

# Summary of recommendations

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## 3. Superannuation regulation: basic issues

### 3.1: *Indemnification of members of boards*

1. The law should provide that the responsible entity, and the members of the board of management of the responsible entity, for a superannuation fund, an ADF or a PST may not be indemnified out of the fund, ADF or PST for any liability incurred by it or them while acting as responsible entity or member. Failure to comply should be an offence as well as a breach of fiduciary obligation.
2. The law should provide that the responsible entity for a superannuation fund, an ADF or a PST must ensure that the annual report for the scheme include a statement whether the responsible entity or the members of the board of management of the responsible entity are insured in respect of their liability to members of the scheme for loss caused by fraud or negligence and, if they are, of the prescribed particulars of that insurance.
3. Nothing should prevent the payment out of the fund of the costs associated with obtaining insurance for the responsible entity for the fund, ADF or PST or for a member of the board of management of the responsible entity against liability for loss caused by fraud or negligence.

## 7. The constitutional basis for Commonwealth regulation

### 7.1. *Constitutional framework*

The law should provide that the conditions under which a superannuation fund, an ADF or a PST attract taxation concessions include a condition that, at all times during the relevant year of income, there was a responsible entity for the fund, ADF or PST and that:

- the responsible entity was a foreign corporation within the meaning of the Constitution s 51(xx) or a trading or financial corporation within the meaning of that paragraph or
- in the case of a superannuation fund, the substantial or dominant purpose of the fund was to provide old-age pensions within the meaning of the Constitution s 51(xiii).

## 8. Regulating the players: standards for operators

### 8.1. *Appointment of responsible entity*

The law should provide that the conditions under which a superannuation fund, an ADF or a PST attracts a tax concession include a condition that the deed or other instrument establishing the fund, ADF or PST must appoint a person as the responsible entity for the fund, ADF or PST.

**8.2. Acceptance of appointment by responsible entity**

The appointment (including an appointment by election) of a person as responsible entity, or as a member of the board of management of a responsible entity, for a superannuation fund, ADF or PST should not be effective unless the person concerned accepts it in writing.

**8.3. Pre-vetting of responsible entities**

There should be no change to the law to require any further pre-vetting of responsible entities for superannuation funds, ADFs or PSTs or for the providers of DAs.

**8.4. What are bodies, and who are persons, unsuitable to act as responsible entity**

1. The law should provide that a foreign corporation or a trading or financial corporation is not suitable to act as the responsible entity for a superannuation fund, an ADF or a PST if

- it is an externally administered body corporate as defined in the Corporations Law or
- it, or one of its responsible officers as defined in the Corporations Law
  - has been convicted of serious fraud as defined in the Corporations Law
  - has been subject to a civil penalty imposed under a State, Territory or Commonwealth law for an act of dishonesty or
- one of its officers is an insolvent under administration

2. The law should provide that an individual is not suitable to act as, or as a member of the board of management of, the responsible entity for a superannuation fund, an ADF or a PST if he or she

- is an insolvent under administration as defined in the Corporations Law or
- has been convicted of serious fraud as defined in the Corporations Law or
- has been subject to a civil penalty imposed under a State, Territory or Commonwealth law for an act of dishonesty

**8.5. Spent convictions**

The law should provide that the Federal Court or the Supreme Court of a State or a Territory may, on application by the regulator declare, by order, that despite the *Crimes Act 1914* Pt VIII A (*spent convictions*), a conviction for a particular offence may be taken into account in determining whether a person is an unsuitable person for the purposes of recommendation 8.4. The court should not be able to make such an order unless it is satisfied that

- the person is or proposes to become the responsible entity, or a member of the board of management of the responsible entity for a superannuation fund, an ADF or a PST and
- it is necessary to make the order to protect the interests of the members of the scheme.

