subsequently invested in unit trusts not managed by APRA regulated institutions.

4. Competence of the Auditors

- (1) *The competence and independence of CNA's auditors have been questioned because they did not adequately identify problems CNA before the collapse. Should auditors report directly to APRA (or ASIC)?*

If an auditor considers that a contravention of the SIS legislation may have occurred, the auditor must inform the trustee in writing of the matter. If the trustee fails to comply with the auditor's request, or the auditor is dissatisfied with the action taken by the trustee, the auditor is required to provide a written report to the Regulator. (Section 129 of the SIS Act).

A similar notification obligation arises if the auditor forms the opinion that the financial position of the superannuation entity may be, or may be about to become unsatisfactory. (Section 130 of the SIS Act).

The practicality is, however, that auditors would only look at small superannuation funds when they come to do the annual audit. Receiving audited annual returns more quickly is thus one of APRA's key priorities. Superannuation funds audits are now required to be completed within 4 months of their annual balance date.

5. Protocols and guidelines

- (1) *ASIC put to the Committee on 12 June hearing that it wants more protocols on the responsibilities between APRA and ASIC, particularly which agency has prime carriage for a matter referred to it.*

Protocols for referrals from one agency to the other were put in place when APRA was established. We agree with ASIC that these protocols need to be improved in the light of experience and are working with ASIC to achieve that improvement.

- (2) *In your submission you indicated that you wanted more regulatory power over investments by way of developing stricter guidelines on funds investment portfolios. Please elaborate on what powers you are wanting and how it will benefit funds.*

APRA has been drawing some lessons for its supervision of superannuation from its first two years as an integrated supervisor with individual officers having responsibilities for deposit-taking and insurance as well as superannuation. A copy of APRA's recent submission to the Productivity Commission was provided to the Committee. This drew out that APRA's review of the supervision regime for superannuation has not as yet progressed to the point of articulating recommendations for legislative change.

APRA stated that its priorities are:

- Targeted portfolio and investment guidelines particularly focusing on asset concentrations;
- Improved supervisory reporting and tightened reporting standards by superannuation funds;
- Consideration of more structured capital requirements for approved trustees and possibly superannuation funds more generally;
- Increased focus on improving governance standards; and
- More effective licensing of superannuation funds.

The present legislation requires trustees to formulate and give effect to an investment strategy that has regard to the whole of the entity's circumstances including importantly liquidity and diversification and the ability to discharge existing and prospective liabilities. Given the investment time frames involved in superannuation a wide variety of investment strategies are likely to be capable of meeting these requirements. For the majority of superannuation funds, investment strategies are generally well founded with portfolio and asset selections broadly consistent with the objectives of the Act. But this is not always the case.

At this stage we are not in a position to be more specific than to say that we believe additional prudential requirements or guidelines covering portfolio strategy, asset allocation and potentially large concentrations of risk should be introduced. As a first step we will be amending existing advice to trustees on asset and portfolio selection to emphasise the need for funds to follow more diversified strategies where they do not already do so. Further we intend to act more forcefully in requiring better portfolio balance in those cases where trustees have not taken the spirit of the SIS requirements on investment strategy and portfolio determination into account. We will be considering the case for more formal legislative amendments to confirm our powers in this area.

The need for improved reporting to APRA by superannuation funds was discussed with the Committee on 25 June. The intention here is to have access to more comprehensive prudential information about superannuation funds such as details on the composition of their investment portfolios and the returns they are achieving for members. Such information is essential if a risk-based supervisory approach is to be used in the assessment of superannuation funds. At the hearing on 25 June the Committee requested that APRA begin to collect information on fees and charges levied by superannuation funds.

While APRA intends to review the potential role of capital requirements for superannuation funds generally the requirements on Approved Trustees will be subject to more specific review. The capital requirements for Approved Trustees allow the Trustee to have either \$5 million in the sum of net tangible assets or guarantees from Approved Deposit-Taking Institutions (ADIs) or agree to comply with any requirements imposed by APRA in relation to custody of assets. SIS requires that a custodian has a minimum capital requirement of \$5 million and the Insurance and Superannuation Commission and now APRA have required Approved Trustees who do not have \$5 million in capital in their own right or by an ADI guarantee to use an arm's length custodian (who is required to have \$5 million in capital). APRA intends to review these requirements with a view to providing clearer powers to APRA to impose a requirement that the Approved Trustee have its own capital rather than being able to meet the test by using a custodian with \$5 million in capital.

By way of illustration, the policy that Approved Trustees catering for Small APRA Funds should have \$5 million capital in their own right rather than relying on the use of a custodian with more than \$5 million in capital is not based on a legislative provision. The policy was implemented by use of the Instruments of Approval of Approved Trustees. For Approved Trustees which did not have the \$5 million capital in their own right the Insurance and Superannuation Commission had a general policy of imposing a condition that they could only act as Approved Trustee for superannuation funds listed in their Instruments of Approval. While this was a general policy there were a limited number of such Approved Trustees who did not have this condition and APRA reissued these Instruments of Approval to incorporate this condition. APRA made it known that it would not agree to add Small APRA Funds to these lists of funds in the Instruments of Approval of Approved Trustees which did not have the \$5 million capital in their own right. In CNA's case it did not have \$5 million capital in its own right but was already the trustee for large numbers of small funds (ie excluded funds under the previous regime).

The application of this policy to CNA led to an objection from them on the grounds that it was ultra vires to impose a condition in the Instrument of Approval which clearly sets a higher test than that laid down in the legislation. An Approved Trustee can appeal against changes to its Instrument of Approval firstly by seeking an APRA review of the decision and then if not satisfied by taking the matter to the Administrative Appeals Tribunal. By this stage of proceedings the Section 257 Investigation was in progress. APRA staff formed the view that to pursue revocation of CNA's status as Approved Trustee on the grounds that it was acting as an Approved Trustee for Small APRA Funds without having \$5 million capital in its own right, without a clear legal underpinning for these grounds for revocation, was likely to be unproductive. A more direct power for APRA to impose a minimum capital requirement on an Approved Trustee is likely to be one of the recommendations ensuing from APRA's review of the potential for capital requirements to improve APRA's supervision of the superannuation industry.

On governance standards APRA has noted that the trend in modern supervisory practice is for increased emphasis on the development of effective internal risk measurement and management practices within financial entities. It is generally accepted that the complexity of these practices should be commensurate with the size and risk characteristics of the financial entity. These issues of risk management practices form part of the broader question of governance which is as relevant in superannuation funds as it is with the insurance companies and ADIs supervised by APRA. We believe there is a strong case for strengthened governance requirements and we will be moving to introduce improved guidance to trustees on current best practice in relation to governance.

Effective licensing requirements are in APRA's view essential to any prudential regime. Without a clear licensing regime there is no way of knowing with any certainty which entities are accepting superannuation funds. This poses a clear threat to members and needs to be addressed at the earliest opportunity.

6. Replacement trustees

- (1) *Under S141 of the SIS Act, APRA has provision to issue directions to replacement trustees. What directions did you issue to Oak Breeze?*

APRA has not issued any directions to Oak Breeze Pty Ltd. APRA has an agreement with Oak Breeze Pty Ltd that they will bring all funds to a level where they are in compliance for this financial year by the 31st October 2001. Failing any unforeseen circumstances Oak Breeze will retire as acting trustee by the 31st October 2001.

- (2) *The Committee has heard that fees of up to \$10,000 per investor have been charged by Oak Breeze after the appointment of the new trustee. What fees are involved? What services do investors get for this? When investors have already lost so much money, do you think this is fair?*

Oak Breeze Pty Ltd has not charged a fee of \$10,000 but has requested each fund to have a cash balance of \$10,000 to meet on-going costs of administration and liabilities of each fund. These costs would include audit and tax return preparation, financial advisor commissions, tax payable, and APRA levies in addition to the fees of the Acting Trustee and are normal costs that a trustee would incur. For most of the funds annual returns and tax returns were not completed by CNA for 2000 and so the Acting trustee needs to have both the 2000 and 2001 returns completed to ensure each fund is complying. APRA intends to waive any late lodgement fees occasioned by the failure of CNA to complete the preparation of accounts and annual returns in 2000.

The individual superannuation funds will need to be complying when Oak Breeze completes its duties as Acting Trustee and moves the funds to a trustee of their choice. This is planned for 31 October 2001 when returns for June 2001 have been completed. The attached copy of a letter sent by Oak Breeze to individual funds contains some more detail (see **Attachment B**).

APRA is paying for the Inspector who is assisting us in the identification of recovery actions and assimilation of evidence for actions against individuals. The appointment by APRA of an Acting trustee does not involve APRA in the payment of administrative costs of the funds to which the Acting Trustee is appointed. Oak Breeze as the Acting Trustee is also providing APRA with any information that may assist in taking recovery actions on behalf of these funds.



**APPLICATION BY A CORPORATION FOR APPROVAL AS AN
"APPROVED TRUSTEE" FOR THE PURPOSES OF THE
*SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993***

PART A

COMPOSITION OF THIS APPLICATION FORM

This application form consists of two separate parts.

PART A is a "GENERAL INFORMATION AND GUIDE FOR THE COMPLETION OF THE APPLICATION".

PART B, "THE APPLICATION", contains the information and certificates that the applicant is required to provide.

HOW AND WHERE TO LODGE THE APPLICATION

PART B of the application should be completed in full in all relevant parts, including the required signatures at certifications A and B. Applications can only be considered as lodged when received at the relevant APRA office, so completed, together with an application fee of the prescribed amount.

Applications, along with the application fee, should be mailed to the appropriate General Manager of either Specialised or Diversified Institutions Division in your capital city:

General Manager
Specialised/Diversified Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836

IN ALL CAPITAL CITIES (except for applicants from Tasmania & Northern Territory)

*specific address details of where to mail an application form are provided on the next page

COPIES OF APPLICATION FORM

Copies of the form can be obtained from APRA website <http://www.apra.gov.au>. Copies of the form are also available from all APRA Offices, which may be contacted on the telephone numbers below, or by dialling 13 10 60:

Canberra	02 6247 2299	Melbourne	03 9246 7500
Sydney	02 9210 3000	Brisbane	07 3221 2533
Adelaide	08 8232 5130	Perth	08 9481 8266

APPLICATION FEE

An application fee of two thousand dollars (\$2,000), being the amount prescribed by Regulation 3.02 of the *Superannuation Industry (Supervision) Regulations*, is to accompany the application. Cheques or Money Orders should be made payable to the "Receiver of Public Moneys" or to the "Australian Prudential Regulation Authority".

WHO MAY APPLY TO BE AN APPROVED TRUSTEE

An entity which is a "constitutional corporation" under the *Superannuation Industry (Supervision) Act 1993* (SIS) and which wishes to be an "approved trustee" under that Act, may apply on this form for approval.

Under the SIS provisions, approved deposit funds (ADFs) pooled superannuation trusts (PSTs), and public offer superannuation funds need to have an approved trustee. These entities are referred to in this application form as "relevant entities".

Applicants must be corporations formed within the limits of the Commonwealth. In the case of foreign corporations, their Australian subsidiaries may apply to become an approved trustee.

FAILURE TO OBTAIN APPROVAL

Should the trustee of a relevant entity fail to obtain approved trustee status, it will not be able to make offers or invitations for the issue of interests. An ADF cannot operate unless it is maintained by an approved trustee.

Address details of where to mail applications

NSW applications should be mailed to:

**General Manager
Specialised/Diversified Institutions Division
Central Region
Australian Prudential Regulation Authority
GPO Box 9836
SYDNEY NSW 2001**

ACT applications should be mailed to:

**General Manager
Specialised/Diversified Institutions Division
Central Region
Australian Prudential Regulation Authority
GPO Box 9836
SYDNEY NSW 2001**

Victorian applications should be mailed to:

**General Manager
Specialised Institutions Division
South West Region
Australian Prudential Regulation Authority
GPO Box 9836
MELBOURNE VIC 3001**

Tasmanian applications should be mailed to:

**General Manager
Specialised Institutions Division
South West Region
Australian Prudential Regulation Authority
GPO Box 9836
MELBOURNE VIC 3001**

Queensland applications should be mailed to:

**General Manager
Specialised Institutions Division
Northern Region
Australian Prudential Regulation Authority
GPO Box 9836
BRISBANE QLD 4001**

Western Australian applications should be mailed to:

**Senior Manager
Specialised Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836
PERTH WA 6001**

South Australian applications should be mailed to:

**Senior Manager
Specialised Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836
ADELAIDE SA 5001**

Northern Territory applications should be mailed to:

**Senior Manager
Specialised Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836
ADELAIDE SA 5001**

PART A

GENERAL INFORMATION AND GUIDE FOR THE COMPLETION OF THE APPLICATION

DISCLAIMER

The information contained in Part A and elsewhere in the application, to the extent that it refers to criteria for the approval of trustees, duties of trustees, functions and powers of APRA and other matters arising under SIS, is not intended as a comprehensive statement of these matters. Nor should the Australian Prudential Regulation Authority (APRA) be regarded as being bound or estopped in any way by reason of the matters that APRA has chosen to include here. Applicants should refer to the SIS provisions for accurate and comprehensive information about all relevant matters and should obtain advice from a qualified person if necessary. APRA accepts no liability or responsibility whatsoever for any act or omission by any person on the basis of the material contained in this application form.

SECURITY OF INFORMATION

The applicant is assured that the information obtained under the legislative authority of, and for the purposes of, SIS will be protected under the secrecy provisions of the *Australian Prudential Regulation Authority Act 1998* (sections 56 and 57) and, to the extent that information of a "personal" nature is sought, the *Privacy Act 1988* will apply.

PENALTY PROVISIONS

Applicants should note that SIS contains stringent penalty provisions for the provision of false or misleading information (s.302, s.304 and s.305 refer) and that where information is disclosed to APRA which appears to indicate a breach of the law, APRA is authorised under section 56 of the *Australian Prudential Regulation Authority Act 1998* to pass that information onto the Australian Securities and Investments Commission.

RECOMMENDATION

We recommend that if the applicant is not currently functioning as a trustee of a relevant entity and does not intend to be so functioning within 6 months of this application, it delays making an application. APRA's approval would usually be on the basis that the entity is functioning as an approved trustee within that period.

GUIDE FOR COMPLETION OF PART B

ASSESSMENT OF THE APPLICATION FORM

By completing and submitting this application the applicant is attesting, under s.26(1)(a) of SIS, to its capacity to 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.

The application form consists of declarations by the applicant, supported by certifications and copies of relevant documents. Where certain minimum requirements are set by APRA, these are specified in this form for the information of the applicant.

When an application form is sent to APRA together with the appropriate fee but APRA considers that material part(s) of the information are missing or obviously inadequate then it will not be accepted as "lodged" under s.23(2) of SIS on the grounds that it does not provide the information required by the form.

When an application has been accepted as lodged but the assessing officer considers that the information provided in some parts of the application is not adequate, the processing of the application may be delayed while further information is sought.

APRA may lawfully request further information to that which is required in this application and in connection with assessing the application (s.24 of SIS).

If the further information which is sought is not provided without reasonable excuse, APRA is empowered, under s.24(2) of SIS, to treat the application as being withdrawn.

On completion of assessment of the application, APRA must be satisfied as to the applicant's capacity to perform the duties of approved trustee, otherwise APRA must refuse the application under s.26(2) of SIS.

If APRA approves the applicant, APRA also has the authority to impose conditions on the approval, provided they are specified in the instrument of approval.

TIMING

Under s.25 of SIS, APRA must decide an application for approval within **60 days** of receiving it, irrespective of whether APRA seeks further information relating to the application under s.24.

If APRA thinks it will take longer to decide the application, APRA may, if it considers this is warranted, extend the period for deciding it by a period of up to a further **60 days**. The extension must be made by written notice to the applicant within the first 60 day period.

If no decision has been made within the first 60 day period, or any extended period, then under s.25(5) of SIS, the application is deemed to be refused.

REVIEW OF APRA'S DECISION

If APRA refuses an application for approval [or is deemed to have refused it by virtue of s.25(5)] the applicant may, if dissatisfied with the refusal, apply to APRA under s.344(1) for a reconsideration of the decision. The applicant may also apply under s.344(1) for a reconsideration of any conditions that APRA includes in an instrument of approval.

The application for reconsideration must be made in writing, must be given to APRA within 21 days after the applicant first receives notice of the decision (or within such further period as APRA allows) and must set out the reasons for making the request.

NOTES ON SPECIFIC SECTIONS IN PART B

NOTE: There may be instances where the applicant cannot certify that it meets a requirement at the date of completing this application but is confident that the requirement will be met before an instrument of approval might be issued. In these instances the applicant should suitably qualify the certification.

IDENTITY OF APPLICANT

1. Registered name of the applicant

The corporate name of the applicant, as registered with the Australian Securities and Investments Commission (ASIC), should be shown.

2. The trading names of the businesses under which the applicant would operate as trustee.

The names of the businesses under which the applicant intends to operate as trustee should be shown.

3. The Australian Company Number (ACN)

The Australian Company Number (ACN) of the applicant should be shown.

4. Contact person information

To assist with the processing of the application, please provide the name, position held, postal address, telephone and facsimile numbers of the person to whom any queries may be addressed.

5. Particulars of the location of the applicant's registered office including:

- a. registered address with the ASIC
- b. postal address

Please ensure that the address shown is the current address and that it is complete.

6. Information relating to the chief executive officer, company secretary and directors of the applicant

The information sought is self explanatory.

If there are more than six directors, please attach the information in respect of the additional directors on a photocopied page as an attachment.

7. Power to exercise a controlling influence

The applicant is to provide information on each person, whether an individual or a corporation, who has the power to exercise a controlling influence over management and policies of the applicant.

For example, this includes major shareholders who are, for the purpose of this application, any person, individual or corporation holding 10% or more of the issued capital of the applicant at the date of making this application.

If there are more than six individuals and/or companies, please attach the information in respect of the additional individuals/companies on a photocopied page as an attachment.

HISTORY OF APPLICANT

8. Currently operating as a trustee of a superannuation fund, ADF, or PST

In this section, the applicant is to indicate if it is currently operating as a trustee of any superannuation fund, ADF or PST.

If the applicant answers “Yes” to **Item 8(a)**, then it is to show the total number of funds it administers as trustee at the date of application and the names of those funds. The fund name and Superannuation Fund Number (SFN) shown exactly as shown in the most recent annual return or, if the name of the fund has changed since that last return, the name as shown in the governing rules.

Where there are up to 10 funds, details are required of each fund; where there are more than 10 funds, details are required of the 10 with the most assets at the date of application.

9. Does the applicant hold a dealer's licence under the Corporations Law

In this section the applicant is to indicate if it holds a dealer's licence under Part 7.3 of the *Corporations Law*. If the answer is “Yes”, the applicant is to provide, along with the application, a copy of their dealer's licence.

If the answer is “No”, the applicant must apply for such a licence with ASIC, and if granted, provide a copy to APRA as part of the application process for Approved Trustee status.

If a licence is not granted by ASIC, you cannot proceed further with your application for Approved Trustee Status as ASIC have advised that all Approved Trustees are required to hold a dealer's licence.

An approved trustee must hold a dealers licence if it undertakes investment advisory activities for investment in public offer entities. More information on how the licensing provisions of the Corporations Law impact on trustees of superannuation entities can be found on ASIC's website <http://www.asic.gov.au>. The dealers licensing kit can be found under “Policy and Practice”.

10. Company Accounts

The applicant is to provide, along with the application, copies of the annual audited accounts of the corporation for the last 2 years (except for a year in which the corporation was not in existence). If a (new) set of audited accounts is to be produced within sixty days from the date of this application, a copy of the new audited accounts is also to be forwarded as soon as they are prepared.

11. Capacity of Applicant

In this section the applicant is to provide a significant amount of information that is critical to the capacity of the applicant to carry out the duties of a trustee. It is essential that all of the information is provided at the time of lodging the application. The information sought is self explanatory. *Please provide the requested information in the order the question is listed and indexed to the relevant part of the question.*

12. Additional Information May Be Sought

Upon receipt of the application APRA will provide a copy of the standard instrument of approval to the applicant. If a custodian is to be used the applicant will be required to provide, along with a copy of the custodian agreement, a statement demonstrating where each clause mentioned in condition D.9 of the instrument of approval is present in the custodian agreement.

CERTIFICATE A

13. Change of Executive

In Certificate A(i) the applicant is to certify that advice of any change of chairman, chief executive officer, company secretary, director(s) or any other responsible officer (as defined in s.10 of SIS) of the trustee which occurs at any time in the future while the applicant is an approved trustee, will be given to APRA no later than 14 days after the end of the month in which the change occurred. It will be a condition of APRA's approval that such information be provided.

Police checks must also be undertaken for the newly appointed persons and forwarded to APRA as soon as practicable. A copy of the appropriate form, which is a modified Australian Federal Police form, is attached to Part A. Copies are also available from APRA at the address to which this application form should be posted.

14. Change of controlling influence in the entity

In Certificate A(ii) the applicant is to certify that advice of any change of controlling influence in the entity or any material increase in a controlling influence in the entity will be given to APRA in writing no later than 14 days after the end of the month in which the change occurred. A material increase in a controlling influence would include any increase of 10% or

more of the existing amount of a controlling influence's interest (eg where 20% increases to 22%, notification would be required). It will be a condition of APRA's approval that such information be provided.