**8.6. Persons etc. not to act as responsible entity while unsuitable**

1. The law should provide that it is an offence for a foreign corporation or a trading or financial corporation to act as the responsible entity for a superannuation fund, an ADF or a PST while it is an unsuitable body corporate.
2. The law should provide that it is an offence for an individual to act as, or as a member of the board of management of, the responsible entity for a superannuation fund, an ADF or a PST while he or she is an unsuitable person.
3. The law should provide that a purported appointment of an unsuitable body corporate or an unsuitable person as a responsible entity for a superannuation fund, an ADF or a PST, or of an unsuitable person as a member of the board of management of the responsible entity for a superannuation fund, an ADF or a PST, is of no effect.
4. The law should provide that, if a responsible entity, or a member of the board of management of a responsible entity, for a superannuation fund, an ADF or a PST becomes an unsuitable body corporate or an unsuitable person
  - the matter must be reported to the regulator without delay — the body corporate or person commits an offence if the matter is not so reported and
  - the body corporate's or person's appointment as responsible entity, or as member of the board of management of a responsible entity, thereupon ceases.

**8.7. Declaration as to suitability**

1. The law should provide that it is an offence for a person to offer himself or herself for appointment or election as the responsible entity, or as a member of the board of management of a responsible entity, for a superannuation fund, an ADF or a PST without first making a written declaration stating that he or she is not an unsuitable person. The declaration is to be given to
  - in the case of an election — the returning officer for the election
  - in the case of an appointment — the person making the appointment.
2. The law should provide that it is an offence for a foreign corporation or a trading or financial corporation to offer itself for appointment or election as the responsible entity for a superannuation fund, an ADF or a PST unless it, and each of the members of its board of management, have made written declarations stating that it, he or she is not unsuitable. The declarations are to be given to
  - in the case of an election — the returning officer for the election
  - in the case of an appointment — the person making the appointment.
3. It should be an offence knowingly to make a false declaration.

**8.8. Unsuitability to act as investment manager**

1. The law should provide that a foreign corporation or a trading or financial corporation is not suitable to act as investment manager for the responsible entity for a superannuation fund, an ADF or a PST, if

- it is an externally administered body corporate as defined in the Corporations Law or
- it, or one of its responsible officers as defined in the Corporations Law
  - has been convicted of serious fraud as defined in the Corporations Law
  - has been subject to a civil penalty imposed under a State, Territory or Commonwealth law for an act of dishonesty or
- one of its responsible officers is an insolvent under administration

2. The law should provide that an individual is not suitable to act as an investment manager for the responsible entity for a superannuation fund, an ADF or a PST if he or she

- is an insolvent under administration as defined in the Corporations Law or
- has been convicted of serious fraud as defined in the Corporations Law or
- has been subject to a civil penalty imposed under a State, Territory or Commonwealth law for an act of dishonesty.

3. The law should provide that the Federal Court or the Supreme Court of a State or a Territory may, on application by the regulator, declare, by order, that despite the *Crimes Act 1914 Pt VIIIA (spent convictions)*, a conviction for a particular offence may be taken into account in determining whether a person is an unsuitable person for the purposes of this recommendation. The court should not be able to make such an order unless it is satisfied that

- the person is acting or proposes to act as investment manager for the responsible entity for a superannuation fund, an ADF or a PST and
- it is necessary to make the order to protect the interests of the members of the fund, ADF or PST.

**8.9. Persons etc. not to act as investment managers while unsuitable**

1. The law should provide that it is an offence for a foreign corporation or a trading or financial corporation to act as investment manager for the responsible entity for a superannuation fund, an ADF or a PST while it is an unsuitable body corporate.

2. The law should provide that it is an offence for an individual to act as investment manager for the responsible entity for a superannuation fund, an ADF or a PST while he or she is an unsuitable person.

3. The law should provide that a purported engagement by the responsible entity for a superannuation fund, an ADF or a PST of an unsuitable body corporate or an unsuitable person as investment manager is of no effect.

4. The law should provide that, if a foreign corporation or a trading or financial corporation or a person is acting as investment manager for the responsible entity for a superannuation fund, an ADF or a PST becomes an unsuitable body corporate or person:

- the matter must be reported to the responsible entity without delay — the body corporate or person commits an offence if the matter is not so reported and
- the body corporate's or person's engagement as investment manager thereupon ceases.

5. The law should provide that it is an offence for an investment manager for the responsible entity for a superannuation fund, an ADF or a PST who becomes unsuitable to charge the responsible entity a fee in connection with the repayment or return of funds or assets to the responsible entity (that is, no exit fees).

6. 'Acting as investment manager' means dealing with the assets of the fund, ADF or PST by exercising a judgment as to their investment that is independent of the judgment of the responsible entity, but is authorised by the responsible entity.

#### **8.10. *Dealing in securities***

The Corporations Regulations reg 7.3.13 should be amended by omitting subregulation (1).

#### **8.11. *Investment managers who do not carry on the business of dealing in securities***

Investment managers for responsible entities for superannuation funds, ADFs or PSTs should not have to hold a dealers licence under the Corporations Law if they do not carry on the business of dealing in securities within the meaning of the Corporations Law s 93.

#### **8.12. *Investment managers not to hold assets***

The law should provide that, if

- the responsible entity for a superannuation fund, an ADF or a PST enters into an agreement or arrangement with a person or with a body corporate under which the person or body corporate is to act an investment manager for the responsible entity and
- under the agreement or arrangement, the person or body is to hold or have custody of some or all of the assets of the fund, ADF or PST and
- at the time of entering into the agreement or arrangement and at all times while the agreement or arrangement is in effect, the person or body corporate had less than \$5m in net tangible assets

the responsible entity and the investment manager should each be guilty of an offence. The responsible entity should have a defence that it made reasonable inquiries, and exercised due diligence, in relation to the matter. There should be no similar defence for the investment manager.

**8.13. Contracts for investment managers**

1. The Federal Court or the Supreme Court of a State or Territory should be able, on application by the responsible entity for a superannuation fund, an ADF or a PST, to vary, by order, a contract between the entity and another person under which the other person is to act as investment manager for the entity so as to ensure that the contract does not unreasonably exclude or limit, or unreasonably provide for indemnity in relation to, the manager's liability for negligence or breach of contract.

2. The *Trade Practices Act 1974* (Cth) s 52A should extend to such contracts.

3. The responsible entity for a superannuation fund, ADF or PST should have to be a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth, or the fund should have, as its substantial or dominant purpose, the provision of old-age pensions.

**8.14. Standards for insurance intermediaries**

1. Amend the *Insurance (Agents and Brokers) Act 1984* s 10 to provide that an insurer must not enter into an agreement for the purposes of s 10 under which the insurance intermediary is authorised to offer membership of a superannuation fund or DA for which the insurer is the responsible entity or provider, as agent of the insurer unless the insurer is satisfied, after proper inquiry, that the intermediary

- is of good fame and character<sup>1</sup> and
- will be able to act as agent honestly and
- has adequate educational qualifications and expertise and
- is not an undischarged bankrupt.

Failure to comply should be an offence by the life insurance company.

**8.15. Know your client rule**

The law should apply the Corporations Law s 851 to all persons who sell membership of superannuation funds, ADFs, PSTs and DAs, including insurance intermediaries authorised to offer, as agent of the insurer, membership of a scheme for which the insurer is the responsible entity or provider. The provision should require the person to make reasonable inquiries as to the client's circumstances.

**8.16. Disclosure of interests etc.**

The law should apply the Corporations Law s 849 to all persons who sell membership of superannuation funds, ADFs, PSTs and DAs, including insurance intermediaries authorised to offer, as agent of an insurer, membership of a scheme for which the insurer is the responsible entity or provider.

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1. Although this is the formulation appearing the Corporations Law, it may be more precise to express it as 'unlikely to contravene, or cause a contravention of, the law'.

### **8.17. Continuing professional education for dealers and life agents**

1. The law should provide that it is a condition of holding a dealers licence that authorises the dealer to offer membership of a superannuation fund, an ADF or a PST that the dealer satisfactorily complete courses or other training prescribed in the regulations.

2. The law should provide that each agreement for the purposes of the *Insurance (Agents and Brokers) Act 1984* s 10 under which an insurance intermediary is authorised to offer, as agent of an insurer, membership of a superannuation fund, ADF, PST or DA for which the insurer is the responsible entity or provider, that the intermediary will satisfactorily complete courses or other training prescribed in the regulations.