FINANCIAL INFORMATION

15. Asset Backing

In **Certificate A(iii)** the applicant is to certify how it will meet the asset backing or approved guarantee requirements as required by section 26 of SIS and the relevant regulations. APRA is to be satisfied that the applicant meets the prescribed asset backing or approved guarantee requirements for trustees of relevant entities. **These requirements, as spelt out in Certificate A(iii), are self explanatory.**

16. Trustee ceases to comply with requirements of s.26(1)(b).

The applicant is to certify in **Certificate A(iv)** that if the applicant should, in the future, cease to satisfy the particular sub paragraph of s.26(1)(b) on the basis of which the approval is given, then the applicant will advise APRA in writing as soon as practicable, and in any event within 30 days of becoming aware of such an event. Under section 29, there are penalties for approved trustees who fail to notify APRA of those events within 30 days.

Where there is a variation of the approval under s.27A or s.27C pursuant to which the applicant satisfies a new sub paragraph of s.26(1)(b), then the applicant is certifying as to the requirement to advise APRA in respect of it ceasing to satisfy the new subparagraph.

FUTURE PLANS

17. Assets

The applicant is required to provide, in **Certificate A(v)**, estimates, as at 1 July of the current year and the following two years, of the total assets of relevant entities for which the applicant expects to be trustee. Information relating to PSTs must be estimated separately from superannuation funds and ADFs.

18. Investment Options

The applicant is required to provide, in **Certificate A(vi)**, estimates, as at 1 July of the current year and the following two years, of the total number of investment options which the applicant expects it will have available for superannuation entities of which it expects to be trustee during this period. By way of example, an entity which offers a capital guaranteed option and a market linked option, at the member's choice, would be offering two investment options.

19. Participants

The applicant is required to provide, in **Certificate A(vii)**, estimates as at 1 July of the current year and the following two years, of the total number of participants (members or unit holders) it expects will exist in the superannuation entities of which it expects to be trustee during this period.

20. Material Changes in Plans

The applicant is to certify in **Certificate A(viii)** that it will advise APRA of any changes in the estimates given in Certificates A(v), A(vi) and A(vii), which occur at any time in the future, after submitting this application, where the variation is 25% or more (either an increase or decrease) of the previous estimate given to APRA. Such change should be advised immediately upon the estimate being changed in the applicant's business plan or other planning document. It will be a condition of APRA's approval that such information be provided.

21. Capacity to perform duties of trustee

In **Certificate A(ix)** the applicant must certify to APRA that it has the capacity to meet the requirement of paragraph 26(1)(a) of SIS. - *see Assessment of Application Form on page 5 for details.*

In making this certification, the applicant is attesting to both its own capacity and that of any entity (such as an investment manager, funds custodian or funds administrator) which will perform functions in relation to any relevant entities of which the applicant will be trustee.

Further, an approved trustee must have a minimum of four directors, three of whom must be Australian residents. If there are more than four directors, the majority of directors must be Australian residents.

22. Insurance

The applicant is to certify in **Certificate A(x)** that it (or individual directors) has adequate levels of insurance against liabilities incurred as a result of breach of its professional duty as trustee of an entity. The applicant is also to certify that it has adequate levels of material damage and consequential loss insurance in respect of its business or undertaking as trustee of superannuation entities.

Details to be included are self explanatory.

23. Disqualified person

The applicant is to certify in **Certificate A(xi)** that no responsible officer is a disqualified person. Under s.120 of SIS, an individual is a "disqualified person" if they have been, at any time in the past and whether before or after the commencement of the SIS Act, convicted of an offence in respect of dishonest conduct under a law of Australia, any State or Territory of Australia or any foreign country. An individual is also a disqualified person if a civil penalty

order under s.196 of SIS has been made against them, or if they are an insolvent under administration.

Note that a person is taken to have been “convicted” of such an offence even if an order has been made under s. 19B of the *Crimes Act 1914* (Cth) or a corresponding law of a State, Territory or foreign country (that is, if the offence in respect of dishonest conduct was found proved but the court concerned discharged the person without conviction).

Note also that the law of “spent convictions” under Part VII C of the *Crimes Act 1914* (Cth) does not apply. That is, it does not matter how long ago the conviction occurred. If it is taken to be “spent” or “expunged” under any Australian, State, Territory or foreign law a conviction in respect of dishonest conduct it is still counted as a conviction for the purposes of SIS.

Under s.120, a body corporate is a “disqualified person” if the body knows, or has reasonable grounds to suspect, that a responsible officer, or person acting as a responsible officer, of the body is a disqualified person who has not applied to APRA under s.126B for a waiver of his or her disqualified person status. A body is also a disqualified person if a receiver, or receiver and manager, has been appointed in respect of property beneficially owned by the body; or, an official manager, deputy official manager or administrator has been appointed in respect of the body; or, a provisional liquidator has been appointed in respect of the body; or, the body has begun to be wound up.

24. Bona fides of responsible officers

In **Certificate A(xii)** the applicant is to certify that there is no reason to doubt the bona fides of responsible officers. A doubt may arise if a responsible officer, for reasons of actual or alleged dishonesty, malpractice or other suspicious matters:

- has been refused the right or has been restricted in his or her right to carry on any trade, business or profession relevant to his or her duties with the applicant;
- has been removed from membership of, or disciplined by, any professional body relevant to his or her duties with the applicant; or
- is under investigation by a professional body for a matter relevant to his or her duties with the applicant.

Where such doubts have arisen, the applicant is asked to certify that it still meets the requirements of SIS, ie it should show cause as to how the applicant meets the requirements of SIS paragraph 26(1)(a). Such a statement must be included as an attachment to this application.

All directors and responsible officers should provide individual certified statements that they:

- are not disqualified persons;
- have not been refused the right or have been restricted in their rights to carry on any trade, business or profession relevant to their duties with the applicant;
- have not been removed from membership of, or disciplined by, any professional body relevant to their duties with the applicant; or

- are not under investigation by a professional body for a matter relevant to their duties with the applicant.

25. Further information

In **Certificate A(xiii)** the applicant is to agree it will provide any information which APRA assesses is necessary in order for the application to proceed and, in the event the application is approved, any other information which APRA assesses is necessary for deciding whether the approval should remain in force.

SIGNATURES OF APPLICANT

26. Acknowledgment of SIS responsibilities

In **Certificate A (xiv)** the applicant is to acknowledge its duties and obligations under the SIS legislation, if approved as a trustee.

27. Signatures

Certificate A must be signed by the chairman or chief executive officer on behalf of the corporation on **page 20** of Part B. It must also be countersigned by the secretary, director, or other person duly appointed by the Board of Directors to countersign documents on the corporation's behalf, or otherwise as prescribed in the corporation's articles of association, replacement rules or constitution. The use of the common seal of corporation is optional.

The application must be signed by **each** director, (or by a person authorised in writing by the director to sign the application on his or her behalf and when this occurs, a copy of the written authorisation signed by the director must be provided with the application), on **page 21** of Part B.

CERTIFICATE B

28. Certification by an independent registered company auditor - Certificate B

Where the applicant indicates that it will meet the net tangible asset or approved guarantee requirements in s.26(1)(b) other than by means of options at item (d) or item (e) of Certificate A(iii), a second certificate must be provided. This second certificate, **Certificate B**, must be completed by an independent registered company auditor confirming that the requirements of the SIS legislation applicable to the asset backing of the applicant have been complied with.

Certificate B must be lodged along with the application form or within such further period as APRA agrees where the applicant has indicated any of the items (a) to (c) in Certificate A(iii).

STAFF-IN-CONFIDENCE PART EXCLUSION
(when completed)

Commonwealth of Australia

CONSENT TO OBTAIN PERSONAL INFORMATION
(for categories where **PART EXCLUSION** has been granted from
spent convictions legislation)

I.....hereby:
(Full name - **BLOCK LETTERS** and in **INK**)

- (i) acknowledge that I have read the General Information document provided with this Form and understand that I do not have to disclose old protected convictions information, which is described under the heading Spent Convictions Scheme in the General Information document, except any of a type listed below for which an exclusion has been granted;

.....OFFENCES IN RESPECT OF DISHONEST CONDUCT.....
(Agency to list category(ies) of offence(s) for which an exclusion has been granted)

- (ii) certify that the personal information I have provided on both the front and back of this form relates to me and is correct;

- (iii) consent to..... SELF.....
(Name of Organisation Seeking Information)
forwarding this form to the Australian Federal Police and/or the Police Services of the States or Territories of the Commonwealth of Australia and providing relevant information to the above organisation.

- (iv) specify position applied for:.....eligibility to act as officeholder of approved trustee pursuant to S. 121 *Superannuation Industry (Supervision) Act 1993*.....

- (v) consent to the AFP or other relevant Australian police force(s) extracting from their records details of traffic violations, and criminal and/or traffic records involving dishonest conduct relating to me pending before a Court, and/or details of convictions or findings of guilt which have been recorded against me involving dishonest conduct and which are not covered by Part VIIC of the *Crimes Act 1914* dealing with spent convictions;

- (vi) acknowledge that any information provided by me on this Form or by the police as a result of the records may be taken into account by the organisation mentioned in (iii) above in assessing my suitability to receive the entitlement.

Signature: Date / /

Note: The information you provide on this form and which the police provide to this organisation on receipt of the form, will be used only for the purpose stated above unless statutory obligations require otherwise.

Personal Particulars

Partial Exclusion (Reverse)

Please Print

Surname (present)		All other surnames used	
Christian or given names			Sex Male Female
Date of birth / /	Town/city of birth	State/country of birth	
Contact phone number	Drivers licence number	State of drivers licence	

If full details of previous addresses are unavailable details to town(s) and state(s) will suffice.	If actual dates are unavailable, details of year of residence will suffice. Attach list if insufficient room.
Current	Period of residence / / to / /
	/ / to / /
	/ / to / /
	/ / to / /
	/ / to / /

CRIMINAL CHARGE, CONVICTION OR PECUNIARY PENALTIES

- (i) Are you the subject of any criminal charge(s) still pending before a court? YES/NO
- (ii) Do you have any conviction(s) or finding(s) of guilt which are less than ten (10) years old, or any juvenile conviction(s) or findings of guilt which are less than five (5) years old? YES/NO
- (iii) Do you have any conviction(s) or finding(s) of guilt which are over ten (10) years old, [or five (5) years for juvenile conviction(s) or finding(s) of guilt] where the sentence imposed was less than thirty (30) months imprisonment of offences of the type(s) mentioned at (i) on the reverse of this form (ie. offences for which an exclusion has been granted)? YES/NO
- (iv) Do you have any conviction(s) or finding(s) of guilt which are over ten (10) years old, [for five(5) years for juvenile conviction(s) or findings(s) of guilt] where the sentence imposed was greater than thirty (30) months imprisonment? YES/NO

If you answered YES to any of the above questions, please attach details.

FOR POLICE USE ONLY

Address of Initialling Department User Code: 499 (to be inserted by Department)	AUSTRALIAN FEDERAL POLICE NOT RECORDED/RECORDED NOTE: As fingerprints do not accompany your request, the Australian Federal Police cannot guarantee in any manner, that the information supplied herewith concerns the individual in whom you are interested, Signature: Date: For Commissioner Australia Federal Police
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**APPLICATION BY A CORPORATION FOR APPROVAL AS AN
“APPROVED TRUSTEE” FOR THE PURPOSES OF THE
SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993**

PART B

THE APPLICATION

Please carefully follow Part A, General Information and Guide for the Completion of the Application, when completing Part B.

The applicant is assured that all information sought in connection with this application, which is obtained under the legislative authority of the *Superannuation Industry (Supervision) Act 1993* (SIS), will be protected under the secrecy provisions of the *Australian Prudential Regulation Authority Act 1998* (sections 56 and 57). To the extent that information of a “personal” nature is sought, the *Privacy Act 1988* will also apply.

Applicants should note that the SIS provides significant penalties for intentionally or recklessly making false or misleading statements.

Applications, along with the application fee, should be mailed to the appropriate General Manager of either Specialised or Diversified Institutions Division in your capital city:

**General Manager
Specialised/Diversified Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836
IN ALL CAPITAL CITIES (except for applicants from Tasmania & Northern Territory)**

*specific address details of where to mail an application form are provided on the next page

Checks for Acceptance:					Application Number
Cheque OK	Q1	Q3	Q4	Q6	Receipt Number
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Date of Decision
Q8	Q11	Cert A	Execution	Directors Sign.	Date Received
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Cert B	Data Input	Form Accepted Y or N		<input type="checkbox"/>	
<input type="checkbox"/>	<input type="checkbox"/>				

Address details of where to mail applications

NSW applications should be mailed to:

**General Manager
Specialised/Diversified Institutions Division
Central Region
Australian Prudential Regulation Authority
GPO Box 9836
SYDNEY NSW 2001**

ACT applications should be mailed to:

**General Manager
Specialised/Diversified Institutions Division
Central Region
Australian Prudential Regulation Authority
GPO Box 9836
SYDNEY NSW 2001**

Victorian applications should be mailed to:

**General Manager
Specialised Institutions Division
South West Region
Australian Prudential Regulation Authority
GPO Box 9836
MELBOURNE VIC 3001**

Tasmanian applications should be mailed to:

**General Manager
Specialised Institutions Division
South West Region
Australian Prudential Regulation Authority
GPO Box 9836
MELBOURNE VIC 3001**

Queensland applications should be mailed to:

**General Manager
Specialised Institutions Division
Northern Region
Australian Prudential Regulation Authority
GPO Box 9836
BRISBANE QLD 4001**

Western Australian applications should be mailed to:

**Senior Manager
Specialised Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836
PERTH WA 6001**

South Australian applications should be mailed to:

**Senior Manager
Specialised Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836
ADELAIDE SA 5001**

Northern Territory applications should be mailed to:

**Senior Manager
Specialised Institutions Division
Australian Prudential Regulation Authority
GPO Box 9836
ADELAIDE SA 5001**

1. Name of the applicant as registered with the Australian Securities and Investments Commission

2. Trading name(s) of the business(es) under which the applicant would operate as trustee

3. Australian Company Number of applicant

--

4. Contact Person of applicant

Family Name

--

Given Name(s)

--

Position Held

--

Address

	State	Postcode

Telephone Number

()

Facsimile Number

()

5. Applicant's Address

(a) Registered Office Address With ASIC

	State	Postcode

(b) Postal Address of Registered Office

	State	Postcode

6. Information relating to the Chief Executive Officer, Company Secretary and Directors

(a) Chief Executive Officer

Family Name

--

Given Name(s)

--

Residential Address

	State	Postcode

Date of Birth

Day	Month	Year

Date of Appointment as C.E.O.

Day	Month	Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

--

(b) Company Secretary

Family Name

Given Name(s)

Residential Address

Date of Birth
Day Month Year

Date of Appointment
Day Month Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

Number of Directors

(c) Director (Chairman)

Family Name

Given Name(s)

Residential Address

Date of Birth
Day Month Year

Date of Appointment
Day Month Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

(d) Director

Family Name

Given Name(s)

Residential Address

 State Postcode

Date of Birth
Day Month Year

Date of Appointment
Day Month Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

(e) Director

Family Name

Given Name(s)

Residential Address

 State Postcode

Date of Birth
Day Month Year

Date of Appointment
Day Month Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

(f) Director

Family Name

Given Name(s)

Residential Address

 State Postcode

Date of Birth
Day Month Year

Date of Appointment
Day Month Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

(g) Director

Family Name

Given Name(s)

Residential Address

 State Postcode

Date of Birth
Day Month Year

Date of Appointment
Day Month Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

(h) Director

Family Name

Given Name(s)

Residential Address

 State Postcode

Date of Birth
 Day Month Year

Date of Appointment
 Day Month Year

Directorships and Major (ie 10%+) Shareholdings

Nationality and Residency Status if other than Australian

7. Power to exercise a controlling interest

Each of the following PERSONS (individual or corporation) has the power to exercise a controlling influence over management and policies of the applicant.

- * (if an individual)
- ** (if a corporation)

(a) *Family Name or Given Name(s)

** Company Name

Address

 State Postcode

(ACN if a company)

(b) * Family Name or Given Name(s)

** Company Name

Address

 State Postcode

(ACN if a company)

(c) *Family Name or Given Name(s)

** Company Name

Address

 State Postcode

(ACN if a company)

(d) *Family Name or Given Name(s)

** Company Name

Address

 State Postcode

(ACN if a company)

(e) * Family Name or Given Name(s)

** Company Name

Address

 State Postcode

(ACN if a company)

(f) * Family Name or Given Name(s)

** Company Name

Address

 State Postcode

(ACN if a company)

8. Currently operating as a trustee of a superannuation fund, ADF, or PST

(a) Is the applicant currently operating as a trustee of a superannuation fund, ADF or PST? **Y**
or **N**

If Y, complete 8(b) to 8(l) as applicable and then proceed to question 9.

If N, does the applicant intend to be functioning as the trustee of either a public offer superannuation fund, an ADF or a PST within six months after the date of this application? **Y or N**

If Y, go direct to question 9.

If N, the entity need not apply at this time.
(see note at page 5 of Part A)

Funds and assets under management

(b) Total number of superannuation funds, ADFs and PSTs under management at date of application.

(c) Name of Fund

Approximate Assets \$

(d) Name of Fund

Approximate Assets \$

(e) Name of Fund

Approximate Assets

(f) Name of Fund

Approximate Assets

(g) Name of Fund

Approximate Assets

(h) Name of Fund

Approximate Assets

(i) Name of Fund

Approximate Assets

(j) Name of Fund

Approximate Assets

(k) Name of Fund

Approximate Assets

(l) Name of Fund

Approximate Assets

9. Dealer's Licence

Does the applicant hold a dealer's licence under Part 7.3 of the Corporations Law?

Y or N

If N, the applicant must apply for such a licence with ASIC, and if granted, provide a copy to APRA as part of the application process for Approved Trustee status.

If a licence is not granted by ASIC, you cannot proceed further with your application for Approved Trustee status as ASIC have advised that all Approved Trustees are required to hold a dealer's licence.

10. Company Accounts

A copy of the applicant's last audited accounts for the immediately preceding 2 years are included with the application.

Y or N

If Y, the date of accounts is

<input type="text"/>	<input type="text"/>	<input type="text"/>
Day	Month	Year

<input type="text"/>	<input type="text"/>	<input type="text"/>
Day	Month	Year

If N, state the reasons why the audited accounts are not included and the date they will be produced.

New audited accounts must be provided to APRA within 60 days of the date of this application, if not already provided.

<input type="text"/>	<input type="text"/>	<input type="text"/>
Day	Month	Year

11. Capacity of Applicant

11A The applicant is to give an outline of its background and plans including information on its corporate structure (and relationships with other entities) its business plan and general intentions for business operations.

11B The applicant must provide, as attachments to this application, the information set out below in relation to its capacity to perform the duties of an approved trustee. The information sought in the attachments will require both the provision of statements, descriptions or procedures and also copies of relevant documents.

The information required is

- (a) Documentation (eg. minutes of meetings) evidencing how the applicant has satisfied itself of its capacity to act as trustee of a relevant entity.

- (b) A description of arrangements to implement any requisite amendments to the governing rules, in particular ensuring members/unitholders' approval is obtained first where necessary.
- (c) A description of how the applicant proposes that each of the covenants, referred to in Section 52(2) of SIS and those contained or deemed to be contained in the governing rules of the relevant entities will be satisfied.
- (d) Details of the arrangements for the physical custody and security of fund assets which ensure that fund assets would be kept separate and protected. APRA will provide a copy of the standard instrument of approval in use at time of receipt of the application. If a custodian is used the applicant will be required to provide, along with a copy of the custodian agreement, a statement demonstrating where each clause mentioned in condition D.9 of that instrument is present in the custodian agreement.

Where a custodian is used, in addition to the certification provided by the trustee in the application concerning the custodian's net asset backing of \$5m, the applicant will need to itself maintain, at all times, both net tangible assets of at least \$100,000 and a level of liquid assets of at least \$100,000. For this purpose, liquid assets are defined as current assets less intangibles less current receivables due from a related company. The applicant must advise how it proposes to meet this requirement.

- (e) A description must be provided as to how the applicant would meet responsibilities placed on it by Part 12 of SIS.
 - (i) What arrangements will be in place to ensure that inquiries/complaints by members are properly considered and dealt with within 90 days?
 - (ii) A copy of the investment management agreement(s). In addition statements from the trustee specifying:
 - (A) What steps are taken to ensure that competent and appropriate investment managers are selected?
 - (B) What arrangements are in place to ensure that the trustee is provided with the necessary information under an investment management agreement to enable full and ongoing assessment of the performance of the investments and investment manager(s) [Section 102(1)].
 - (C) What action has been or will be taken to amend or terminate existing investment management agreement(s) that do not comply with the requirements [Section 102(2)].
 - (iii) What arrangements are there for keeping minutes and records of all meetings and decisions affecting the fund [Section 103]?
 - (iv) How will up-to-date records of all changes of trustee and directors of the trustee be kept [Section 104]?
 - (v) How will member reports be retained [Section 105 - superannuation funds and ADFs only].
 - (vi) What procedures have been established to:
 - (A) identify and monitor the occurrence of a significant adverse event; and
 - (B) ensure that APRA is notified within the prescribed time [Section 106].