### **8.18. Preserving acts done**

The law should provide that a third party who acts in good faith and without notice of the unsuitability of

- the responsible entity for a superannuation fund, ADF or PST
- a member of the board of management of a responsible entity of a superannuation fund, ADF or PST
- an investment manager for a superannuation fund, ADF or PST

is not affected by the unsuitability.

## **9. Duties of the responsible entity**

### **9.1. Fiduciary obligations of responsible entities to be set out in legislation**

The law should set out the basic fiduciary obligations owed by responsible entities of superannuation funds, ADFs and PSTs to members. This provision should not affect any other duty that may be imposed on the responsible entity by the deed or other instrument constituting the fund, ADF or PST, or by some other law, if the other duty is not inconsistent with the basic obligations set out. Any provision of a deed or other agreement that purports to modify or exclude these basic obligations should be of no effect.

### **9.2. Basic fiduciary obligations of the responsible entity**

1. The law should specify the following obligations as basic fiduciary obligations of a responsible entity that cannot be excluded or modified:

- to hold the property of the fund not for the use or benefit of itself or the members of the responsible entity, but for the use and benefit of the members of the fund, including non-contributing members
- to become familiar with and to observe the provisions of the deed or other instrument constituting the superannuation fund or ADF and to apply them fairly as between the members of the scheme
- to act honestly in all matters concerning the fund or ADF

- to avoid any conflict between the interests of the members and the interests of the responsible entity and, if such a conflict arises, to disclose it to the members
- to exercise its powers, and perform its duties, as responsible entity in the best interests of the members
- to act, in relation to all matters affecting the fund or ADF with the care, skill and diligence with which a person of ordinary prudence would act when dealing with property of another for whom he or she was morally bound to provide
- to keep the money and other assets of the fund or ADF separate from the money and other assets of itself, of the members of its board of management and, in the case of an employer sponsored or industry superannuation fund, of any employer involved in the fund
- to exercise a discretion or a power vested in the responsible entity, either by law or by the deed or other instrument constituting the scheme, only after proper consideration
- if it invests the money, or deals with the other assets, of the fund or ADF — to seek advice from an appropriately qualified person before doing so; however, nothing prevents that person from being a member of the board of management of the responsible entity
- not to delegate trustee responsibility in relation to a matter affecting the fund or ADF
- not to profit from acting as responsible entity; this duty should not prevent an individual who is the responsible entity or a member of the board of management of a responsible entity from receiving reasonable remuneration for work done in that capacity
- to monitor regularly the relationship between the realisable assets of the fund or ADF and its liabilities and prospective liabilities to members to ensure that the scheme is able to pay benefits to which members become entitled as they fall due
- in determining whether to make a particular investment, to have regard to the whole of the circumstances of the fund or ADF including, but not limited to, the following:
  - its other investments
  - its obligations, both existing and prospective
  - the nature of its membership
  - the desirability of diversifying investments to minimise risk
- to allow a member access to any information or document in the possession or under the control of the responsible entity that relates to the fund or ADF, except a document the disclosure of which to the member who seeks it
  - would unreasonably disclose another person's private affairs or



- would disclose trade secrets or other information that has a commercial value that would be destroyed or lessened by the disclosure, and in relation to which the responsible entity is under a duty of confidence to another person not to disclose.
2. Parallel obligations should be imposed on responsible entities of PSTs.

### ***9.3. Fiduciary obligations of members of boards of management of incorporated responsible entities***

The law should provide that each member of the board of management of the responsible entity for a superannuation fund, an ADF or a PST owes to the members of the fund, ADF or PST the obligations set out in recommendation 9.2, changing what needs to be changed. In the case of a responsible entity that is a body corporate, this is in addition to any other obligation that he or she owes as director or officer of the body corporate.

## **10. Disclosure: a critical obligation**

### ***10.1. Inconsistencies in disclosure requirements***

The law should impose on all superannuation funds, ADFs, PSTs and DAs disclosure requirements conforming to those imposed by the Corporations Law. Where requirements do not meet this criteria, they should be changed.

### ***10.2. Disclosure to single member schemes***

No disclosure requirements should apply to a superannuation scheme if the responsible entity is the only member.

### ***10.3. Plain language***

1. The law should provide that all documents issued by
  - the responsible entity of a superannuation fund or ADF or
  - the provider of a DA

and given to members or prospective members to inform them about the scheme are to be written in clear and simple language. Failure to comply should not be an offence, but the regulator may give a written direction to the responsible entity or provider not to issue, or to take reasonable steps to recall from circulation, a particular document on the grounds that it is not written in clear and simple language. Failure to comply with the direction should be an offence.

2. The regulator, in conjunction with ASFA, other industry bodies and other experts, should develop guidelines for plain language in superannuation and related documents.

### ***10.4. Information to persons not fluent in English***

1. The law should provide that the responsible entity for a superannuation fund or ADF, and the provider of a DA, must ensure that, as soon as practicable after a person becomes a contributing member of the scheme or starts to receive a pension

from the scheme, the person is given an opportunity to indicate whether he or she is not fluent in English. If the person indicates that he or she is not fluent in English but is fluent in one of the prescribed languages, the responsible entity or provider must

- forthwith give the person a copy of the statement prepared by the regulator for the scheme, or for schemes of the relevant kind, in that language and
- send, with each benefit statement or annual report sent or given to the person, a copy of the statement prepared by the regulator in that language.

Failure to comply should be an offence.

2. Regulations under the law should prescribe such a statement, which should include words to the following effect:

This is an important document. It tells you about your superannuation scheme and the money you have in the scheme at the moment. You cannot get the money out of the scheme now, but you should take an interest in the scheme and how it is run.

If you cannot understand the document, you should seek help to have it interpreted for you. If you do not know anyone who can help you, contact the Superannuation Advisory Service.

#### **10.5. Information about benefits**

1. The law should provide that it is an offence for the responsible entity for a superannuation fund to publish information to members or prospective members of the scheme about the benefits available under the scheme, being information that does not comply with the following requirements:

- if the fund is a defined benefits superannuation fund under which the amount of the benefit for a member on ceasing employment is worked out by reference only to the amount of the member's remuneration during the year, or during 2 or more of the years, immediately before the member ceased the employment — the amount of the benefit must be expressed as a fraction or multiple of the amount of the member's remuneration during the year immediately before the member ceased the employment
- in any case
  - if the amount of the benefit is expressed in the information in dollars, the amount must be expressed in both present day dollars and in nominal dollar values
  - the information must include a statement of the assumptions about the rate of inflation, the rate of earnings of the fund and the rate of wages growth used to work out the amount of the benefits

- the information must include a statement to the effect that the amounts of benefits stated are not to be taken to be the actual amounts to which the member or prospective member will be entitled, and that there is no guarantee that the amounts stated will be paid.

#### **10.6. Regulator to publish standard rates**

1. The law should provide that the regulator may, by notice in the *Gazette*, specify estimates for factors to be used in working out amounts of benefits. The estimates may include estimates as to the rate of inflation and the rate of wages growth.

2. The law should provide that it is an offence for a responsible entity for a superannuation scheme or an ADF, or the provider of a DA, to publish, as mentioned in recommendation 10.5, estimates of benefits worked out using, for a factor for which an estimate has been specified by such a notice, an estimate other than that specified unless the regulator has given written approval to the publications.

#### **10.7. Free look**

1. The law should provide that a member of a personal superannuation fund, or of an ADF or DA, has a right, exercisable at any time before the end of 14 days after being first notified of his or her membership, to withdraw from the fund, ADF or DA. The right must be exercised by notice in writing given to the responsible entity of the fund or ADF or the provider of the DA.

2. The law should provide that, on withdrawal of an investment within 14 days of the investment being made, the responsible entity or provider is liable to repay to the member the amount due to the member under the terms of the scheme, worked out as at the date of the withdrawal notice. No exit fees are to be charged to the member in this instance.

#### **10.8. Misleading and deceptive conduct in advertising superannuation**

The *Insurance Contracts Act 1984* (Cth) s 15 should be amended to ensure that it does not prevent the *Trade Practices Act 1974* (Cth) s 52 and 52A or the Corporations Law s 995 from applying in relation to insurance contracts issued in connection with a superannuation fund, an ADF, a PST or a DA. However, the effect of the *Insurance Contracts Act 1984* (Cth) s 33 and 55 should be preserved.