- (vii) For public offer superannuation funds with standard employer-sponsored members:
- (A) What procedures are in place to ensure that policy committees are established where required [Sections 91-93].
 - (B) What procedures are in place for appointing member representatives on a policy committee [Section 107(2)(a)]?
 - (C) What arrangements have been made to publicise such procedures to members [Section 107(2)(b)]? -
- (viii) What steps have been taken to ensure compliance with the in-house assets rules [Part 8]?
- (ix) What policy and procedures are in place for ensuring that investments are made on an arm's length basis?
- (x) What policy and procedures are in place to deal with potential conflicts of interest, such as common directors with the administration or investment manager of companies with which investments are made? [eg Section 109]
- (f) What staff training is proposed or has been conducted for educating the staff of the proposed trustee in relation to the duties and responsibilities of trustees imposed by the SIS Act and general trust law.
- (g) What procedures have been established to ensure that service providers to the relevant entities, delegates, sub-contractors have the appropriate qualifications, capacity and evidence of experience.
- (h) What access is there to expert advice, and what guidelines are there for determining the capacity, experience and qualifications of the expert.
- (i) What systems, controls and structures exist to ensure that the chances of fraud, non-compliance with relevant legislation and the deed, and maladministration are minimised? What policy/procedures manual and compliance process are in place to ensure that these controls/manuals etc are followed.
- (j) What procedures are in place to ensure that unclaimed money is dealt with in the manner required by Part 22 of SIS.
- (k) How are member, APRA and other reporting requirements complied with?
- (l) What procedures are in place for ensuring ongoing compliance with APRA & regulatory obligations?
- (m) What procedures are in place to disclose the SIS approved trustee arrangements to members/unitholders.
- (n) How does the applicant satisfy itself that computer and systems capacity is adequate to handle the current and expected volume of transaction processing.
- (o) What procedures are in place for preventing unauthorised or inappropriate investments or expenditures?
- (p) What procedures are in place for reimbursement for any errors which may occur in the operations of the fund (eg. overpayment, lack of group life insurance giving rise to a claim on the fund itself).

- (q) What arrangements are in place for collection of income and receivables?
- (r) What arrangements are in place for processing applications/withdrawals?
- (s) What arrangements are in place for account keeping, registers and member accounting?
- (t) Company details
 - (i) What is the structure of the Board of the proposed trustee, outline which directors are independent and which directors are members of audit and compliance committees.
 - (ii) A copy of an Australian Securities and Investments Commission Company Search which is not more than 7 days old must be provided.
- (u) Details of the arrangements which have been adopted by the applicant to ensure that no responsible officer of the applicant (as defined in Section 10 of SIS) is a disqualified person (as defined in Section 120 of SIS). It should be noted that the company is subject to a maximum fine of \$60,000 if it, or a responsible officer, is a disqualified person.
(see paragraph 23, pages 11 & 12 of Part A for details)

The applicant must arrange an Australian Federal Police (AFP) check for each responsible officer. Please note that the form on which these checks are performed has been modified for SIS purposes. A sample of the form is located at the back of Part A, for your information. A cheque for \$34 must accompany the form, which must be lodged at:

Australian Federal Police
Criminal History Branch
Locked Bag No. 1
WESTON ACT 2611

- (v) What backup arrangements exist for files and computer records and what contingency plan has been developed to protect members against systems or administration failures.
- (w) How does the applicant satisfy itself that it has adequate levels of professional indemnity and business insurance as set out in paragraph 22 of Part A and as certified at certificate A(x) of this Part. Copies of policies must be provided.
- (x) What arrangements are in place in respect of group life insurance cover for members of the relevant entities of which the applicant is (or will be) a trustee.
- (y) Where a dealer's licence from the ASIC is held, a copy of this should be provided.
- (z) How does the applicant satisfy itself that it meets member and fund reporting requirements? Copies of current disclosure material to prospective members or employer sponsors should be provided including Key Feature Statements where relevant. If such documents exist but are still in draft form, then please advise that this is the situation. APRA will require a copy AFTER the document has been through the due diligence process and has been signed off by the Board.

NOTE: APRA requires this information to gain a complete picture of the operations of the applicant in order to satisfy itself 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. APRA may request information above where ASIC has responsibility for compliance with certain provisions of the SIS legislation. That information may be passed to ASIC under sections 56 and 57 of the *Australian Prudential Regulation Authority Act 1998*.

CERTIFICATE A

Certificate by the Corporation

The corporation certifies that each of the statements (i) to (xiv) in this certificate are true and correct:

(i) Change of Executive

(see Guidelines in Part A, Paragraph 13)

any change of chairman, chief executive officer, company secretary, director(s) and any other responsible officer of the trustee will be advised to APRA no later than 14 days after the end of the month in which the event occurred. Police checks on newly appointed officers will also be provided as soon as practicable.

(ii) Change of controlling interest in the entity

(see Guidelines in Part A, Paragraph 14)

any change of controlling influence or the material increase in any controlling influence in the entity will be advised to APRA no later than 14 days after the end of the month in which the event occurred. It agrees to provide any further information, upon request, that APRA may require as a consequence of such advice.

(iii) Asset Backing

(see Guidelines in Part A, Paragraph 15)

the box in which an "x" is inserted best describes how the applicant will meet the asset backing or approved guarantee requirements of s26 (1)(b) of SIS.

- (a) It has \$5 million net tangible assets (NTA), and Certificate B has been completed.
- (b) It is entitled to the benefit of an approved guarantee of \$5 million in respect of the applicant's duties as trustee of any relevant entity, and Certificate B has been completed.
- (c) It has a combination of NTA and approved guarantee that together is not less than \$5 million and Certificate B has been completed.
- (d) It is a wholly owned subsidiary of a prudentially supervised institution which has \$5 million NTA, and all the assets of superannuation entities under trusteeship are invested in deposits or policies of life insurance with
- (e) The custody of all assets of any relevant entity of which the applicant is or becomes trustee will be held by a custodian appointed under a written agreement between the trustee and the custodian. The applicant has checked and is satisfied that the custodian has or will have \$5 million NTA or be entitled to the benefit of an approved guarantee of \$5 million (or a combination of the two) amounting to not less than \$5 million.
- The trustee will maintain at all times both NTA of at least \$100,000 and a level of liquid assets of at least \$100,000. For this purpose liquid assets are defined as current assets, less intangibles, less current receivables due from a related company. This requirement may be met, where necessary, by means of a guarantee of a kind approved by APRA.

(iv) Requirements cease to apply

(see guidelines in Part A, Paragraph 16)

If the applicant should, in the future, cease to satisfy the requirements which form the basis of its approval, as set out in the guidelines in Part A, then it will advise APRA in writing as soon as practicable, and in any event within thirty (30) days of becoming aware of such an event.

(v) Assets

(See Guidelines in Part A, Paragraph 17)

the estimated assets of relevant entities for which it expects to be approved trustee are:

	Super funds and ADFs \$m	PSTs \$m
1 July (current year)	<input type="text"/>	<input type="text"/>
1 July (1st outyear)	<input type="text"/>	<input type="text"/>
1 July (2nd outyear)	<input type="text"/>	<input type="text"/>

(vi) Investment Options

(See Guidelines in Part A, Paragraph 18)

the estimated number of investment options expected to be available in respect of all the relevant entities of which it expects to be the approved trustee are:

1 July (current year)	<input type="text"/>
1 July (1st outyear)	<input type="text"/>
1 July (2nd outyear)	<input type="text"/>

(vii) Participants

(See Guidelines in Part A, Paragraph 19)

the estimated total number of participants it expects will exist in all the relevant entities of which it expects to be the approved trustee are:

1 July (current year)	<input type="text"/>
1 July (1st outyear)	<input type="text"/>
1 July (2nd outyear)	<input type="text"/>

(viii) Material Changes in Plans

(See Guidelines in Part A, Paragraph 20)

the applicant will advise APRA immediately of any changes in the estimates given in Certificates A (v), A(vi) and A(vii) which vary by 25% or more (either an increase or decrease) of the previous estimate given to APRA.

(ix) Capacity to perform duties of trustee**(PLEASE CAREFULLY READ THE GUIDELINES IN PART A, PARAGRAPH 21)**

it can be relied on and has the capacity, including prudential controls, to perform, in a proper manner, the duties of trustee of any relevant entity of which it is or becomes trustee.

(x) Insurance

(see Guidelines in Part A, Paragraph 22)

(a) it has an adequate level of professional indemnity insurance

Insurer's Name

Amount of Cover

Amount of Premium

Amount of Excess

Is this insurance specific to the applicant

Y or N

Do any individual Directors have professional indemnity insurance?

Y or N

(b) adequate levels of business insurance have been effected.

(xi) No responsible officer is a disqualified person

(See Guidelines in Part A, Paragraph 23)

neither the applicant nor any of its responsible officers are “disqualified persons” as defined by SIS;

(xii) Bona fides of responsible officers

(See Guidelines in Part A, Paragraph 24)

- a. there is no reason to doubt the bona fides of each of its responsible officers; or
- b. it certifies that the requirements of SIS paragraph 26(1)(a) are met, notwithstanding the information provided as an attachment to this application.

(Delete whichever is not applicable)

(xiii) Further information

(See Guidelines in Part A, Paragraph 25)

it acknowledges that APRA may ask for more information and agrees that it will promptly provide any information which APRA assesses is necessary in order for the application to proceed, and, in the event that the application is approved, any other information which APRA assesses is necessary for deciding whether the approval should remain in force.

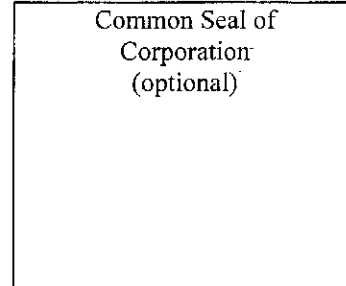
(xiv) Acknowledgement of SIS Responsibilities.

(See Guidelines in Part A, Paragraph 26)

if approved as an approved trustee under SIS, it acknowledges the need to provide an annual Prudential Management Certificate in the format specified in the Instrument of Approval.

Signature of chairman or chief executive officer on behalf of the Corporation (Print name below signature) and Common Seal of Corporation (optional).
(see guidelines in Part A, Paragraph 27)

If the corporation's constitution, articles of association or replacement rules provide for an alternative method of affixing and/or attesting the seal or execution of documents by or on behalf of the corporation, that method should be used.



.....
.....

Signature of secretary, director or other person duly appointed by the Board of Directors to countersign sealed documents on the corporation's behalf, or otherwise as prescribed in the corporation's articles of association, replacement rules or constitution. (Print name below signature.)

.....
.....

List of Attachments

Please list attachments to the application (attach a separate list if required).

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.

Certificate B

Certificate B completed and lodged as part of this application

Y or N

CERTIFICATE B

Certificate by Independent Registered Company Auditor

THIS CERTIFICATE FORMS PART OF AN APPLICATION FOR APPROVAL AS AN "APPROVED TRUSTEE" UNDER THE *SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993*.

(See guidelines in Part A, Paragraph 28)

*....., ACN/ARBN....., indicates in its application for approved trustee status dated/...../..... that it satisfies the asset backing or approved guarantee requirements prescribed in s26(1)(b) of SIS on the basis that it:

has \$5 million net tangible assets.

is entitled to the benefit of an approved guarantee of \$5 million in respect of the applicant's duties as trustee of any relevant entity.

the sum of the approved guarantee and the value of the net tangible assets of the applicant is not less than \$5 million

(place an "x" in the appropriate box)

I/We certify that the information is true and correct.

Signature of Independent Registered Company Auditor
(print name and address below signature)

.....
.....
.....
.....

Date.....

* Insert applicant's name

If Certificate B is not completed and not being lodged as part of the application - the applicant should retain a copy of Certificate B for later lodgement.

OAK BREEZE PTY LIMITED

«Contact»
«Fund»
«Floor»
«Street»
«Suburb»

Oak Breeze Pty Limited
ACN 095 333 743

c/o PricewaterhouseCoopers
Darling Park Tower 2
201 Sussex Street
GPO BOX 2650
SYDNEY NSW 1171

Telephone 61 2 8266 5423
Facsimile 61 2 8266 8915
Email: strategy.one@au.pwcglobal.com
Website: www.pwcrecovery.com

2 July 2001

Dear Fund member

«Fund» (the Fund)

Report to Fund Members - Financial position at 31 May 2001 and update on planned acting trustee activities

We refer to our letter of 1 June 2001 and provide herein the foreshadowed updated information on the estimated financial position of the Fund as at 31 May 2001 together with comparisons for year ended 30 June 2000.

Accordingly, please find attached at Appendix A the following documents in relation to the Fund, as:

- Unaudited Statement of financial Position as at 31 May 2001- details investments, other assets, liabilities and net assets available to pay benefits
- Unaudited Operating Statement for the period 1 July 2000 to 31 May 2001 - details investment revenue, contribution revenue and expenses
- Listing of fund assets - details fund investments showing for each investment units, cost and current valuation
- Notes to financial statements - disclaimer on financial statements, description of certain asset and liability balances.

We note that the attached financial statements are unaudited and may be subject to variation. Fund members who dispute any details in the attached statements should notify us in writing, with all supporting documentation, prior to 15 July 2001.

«Fund»

2 July 2001

Also included in this report is an update on the planned activities of the acting trustee in relation to a number of issues raised by various fund members. The balance of this report addresses these issues.

Can I continue to make contributions to the Fund?

Oak Breeze is continuing to operate the funds for the benefit of the fund members. Contributions can continue to be made in the normal course of fund operations.

To assist the administration of the fund we have attached at Appendix B a contribution advice form, a copy of which should be forwarded to Oak Breeze with any contribution made to the Fund. The contribution advice will detail the nature of the contribution and should minimise the existing requirement to contact contributing fund members or their employers to determine the nature of contributions.

What should I do with assets of the Fund which I am holding separate to the fund?

It has come to our attention that some fund members were withholding assets from the former trustee due to concerns as to the probity of the trustee. Fund members should ensure that all assets which are the property of the Fund are now held by the trustee on behalf of the Fund.

Accordingly, we advise all fund members who are holding such assets to arrange transfer of these assets to Oak Breeze as trustee of the Fund immediately. Failure to do so could cause the Fund to be non-compliant according to the relevant superannuation and taxation legislation. The consequences of non-compliance could include significant taxation imposition.

Why is there a general requirement for a cash balance?

The members of each fund were advised in our letters of 1 May 2001 and 1 June 2001, that a cash balance of at least \$10,000 (which is generally in accordance with most funds investment strategy) must be kept in the fund account to meet ongoing costs of administration and other liabilities of the fund. Fund liabilities may include rectification of non-compliance, audit and tax return preparation, financial adviser commissions, appropriate lodgement fees and any tax payable together with general administration and trustee costs.

We note that the ability to meet liabilities is dependent upon the availability of liquid monies, ie cash. Monies invested in impaired assets such as the Enhanced Cash Management Trust, Confidens Investment Trust or the Global Bank Account are not

«Fund»

2 July 2001

readily available and thus may not be considered as cash until these investments have been realised and banked to the Fund's individual bank account.

To assist you in understanding how this affects the Fund, estimated liabilities and expenses as at 31 May 2001 are provided in the attached unaudited draft financial statements of the Fund.

What are fund expenses?

The attached operating statement provides details of identified fund expenses paid to date, and the liabilities detailed in the attached statement of financial position identifies expenses which have been incurred but not yet paid by the acting trustee.

Expenses are broken down into categories including acting trustee fee, administration fee, advisor fees, APRA charges, audit fees, bank charges, contribution fee, fund expenses, income tax, insurance, professional fees, superannuation contributions tax, surcharge tax, trustee fee.

As mentioned in previous reports, we are seeking waivers of fines or late fees in relation to APRA and ATO lodgements.

What are the acting trustee administration expenses?

The acting trustee administration expenses have been determined in accordance with the Notice of Appointment under section 135 of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). Schedule 2 of the Notice of Appointment contains the Terms and Conditions and clauses 3 and 6 provide for payment of the acting trustee's fees and expenses in operating the funds and undertaking work to ensure they maintain their complying status.

The fees and expenses charged to each fund are based on the extent of time involved in acting as trustee and arranging for the completion of relevant administration tasks in relation to the Fund. Typically the time spent on each fund varies according to:

- extent of exposure to impaired assets
- number and type of investments
- compliance arrears and work backlogs.

The acting trustee's administration expenses to 31 May 2001 as shown in the attached unaudited operating statement relates to the following:

«Fund»

2 July 2001

- establishing the financial position of each Fund
- identifying compliance rectification imperatives
- securing the funds' investments
- initiating realisation action on impaired assets
- commencing rectification work including bringing the fund accounts up to date, arranging for funds to be audited, preparing tax returns, negotiating for non-compliance fines to be waived
- continuing the administration of the Funds, including:
 - accepting new contributions
 - undertaking pension payments where relevant
 - trading fund investments as required
- communicating with funds and APRA including correspondence, reports, meetings and enquiries
- taking actions being regarding the conduct of the previous trustee and officers including:
 - obtaining legal advice on possibility for oak breeze to hold the previous trustee liable for losses
 - pursuing the findings of the liquidator of CNA to determine the financial benefit possible from such actions
 - determining the extent that former directors may be personally liable.
 - determining the coverage of the director's liability insurance
 - assessing the former directors' personal wealth and determining the amounts that can be recovered
- examining whether there are grounds for action should any audit shortcomings be identified relating to the 1998 and 1999 reports on the now impaired assets

«Fund»

2 July 2001

- investigating whether funds have suffered loss because of auditors, trustees or financial planners, and notifying funds should it be more appropriate for funds to take action
- pursuing avenues for government financial and other assistance in seeking redress for the losses incurred.

Is the Trustee able to redeem assets to meet Fund liabilities?

The ability to meet Fund liabilities as they fall due is a prerequisite of compliance and allowing continuation of the taxation benefits afforded to complying superannuation funds. If, in the Trustee's consideration, it is in the best interests of a Fund to take actions such as asset redemptions to meet Fund liabilities, the trustee is bound to take such action.

Where a fund has insufficient assets to be redeemed and the fund member has chosen not to make a contribution to allow the fund to meet its liabilities, Oak Breeze will need to consider the fund's ability to meet the compliance requirements of the SIS Act.

When may the Fund migrate to new arrangements?

As advised in our letter of 1 June 2001, it is intended that the funds endeavour to resolve their outstanding compliance issues as at 30 June 2001.

We shall then be writing to fund members requesting their preferred choice for the future of their Fund. At this stage, it appears the options which may be available to complying funds will include:

- appointment of a replacement trustee and fund administrator
- conversion into a self managed (ATO regulated) fund
- encashment and rollover into an approved superannuation fund
- wind-up of fund.

The acting trustee is not able to offer fund members advice as to the best course of action for each fund. Accordingly, fund members should seek their own independent advice as to the course of action which they will recommend to the acting trustee.

«Fund»

2 July 2001

How can Fund members assist the progress of their Fund's claim for the compensation from the Minister for Financial Services?

As advised in our letter of 1 June 2001, certain fund members have volunteered to consider how best to take Fund member concerns, regarding the losses incurred by their Funds due to the activities of the former trustee CNAL, to the Minister for Financial Services.

Accordingly, we have been asked by Mr Ken Moffitt, fund member of an affected Superannuation Fund, to include with this report a letter from him to all fund members seeking support in this matter. Mr Moffitt's letter is attached at Appendix C.

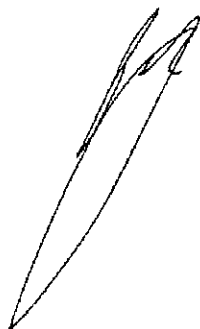
What action has the acting trustee taken in relation to seeking assistance for the Funds from the Minister for Financial Services?

Oak Breeze has written to Mr Joe Hockey, Minister of Financial Services, on behalf of the funds seeking Government funding to rectify the losses in the funds due to the inappropriate actions of CNAL or any other prior trustee.

In our discussions with the Minister's office to date, we have been informed that any assistance offered by the Minister is discretionary and he will be seeking input from Treasury and APRA in relation to this issue. We will keep you informed of their progress on this matter.

We will report to you again shortly as matters progress.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Hedge', written in a cursive style.

Peter Hedge
Director
Oak Breeze Pty Limited

7. Consumer Protection

(1) *What advice did/does APRA provide to the public in relation to what APRA regulation and APRA approval rating for trustees means to the investing public?*

APRA provides introductory information (APRA website) with regard to APRA regulation and supervision of superannuation institutions, also additional information is provided in circulars regarding approved trustees.

Attachment C provides three Superannuation Circulars currently available:

- Circular III.A.3 - Trustee Arrangements Public Offer Superannuation Funds;
- Circular III.A.5 – What are Public Offer Entities; and
- Circular III.E.1 – Regulation of Small APRA Funds.

The APRA website also provides of the names of all current Approved Trustees; this and other information is also available via contact with the APRA call centre.

APRA does not, however, provide information to the public in terms of Approved Trustees' performance; either investment or administrative, or performance of any other duties.

(2) *How does APRA deal with complaints made about trustees?*

Complaints about regulated institutions are an important source of information for APRA in the discharge of its obligations.

The attached APRA internal supervision note (**Attachment D**) addresses how complaints about APRA's regulated institutions must be handled.

Complaints to which this note applies are:

- any correspondence received by APRA about the conduct of those involved in the management or administration of an institution or fund,
- any institution or fund specific matter referred to APRA by ASIC, the Superannuation Complaints Tribunal (SCT), any financial sector supervisory agency or any government department, and
- oral complaints where initial inquiries confirm that the complaint raises issues of substance.

Where a complaint is considered significant in the overall context of the fund then APRA would investigate such complaint (eg, allegation of fraud). For example, a complaint against trustee of Asset A1 superannuation fund (as mentioned in the response to question 4c in Section 3 on details of replacement trustees) was investigated and the trustee was found to be inappropriately managing the fund. The trustee was eventually replaced and fund assets were sold and fund records reconstructed to attempt to recover monies for members.

However, it is noted that APRA does not specifically seek to resolve individual complaints, such as disputes over member entitlements. All complainants are informed that complaints should be firstly directed to the trustee. All trustees are required to have complaints handling systems in place. Where the complaint is not resolved the complaint should be forwarded to the SCT (Superannuation Complaints Tribunal).