#### **10.9. State government superannuation schemes**

The law should provide that the provisions of the *Trade Practices Act 1974* (Cth) relating to fair trading, that is, Pt V, extend to State government superannuation schemes.

**10.10. Warranty of care and skill in superannuation**

The *Trade Practices Act 1974* (Cth) s 74 should be amended to ensure that it applies to insurance contracts issued in connection with a superannuation fund, an ADF, a PST or a DA.

**10.11. Power to require production of advertisements**

The law should make provision analogous to the *Life Insurance Act 1945* (Cth) s 77, and that recommended by the ALRC in its report *Insurance Contracts* (ALRC 20) giving the regulator a power to require production of any advertising matter used or proposed to be used by or on behalf of the responsible entity of a superannuation fund, an ADF or a PST or by the provider of a DA, and to stop the use or further use of the matter as advertising on the ground that it is misleading or deceptive.

**10.12. Applications for membership of schemes**

The law should provide that it is an offence for the responsible entity for a superannuation fund, an ADF or a PST, or the provider of a DA, to accept an application by a person to become a contributing member of the scheme unless the application is made in writing on a form attached to a copy of the most recently issued prospectus or member booklet or, in the case of a DA, the most recently issued offer document, for the scheme.

**10.13. Information to accompany prospectuses etc.**

The law should provide that it is an offence for

- a responsible entity for a superannuation fund, an ADF or a PST, or the provider of a DA, to give a prospectus, member booklet or offer document to a person with a view to the person's becoming a contributing member of the scheme or
- a responsible entity for a superannuation fund to give a member booklet to a person who has become a member of the fund

unless the responsible entity or provider also gives to the person

- a copy of the most recent annual report for the scheme relating to the investments of the scheme and
- a copy of any statement of material adverse change notified to members since the most recent annual report was issued.

**10.14. Advertisements, brochures etc.**

The law should provide that the cover of (or, if it does not have a cover, the front page of the document) a brochure, pamphlet or other document about a superannuation fund, ADF, PST or DA (including an annual report, member booklet, offer document or prospectus) published by the responsible entity for the scheme or the provider of the DA may only display the name of the responsible entity for the scheme or of the provider of the DA and the name of the scheme. A contravention should be an offence by the responsible entity or provider.

**10.15. Further information: member booklets etc.**

1. The law should provide that it is an offence if a prospectus, member booklet or offer document published by the responsible entity for a superannuation fund, ADF, PST or by the provider of a DA does not include, on the inside cover, the following information:

- the name and address of the responsible entity
- if the responsible entity or provider is a body corporate or unincorporated — the names of the members of the board of management of the responsible entity
- the name of each investment manager engaged by the responsible entity or by the provider during the 12 months immediately before the booklet, prospectus or offer document was issued
- whether there is institutional backing for the responsible entity, for the provider or for an investment manager and, if there is, the prescribed particulars of that backing.

2. 'Institutional backing' means whether any return to the member of capital or interest is guaranteed by the responsible entity or a related corporation.

**10.16. Contents pages**

Member booklets, prospectuses and offer documents for superannuation funds, ADFs, PSTs and DAs should include a comprehensive contents page or index, but failure to comply should not be an offence.

**10.17. Disclosure of adverse changes**

1. The law should provide that the responsible entity for a superannuation fund, ADF or PST must take reasonable steps to notify the members of the scheme of any significant adverse change in the circumstances of the scheme. Non-compliance should be an offence.

2. If there are more than 200 members of the fund, the law should provide that the responsible entity must, within 14 days after becoming aware of the existence of such a change, notify the ASC. Failure to comply should be an offence.

3. The responsible entity for the scheme and the members of the board of management of the responsible entity should be subject to the same criminal and civil liability as will apply in respect of enhanced disclosure obligations under proposed amendments to the Corporations Law.

4. A 'significant adverse change in the circumstances of a scheme' should be defined as

- in the case of a defined benefit superannuation fund — a change in the circumstances of the scheme that would reasonably be likely to be taken into account by a person in determining whether the scheme will be able to meet its obligations to members as and when they fall due

- in other cases — a change in, or re-assessment of, the circumstances of the scheme that members or prospective members would reasonably require to make an informed assessment of the assets and liabilities, financial position, profits, losses and prospects of the scheme being a change that tends to show that the scheme will not be able to meet its obligations to members as and when they fall due.

#### **10.18. *Information about financial performance***

The law should provide that a prospectus, member booklet or offer document published by the responsible entity for a superannuation fund or ADF, being a fund or ADF that has 5 or more members, must include the prescribed particulars of the scheme's financial performance over

- each of the 5 financial years immediately before the booklet or prospectus was issued or
- if the scheme has been in existence for less than 5 years, over all the years during which the scheme has been in existence.

Failure to comply should be an offence. The prescribed particulars should include particulars about the arithmetic average performance of the scheme over the relevant period.

#### **10.19. *Establishing, and reporting performance against, investment targets***

1. The law should provide that the responsible entity for a superannuation fund, an ADF or a PST must, before the start of each financial year, determine financial performance goals for the fund, ADF or PST. The goals must relate to the next 5 years (that is, a 5 year rolling investment plan). The goals are to be expressed in terms of the financial performance expected to be achieved by investments of the fund, ADF or PST when compared with

- an appropriate index (such as the CPI) or
- a specified portfolio of investments.

Failure to comply should be an offence.

2. The law should provide that the responsible entity for a superannuation fund, an ADF or a PST must include in the annual report for the scheme the following information:

- a statement of the goals determined in respect of the year to which the report relates (which will be the goals for the present 5 year investment plan)
- a statement of the financial performance of the scheme during that year measured against those goals, and how that performance relates to achievement of the relevant 5 year goals
- if the responsible entity has determined that the 5 year goals should be altered — a statement of those goals as altered and of the nature of the alterations.

Failure to comply should be an offence.

**10.20. Reserving**

The law should provide that the responsible entity for a superannuation fund must include in the annual report for the fund the following information:

- whether amounts in the fund are credited to reserves and
- if amounts are credited to reserves
  - how the amount to be credited to reserves is worked out
  - the amount credited to reserves during the period to which the report relates
  - the source of the money credited in reserves during that time and
- what amounts, if any, have been transferred from reserves during the relevant year.

**10.21. Timing of annual reports**

The law should provide that the responsible entity of a superannuation fund and the provider of a DA, must give an annual report to each member of the scheme not later than 6 months after the end of the period to which the report relates. Failure to comply should be an offence.

**10.22. Reporting associated third parties**

1. The law should provide that the responsible entity for a superannuation fund must include in the annual report for the fund

- a statement whether, during the period to which the report relates, the responsible entity or provider engaged or retained an associate, as defined in the Corporations Law, of the responsible entity or, if the fund is constituted by a deed or other agreement between parties, of 1 or more of the parties to the deed or other agreement, as investment manager, adviser, consultant or in any other capacity and
- if it did — the prescribed particulars of the engagement or retainer and of the association.

Failure to comply should be an offence.

2. The law should provide that the responsible entity for a superannuation fund must, within 14 days after so engaging such an associate, report the matter to the regulator. Failure to comply should be an offence.

**10.23. SGL certification in benefit statements**

1. The law should provide that, in the case of employer related superannuation funds, each employer must, within 2 weeks after receiving a written request from the responsible entity, certify to the responsible entity whether the employer has made all payments required to be made to the scheme (including those to be required under the SGL). Failure to comply should be an offence.

2. The law should provide that the responsible entity for a superannuation fund must include in each benefit statement sent to a member of the fund

- a statement whether the employer has given a certificate in relation to the period since the last previous benefit statement was given to the member and
- if any of the payments required to be made have not been made — what steps the responsible entity is taking to recover the amounts due but unpaid.

Failure to comply should be an offence.