(3) *What dispute resolution processes does APRA have to ensure expedite resolution of matters drawn to its attention?*

As noted at (2) above, APRA would deal directly with any complaint where it is considered there may be material concerns regarding the prudent operation of a fund, in particular allegations of fraudulent conduct would be immediately investigated.

**AUSTRALIAN PRUDENTIAL
REGULATION AUTHORITY**

**SUPERANNUATION CIRCULAR
NO. III.A.3**

**TRUSTEE ARRANGEMENTS -
PUBLIC OFFER
SUPERANNUATION FUNDS**

SEPTEMBER 2000

DISCLAIMER AND COPYRIGHT NOTICE

1. The purpose of this Circular is to provide general guidance on issues arising out of the legislation under which the Australian Prudential Regulation Authority ("APRA") regulates particular superannuation entities. It is not exhaustive in its coverage of rights or obligations under any law.
2. This Circular is based on APRA's interpretation of the relevant legislation in respect of the superannuation entities for which it is the regulator and has no legal status or legal effect whatsoever. Any reference to self managed superannuation funds is for general assistance only. Trustees of self managed funds should seek appropriate guidance from the Australian Taxation Office in respect of the application of the legislation in respect of those funds.
3. This Circular may be affected by changes to legislation. APRA accepts no responsibility for the accuracy, completeness or currency of the material included in this Circular.
4. Users of this Circular are encouraged to obtain professional advice on the relevant legislation and to exercise their own skill and care in relation to any material contained in this Circular.
5. APRA disclaims any and all liability or responsibility for any loss or damages arising out of any use of, or reliance on, this Circular.
6. This Circular is copyright. You may use and reproduce this material in an unaltered form only for your personal non-commercial use or non-commercial use within your organisation. Apart from any use permitted under the *Copyright Act 1968*, all other rights are reserved. Requests for other types of use should be directed to APRA.

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Objective

1. The aim of this Circular is to explain the trustee arrangements under the *Superannuation Industry (Supervision) Act 1993 (SIS)* applying to standard employer-sponsored superannuation funds which are public offer superannuation funds. Public offer superannuation funds are discussed in Superannuation Circular III.A.5 “What are Public Offer Entities?”
2. The trustee arrangements for standard employer-sponsored superannuation funds which are not public offer funds are discussed in Superannuation Circular III.A.2 “Trustee Arrangements - Superannuation Funds Other Than Public Offer Funds”.
3. This Circular replaces Superannuation Circular III.A.3 “Trustee Arrangements - Public Offer Superannuation Funds” which was released by APRA in January 1999. That document replaced Superannuation Circular III.A.3 “Equal Representation for Public Offer Superannuation Funds” issued by the former Insurance and Superannuation Commission in December 1994.

Introduction

4. Superannuation fund trustees are solely responsible for the sound and productive management of the fund in the interests of members. Trustees must manage the fund to meet the operating standards and other requirements of SIS and the fund’s governing rules.
5. The trustee of a public offer superannuation fund must be a corporation approved by APRA under Part 2 of SIS.
6. A public offer fund may be a standard employer-sponsored fund. The trustee arrangements for public offer superannuation funds which are standard employer-sponsored funds ensure that members and standard employer-sponsors are able to participate in the management and operation of their fund via their nominated representatives (“equal representation”). This is consistent with the principle that an informed and appropriately represented membership is an important element of fund management.

Public offer fund trustees

Sections 21(2), 26 and 152

7. In order to offer and issue superannuation interests in the fund, a trustee of a public offer superannuation fund must be a corporation approved by APRA.

8. For a trustee to be approved, APRA must be satisfied on a range of issues including that:

- the applicant can be relied on to perform its trustee duties and has a required level of assets or adheres to specified custody requirements. This ensures that the trustee's capital base and resources are adequate to perform its duties and functions without jeopardising the security of members' benefits; and
- the board consists of at least 4 directors, 3 of whom must be Australian resident directors.

Further information and detailed application forms are available from APRA.

Standard employer-sponsored funds

Sections 10, 16, 18 and 18A

9. A "standard employer-sponsored fund" is a regulated superannuation fund that has at least one standard employer-sponsor. In broad terms, a standard employer-sponsor is an employer who contributes to the fund (or has ceased only temporarily to contribute) wholly or partly pursuant to an arrangement between the employer and the trustee of the fund. A standard employer-sponsored fund may be a subplan, including under a master trust.

10. An "arrangement" for these purposes may be formal (written or oral) or informal. An arrangement is established where there has been some communication between the trustee and an employer which intentionally raises an expectation in both parties that the other will act in a particular way in relation to superannuation contributions.

11. A fund does not become a standard employer-sponsored fund merely because an employee selects it as the fund to which the employer will contribute and the contributing employer has no other association or communication with the trustee (apart from contributing on behalf of the employee).

12. A standard employer-sponsored fund may be a public offer fund because of the nature of its membership or because it has elected to be a public offer fund (further information see Superannuation Circular III.A.5. “What are Public Offer Entities”).

13. The trustee board, or policy committees, of a standard employer-sponsored public offer fund must generally consist of equal numbers of “employer representatives” and “member representatives”. The rules for equal representation vary depending on the type and size of the fund. These rules do not apply to funds that have fewer than 5 members (self managed superannuation funds and small APRA funds). The members of the former are closely associated with the operation of the fund, while a small APRA fund must have an independent corporate trustee approved under Part 2 of SIS.

14. Throughout this Circular, a reference to a “fund” will be a reference to a standard employer-sponsored public offer superannuation fund with more than 4 members unless otherwise stated.

Trustee arrangements for funds with 5 to 49 members

Section 92 and Regulation 3.05

15. SIS provides two options for trustee arrangements for a fund with more than 4 but fewer than 50 members:

- the fund complies with the basic equal representation requirements (refer to paragraphs 28 to 29); or
- the fund has an independent trustee (refer to paragraph 30 to 35) and complies with rules relating to policy committees (refer to paragraphs 36 to 45).

16. Where the fund has an independent trustee it must take all reasonable steps (including advising members of the advantages of having a policy committee) to ensure that if:

- there are at least 5 standard employer-sponsored members with the same or associated standard employer-sponsors (a “group”); and
- a written request to establish a policy committee is made to the trustee on behalf of at least 5 members of the group;

there is at least one policy committee established for that group within 90 days of the request.

17. The actual way in which this requirement may be met will depend on the circumstances of each fund. For example:

- a single employer-sponsor operating in more than one location may have a single policy committee covering all locations (the representation should take into account the geographic spread) or a separate policy committee for each location;
- two associated employers, who together sponsor more than 4 but fewer than 50 employees, could put either of the following into place:
 - one policy committee representing the employees of both employers; or
 - two policy committees each representing the employees of one of the employer-sponsors.
- two associated employers who each sponsor more than 4 but fewer than 50 employees have the same options.

Trustee arrangements for funds with 50 or more members

Section 93 and Regulation 3.05

18. These funds must either:

- comply with the basic equal representation requirements (refer paragraphs 28 to 29); or
- have an independent trustee (refer paragraphs 30 to 35) and comply with rules relating to policy committees (refer paragraphs 36 to 45).

19. Where the fund has an independent trustee the rules relating to policy committees vary according to the size of relevant groups of members. A “group” is a collection of members who are employed by the same or associated standard employer-sponsors.

Groups of more than 4 but fewer than 50 members

20. The trustee of the fund must take all reasonable steps to ensure that if:

- there are more than 4 but fewer than 50 standard employer-sponsored members with the same or associated standard employer-sponsors (a “group”); and

- a written request to establish a policy committee is made to the trustee on behalf of at least 5 members of the group;

there is at least one policy committee established for that group within 90 days of the request.

21. A policy committee is only required to be established on request for groups of fewer than 50 members. Where such a request is made, the group must be represented by at least one policy committee. The actual way in which this requirement is met will depend on the circumstances of the fund (refer paragraph 17).

Groups of 50 or more members

22. The trustee of the fund must take all reasonable steps to ensure that, if there are 50 or more standard employer-sponsored members with the same or associated standard employer-sponsors (a “group”), there is at least one policy committee established for that group.

23. For groups of this size the requirement for the trustee to take all reasonable steps to ensure that there is a policy committee is mandatory in all cases. As such, the steps taken should reflect the mandatory nature of the requirement and may include contacting each member to explain the consequences of the absence of a policy committee and detailing the nomination process for representatives.

24. Every group must be represented by at least one policy committee. The actual way in which this requirement may be met will depend on the circumstances of each fund (refer to paragraph 17 - except that references to “more than 4 but fewer than 50” should be read as “50 or more” in this context).

Transitional arrangements

Sections 92(13) and 93(5)

25. As different equal representation requirements apply depending on the size of the fund membership, transitional provisions allow funds which change in membership size up to 90 days to meet the appropriate requirements.

26. During the transitional period, funds are required to continue complying with the existing equal representation requirements eg. if the number of members of a fund increases from 49 members to 50 or more, the fund must continue to comply with the requirements applying to funds having more than 4 to fewer than 50 members (paragraphs 15 to 17) until it complies with the requirements for funds

having 50 or more members (paragraphs 18 to 24) which it must do within 90 days.

27. Further, as the size of groups of employer-sponsored members within a fund affects the need to form policy committees (refer paragraphs 16 to 17 and 20 to 24), the fund has 90 days to take all reasonable steps to form any policy committee required as a result.

The basic equal representation rule

Sections 10 and 89

28. The basic equal representation rule is that the board of the corporate trustee must consist of equal numbers of “employer representatives” and “member representatives” (refer to paragraphs 46 to 48).

29. SIS does not define “member” for these purposes. Any person with a beneficial interest in the fund should be recognised as a member of the fund and entitled to the protection of SIS. This includes pensioners and beneficiaries of deferred benefits.

Independent trustees

Sections 10 and 93A

30. The trustee of a standard employer-sponsored public offer superannuation fund must be an independent trustee or comply with the equal representation requirements.

31. A trustee (or a director) is not “independent” if the trustee or (a director) is:

- a member of the fund;
- an employer-sponsor or associate of an employer-sponsor of the fund;
- an employee of an employer-sponsor of the fund or an employee of an associate of such an employer-sponsor;
- in any capacity a representative of an organisation (such as a trade union) representing the interests of one or more members of the fund; and
- in any capacity a representative of an organisation representing the interests of one or more employer-sponsors of the fund.

32. An associate, for SIS purposes, is determined under Corporations Law provisions, with some modifications. In summary, an associate of an employer-sponsor may include:

- if the employer-sponsor is a body corporate - a director or secretary of that body or of a related body corporate, or a related body corporate itself. A related body corporate is a holding company or subsidiary of the employer-sponsor, or a subsidiary of a holding company of the employer-sponsor;
- a person in partnership with the employer-sponsor;
- a trustee of a trust from which the employer-sponsor benefits, or is capable of benefiting, otherwise than in the ordinary course of business in connection with lending money;
- a person with whom the employer-sponsor is acting or proposes to act, or with whom the employer-sponsor is or proposes in any way to become associated.

33. However, the trustee of a public offer superannuation fund who is an employer-sponsor of the fund will be considered to be an independent trustee of the fund for these purposes if:

- no more than 10% of the members of the fund have an employer-sponsor of the fund who is the trustee or an associate of the trustee; and
- the value of the accrued benefits of those members is no more than 10% of the market value of fund assets; and
- the trustee is not in any capacity a representative of an organisation representing the interests of either employer-sponsors or members of the fund.

34. APRA can approve a percentage higher than either of the 10% limits referred to above in individual cases. This approval may be for a limited time and subject to conditions.

35. The power to approve a higher percentage may only be exercised by APRA after considering:

- the effect that the approval of a higher percentage will have on the likelihood of the trustee performing its functions independently and impartially; and
- all other relevant circumstances.

Policy committees

Sections 10, 58, 92, Regulations 3.05, 3.06 and 3.07

36. Where there is an independent trustee, policy committees may be required or requested to be established. A policy committee is a body that advises and informs the trustee about matters of concern relating to the fund which have been raised by members or employer-sponsors of the fund. It generally provides the main avenue for members and employer-sponsors to monitor the management of the fund.

37. The functions of a policy committee include:

- assisting the trustee eg. in dealing with complaints or inquiries about the operation or management of the fund; and
- providing an avenue for members to inquire about and provide their views on:
 - the investment strategy and performance of the fund;
 - the fund's operation and performance; and
 - members' information requirements.

38. However, a policy committee cannot limit the functions or responsibilities of a trustee nor can it give directions to a trustee.

39. These committees must have equal numbers of member representatives and employer representatives (refer paragraphs 46 to 48). There is no scope to appoint additional independent representatives to a policy committee.

40. Where a policy committee is required or requested (refer paragraphs 15 to 27), the trustee must take all reasonable steps to establish the committee within 90 days and should be able to provide evidence of such measures to an auditor or APRA. The policy committee must be established by or under the governing rules of the fund.

Policy committee meetings

Regulation 3.08

41. The trustee must, so far as practicable, ensure that policy committees meet at least annually. The trustee must provide facilities that are reasonably necessary to enable the committee to meet and to function effectively. Meetings may be held by teleconference.

42. If requested by a policy committee, a representative of the trustee must attend a meeting of the policy committee.

Policy committee costs

Regulations 3.08 and 5.02

43. The trustee may recoup from the fund (but not the policy committee or its members personally) the costs of providing policy committee meeting facilities, the trustee attending such meetings and providing information to the committee.

44. These costs may be charged against members' benefits. In doing so, the trustee must ensure that the costs are distributed in a fair and reasonable manner as between all the members of the fund. Policy committee costs may be charged against the benefits of the members represented by the relevant policy committee only, unless it is clearly unfair to a particular group of members.

Dissolution of policy committees

Regulation 3.09

45. A policy committee may dissolve itself. However, if at least 5 members of the group which was previously represented by the committee request that a replacement committee be formed then the trustee must take all reasonable steps to form a replacement committee. The trustee will be allowed 90 days to do so.

Employer representatives

Section 10

46. For the purposes of both the basic equal representation rule (refer paragraphs 28 to 29) and the policy committee requirements (refer paragraphs 36 to 45) "employer representative" means a person nominated by the employer-sponsor(s) of the fund or an organisation representing the interests of the employer or employers. It is not necessary for an employer representative to be a member of the fund.

47. For example, in a multi-employer fund an employer representative may be nominated by:

- one or more of the employer-sponsors; or
- one or more organisations representing the interests of one or more of those employer-sponsors (eg. a peak employer body); or

- one or more of the employer-sponsors and one or more organisations representing the interests of one or more of the other employer sponsors.

Member representatives

Section 10

48. For the purposes of both the basic equal representation rule (refer paragraphs 28 to 29) and the policy committee requirements (refer paragraphs 36 to 45) “member representative” means a person nominated by the members of the fund or an organisation representing their interests, such as a trade union. For this purpose an employer-sponsor or a trustee board would not be considered as representing the interests of members. It is not necessary for a member representative to be a member of the fund.

Appointment of representatives

Sections 10, 107 and 108

49. Trustees must establish the rules for appointment and removal of directors to the corporate trustee’s board (where the board is required to comply with the basic equal representation requirements) and of representatives to policy committees. Where the rules are for the appointment of directors, these rules should form part of the fund’s governing rules and must be consistent with Corporations Law requirements.

50. The rules should not only address processes for nomination, appointment, election and removal but should also address issues such as vacancies, use of proxies and alternates and dispute resolution for any of the above matters.

51. It is desirable that each director/representative be appointed for a fixed term to encourage new representation and new ideas to the trustee body or policy committee. This may involve a staggered nomination process to ensure continuity and an appropriate transfer of knowledge and skills to new directors/representatives. Of course, representatives may stand for re-election if permitted under the rules.

52. Once the rules for appointment of directors/representatives are established the trustee must publish them in a way that will make fund members aware of the procedures. An efficient way to ensure that all members are made aware of the procedures is to include the rules in the booklet given to members at the time of joining the fund with any additional updates provided as needed. In addition, a summary of the rules could be included in the annual report.

53. Posting the rules on a work or electronic (eg. internet) noticeboard would not normally meet the requirement to publish the rules in a way that would make members aware of the procedures, as a trustee could not normally be satisfied that **all** fund members would access the information if provided in these forms.

54. In arranging for the nomination and subsequent appointment of member directors/representatives it is important that formal procedures are in place where all eligible members can submit nominations and/or stand for election.

55. The process for nomination and appointment of member directors/representatives should be fair and democratic. It should provide members with real and free choice regarding who will represent them and it must give effect to their choice. All nominees should be aware of the duties and responsibilities of a director/representative, with information being provided by the trustee, employer-sponsor or employee organisation in a manner that encourages participation (eg. free training, opportunity for personal development). Detailed education of directors/representatives should be undertaken at the time of their appointment.

56. Rules governing the nomination process which impose unreasonable restrictions on nominations will prevent the persons nominated from being “member representatives” within the definition in section 10. Such unreasonable restrictions include preventing staff with little service or status from nominating or limiting all representatives to specific geographical location. However, it may be acceptable to set quotas for member representatives for specific sites or geographical locations in order to ensure reasonable representation of all classes of members within a fund. Geographical difficulties can be overcome by using technology eg. teleconference facilities.

57. It is the trustee’s responsibility to actively encourage nominations, eg. by promoting the fund, encouraging participation in its management and educating members on superannuation issues. Where this is unsuccessful and the governing rules permit, members should be encouraged to nominate an appropriately qualified person outside the fund to be their representative or the number of employer representatives may be reduced to maintain equality.

58. Except in very unusual circumstances APRA will not accept that equal representative requirements cannot be met due to insufficient nominations for member representatives.

Requirements for representatives

Sections 52, 57, 107 and 108

59. All employer, member and independent representatives on corporate trustee boards must act in the best interests of all the members and other beneficiaries of the fund and also in accordance with the standards of care, skill and diligence required by the trustee covenants under subsection 52(2) of SIS. These responsibilities over-ride any obligation to represent the group who they have been nominated to represent as trustees.

60. Although members of policy committees are not required to comply with the section 52 covenants, they have a responsibility to act in the best interests of members and as a matter of good practice should adhere to the legislative requirements applicable to other representatives.

61. Directors/representatives' responsibilities are substantial but not necessarily onerous. Members should not consider standing for election to a position as a director/representative unless they believe they will be able to devote sufficient time and attention to their responsibilities. Employers should be aware that both member and employer directors/representatives will need time to attend to their responsibilities, which can be during normal business hours. Failure to actively participate in the decision making process of the fund or relying heavily on other directors, may expose directors to personal liability.

62. Directors should hold appropriate insurance cover that provides indemnity against any liabilities to which they may be exposed while carrying out their duties. Under section 57, directors of a corporate trustee can be indemnified from the assets of the fund for any liability they may incur arising from their role as trustee. However, this indemnification does not apply if the director breaches the trust through:

- acting dishonestly in relation to the fund;
- recklessly or deliberately failing to exercise the degree of care or diligence that the trustee is required to exercise; or
- being subject to a monetary penalty under a civil penalty order.

Additional independent directors

Section 89(2)

63. The board of a corporate trustee, which is required to have equal representation may include an independent director.

64. The capacity for a board to contain an independent director provides scope for appointment of an additional person who has required skill or expertise.

65. In making such an appointment the following requirements must be met:

- the additional director is “independent” (refer to paragraph 31);
- the additional director is appointed at the request of the employer representatives or member representatives;
- the governing rules of the fund allow the appointment; and
- the governing rules do not allow the additional director to exercise a casting vote in any proceedings of the board concerned. The independent director is permitted a deliberative vote in the normal course of proceedings.

66. The appointment of an additional independent director is subject to the consent of the trustee body as a whole. Thus a request by some of the directors to appoint an additional director would need to be considered and agreed upon by all others.

Disqualified persons

Sections 120, 121 and 126B

67. A person who knows they are a disqualified person cannot intentionally be involved in the trusteeship of a fund as a responsible officer of a corporate trustee. A responsible officer is a director, secretary or an executive officer of the body corporate.

68. A person may be disqualified as a result of insolvency, being convicted at any time of a dishonest conduct offence or being the subject of a civil penalty order under SIS. A person is a disqualified person if they have been convicted of an offence of dishonesty, whether or not a penalty was imposed and irrespective of whether the “spent convictions” provisions of Commonwealth or State law apply in relation to the conviction. They are also disqualified irrespective of whether the conviction was for an offence of dishonesty under Australian law or the law of any other country. A person with a dishonest conduct offence conviction may be able to apply to APRA for a waiver of their disqualified person status to allow them to take up a position as a trustee. Section 126B of SIS describes the process of seeking a waiver.

69. Where the trustee is a body corporate which has been disqualified it cannot act as a trustee. A body corporate may be disqualified as a result of insolvency,

being wound up or (broadly) if the body corporate knows or has reasonable grounds to suspect that a disqualified person is acting as a responsible officer.

70. If a trustee is or becomes disqualified, they must immediately inform APRA in writing. Trustees must check whether a responsible officer is not a disqualified person upon their appointment and should confirm this status on at least an annual basis.

Alternates and proxies

71. All directors/representatives should attend regular trustee or policy committee meetings and participate in the discussions to ensure informed and representative decisions are made. However, there may be circumstances when a director/representative cannot attend a formal meeting and alternate arrangements, such as circulating resolutions or holding the meeting by teleconference are not considered appropriate. In this case, if the governing rules permit, directors/representatives may consider appointing an alternate or giving a proxy.

72. In appointing an alternate or giving a proxy, the director/representative must:

- ensure consistency with the equal representation requirements, sound corporate governance principles, the governing rules of the fund and any Corporations Law requirements (in the case of a corporate trustee);
- exercise reasonable care;
- have no improper purpose; and
- have a reasonable belief that the delegate is reliable and competent and will act in good faith in carrying out their duties.

Alternates

73. An alternate director or representative may occupy the office of the elected incumbent for a (short) period. This does not create an additional office. If the absence is likely to be permanent the director/representative should step down or the remaining trustees/committee members should consider arranging for the appointment of a replacement (refer paragraphs 79 to 83).

74. The rules for the appointment of alternates should be established as part of the governing rules and published so that all members, employer sponsors, trustee directors and policy committee members are aware of the procedures.

75. The representative election process may provide for the appointment of one or more nominees to be available to act as an alternate. In so doing consideration should be given to the governing rules of the fund and for the corporate trustee, the requirements under Corporations Law. However, should the incumbent appoint an alternate, the incumbent should consider the alternate's training, knowledge of the fund and associated legal requirements and their availability.

76. Where alternates are used trustees should check that appropriate insurance cover extends to them (refer paragraph 62) and the alternate is not a disqualified person (refer paragraphs 67 to 70).

Proxies

77. Persons appointed as proxies are agents of the person they represent. It is strongly preferable that the voting instructions of the director/representative be in writing and restricted to specific areas. Member representatives should give their voting instructions to other member representatives and employer representatives should give their voting instructions to other employer representatives.

78. The voting by the proxy should be recorded in the minutes of the meeting and monitored by the representative who authorised it.

Removing representatives

Section 107 and Regulation 4.06

79. Trustees must establish and publish rules which set out the procedure for removing member representatives from trustee boards and policy committees. Such rules should be included in the fund's governing rules and must not be inconsistent with the Corporations Law.

80. Once the rules for removal of representatives are established the trustee must publish them in a way that will make fund members aware of the procedures (refer paragraphs 52 to 53).

81. SIS specifies the circumstances where a member representative (ie. a director or policy committee member) or additional independent director can be removed other than by the same procedure by which appointment occurred. These are in the event of:

- death;
- mental or physical incapacity;

- the person becoming a disqualified person (refer to paragraphs 67 to 70);
- resignation from the position of member representative or additional independent director;
- expiration of the tenure of the appointment; or
- the member representative or additional independent trustee or director ceasing to satisfy a condition of eligibility for appointment (eg. when a member representative retires, terminates employment, or ceases to be a member of the fund, or when an independent director ceases to be independent).

82. In addition, a member representative may be removed by following the same procedures by which they were appointed. For example, if a member representative is appointed on the basis of an election involving members then they can be removed by another election removing or replacing the member representative. This removal may be as a result of a petition by members.

83. Similarly, where a trustee structure includes an additional independent director, then rules must set out the procedure for their removal. Generally, these rules must ensure that the director can only be removed in the same manner by which they were appointed and the circumstances listed in paragraph 81.

Vacancies

Section 89(3) and Regulation 3.05(5)

84. When a vacancy arises in the membership of a policy committee or on the board of the corporate trustee, it is the trustee's responsibility to ensure equal representation is maintained. The fund is taken to have complied with the basic equal representation rule during a period of vacancy provided that:

- immediately before the vacancy occurred the fund complied with the relevant equal representation rule;
- the vacancy was filled within 90 days of it occurring; and
- immediately after the vacancy was filled the fund complied with the relevant equal representation rule.

85. Vacancies should be filled in accordance with established procedures. The nomination and appointment procedures should detail how vacancies are filled for member representatives. This may include:

- a new nomination and appointment process;

- appropriate fallback arrangements eg. appointing the next highest unsuccessful candidate from the last election; or
- at the time of nomination, member nominees declaring a specific substitute should they leave during the term of their representation.

86. It is not acceptable for representatives to appoint other representatives to fill a vacancy. In particular, it is not acceptable for employer representatives to nominate a member representative to fill a vacancy for a member representative.

Victimisation

Sections 10 and 68

87. A person must not intentionally or recklessly victimise a trustee or a responsible officer of a corporate trustee of an employer-sponsored fund. A responsible officer is a director, secretary or an executive officer of the body corporate.

88. Generally, victimisation is where a person subjects or threatens to subject another to a detriment on the grounds that:

- the trustee/responsible officer has, is or is proposing to fulfil an obligation imposed by their position as trustee/responsible officer; or
- the trustee/responsible officer has, is or is proposing to exercise trustee/responsible officer powers in a particular way.

89. Subjecting a person to detriment includes an employer-sponsor:

- dismissing an employee;
- injuring an employee in the course of his or her employment; and
- altering the position of the employee to the employee's prejudice.

Penalties

Sections 63 and 87

90. It is not an offence to contravene the equal representation requirements. However, a contravention of the equal representation requirements could lead to APRA issuing a notice to the trustee directing that no more employer contributions may be accepted by the fund.

91. It is an offence to intentionally or recklessly contravene the requirement:
- to establish procedures for appointing and removing member representatives;
 - to establish procedures for removal of additional independent directors; and
 - to ensure that the standards applicable to the operation of the fund are complied with at all times.

92. Significant penalties may apply to trustees who commit an offence. Directors of the trustee may incur personal liability if they are negligent in the exercise of their duties.

**AUSTRALIAN PRUDENTIAL
REGULATION AUTHORITY**

**SUPERANNUATION CIRCULAR
NO. III.A.5**

WHAT ARE PUBLIC OFFER ENTITIES?

SEPTEMBER 2000

DISCLAIMER AND COPYRIGHT NOTICE

1. The purpose of this Circular is to provide general guidance on issues arising out of the legislation under which the Australian Prudential Regulation Authority ("APRA") regulates particular superannuation entities. It is not exhaustive in its coverage of rights or obligations under any law.
2. This Circular is based on APRA's interpretation of the relevant legislation in respect of the superannuation entities for which it is the regulator and has no legal status or legal effect whatsoever. Any reference to self managed superannuation funds is for general assistance only. Trustees of self managed funds should seek appropriate guidance from the Australian Taxation Office in respect of the application of the legislation in respect of those funds.
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Objectives

1. The aim of this Circular is to explain which superannuation entities are public offer entities under the *Superannuation Industry (Supervision) Act 1993* (“SIS”).
2. This Circular replaces and updates Superannuation Circular III.A.5 entitled “Which Funds are Public Offer Funds?” which was released by the Australian Prudential Regulation Authority (APRA) in September 1998. It incorporates amendments of SIS made by the *Superannuation Legislation Amendment Act (No 3) 1999* (SLAA3) which came into effect on 8 October 1999.

Introduction

3. The concept of a public offer entity is established in sections 10 and 18 of SIS. Broadly speaking the concept covers those superannuation entities offering, or intending to offer, superannuation interests to the public on a commercial basis.
4. They are subject to prudential requirements over and above those applying to entities which are not public offer entities. This is due to the nature of public offer entities and the potential diversity of their membership. These additional requirements are designed to enhance internal control systems, and to inform and protect members.

What is a public offer entity?

Section 10

5. The following types of funds and trusts, as defined by section 10 of SIS, are public offer entities:
 - public offer superannuation funds;
 - approved deposit funds (ADFs), but not **excluded ADFs**; and
 - pooled superannuation trusts (PSTs).

Small APRA supervised superannuation funds (SAFs) are capable of being public offer superannuation funds, that is, superannuation funds with fewer than 5 members that are not self managed superannuation funds but which do meet the definition of a public offer superannuation fund in subsection 18(1) of SIS.

6. An excluded ADF is an ADF that has only one beneficiary and either:
- was established before 1 July 1994; or
 - was established on or after 1 July 1994 with an eligible termination payment of at least \$400,000.
7. ADFs (except for excluded ADFs) and PSTs are public offer entities by definition whereas a superannuation fund (including a SAF) may or may not be a public offer fund, depending on the circumstances. This Circular discusses the circumstances peculiar to public offer superannuation funds.

What is a public offer superannuation fund?

Section 18

8. A public offer superannuation fund is defined in section 18 of SIS. Basically, a superannuation fund (including a small APRA supervised fund) is a public offer superannuation fund if any of the following apply:
- the fund is a regulated superannuation fund which is not a standard employer-sponsored fund; or
 - the fund is a standard employer-sponsored fund that has at least one member who:
 - is not in a prescribed class (see paragraphs 22 to 31 below); and
 - is not a standard employer-sponsored member; or
 - the trustee of the fund has elected for the fund to become a public offer superannuation fund; or
 - APRA has declared the fund to be a public offer superannuation fund; and
 - the fund is not a self managed superannuation fund (SMSF); and
 - APRA has not declared the fund not to be a public offer superannuation fund.

A fund can be both an employer-sponsored fund and a public offer fund simultaneously. When this occurs, the fund must have an approved trustee regardless of the fact that the fund is a standard employer sponsored fund with equal representation on the trustee board.

9. In simple terms, public offer superannuation funds market themselves to the general community. They generally have at least one member who joined the fund by his or her own choosing.

10. The exceptions to this general rule are set out in paragraphs 37 to 43. They include superannuation funds which APRA declares not to be public offer superannuation funds (under subsection 18(7) of SIS) and small supervised APRA funds (SAFs) that do not meet the definition of a public offer superannuation fund under subsection 18(1), for example SAFs that have only standard employer-sponsored members.

Standard employer-sponsored funds

Section 16

11. The concepts of a standard employer-sponsored fund and a standard employer-sponsored member are relevant to the identification of public offer funds.

12. A “standard employer-sponsored fund” is defined in section 16 of SIS. It is a regulated superannuation fund that has at least one standard employer-sponsor. In broad terms, a standard employer-sponsor is an employer which contributes to the fund (or has ceased only temporarily to contribute) wholly or partly pursuant to an arrangement between the employer and the trustee of the fund.

13. An arrangement for these purposes may be formal (written or oral) or informal. An arrangement would occur where there has been some communication between the trustee and an employer which intentionally raises an expectation in both parties that the other will act in a particular way in relation to superannuation contributions. If the members and the employer are effectively the same people (eg. if the members are also the directors of the employer company) an arrangement between the members and the trustee is also an arrangement between the employer and the trustee.

14. Typically, “company funds” and “industry funds” are standard employer-sponsored funds. That is, membership is restricted to employees of a particular employer or associated employers who have entered into an arrangement with the trustee to contribute on behalf of their employees.

15. An arrangement where an employee automatically joins a fund of the employer’s choosing would normally involve a standard employer-sponsored fund.

16. Employer contributions pursuant to a salary sacrifice arrangement between the employer and the member will satisfy the definition of a standard employer-sponsored if they are made under an arrangement entered into between the employer and the trustee. This would not be the case if the contributions are made under a personal superannuation arrangement set up by the member and where no arrangement exists between employer and trustee.

17. The Government has foreshadowed changes, under proposed Member Choice legislation, to allow employees greater choice in nominating a fund for receipt of superannuation contributions made by their employer. A nominated fund will continue to be a standard employer-sponsored fund if contributions are made pursuant to an arrangement made between the employer and the trustee. The mere fact of a member being able to choose a fund to which contributions must be paid does not of itself mean the fund will not be a standard employer-sponsored fund.

Standard employer-sponsored members

Subsection 16(5), regulation 3.01

18. A “standard employer-sponsored member” is a member in respect of whom an employer contributes wholly or partly under an arrangement between the trustee of the fund and the employer.

19. Where an employer has made arrangements with the trustees of a number of superannuation funds and offers employees a choice of fund, those employees will still be standard employer-sponsored members of the superannuation funds they choose. The deciding factor is the arrangement between the employer and the trustee of the particular fund.

20. Once an employee has become a standard employer-sponsored member of a superannuation fund this status will not alter, provided the employee (even despite changing employment) is a continuous member of the fund. A continuous member of a fund is one who does not leave the fund (for example by withdrawal, transfer or rollover). A member of a prescribed class (as explained below) will be a continuous member of the fund.

21. However, where a standard employer-sponsored fund has at least one member who is **not** a standard employer-sponsored member and who is not in a prescribed class, then the fund will, unless it falls within the following exceptions, be a public offer superannuation fund.

Prescribed classes – former standard employer-sponsored members and spouses

Regulation 3.01

22. The definition of a “public offer superannuation fund” provides for an otherwise standard employer-sponsored fund to not be treated as a public offer fund when it contains some members who, while not strictly standard employer-sponsored members, nevertheless meet the definition of a “prescribed class”.

23. “Prescribed class” is defined in regulation 3.01 of SIS. A member belongs to a prescribed class if:

- he or she was a former standard employer-sponsored member of the fund who, since ceasing to be standard employer-sponsored member of the fund, has remained in the fund at all times; or
- he or she is a spouse or former spouse of an existing or former standard employer-sponsored member of the relevant fund on whose behalf the fund has accepted eligible spouse contributions (see paragraphs 28-30); or
- he or she is a spouse or former spouse of an existing or former standard employer-sponsored member of another fund which has the same standard employer-sponsor as the relevant fund that accepted the eligible spouse contributions.

24. Without regulation 3.01, the existence or change in circumstances of such members in a fund might cause a standard employer-sponsored fund to be a public offer superannuation fund.

25. Accordingly, a fund may accept contributions on behalf of a standard employer-sponsored member:

- from an employer who is not a standard-employer sponsor;
- from the member;
- or as eligible spouse contributions;

without causing the fund to become a public offer superannuation fund.

26. Once a person has legitimately become a standard employer-sponsored member, they are entitled to remain so regardless of any subsequent changes in their employer-sponsorship. The source of any subsequent contributions will never be contentious in respect of employer-sponsorship, even if there is no standard employer-sponsored element in the superannuation contribution. This is, of course, subject to the condition that membership of the fund remains

continuous from the time the person ceased to be a standard employer-sponsored member.

27. This provides flexibility for members upon change of employment. Where permitted by the fund's rules, a member may consolidate superannuation benefits with one fund or leave benefits in an existing standard employer-sponsored fund upon termination of employment with the employer-sponsor.

28. A fund may also accept eligible spouse contributions without becoming a public offer superannuation fund if, at the time the contributions were accepted, the contributing spouse was an employer-sponsored member of that fund, or of a fund with the same employer sponsor. Employer sponsored members also include former employer sponsored members who have retained membership of their funds. Refer to Superannuation Circular No. I.A.1 entitled "Contribution and Benefit Accrual Standards for Regulated Superannuation Funds" issued September 2000. Reference may also be made to the Australian Taxation Office (telephone 13 10 20 or www.ato.gov.au) for information on eligible spouse contributions.

29. Where a spouse member is admitted to a standard employer-sponsored fund on the basis of eligible spouse contributions, a connection must exist between the contributing spouse and the fund otherwise the fund will be treated as a public offer superannuation fund.

30. A fund which has admitted a spouse member on the basis of eligible spouse contributions does not become a public offer superannuation fund by virtue only of:

- accepting contributions directly from the spouse member; or
- from a contributing spouse who has ceased to be a member of the fund; or
- the continued presence of a spouse member after the departure from the fund of the original (standard employer-sponsored) member.

31. A member of a prescribed class will retain that status while their fund membership is continuous, regardless of changes to the circumstances of their admittance eg. changing employment, ceasing to be a spouse.

Election to be a public offer superannuation fund

Subsections 18(2) and 18(5)

32. Subsection 18(2) of SIS provides that the trustee of a standard employer-sponsored fund may elect in writing to become a public offer superannuation

fund. For example, a standard employer-sponsored fund which does not wish to comply with the trustee equal representation rules may elect to become a public offer superannuation fund. Of course, the additional legislative requirements for public offer superannuation funds must be met.

33. Subsection 18(5) provides that the election to be a public offer fund is irrevocable. The trustees of superannuation funds wishing to elect to become a public offer superannuation fund may obtain the election form from APRA.

Declaration by APRA that a fund is a public offer superannuation fund

Subsections 18(6) and 18(10)

34. APRA may declare in writing under subsection 18(6) of SIS that a superannuation fund is a public offer superannuation fund. This provides a means of overcoming what might otherwise be an inappropriate imposition of standard employer-sponsor requirements, eg. where trustee equal representation is not necessary due to the particular circumstances of the fund. Subsection 18(10) also provides APRA with the power to revoke such a declaration if it is no longer appropriate.

35. The power can only be used to declare individual funds (as opposed to classes of funds) to be public offer superannuation funds.

36. Equal representation requirements are explained in Superannuation Circulars III.A.2 – “Equal Representation for Non- Public Offer Funds”, and III.A.3 – “Equal Representation for Public Offer Superannuation Funds”.

Declaration by APRA that a fund is not a public offer superannuation fund

Subsections 18(7), 18(10) and Regulation 4.08A

37. Under the SIS definition of a public offer superannuation fund, some funds which are not, in practical terms, making offers to the community at large, may nonetheless meet the definition.

38. To accommodate these funds APRA has the power under subsection 18(7) of SIS to declare a fund not to be a public offer superannuation fund, even if it may have previously elected to be one. Funds declared not to be public offer funds must either establish arrangements to ensure compliance with the trustee equal representation requirements or establish an arrangement for the management and control of the fund that has been agreed to by a majority of the fund members and is approved by APRA. Members or potential members must

not be disadvantaged by the change. SIS also provides APRA with the power to revoke such a declaration if it is no longer appropriate.

39. Any decision to declare a fund not to be a public offer superannuation fund will be made in relation to the specific circumstances of the fund concerned. Some types of funds where it may be considered appropriate to give a declaration include:

- Funds that have previously elected to be public offer superannuation funds under subsection 18(2) and now wish to meet trustee equal representation requirements.
- Funds which only have immediate family as members (ie. mother, father, children and grandchildren). This is provided that the trustee does not receive remuneration, trustee equal representation requirements can be achieved and there are a limited number of members.
- Funds operated by a professional practice (eg. that are open to partners of a legal firm) where membership can be likened to an employer-sponsored fund in that membership is a condition of becoming a partner in the firm.

40. The following are some general factors which would be taken into consideration when considering whether a fund should be declared not to be a public offer superannuation fund. These include, but are not limited to:

- the nature of the fund (ie. a small APRA supervised fund etc);
- the number of members in the fund;
- the nature and level of remuneration, if any, received by directors of the trustee company for a non-family fund (remuneration for trustee duties would be viewed as a characteristic of an approved trustee of public offer entities);
- the type of members (ie. standard employer-sponsored members, self employed members);
- the likelihood of those features which make the fund a public offer superannuation fund continuing or increasing in the future (eg. is the fund closed);
- the action the trustee has taken, or proposes to take, to negate the circumstances which give rise to the fund being regarded as a public offer

superannuation fund (ie. transferring members out or steps to ensure appropriate trustee representation);

- special circumstances which make it inappropriate to treat the fund as a public offer superannuation fund for the purposes of the SIS Act.

41. These are general factors only and are provided for guidance purposes only.

42. Subsection 18(7A) provides APRA with the power to impose conditions on subsection 18(7) declarations. APRA normally imposes conditions such as:

- the membership of the fund remain closed to new members; or
- the membership of the fund is limited to members within a specified narrow range such as family members and their spouses or partners;
- the trustee receive no remuneration directly or indirectly for performing trustee duties for the fund;
- the arrangement for member representation approved by APRA under regulation 4.08A(2)(e) of SIS must apply.

43. In making declarations in relation to certain funds APRA may also require trustees to comply with the member representation requirements under Regulation 4.08A. Additional conditions are normally imposed (or can be varied) under this regulation for these funds such as the following examples:

- all members of the fund are to become trustees of the fund and remain trustees of the fund for the duration of their membership; and
- any new members become trustees upon joining the fund.

**AUSTRALIAN PRUDENTIAL REGULATION
AUTHORITY**

SUPERANNUATION CIRCULAR NO. III.E.1

REGULATION OF SMALL APRA FUNDS

DECEMBER 2000

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Objective

This circular is directed towards trustees and members of regulated superannuation funds that:

- **have fewer than 5 members, and**
- **are regulated by APRA.**

Trustees of self managed superannuation funds regulated by the Australian Taxation Office should telephone the ATO on 13 10 20 or visit the ATO internet site at www.ato.gov.au for information relevant to their funds.

1. The *Superannuation Industry (Supervision) Act 1993* (SIS Act) was amended by the *Superannuation Legislation Amendment Act (No.3) 1999* (SLAA 3), with effect from 8 October 1999. The effect of the amendments was to transfer the regulation of self managed superannuation funds (SMSFs) to the Australian Taxation Office (ATO).
2. A feature of this legislation is that small superannuation funds may switch from one regulator to the other according to changes in a fund's circumstances. For example, if a fund commences or ceases to be a SMSF it will switch from regulation by, respectively, APRA or the ATO. For this reason, a detailed list of the definitional requirements for self managed superannuation funds is set out in the Attachment to this Circular.
3. The aim of this circular is to provide guidance on the supervisory and administrative arrangements that flowed from the SLAA 3 amendments. It places emphasis on the arrangements, both legislative and administrative, that apply from 1 July 2000 in respect of superannuation funds with fewer than 5 members that are regulated by the Australian Prudential Regulation Authority (APRA).
4. This circular supersedes Superannuation Circular III.E.1 entitled 'Changes to the regulation of superannuation funds with fewer than five members' which was released by APRA in November 1999.
5. Other superannuation circulars on specific subjects, issued by the Australian Prudential Regulation Authority (APRA) and previously by the Insurance & Superannuation Commission (ISC), remain relevant to trustees of funds that have fewer than five members and are regulated by APRA.

Background

6. Summary of Legislative and Administrative Changes

8 October 1999	<i>Superannuation Legislation Amendment Act (No 3) 1999 (SLAA3) became law.</i>
31 March 2000	End of transitional period allowed for excluded funds to restructure to meet the requirements of SMSF or small APRA fund (SAF).
31 March 2000	Mail out to fund administrators of all funds with fewer than 5 members (200,000 funds) asking whether the fund is an SMSF or a SAF.
Up to 30 June 2000	Fund responses received and telephone callout centre operated by APRA to follow up with non-responders.
End September 2000	The records of over 181,000 funds identified by their trustees as SMSFs were transferred to the ATO at the end of September 2000.

Other significant changes

SIS Sections 6, 121A, Regulation 1.04A

- Funds with fewer than 5 members that did not meet the self management test by 1 April 2000 continue to be regulated by APRA and are required to have appointed a trustee approved under Part 2 of SIS (see paragraph 9 below) to protect the interests of any arm's length members. These funds are not defined in the legislation but are known administratively as small APRA funds (SAFs).
- **Since 1 April 2000 APRA is empowered to suspend or remove a trustee of such a fund if the trustee is not an approved trustee, and replace it with one that is.**
- **From 1 July 2000 it is a strict liability offence for a person or company to be a trustee of such a fund if the person or company is not an approved trustee. If convicted, a person who contravenes this provision ultimately faces the possibility of imprisonment for up to 6 months.**
- Trustees of newly established APRA regulated superannuation funds are advised that the function of receiving fund elections under s.19 of SIS has transferred to the ATO. Now, all new superannuation entities must register with the ATO. Information on APRA regulated entities is then passed by the ATO to APRA. For further information, see APRA Circular III.A.1 "Election to become a regulated superannuation fund, for funds regulated by APRA", issued in September 2000.

- ASIC is the regulator in regard to disclosure and complaints handling issues for all funds other than SMSFs. Trustees of SMSFs are not subject to the requirement under section 101 of SIS to establish arrangements for dealing with enquiries or complaints, nor are they subject to specific disclosure requirements set out in Part 2 of the SIS Regulations.

General Administration of SIS Legislation	
APRA	Fund and trustee regulation of all SIS entities <i>except SMSFs</i>
ATO	Registration of <i>all</i> SIS entities and s.19 SIS elections for <i>all</i> super funds Fund and trustee regulation of <i>all</i> SMSFs
ASIC	Specific disclosure and complaints handling provisions - all SIS superannuation funds <i>except SMSFs</i>

APRA/ATO Co-ordination of the Transfer Process

7. The ATO and APRA have entered into a Memorandum of Understanding (MoU) in respect of superannuation activities. This sets out the framework for the two agencies to work together to achieve consistent application of the SIS legislation and efficient administration of funds that switch between regulators.

Small APRA Funds (SAFs)

Must have an approved trustee

SIS Section 121A

8. Funds with fewer than 5 members that do not meet the definition of a SMSF, as set out in the Attachment to this Circular, remain subject to prudential regulation by APRA and must have appointed an approved trustee. As noted in paragraph 6 above, these funds are not defined in the legislation but are known administratively as small APRA funds (SAFs).

Approved trustees

SIS Part 2

9. An approved trustee is an independent trustee, approved by APRA under Part 2 of SIS, that meets relevant solvency, capital adequacy and operational capacity requirements. An approved trustee, as an independent trustee, provides a greater degree of protection to arm's length members than was available under the previous excluded fund arrangements.
10. There are approximately 70 approved trustees that are automatically able to become trustees of funds with fewer than 5 members because they meet certain capital adequacy requirements. The APRA website at www.apra.gov.au has a list of the names of all approved trustees and indicates which of them can become trustees of SAFs.
11. The prohibition on remuneration of trustees that applies to SMSFs does not apply to approved trustees.

Features of SAFs

12. Small APRA Funds (SAFs):
 - may retain and/or accept arm's length members such as employees of the employer-sponsor of the fund;
 - may continue to utilise member directed investment (within parameters set by the trustee) under section 58 of SIS;
 - may continue to acquire business real property at market value from related parties under section 66 of SIS;
 - must ensure their members have access to an enquiries and complaints mechanism under section 101 of SIS, thus ensuring access to the Superannuation Complaints Tribunal;
 - may increase membership to more than 4 without being required to restructure, although certain consequences would follow:
 - the fund would cease to be a SAF but would remain regulated by APRA;
 - certain exceptions to investment rules that apply to funds with fewer than 5 members would no longer be available; and
 - if such a fund does restructure, alternative trustee requirements (equal representation) apply to funds with 5 or more members that no longer have an approved trustee, see paragraphs 24 and 25 below;
 - may now only pay amounts to an employer-sponsor of the fund in accordance with requirements of section 117 of SIS;

- will continue to have the protection of the culpability test which is designed to protect arm's length members who are not involved in trustee decision making (section 42 of SIS); and
- may require some amendment to the trust deed, for example to the provisions relating to appointment and removal of the trustee.

APRA's approach to regulation of SAFs

13. APRA places considerable reliance on the solvency, capital adequacy and operational capacity requirements that have to be met by each approved trustee to ensure the prudential management of SAFs. As members of SAFs will by definition be 'arms length' from the trustee, increased member reporting requirements apply to the trustee.

Is a SAF a public offer fund?

SIS Section 18

14. Whether or not a SAF is a public offer fund is subject to the same tests as other APRA regulated funds. Thus whilst approved trustees are required for funds to operate as public offer funds, not all funds that have an approved trustee are necessarily public offer funds.
15. Section 18 of SIS sets out the circumstances in which a superannuation fund is a public offer fund for the purposes of the Act. (Section 18A, which previously outlined the conditions under which an excluded fund was not a public offer fund, has been repealed.) A SAF will be a public offer fund, in circumstances where:
- the fund is a standard employer-sponsored fund but has at least one member who is not a standard employer-sponsored member or a member of a prescribed class; or
 - the fund is not a standard employer-sponsored fund.
16. Accordingly, approved trustees of SAFs would need to meet the prospective disclosure requirements for public offer funds where membership is offered to additional non standard employer-sponsored persons.

Financial statements of SAFs

SIS Section 112, Regulation 1.04(2), 8.01A

17. SAFs are no longer exempted from the requirement to prepare a statement of cash flows under Regulation 8.01A, unless they are defined benefit funds or all benefits are determined by reference to a life assurance policy. SAFs are reporting entities for the purpose of preparation of financial statements and audit requirements. The auditor of a SAF must be a registered company auditor and a member of a specified professional organisation, or be otherwise approved by APRA.

Annual return lodgement and levy payments requirements for SAFs

SIS Section 36, 113, Regulation 8.03

APRA no longer accepts annual returns in respect of funds that are identified as self managed superannuation funds. Current returns and outstanding prior year returns for funds that are now self managed superannuation funds must be lodged with the ATO. For further information, trustees of SMSFs should contact the ATO on 13 10 20.

18. SAFs, along with all other APRA regulated superannuation entities must lodge their annual returns within 4 months of the end of the year of income of the entity. The due date for lodgement of APRA annual returns for funds whose year of income ends on 30 June 2001 is 31 October 2001.
19. The rate of the levy payable in the 2000-2001 year has been set at 0.02% of fund asset value at 30 June 2000, with a minimum amount of \$300 and a maximum of \$46,000 (refer section 7 of the *Superannuation Supervisory Levy Imposition Act 1998* and Press Release FSR 026 of 9 June 2000).
20. The technical arrangements for levy payments for all APRA regulated funds changed on 1 July 1998 with the passage of the *Financial Institutions Supervisory Levies Collection Act 1998*. However, APRA will continue to calculate the levy when the return is lodged and then issue an invoice specifying the amount of levy payable by the fund. This amount is payable within 30 days of the date of the invoice. Amounts that remain unpaid after that date attract a late payment penalty. The fund will be advised of the late payment penalty owing and action will be taken to collect the total levy and late payment penalty amount outstanding.

See paragraphs 34 to 40 below for further information on lodgement of annual returns and payment of levies by funds that 'switch' regulators.

Funds with fewer than 5 members that meet neither SMSF nor SAF requirements

SIS Section 121A, 133

21. Trustees of funds with fewer than 5 members that neither met the SMSF definition nor are an approved trustee at 1 July 2000 and after are in breach of SIS.
22. **The trustees of the small number of funds with fewer than 5 members that have not advised APRA of the status of their fund are at ongoing risk of APRA seeking Ministerial approval to suspend or remove the trustee and appoint an acting approved trustee with a view to restructuring the fund or, where necessary, winding up the fund.**

23. In respect of such funds, APRA follows a process of natural justice that includes a "show cause" letter being issued to the trustee of the fund.

As at the date of issue of this Circular, APRA continues to accept responses from trustees advising the status of their funds. Trustees of funds that, for whatever reason, have not yet advised their status are urged to contact APRA immediately. For initial contact, the APRA telephone helpline number 13 10 60 may be used.

Where fund membership increases or decreases

Small APRA funds that grow

24. Where membership of a fund that has been a SAF increases to 5 or more, the fund must determine if it is a public offer fund (see paragraphs 14 to 16 above). If it is a public offer fund it must retain its approved trustee or appoint another approved trustee. If it is not a public offer fund then it must either retain its approved trustee or establish an alternative trustee structure that meets the equal representation requirements set out in Part 9 of SIS.
25. For further information on trustee arrangements for funds with 5 or more members, see Superannuation Circular No III.A.2 "Trustee Arrangements - Superannuation Funds Other Than Public Offer Funds" and Circular III.A.3 "Trustee Arrangements - Public Offer Superannuation Funds", each revised in September 2000 and available on the APRA website.

'Grace period' for SMSFs that no longer meet the definition

SIS Section 17A, 10(3)

26. Provision for time to restructure has been included in SIS, so that in most cases where a fund had been a SMSF, but no longer meets the definition, a 6 month 'grace period' applies. This would be the case, for example, if a member is no longer in a position to act as a trustee and none of the provisions for appointment of a legal personal representative in the member's place are applicable. The breathing space allows membership of the fund to be reorganised or an approved trustee to be appointed without legislative penalty.
27. The 'grace period' does not apply in cases where membership of a fund that had previously been a SMSF rises to 5 or more. Refer to the relevant sections 17A(4) and (5) of SIS set out in the Attachment.
28. Membership of SMSFs includes fund pensioners, if any, and any members who have retained a deferred benefit in the fund. Where a fund ceases to be a SMSF by virtue of admission of new members so that membership increases to more than 4, the fund immediately switches to regulation by APRA. It must then appoint an approved trustee or meet the equal representation requirements for funds with 5 to 49 members set out in Part 9 of SIS.

Large funds winding up are not caught

29. Section 121A of SIS currently prohibits a person from being a trustee of a fund with fewer than 5 members (other than a SMSF) unless the person is an approved trustee. It is recognised that, in circumstances where a larger employer-sponsored fund is being wound up, at some point the number of remaining members will reduce to 4 or fewer and the fund would inadvertently be affected by the requirements for funds with fewer than 5 members.
30. Proposals to remedy this effect are in train. In the meantime, APRA does not intend to take action in such circumstances to remove a trustee solely on the basis of the unintended effect of the legislation.

Switching Regulators

SIS Division 3 of Part 24B, Regulation 11.07A

31. Where an existing fund commences to be a SMSF, or ceases to be one (without winding up), it 'switches' regulators.

Switching funds must notify ATO

32. When a fund switches, irrespective of the direction of the switch, the trustee must notify the **Commissioner of Taxation** of the change.
33. The trustee must advise in writing, within 21 days of becoming aware of the change:
- the name of the fund, its Australian Business Number (if it has one) and, if not, its Superannuation Fund Number (if it has one);
 - contact details;
 - the date of the change;
 - if the fund has become a SMSF, details of the individual trustees or the corporate trustee; and
 - if the fund has become an APRA regulated fund, the details of the trustee.

For information on giving 'switching' advice to the Commissioner of Taxation, a trustee should telephone the ATO on 131020.

Annual returns and levies for switching funds

34. A switching fund is required to lodge an annual return with both regulators in respect of the switching year. It is also liable to pay each regulator's respective levy.
35. For practical purposes however, one audit undertaken for the whole year would suffice to meet the annual audit certificate requirements of both regulators.

36. In addition, a fund that has outstanding prior year returns when it switches regulators is required to lodge those returns with the new regulator. In such a case, the legal liability to lodge those returns by the due date rested with the trustee who was in control of the fund at the relevant time. The new trustee faces no legal risk in relation to the prior years' returns so long as it moves with all reasonable speed to have them prepared and lodged.
37. In summary, in respect of the year of the switch, an annual return is to be lodged with each regulator. The annual return for the year immediately preceding the switch is to be lodged with whichever was the regulator during that year. However, if that return is not lodged by its due date or prior to the switch, whichever is the later, lodgement of that and any other outstanding prior year returns is with the new regulator under section 252G of SIS. A penalty may apply in respect of late lodgement of returns relating to years of income up to and including the year ending 30 June 2000.
38. Where a fund switches **to** APRA, the **type** of return that the trustee will be liable to lodge, for any outstanding prior year returns now due to APRA as well as for the switching year, will be the type of return appropriate to the fund's status with APRA (for example, a SAF return). In addition, for the switching year, an ATO return must also be lodged.
39. Where a fund switches **from** APRA, the trustee will be liable to lodge (for the switching year) an APRA return in a form approved for this particular situation.
40. APRA is continuing to liaise with the ATO to ensure our approach to annual returns for switching funds is consistent. Further information will be provided with the annual return guides and by telephoning APRA on 13 10 60 or the ATO on 13 10 20.

'Switcher' or late responder?

41. While the transitional provisions have expired, there will remain for the time being a need to distinguish between a switching fund and a fund whose status is clarified late. It is not switching if, for example, a fund was incorrectly notified to APRA as a SAF but the trustee later confirmed that it actually had met the SMSF requirements prior to 30 June 2000. Similarly, it is not switching if a fund was incorrectly notified as a SMSF but the trustee later confirmed that there had been more than 4 members at all times and had not been required to appoint an approved trustee.

ATTACHMENT

DEFINITIONAL REQUIREMENTS FOR A SELF MANAGED SUPERANNUATION FUND***SIS s.17A(1) Basic conditions—funds other than single member funds***

Subject to this section, a superannuation fund, other than a fund with only one member, is a *self managed superannuation fund* if and only if it satisfies the following conditions:

- (a) it has fewer than 5 members;
- (b) if the trustees of the fund are individuals—each individual trustee of the fund is a member of the fund;
- (c) if the trustee of the fund is a body corporate—each director of the body corporate is a member of the fund;
- (d) each member of the fund:
 - (i) is a trustee of the fund; or
 - (ii) if the trustee of the fund is a body corporate—is a director of the body corporate;
- (e) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives;
- (f) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund.

SIS s.17A(2) Basic conditions—single member funds

Subject to this section, a superannuation fund with only one member is a *self managed superannuation fund* if and only if:

- (a) if the trustee of the fund is a body corporate:
 - (i) the member is the sole director of the body corporate; or
 - (ii) the member is one of only 2 directors of the body corporate, and the member and the other director are relatives; or
 - (iii) the member is one of only 2 directors of the body corporate, and the member is not an employee of the other director; and
- (b) if the trustees of the fund are individuals:
 - (i) the member is one of only 2 trustees, of whom one is the member and the other is a relative of the member; or
 - (ii) the member is one of only 2 trustees, and the member is not an employee of the other trustee; and
- (a) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund.

SIS s.17A(3) Certain other persons may be trustees

A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

- (a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:
 - (i) beginning when the member of the fund died; and
 - (ii) ending when death benefits commence to be payable in respect of the member of the fund; or
- (b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:
 - (i) the member of the fund is under a legal disability; or
 - (ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or
- (c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative—the parent or guardian of the member is a trustee of the fund in place of the member; or
- (d) an appointment under section 134 of an acting trustee of the fund is in force.

SIS s.17A(4) Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund ('period of grace')

Subject to subsection (5), if a superannuation fund that is a self managed superannuation fund would, apart from this subsection, cease to be a self managed superannuation fund, it does not so cease until the earlier of the following times:

- (a) the time an approved trustee of the fund is appointed;
- (b) 6 months after it would so cease to be a self managed superannuation fund.

SIS s.17A(5) Subsection (4) does not apply if admission of new members

Subsection (4) does not apply if the reason, or one of the reasons, why the superannuation fund would cease to be a self managed superannuation fund was the admission of one or more new members to the fund.

SIS s.17A(6) Extended meaning of employee in certain circumstances

For the purposes of this section, a member of a fund, who is an employee of an employer-sponsor of the fund, is also taken to be an employee of another person (the *other person*), if the employer-sponsor is:

- (a) a relative of the other person; or
- (b) either of the following:

- (i) a body corporate of which the other person, or a relative of the other person, is a director;
- (ii) a body corporate related to that body corporate; or
- (c) the trustee of a trust of which the other person, or a relative of the other person, is a beneficiary; or
- (d) a partnership, where:
 - (i) the other person, or a relative of the other person, is a partner in the partnership; or
 - (ii) the other person, or a relative of the other person, is a director of a body corporate that is a partner in the partnership; or
 - (iii) the other person, or a relative of the other person, is a beneficiary of a trust, if the trustee of the trust is a partner in the partnership.

Note 1: An effect of this subsection is that a fund will not be a self-managed superannuation fund if a member is employed by an employer-sponsor of the fund, and another member (who is not a relative) has a specified interest in that employer-sponsor: see paragraph (1)(e). An example of this would be where the employer-sponsor is a company of which another member is a director.

Note 2: Another effect is that a fund will not be a self-managed superannuation fund if its single member is employed by an employer-sponsor of the fund in which the other trustee of the fund (who is not a relative) has a specified interest: see subsection (2).

SIS s.17A(7) Employee

Subsection (6) does not limit the meaning of the term *employee*.

SIS s.17A(8) Regulations

For the purposes of this section:

- (a) a member of a fund is taken to be an employee of a person belonging to a class specified in the regulations for the purposes of this paragraph; and
- (b) despite subsections (6) and (7) and section 15A, a member of a fund is not taken to be an employee of a person belonging to a class specified in the regulations for the purposes of this paragraph.

SIS s.17A(9) Meaning of relative

In this section:

relative, in relation to an individual, means:

- (a) a parent, child, grandparent, grandchild, sibling, aunt, uncle, great-aunt, great-uncle, niece, nephew, first cousin or second cousin of the individual or of his or her spouse or former spouse; or

- (b) another individual having such a relationship to the individual or to his or her spouse or former spouse because of adoption or remarriage; or
- (c) the spouse or former spouse of the individual, or of an individual referred to in paragraph (a) or (b).

SIS s.17A(10) Disqualified persons

For the avoidance of doubt, subsection (3) does not permit a person, in the capacity of legal personal representative of a disqualified person (within the meaning of section 120), to be a trustee of a self managed superannuation fund.

**REGULATION 1.04AA SELF MANAGED SUPERANNUATION FUNDS
PERSONS NOT TAKEN TO BE EMPLOYEES (ACT S 17A(8))**

1.04AA(1) Specified class of persons

For the purposes of paragraph 17A(8)(b) of the Act, a class of persons is a specified class if it comprises persons each of whom is, in relation to a member of a superannuation fund, an exempt person mentioned in subregulation (2).

1.04AA(2) Exempt persons

A person is an exempt person in relation to a member of a superannuation fund if:

- (a) the person is an employer-sponsor of the fund; and
- (b) the member is a director of the employer-sponsor.

(Note from Explanatory Statement to Statutory Rules No 356 of 1999: The effect of this subregulation is to allow the directors of an employer-sponsor to be members of the same self managed superannuation fund.)

1.04AA(3) Further criteria for "specified class of person"

For the purposes of paragraph 17A(8)(b) of the Act, a class of persons is a specified class if it comprises persons each of whom is a member of a superannuation fund in relation to which the following circumstances exist:

- (a) the person is the employer, but not a relative, of a member of the fund (the employee);
- (b) another member is the employer, and a relative, of that employee.

(Note from Explanatory Statement to Statutory Rules No 119 of 2000: the effect of this subregulation is that a member of a self managed fund who is both an employee and a relative of another member of the fund is not taken to be an employee of any other member of the fund.)



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**SUPERVISION NOTE 02/99
JUNE 2000**

HANDLING COMPLAINTS ABOUT REGULATED INSTITUTIONS

REPLACEMENT

This supervision note replaces Supervision Note 02/99 issued in November 1999.

RELATED SUPERVISION NOTES

Supervision Note 01/99 - Selection of Replacement Trustees.

BACKGROUND

Complaints of regulated institutions are an important source of information for APRA in the discharge of its obligations. All complaints must be treated seriously.

Relationship Managers have primary responsibility, within APRA, for handling complaints about the institutions they are responsible for. Relationship Managers should be alert to the fact that devolution of the complaints handling processes could lead to some inconsistency in approach and should consult with their General Manager if their proposed response raises any policy issues.

In the first instance complainants should normally be encouraged to contact the particular institution to canvass their complaint. However, if the complaint relates to the individual or public officers to whom the complaint would normally be addressed, or could create a conflict of interest for the institution, referring complainants back to the institution is likely to be inappropriate. In those cases, or in cases where prudential issues or potential prudential issues arise, or where reference back to the regulated institution has not resolved the matter, the procedures outlined in this note should be applied.

COMMENT

Complaints to which this note applies are:

- any matters within APRA's jurisdiction pertaining to the prudential aspects of a regulated institution;
- any correspondence received by APRA about the conduct of those involved in the management or administration of a regulated institution or fund;
- any regulated institution or fund specific matter referred to APRA by ASIC, the SCT, any financial sector supervisory agency or any government department; and
- oral complaints where initial inquiries confirm that the complaint raises issues of substance.

The processes outlined below should not, generally, extend to a complaint received via an inquiry line or telephone where the source is unwilling to put the complaint in writing. Unwritten complaints should not be ignored but inquiries should be conducted to verify that they raise matters of substance.

It is not possible to be more specific about the types of complaints and how they are handled. This decision is left to the Relationship Manager.

Once the Relationship Manager determines that the complaint should be followed up formally (ie the complaint becomes a "formal" complaint) he or should also consider if the complaint should be recorded on the 'intell' part of SIS (or other similar database). This will normally be done where there appears to be a significant chance of malfeasance by an individual or a company/ trustee rather than where, for example, the complaint is being followed up because of potential SIS compliance issues. The intell entry is recorded against the name of the entity and the names of parties associated with the complaint. After investigation of the complaint, 'intell' is updated and if the complaint is not substantiated the entry is deleted from the database. Recording of details in SIS applies to Superannuation entities only.

For formal complaints where there appears to be a significant chance of malfeasance by an individual or a company/ trustee, a complaint specific file should be created. At a future date this may prove useful in locating any issues associated with that complaint.

If the complaint is an oral one then a file note, detailing the circumstances, must be placed on the normal supervision file. The TRIM record should include the name of the entity concerned and the names of persons associated with it. The creation of a TRIM file for a relevant complaint relates to all regulated institutions.

The intell module of SIS and TRIM must be searched as part of the process of proposing a replacement trustee (refer to SN 02/99).

OTHER COMPLAINTS

While a particular complaint may raise prudential concerns that are of interest to APRA, the actual handling or response to the complaint may be outside APRA's jurisdiction and more appropriately handled by other bodies. The following list is not exhaustive but is intended to provide Relationship Manager's with insight into common complaints and the relevant complaint scheme.

- Complaints about fair trading, competition and consumer protection such as anti-competitive and unfair market practices, mergers or acquisitions of companies, product safety/liability, and third party access to facilities of national significance should be referred to the Australian Competition and Consumer Commission (ACCC). <http://www.accc.gov.au>
- Complaints about consumer protection in the financial services sector and compliance with the Corporations Law should be referred to the Australian Securities and Investment Commission (ASIC). <http://www.asic.gov.au>
- Complaints about banks, banking practices or bank officers should be referred to the Banking Ombudsman. <http://www.abio.org.au>
- Complaints about life insurance should be referred to the Life Insurance Complaints Board (telephone 1800 335 405).
- Complaints about the following issues should be referred to the Superannuation Complaints Tribunal: <http://www.sct.gov.au>
 - The decisions and conduct of Trustees of most superannuation and approved deposit funds including the conduct of people acting on behalf of the Trustee and the decisions of insurers in relation to insurance benefits provided under superannuation funds;

- The decisions and conduct of life companies as providers of immediate and deferred annuities including the conduct and decisions of people acting on behalf of the life company;
- The decisions and conduct of retirement savings account (RSA) providers including the conduct and decisions of people acting on behalf of the RSA provider and decisions of insurers in relation to insurance benefits where the premiums are paid from the RSA.

If Relationship Manager's are unsure of the relevant complaints scheme responsible for handling a particular complaint, the Financial Complaints Referral Centre within ASIC refers inquiries from people with a complaint about banking, life and general insurance, financial advice, investments, and superannuation to the appropriate complaints scheme (telephone 1300 780 885).

FURTHER INFORMATION

Mark Godfrey - Senior Manager, Quality & Consistency
Specialised Institutions Division
Tel: (02) 9210 3392

Greg Brunner – General Manager, Technical Advice & Support
Diversified Institutions Division
Tel: (02) 9210 3148

8. Redress for victims

- (1) *A number of options have been put to the Committee to provide redress to victims, including invoking S229 of the SIS legislation, accessing CNA's indemnity insurance and revising the current superannuation levy arrangements to create an insurance cover scheme. Do you have any comments on these?*

Oak Breeze Pty Ltd as acting trustee of a number of superannuation funds has lodged applications with the Minister under Section 229 of the Superannuation Industry Supervision Act 1993. Section 229 is applicable only if the losses incurred by the funds are due to "theft or fraud".

APRA has appointed (at its expense) an Inspector under the SIS Act to the small APRA funds that have an exposure to the Enhanced Cash Management Trust. The Inspector's role is to investigate and report to APRA on, among other things, whether or not the losses suffered by these funds were attributable to "theft or fraud".

Claims on CNA's professional indemnity insurance will be assessed by the acting trustees of the various funds. This is further complicated by the fact that HIH Insurance was CNA's professional indemnity insurer up to 20 April 2000. A policy with Liberty Insurance was put in place on 1 July 2000 but we understand that there were exclusions in the policy. Legal representatives for the acting trustees are investigating this area.

Part 23 of the SIS Act covers the Provision of Financial Assistance to Certain Funds.

In particular SIS Section 235 indicates that the Minister has two options where the payment of assistance can be made:

1. A Special Reserve; or
2. Consolidated Revenue.

Where the Minister determines that assistance will be paid from a reserve, then those monies are raised via an imposition of an additional levy on funds (on top of the current annual levy paid) up to an amount of 0.05% of total assets for each fund.

While SIS Section 229 has not to date been activated it has, through the ability to levy the industry, the usual feature of an insurance scheme. Where amounts are too small to warrant the collection costs of imposing a levy on the superannuation industry the option is available of payment being made from Consolidated revenue. The extension of such a compensation scheme to cover losses that were more broadly defined than "fraud or theft" would be a major change in Government policy. For example there is no such insurance scheme for deposit-taking institutions.

- (2) *Provision also exists under the SIS Act for Act of Grace payments. Do you think this course is justified?*

There are no specific provisions in SIS for act of grace payments, however, as noted above SIS Section 235 indicates that the Minister can utilise Consolidated Revenue for the payment of assistance.

Act of Grace payments provisions exist in the Financial Management and Accountability Act 1997. This Act is not administered by APRA, however, it would appear to have a broad application.

The main purpose of the Financial Management and Accountability Act 1997 is to provide a framework for the proper management of public money and public property.

Part 4 of the Act concerns: Accounting, appropriations and payments: This Part establishes an accounting framework for public money that involves the Consolidated Revenue Fund. It also deals with miscellaneous matters such as act of grace payments by the Commonwealth and waiver of debts owing to the Commonwealth.

Below is an extract of the relevant section:

Section 33

“Finance Minister may approve act of grace payments

(1) If the Finance Minister considers it appropriate to do so because of special circumstances, he or she may authorise the making of any of the following payments to a person (even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability):

(a) one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation);

(b) periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation), during a period specified in the authorisation (or worked out in accordance with the authorisation).

(2) If a proposed authorisation would involve, or be likely to involve, a total amount of more than \$100,000, the Finance Minister must first consider a report of an Advisory Committee set up under section 59.

(3) Conditions may be attached to payments under this section. If a condition is breached, the payment may be recovered by the Commonwealth as a debt in a court of competent jurisdiction.

(4) Payments under this section are to be made out of money appropriated by the Parliament for the purposes of this section.”

APRA has responsibility for implementing the legislation and examination of the specific instances presents an opportunity to assess whether the implementation results in hardship or unfairness. However, as there have been no applications under section 229 to date, APRA is not in a position to comment on whether additional provisions such as Act of Grace payments are really appropriate or justified.

9. Update on Mr Trimmer's Client and on Mrs Lawrence's payments

Mr Trimmer's client

Mr Trimmer is a financial adviser. One of Mr Trimmer's clients was receiving an allocated pension which according to Mr Trimmer was stopped by CNA in October 2000 and has not been resumed (Hansard 1287). This matter was taken up with Oak Breeze Pty Ltd, the acting trustee of the client's fund, who advised APRA that:

"The client's pension was stopped by CNA in November 2000 following CNA's freeze on the Enhanced Cash Management Trust (ECMT). There was no cash available to this fund with which to pay the allocated pension of \$150 per month as payments were made from the ECMT."

"Following four lots of correspondence between Oak Breeze Pty Ltd and Mr Trimmer and his client, Oak Breeze Pty Ltd was directed by the client not to liquidate fund assets to resume the allocated pension, but to commute the pension and return the superannuation fund to an "accumulation phase" as the client is under 65 years of age. Oak Breeze is awaiting the return of the paperwork from the client to formally put these instructions into practice."

Oak Breeze has confirmed to APRA that this is the only instance where a pension was not resumed for payment.

Update on Mrs Lawrence

Mrs Margaret Lawrence is a former employee of National Textiles Limited and when this company went into liquidation Mrs Lawrence's superannuation entitlements were rolled over into the Australian Workforce Eligible Rollover Fund (AWERF) Second Pool Division. When APRA appointed an acting trustee to AWERF, Oak Breeze Pty Ltd froze the fund. Mrs Lawrence contacted the Committee requesting its assistance to help her access her funds for day-to-day living expenses.

Mrs Lawrence's issue was raised when APRA appeared before the Select Committee on the 25th June 2001.

APRA has since had discussions with the acting trustee of AWERF who, after consultation with the custodian, has confirmed that the Second Pool Division has no exposure to any of the impaired assets. Following further discussions between APRA and the acting trustee it has been decided to lift the freeze on the Second Pool Division of AWERF. As a result the acting trustee has contacted Mrs Lawrence and her instructions were sought on the payment of her superannuation entitlements from the fund. Mrs Lawrence has subsequently responded, requesting her entitlements be rolled over into another rollover fund. The acting trustee has advised APRA that the rollover should be completed by 17 July 2001.

The same option extended to Mrs Lawrence is to be extended to the other members of the Second Pool Division of AWERF by the acting trustee. The approximate number of people involved is 20.

QUESTION 3 VARIOUS

- 1. Trust Bank of Tasmania**
- 2. Update on status of superannuation funds**
- 3. Superannuation fund date**
- 4. Replacement trustees and Attachment E**
- 5. Host Plus**
- 6. Approved auditors**
- 7. Actuarial valuations of defined benefit funds**
- 8. Levies and Attachment F**

1. The Financial Position of Trust Bank of Tasmania

The following table provides information regarding the financial position of Trust Bank in the years leading to its sale.

Year	Capital Ratio (%)	Impaired Assets (\$m)
1992	9.4	105
1993	10.2	86
1994	12.2	50
1995	13.2	13
1996	12.7	12
1997	12.9	14
1998	12.0	6
1999	10.8	5

2. Update on status of superannuation funds

The WA fund (Australian Independent Superannuation Fund)

The Australian Independent Superannuation Fund ('AISF') was established on 8 June 1994 as a defined contribution fund for the purpose of receiving Superannuation Guarantee ("SG") contributions from eleven standard employer-sponsors. AISF had approximately 165 members and held asset of about \$529,689 at the time of the fraud.

On 27 June 2000, a service provider to the AISF advised APRA's Perth office that there were problems within AISF. The auditors subsequently confirmed this when they were unable to confirm the existence of various assets (shares) recorded in the books of AISF. APRA commenced a review of AISF.

Mr Jurgen (John) Preuss, and Mr Lindsay Dods ('Dods') were the directors of Broadway Fiduciary Pty Ltd, the corporate trustee of AISF, at the time of the fraud.

On or about 10 August 2000 Broadway Fiduciary Pty Ltd submitted an application under Part 23 of the SIS Act, requesting financial assistance for AISF, to the Minister of Financial Services and Regulation.

On 28 August 2000, with the Minister for Financial Services and Regulation's written consent, APRA made a decision to remove Broadway Fiduciary Pty Ltd as trustee. On the same day APRA appointed Denara Nominees Pty Ltd as the Acting Trustee of AISF.

The Acting Trustee subsequently advised APRA it was suspending the application under Part 23 of the SIS Act, pending further investigation into the fraud.

On 1 December 2000, Dods appeared in the District Court (Perth) and pleaded guilty to 17 charges of stealing as a servant and 2 charges of stealing. Dods was subsequently sentenced to 6 years imprisonment.

The Acting Trustee advised APRA that the amount of the fraud perpetrated on the Fund had been established as \$486,098.75.

The Acting Trustee has indicated to APRA that it intends to pursue the application under Part 23 of the SIS Act once it has examined other avenues of recovery. APRA understands from the acting trustee that the revised claim under Part 23 of the SIS Act is likely to be forthcoming within the next month. There is no current indication as to the quantum of the renewed claim.

EPAS

The O'Haras Resort Hotel has been sold for \$2.97million compared to its written down book value of \$2.6 million. Total assets as at 30 June 2000 were \$19.8 million. The total assets position of EPAS, as at 30/6/01, is currently being calculated and will be notified to members.

APRA is not aware of criminal charges being laid by ASIC in relation to EPAS, and while APRA liaises closely with ASIC, direct questions in relation to action by ASIC should best be referred to it. However we understand that ASIC is currently finalising investigations into EPAS. The Director of Public Prosecutions has been consulted and both of those agencies are working together to finalise matters as soon as practicable.

Law Employees Superannuation Fund

APRA reviewed the LESF early in 1999 and does not propose further action. APRA understands ASIC is still pursuing its enquiries.

3. Superannuation fund data

Unfortunately, further breakdown of data requested is not currently available.

As extracted from the table previously provided to the Committee:

Type of Fund	No of Funds	Amount Invested (\$m)	Number of Members (000's)	Average Size of Fund (\$m)	Average number of members
Public Offer	399	154,403	12,363	387	30,985
Small APRA Funds	7,654	2,278	10	0.3	1.3
Other Regulated Funds	440	4,563	2,778	10.4	6,314

The specific breakdown requested by the Committee is not available. It is noted that all Small APRA funds will have less than 5 members, and as indicated in the above table the majority would fall in the <\$1m category (average fund size is \$300,000). Also the public offer funds would predominantly fall in the >\$10m category (average fund size is \$387 million).

Of the 440 'other regulated funds', 10 are ERFs (Eligible Rollover Funds). The ERFs would predominantly fall in the >\$10m category (average fund size is over \$200 million). The ERFs also contain the bulk of members in the 'other regulated funds'. The remainder of the 'other regulated funds' are ADFs (Approved Deposit Funds) of which the majority are single-member ADFs.

4. Replacement trustees

(a) Clarification of previous APRA information

Of the trustees previously replaced by APRA, in all cases only one replacement trustee was appointed, except CNAL, where two replacement trustees were appointed.

The reason for the discrepancy in the previously provided data on the number of replacement trustees appointed was due to an error when compiling the 1999/2000 data. For 1999/2000 the number of replacement trustees active at the end of the year (which was 5) was reported rather than the number of replacement trustees appointed during the year (which was shown as below).

(b) *Attachment E* provides a copy of Supervision Note 0199 - selecting replacement trustees.

(c) Details on replacement trustees

The following table includes the names of each of the trustee or funds where APRA has replaced the trustee. In the process of moving the 187,000 self managed superannuation funds to the Australian Taxation Office, APRA also replaced the trustees of around 1600 small funds who failed to respond to numerous attempts by APRA to establish their status as either Self Managed Superannuation Funds or Small APRA Funds.

Year	Name	Fund Size	Members	Type
1994/95	CASS	\$9m @ 30/6/95	5,000	Multi-employer accumulation
1995/96	ASN	\$6m-\$18.5m @ 30/6/99 depending on asset realisation	120	Trustee for 183 excluded funds
1998/99	Mackay & Allen	\$239,000 @ 30/6/00	34	Corporate Accumulation
1998/99	Divteed	\$74,977 @ 30/6/99	36	Corporate Accumulation
1998/99	Lifespan	\$110,000 @ 30/4/00 (with realisation of claim against Bank)	74	Corporate Accumulation
1998/99	KC Parksafe	\$700k @ 30/6/99	300	Corporate Accumulation
1999/2000	Asset A1	\$1.336m @ 30/4/00	Approx 900	Multi-employer accumulation
2000/01	AISF	\$751,481 @ 30/6/00	200	Corporate Accumulation
2000/01	CNAL	Approx \$300m	475 SAFs & 5 public offer funds	Approved Trustee
2000/01	Alamo	\$110,000	74	Corporate Accumulation
2000/01	Tunstall	\$203,500	17	Corporate

CASS was a fund with multiple employers and the trustee did not need a licence, or minimum capital, to operate. Problems arose with the proper functioning of the trustee, as a result of conflict between directors. The trustee was replaced and the replacement trustee transferred the members into other superannuation funds.

Asset A1 was also a fund with multiple employers. As a result of a complaint the trustee was investigated and found to be inappropriately managing the fund. The trustee was replaced and fund assets (mostly a single property) were sold and fund records reconstructed to attempt to provide members with some money.

(d) Returns to Members

Information on the returns to members where a replacement trustee was appointed is not readily available. We will continue to investigate the files.



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**SUPERVISION NOTE 01/99
NOVEMBER 1999**

SELECTION OF REPLACEMENT TRUSTEES

RELATED SUPERVISION NOTES

SN 02/99 - Handling Complaints about Regulated Institutions

BACKGROUND

Part 17 of the Superannuation Industry Supervision ACT (SIS Act) provides APRA with the power to suspend or remove a trustee of a superannuation entity. The use of part 17 has been infrequent. However, it is critical that the process used by APRA in selecting replacement trustees is transparent.

From time to time APRA is requested to recommend the appointment of office holders at regulated institutions. It is APRA's policy not to make such recommendations.

This supervision note addresses the process APRA staff must follow to select a replacement trustee. It does not cover what preconditions ought to exist prior to APRA exercising this power nor the legal instruments that may be required to effect the appointment of replacement trustees.

Sources of Potential Replacement Trustees

Replacement trustees need all the skills that any competent Superannuation Fund Trustee possesses (or is able to access as needed). These skills include:

- Administration (including systems knowledge - to take on the running of a fund on a day-to-day basis and maintain fund records),
- Accountancy (to develop and maintain fund records),
- Communication (to be able to pass on information to members, handle member inquiries and communication with other third parties),
- Compliance including technical (knowledge of SIS, Tax Act and if relevant Corporations Law to ensure that the fund is conducted in accordance with the law) and legal (to ensure that decisions are taken in accordance with the trust deed and other legal requirements are met), and
- Investment (to enable decisions to be made in accordance with prudent practice).

Depending on the nature of the fund's problems leading to the decision to appoint a replacement trustee, the following additional skills may be needed:

- Account reconstruction (to enable accounts to be drawn up where these have not been properly kept); and
- Debt recovery (to be able to recover debts as fully as possible and to be able to take decisions on the commerciality of debt recovery actions).

In the past, replacement trustees have been sourced from:

- Accountancy/insolvency firms;
- Fund administrators; and
- Legal firms.

Selection of Replacement Trustees

1. Replacement trustees should be sourced from the State or Territory within which most members reside or where most functions are carried out. Where the membership of a fund is geographically dispersed, replacement trustees should be sourced from the State or Territory within which the fund is administered.

Any proposal that a replacement trustee is appointed from a State or Territory other than the place within which most members reside, or where most of the functions are carried out, must address the cost effectiveness of such an appointment.

2. APRA staff in each region are encouraged to actively develop contacts in accounting, legal and insolvency practices and educate these professional groups about the role of a replacement trustee so that proposals can be sought at short notice. However, APRA's policy of an open and transparent selection and appointment process must be made clear to any contacts.
3. Consider the following broad criteria in the selection of a proposed replacement trustee:
 - Formal qualifications held by the proposed replacement,
 - Relevant experience of the proposed replacement eg. insolvency, debt recovery including knowledge of superannuation entities,
 - Professional reputation. Names of referees must be sought,
 - How skills that may be needed by a proposed replacement trustee but not personally held by them could be accessed,
 - No negative comment recorded by APRA relating to the performance of the proposed replacement. A search of APRA's records must be undertaken and this would include the SIS database and APRA's records management system,
 - Proposed fee structure with agreement that proposed replacement will work within the bounds set by the assets of the fund. Where assets may take some time to be realised, the ability to work without any cash inflow for a sustained period must be considered. The proposed fee structure should be inclusive of skills the replacement trustee must source externally,
 - Commitment to keep members and APRA informed, and
 - Whether the proposed replacement's proposed work plan is likely to meet APRA's objectives.
4. There are two alternative selection processes for replacement trustees depending on the urgency of the appointment. The Relationship Manager determines the

process to be followed and is responsible for assessing and recommending the proposed replacement trustees. The management group of Coordination, Rehabilitation & Enforcement (General Manager and Senior Managers) will assess the recommendations made by the Relationship Manager. The Executive General Manager of the Division responsible for the entity will ultimately approve the replacement trustee's appointment. The primary selection process should be followed unless the abbreviated appointment process better serves the interests of the members.

Primary Selection Process

- 4.1. Assess the needs of the individual case. Is there any indication that specific skills will be required by the replacement trustee, such as account reconstruction? If so, proposed replacement trustees should have those skills as a prerequisite. Assess the relevance of the broad criteria for selection (refer to 3 above). Where appropriate include other specific criteria. Where the relevant trustee is a corporation, the replacement trustee must also be a corporation.
- 4.2. APRA prepares a written brief for the four entities invited to make a submission that outlines the facts of the case (in a form that does not identify the specific entity) as well as the selection criteria. Submissions are to be made within two weeks of the date of the invitation.
- 4.3. Invite four entities to make submissions to APRA. Unless step 4.1 requires specific skills, the entities should be drawn as follows:
- 4.4. One from the 'default trustee'¹ list or an 'approved trustee',
- 4.5. An accredited legal firm with recovery/insolvency experience. A list of legal firms can be obtained from the local Law Society (or from the Internet – NSW Law Society's address is www.lawsoensw.asn.au and it provides links to other law societies) with a phone call made to check with the firm whether they have recovery/insolvency experience. Note that the nature of accreditations varies from state to state.
- 4.6. An accountancy firm with insolvency expertise. The firm could be identified through a publicly published list such as that published from time to time in Business Review Weekly. Verify by telephone that the firm has insolvency experience,
- 4.7. A superannuation consultancy identified through a publicly available list such as that published by Superfunds magazine for fund administrators and other service providers. Verify by telephone that the firm has an interest in carrying out such an assignment.
- 4.8. Where possible the entities selected should be ones that have not acted as a replacement trustee in the past.

¹ Trustees appointed to funds that do not meet the criterion for transfer to the Australian Tax office

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- 4.9. If two or more submissions are received within the time frame set at step 4.8, the Coordination, Rehabilitation and Enforcement (CRE) management group (General Manager CRE, Senior Managers Rehabilitation & Enforcement and Senior Manager Quality & Consistency) assesses the submissions against the criteria. Where only one submission is received, two more entities should be invited to make submissions within one week of the invitation. The outcome of the second round will form the pool of possible replacement trustees. If no submissions are received, follow the “abbreviated selection process”.
 - 4.10. Based on the recommendations made in step 4.9, the relevant Executive General Manager approves (or otherwise) the appointment of the recommended replacement trustee.
 - 4.11. The performance of the replacement is monitored on a periodic basis. The Relationship Manager prepares a short report annually for the first 2 years and/or at the end of the trusteeship. The report is filed in APRA’s records management system under “Replacement Trustee Performance Report”.
 5. To avoid perceptions of actual or perceived conflict of interest, APRA, under section 135 of the SIS ACT, directs that replacement trustees provide APRA with regular reports. The report must include details of any trustee decision resulting in work for a replacement trustee or an associated individual or entity, and the amounts paid to any replacement trustees or associates. The Relationship Manager responsible for the entity whose trustee is being replaced determines the frequency of the report.

Abbreviated Selection Process

Follow Steps 4.1 to 4.11 as outlined in the “Primary selection process”, subject to the following the variations:

- Abridge the time for the making of a submission to one week from the date of issue of the invitation;
 - If less than two submissions are received, a further two invitations are to be issued. These can be drawn from the list of default trustees and where relevant, entities that have previously satisfactorily been appointed as an acting trustee. The time for the making of a submission is one week.
6. Where a suitable replacement trustee cannot be found consult ASIC on the potential impediments to APRA making applications to a court for the appointment of a liquidator to the corporate trustees.
 7. APRA will not fund the appointment or work of a replacement trustee.

FURTHER INFORMATION

Mark Godfrey - Senior Manager, Quality & Consistency

Specialised Institutions Division

Tel: (02) 9210 3392

Greg Brunner – General Manager, Technical Advice & Support

Diversified Institutions Division

Tel: (02) 9210 3148

5. Host-Plus

At the hearing of the Senate Select Committee on Superannuation and Financial Services on 25 June 2001, the Committee requested a briefing on APRA's current supervisory activities with respect to Host-Plus Superannuation Fund. It was noted that usually APRA's activities relating to individual institutions is not aired in public hearings. The Committee requested the briefing and indicated it would decide on the status of this response on receipt of this document.

The Chairperson of Host-Plus Pty Ltd approached APRA on 25 May 2001. A number of matters were raised that pointed to difficulties with the corporate governance structure. The board of trustees has six employee and six employer representatives.

An APRA review commenced in early June. The scope of the review was to look at the corporate governance framework in which the Fund operated, to verify the existence of the Fund assets and to consider the manner in which Directors and Management were dealing with possible conflicts of interest in contracting with related parties.

With the exception of a small Trustee bank account maintained to administer the Trustee Company, the assets are held by a custodian as required by the Superannuation Industry (Supervision) Act, 1993 and the terms of the Trustee's Instrument of Approval. The custodian certified the existence of the assets. Of the total portfolio 12 per cent is represented by non-listed securities in industry related investment vehicles. Further work is being undertaken with regard to these assets, to verify the appropriateness of the valuation methodology used to derive a value for these assets.

In relation to the overall corporate governance framework, the review was conducted with a comprehensive examination of the minutes and Board papers of the company and extensive interviews with the Chairperson, Deputy Chairperson, one employee representative director, one employer representative director, the Chief Executive Officer and his deputy.

APRA wrote to the Trustee on 19 June 2001 setting out APRA's comments on the corporate governance framework and the inability of the Board to reach consensus on issues such as an operating budget for the 2001/2002 financial year and formalising a strategic plan for the fund. The letter requested that the matter be discussed at the Board Meeting of 27 June 2001 at which APRA officers would be present. The letter also suggested that the Board consider a number of corporate governance initiatives that were based on best practice.

The General Manager of the South West Region attended the Board Meeting of 27 June 2001 and discussed APRA's letter of 19 June 2001 and the Basle and OECD principles. The Board was requested to advise APRA in writing within 30 days of how it intended to respond to the issues raised by APRA.

6. Approved auditors

Superannuation Industry (Supervision) Act 1993

In respect of each year of income, the financial statements and accounts of a superannuation entity must be audited by an approved auditor who is required to give a report in the approved form to the trustee of the entity within the prescribed time as outlined in the SIS legislation. (Section 113 of the SIS Act).

In addition to the normal audit of the entity's financial position, the approved auditor of a superannuation entity must undertake a mandatory compliance audit of the entity. (Sub section 113(3)(b) of the SIS Act) The auditor must form an opinion on a fund's compliance with specific provisions of the SIS legislation.

APRA does not appoint an auditor, nor is approval sought or required from APRA, prior to a trustee appointing an auditor. Each trustee is required to appoint an auditor and it is the trustee's responsibility to ensure the auditor is appropriately qualified (ie an approved auditor).

To become an approved auditor, a person must be a registered auditor under the Corporations Law, which requires membership of a professional accounting organisation and a minimum of three years company auditing experience. SIS Schedule 1AAA indicates that the auditor must be a member of either the Australian Society of Certified Practising Accountants (CPA), the Institute of Chartered Accountants in Australia (ICAA), the National Institute of Accountants (NIA) or the Association of Taxation and Management Accountants (ATMA). An auditor can alternatively be a fellow of the National Tax and Accountants Association.

For all funds, excluding SMSF and SAFs, this means an approved auditor has been registered by ASIC and is a member (or fellow) of the above listed professional bodies.

While the legislation does not explicitly require specific superannuation experience, the professional standards of the accredited accounting bodies (eg, ICAA, CPA, NIA, ATMA) require that before their members undertake any work, they must ensure that they have relevant expertise in the area. By prescribing the mandatory membership requirement, the legislation implicitly imposes on the individual requirement for appropriate expertise.

In the course of prudential reviews undertaken by APRA, where significant issues arise in respect of the quality of financial or compliance audit, APRA (and its predecessor ISC) has the practice of considering whether there is any evidence of lack of sufficient industry expertise, and where this is the case, will recommend that the auditor undertake appropriate training. There has been cooperation with professional bodies in delivering such training in the past. Such training is considered as an option before APRA would contemplate disciplinary action (reference to professional association or disqualification).

A person may be disqualified from being an approved auditor by APRA if the person has failed to perform their duties and functions adequately.

Trustees are required to enter details of the appointed auditor in the APRA annual return; in addition auditors supply a copy of the audit report to APRA. From this information APRA can ensure that disqualified auditors do not undertake any further fund audits.

Reporting concerns to the regulator

If an auditor considers that a contravention of the SIS legislation may have occurred, the auditor must inform the trustee in writing of the matter. If the trustee fails to comply with the auditor's request, or the auditor is dissatisfied with the action taken by the trustee, the auditor is required to provide a written report to the Regulator. (Section 129 of the SIS Act).

A similar notification obligation arises if the auditor forms the opinion that the financial position of the superannuation entity may be, or may be about to become unsatisfactory. (Section 130 of the SIS Act).

Under sections 129 and 130 of the SIS Act, it is possible that APRA may not learn from an auditor about a possible contravention of the Act or the regulations or about a possible unsatisfactory financial position until after the trustee has been given an opportunity to deal with the matter.

7. Actuarial reports and defined benefit funds

The SIS Act and Regulations stipulate that all defined benefit funds are required to have an actuarial valuation prepared at a maximum of three-year intervals (SIS Regulation 9.29). In addition those funds that pay pensions are required to have a valuation prepared each year (SIS Regulation 9.29A). Not all defined benefit funds pay pensions.

Neither the Government actuary, nor APRA actuaries, review these reports as a matter of course. Actuarial reports are requested by APRA supervision teams prior to visiting a trustee. Where a supervision team believes the accuracy of information contained may be inaccurate then the report may be reviewed by an APRA actuary.

There are approximately 350 defined benefit funds (comprising 0.6 million members and \$25 billion in assets), and 300 hybrid funds (comprising 2.5 million members and \$150 billion in assets).

A hybrid fund includes both defined benefit members and accumulation members in the one fund. As a result the figures for hybrid funds are a total of both types of members for the fund.

8. LEVIES

(a) Total Levies Received By APRA

The following tables compare the cash received from levies by sector over the last three years.

ALL SECTORS	1999/2000	2000/01	2001/02
	(\$ million)	(\$ million)	(Estimated) (\$ million)
Total Levies Received	71.1	63.5	67.1
Less determination for:			
- ASIC	11.6	12.6	12.3
- ATO	2.4	2.4	2.4
Net to APRA	57.1	48.5	52.4

Note: Levies received is the cash received from the levy in the fiscal year. Over and under collections adjust the amount recognised by APRA as revenue. Also, prior year collections may be included. Amounts from RSAs are not included, but are not material.

Levies received by APRA for superannuation

Superannuation	1999/2000	2000/01	2001/02
	(\$ million)	(\$ million)	(Estimated) (\$ million)
Total Levies Received	31.4	27.3	27.6
Less determination for:			
- ASIC	5.3	6.3	6.0
- ATO	2.4	2.4	2.4
Net to APRA	23.7	18.6	19.2
Rate %	0.04	0.02	0.025
Minimum \$	300	400	400
Maximum \$	41,000	46,000	53,000

Note:

1. The levy collected reflects cash received, including significant amounts collected for prior years. Amounts over or under collected to plan are carried forward to the following year.
2. This does not include amounts collected in 1999/2000 for excluded (self-managed) superannuation funds (\$25.6 million) which were transferred to the ATO from July 1999.

Levies received by APRA for ADIs

ADIs	1999/2000	2000/01	2001/02 (estimated)
	(\$ million)	(\$ million)	(\$ million)
Total Levies Received	27.1	22.7	22.4
Less determination for:			
- ASIC	2.6	2.7	2.7
- ATO	0	0	0
Net to APRA	24.5	19.8	19.7
Rate %	0.013	0.012	0.012
Minimum \$	500	500	500
Maximum \$	1,000,000	1,000,000	1,005,000

Levies received by APRA for life insurance (and friendly societies)

LIFE INSURANCE	1999/2000	2000/01	2001/02 (estimated)
	(\$ million)	(\$ million)	(\$ million)
Total Levies Received	8.4	8.3	8.7
Less determination for:			
- ASIC	2.0	1.9	1.9
- ATO	0	0	0
Net to APRA	6.4	6.6	6.8
Rate %	0.02	0.02	0.02
Minimum \$	500	500	500
Maximum \$	280,000	280,000	364,000

Levies received by APRA for general insurance

GENERAL INSURANCE	1999/2000	2000/01	2001/02 (estimated)
	(\$ million)	(\$ million)	(\$ million)
Total Levies Received	4.2	5.2	8.4
Less determination for:			
- ASIC	1.7	1.7	1.7
- ATO	0	0	0
Net to APRA	2.5	3.5	6.7
Rate %	0.02	0.02	0.025
Minimum \$	5,000	5,000	5,000
Maximum \$	75,000	100,000	240,000

- (b) **Attachment F** provides a copy of APRA's correspondence with the Productivity Commission regarding levies.

27 April, 2001

Paul Balin
Acting Assistant Commissioner - Melbourne
Productivity Commission
LB2 Colin Street East
MELBOURNE VIC 8003

Dear Mr Balin

RE: DRAFT REPORT ON COST RECOVERY

We have received the release of the draft report on Cost Recovery on the 17th April 2001. The study is certainly comprehensive and provides an insight into government agency practices and ways to improve administration.

APRA is a new agency. We recognise some of the shortcomings of earlier arrangements and have resolved many of them. At times, we have not been successful in adequately communicating the progress that we have made to date. We are not clear why there remains a predominate focus on historical data with little explanation on the reasons for the anomalies. We are particularly concerned when such obsolete data is used to represent our current and future position. A forward-looking perspective on APRA's strategies would support both our current achievements and permit our stakeholders to genuinely contribute to further improvements.

Recent articles in the press (AFR 17/04/01 and Herald Sun 21/04/01) have been quick to point out the injustice of APRA receiving 150% of our costs. Such calculations can be derived from Table 1 of the draft Cost Recovery Report without any further effort being made to understand the data provided.

The misleading sensationalism of such observations is not constructive. Our ongoing dialogue with stakeholders on the adequacy of our levies in line with the services we provide needs to be based upon correctly stated facts. Table 4.3 repeats the data but leaves the reader with the obvious concern that 150% cost recovery is well in excess of the target of 100% aimed for. The source of this misinformation is the questionnaire that I completed and sent to Patrick Leplange.

The questionnaire required that APRA distinguish the additional revenue administered by it. However, the calculated ratio of cost recovery to total expenses is misleading. APRA made a strenuous effort, in its last annual report (note 5A), to explain *that \$25.6 million had been collected on behalf of the Government, but was not part of APRA's revenue*. The revenue was for "excluded" superannuation funds (i.e. small funds). APRA did not set the levy and has merely been administering the funds during their transition of their regulation from the Insurance and Superannuation Commission (ISC) to the Australian Taxation Office (ATO). The only amount received by APRA from this revenue was \$1.5 million as an appropriation to defray some of the costs we incurred in arranging that transition. APRA's revenue from cost recovery for 1999/2000 was \$59.2 million as explained in note 5A. This is net of \$2.9 million over collected, but committed to be returned to industry within the balance sheet (see note 10B).

APRA cost for the same period was \$52.6 million operating expenses plus \$6.2 million abnormal expenditure incurred in establishing APRA. Our total cost was therefore \$58.8 million compared to cost recovery of \$59.2 million. All of this is clearly explained within the Financial Statements of the Annual Report.

APRA is included in Appendix F as a case study. Since we have become a significant part of the draft Cost Recovery Report, it is important that the messages from such an exercise are based on current facts and out intended strategies if anything useful can be learnt from our position.

Firstly, I am curious why we get such additional attention. If the main notion of this report is that government levies are increasing and a significant part of this income comes from agency cost recovery mechanisms approaching \$3 billion, then APRA is a small player being 1.6 per cent of such funding.

The up-front conclusion of the case study is that "APRA and ASIC undertake cost recovery on a large scale, recovering all or more than their operating costs. According to some enquiry participants, such as the ACCI, charges recovered from industry by their agencies amount to over-recovery. This potentially sets them apart from most of the Commonwealth agencies and as such justifies close examination of the rationales and arrangements for cost recovery in this area."

Table F1 is used to demonstrate that cost recovery by APRA is in excess of operating expenses. The costs are correctly stated in the table for both years. But the revenue in both years contains administered revenue from excluded superannuation that flowed to the CRF and did not come to APRA. The amount was \$25.6 million in 1999/2000 and \$17.6 million in 1998/1999. Excluding these amounts demonstrates that APRA just recovered its costs in 1999/2000 and significantly under-recovered its costs in 1998/1999. (The under-recovery is built into collection in future periods.) Therefore, APRA's inclusion as a case study is based on the incorrect interpretation of data and APRA should be removed from this part of the Report in future.

Table F3 provides an analysis of APRA's operating expenses from 1997/98 to 2000/01. This is an extract from our Annual Report. We want to make a few points about this.

Firstly, it is based on the estimated aggregate cost of prudential supervision and not just APRA's costs. APRA did not exist until July 1998.

Secondly, the note to the Annual Report indicates the Government Actuary costs are included until April 2000. This \$1 million should be removed from the 1997/98 to 1999/00 to improve the comparison. The draft report advances the notion that costs have been reduced at a time of increased complexity and size of financial institutions. This does not adequately explain the primary reason for cost reduction, which has been the reduction in administrative costs following the merger of State-based financial institutions into APRA in mid 1999. Some savings could be expected from the merger of 11 agencies into one.

The case study progresses with some useful comments about the challenges confronting APRA regarding industry sectors. There is insufficient recognition of the benefit to banks in the removal of non-callable deposits in 1999 and the progressive approach APRA has taken in advancing risk based supervision in support of the Financial Institutions Inquiry (Wallis) reforms. Some of the more significant distortions can be found in comparing the maximum levies across industry sectors and the "capping" of maximum rates. APRA has promoted the concept that a single uniform levy across industry sectors will assist in reducing some of these anomalies.

Nowhere has APRA been more misunderstood than its commitment to straightening out levies collected from the superannuation sector. APRA inherited arrangements with major cross-subsidies - we have openly stated what the issues are and many have been resolved during the transfer of small funds to the ATO. This has cost both resources and management time for an activity, whose regulation was deemed to be better aligned to the expertise of the ATO rather than prudential supervision of financial institutions, which is the expertise of APRA. Suggestions that APRA had benefited significantly are clearly wrong. Excluded superannuation funds have not funded APRA.

The ANAO has reviewed APRA's financial governance arrangements both during last year's cross-portfolio review of levies and during its current performance audit of bank supervision. APRA contests two of their primary notions that they have expressed from the inception of such reviews.

Firstly, ANAO has supported an inflexible view of cost recovery by industry sectors. This is not compatible with APRA's "risk-based" approach to prudential supervision.

Secondly, the ANAO strongly advocate activity based costing as a solution to all problems. ABC is an excellent tool for a strict cost recovery regime, where precision is required in ensuring accurate costing. It is the "accountants" solution and well matched to many costing situations. However, it does not match APRA's needs. APRA's levies are clearly taxes paid by entities to fund regulatory activity conducted for the benefit, over time of their customers. The levies are not "fee for service" charges.

APRA needs an economic model. Levies are determined for the year ahead. A strict user pays model is going to cause more distortions than it solves. For example, how much are we to charge a failing institution for its supervision, and is this compatible with our mission to protect deposit holders and premium takers? Who will ask for advice if we charge by the hour for it? The important feature of the current model adopted by ARPA, is that APRA as a statutory authority recovers its costs from industry in a transparent way that clearly indicates how such recoveries are spent.

Table F4 is taken from an ANAO report on cross-portfolio levies. The table refers to appropriations for 1998/99. This was the first years in APRA's existence. The method of funding was a mix of budget and cost recoveries.

In this transition year, this table shows excluded superannuation funds contributing \$33.8 million and costs of \$3.5 million. This estimate by the ANAO describes activity administered by APRA, but which did not form part of APRA's funding. Similarly Treasury had modelled revenue and program costs to transition activity from the ISC and the RBA into the new organisation. Three years on, little value is derived from focusing on the historical transition of prior entities into APRA. Problems were known, were resident in prior arrangements and could not be fully resolved immediately on APRA's formation. Strategies and programs were put into place to respond to these issues.

Of greater relevance is what APRA is intending to do in the future. The facts for the current year 2000/01 are:

	\$ Million
APRA's Forecast Expenditure	51.0
Less:	
Other income (mainly interest)	1.7
Operating deficit	0.3
Over collection from prior year	3.0
Under collection from current year	0.6
	<u>45.4</u>
Add:	
Collection on behalf of ASIC for identified costs	12.6
Collection on behalf of ATO for identified costs	2.4
	<u>60.4</u>
Levy collection in the current year:	
ADI's	22.5
Superannuation	24.2
Life Insurance	8.4
General Insurance	5.2
Retirement Savings	0.1
	<u>60.4</u>

There is no over collection. This information is available to industry in the current Consultation Paper, the comparable budget estimates are in the Portfolio Budget Statement and the numbers will be confirmed in the Financial Statements.

The draft report points to a number of safeguards in APRA's governance. There have been opportunities for stakeholders to both receive information from APRA and input to changes in the way levies are administered. However, appendix F relies heavily on the input from two sources, ASFA and the NRMA, to detract from the achievements of APRA.

APRA consults with eleven industry associations representing more than 10,000 institutions. The institutions range from about 8800 institutions with less than \$5 million each in assets, to 163 institution with assets in excess of \$1 billion each. APRA's costs of \$50 million compare to the total assets under supervision of \$1355 million being 0.004%. Determining a fair levy is a challenge that has been taken seriously by APRA. The remarks made by ASFA on page F22 are not fairly balanced with other consultative activity in that year. What is omitted from their statement is that four months earlier, Treasury and APRA had requested responses to the financial sector levy review. In addition, the levy rate for superannuation was halved from 0.04% to 0.02%, with the maximum rising from \$41,000 to \$46,000. The total amount collected from superannuation dropped from \$29.7 million to \$25.1 million for the year 2000/01. The comment attributed to ASFA on page F23 regarding minimum levies assigned to superannuation and life insurance both being \$5000 is incorrect. The superannuation minimum in the 1999 review of 1999/2000 levy was \$200.

The following paragraph is also incorrect. Superannuation accounted for 38% of APRA's costs in 1999/2000 but ADI's contributed 44%. APRA's timesheets on supervision in 2000/01 indicate that APRA is committing more than 130 direct supervisory staff on superannuation out of 340 in total. This is significantly more than for any other sector.

In summary APRA has consulted industry, does listen to a wide range of representatives, is aware of sectorial interests and does attempt to balance competing interests. The case study is based on obsolete data and the narrow view of a small sample of APRA's "clients". Quoted facts are significantly in error and the conclusions reached are therefore unlikely to be sound. A simple comparison of the issues identified pre-APRA with their current resolution will demonstrate considerable progress. APRA has strategies for making levies funding fairer; this is not advanced by imposing inappropriate costing methods.

APRA requests that the Productivity Commission significantly refines the draft report to provide a more contemporary view of APRA, balancing past issues with current progress. Please advise how this will be done.

Yours faithfully

Jim Flaye
Chief Financial Officer