#### **10.24. *Advice of SGL vesting etc.***

The law should provide that the responsible entity for a superannuation fund must include in each benefit statement sent to a member of the fund

- if the fund is an accumulation fund — the proportion of the gross SGL payment made to the responsible entity for the fund by an employer of the member that has been credited to the member's account in the fund
- in other cases — what percentage of the gross SGL payment during the period covered by the benefit statement has vested in the member.

Failure to comply should be an offence.

#### **10.25. *Employers not to divert superannuation payments***

To ensure that the responsible entities concerned receive the amounts due to them, the law should provide that it is an offence for an employer to deduct an amount from an employee's remuneration on account of superannuation contributions to a superannuation scheme the responsible entity for which is a foreign corporation or a trading or financial corporation, or the substantial or dominant purpose of which is to provide old-age pensions, without immediately giving the amount to the responsible entity of the relevant eligible superannuation fund.

#### **10.26. *Disclosure of fees and charges***

1. The law should provide that the responsible entity for a superannuation fund or an ADF must include in each annual report issued to members of the fund a statement whether any of the following payments were made by the responsible entity on account of the fund or ADF during the year to which the report relates and, if so, the amount of that payment:

- payments of fees or charges to each investment manager
- payments of administration fees
- payments of commission not included in those amounts.

Failure to comply should be an offence.

2. The law should provide that the responsible entity for a superannuation fund or an ADF must include in each annual report issued to members of the fund a statement of

- the amounts received from the fund by the responsible entity on account of its fees and charges



- the total of the amounts paid by the scheme directly to, and of the value of benefits given by the scheme directly to, the members of the board of management of the responsible entity because of their membership of the board of management of the responsible entity.

Failure to comply should be an offence.

3. The law should provide that, if at least 5% of the members of a superannuation fund so require in writing given to the responsible entity, the annual reports for the scheme must also include a statement of amounts of the salaries and other emoluments paid by the responsible entity to, and the value of the benefits given by the responsible entity to, each member of the board of management of the responsible entity. Failure to comply should be an offence.

**10.27. Disclosure of significant holdings**

The law should provide that the responsible entity for a superannuation fund or an ADF must include in each annual report issued to members the prescribed particulars of each asset the value of which, at the end of the period to which the report relates, was equal to 5% or more of the total value of all the assets of the fund. 'Value' means market value.

**10.28. Disclosure to lost member**

The law should provide that the responsible entity for a superannuation fund or ADF does not have to comply with any requirements to report to members in relation to a member who is 'lost' to the scheme. A member is lost if six months have passed since the prescribed procedures were followed and the responsible entity has not located the member.

**10.29. Information to beneficiaries**

The law should provide that disclosure and notification requirements imposed by law apply for the benefit of non-contributing members of the fund concerned.

**10.30. Reconcilable information**

The law should provide that the reporting requirements and requirements to lodge returns imposed on life insurance companies are such that the ISC is easily able to reconcile the information provided in respect of superannuation business and in respect of life business.

**10.31. Consequences of breach of disclosure requirements**

A contravention of the disclosure requirements recommended in this report should attract criminal liability except where otherwise indicated. Except in the case of disclosure by the responsible entity of an employer related superannuation fund, it should also attract civil liability to the same extent as provided for in the Corporations Law.

## **11. Investment controls**

### **11.1. *No rule requiring the use of external investment managers***

There should be no rule apart from the responsible entity's fiduciary obligations to members of the fund that requires the responsible entity for a superannuation fund, an ADF or a PST to engage an investment manager.

### **11.2. *Asset allocation***

There should be no prescription of specific asset allocation for superannuation funds, ADFs or PSTs.

### **11.3. *PSTs subject to the same investment controls***

The law should provide that the prudential regulations applying to the use of superannuation scheme funds should apply to PSTs and to any other vehicle that may only accept investments from superannuation schemes and other tax preferred investment schemes.

### **11.4. *In-house investments***

1. The law should provide that the responsible entity for a superannuation fund must not knowingly lend to, or make an investment in, an employer sponsor of the fund or an associate of the employer within the meaning of the Income Tax Assessment Act of an employer sponsor of the fund if the amount of the loan and the value of the investment (worked out at cost in the prescribed way) is more than the prescribed percentage of the total of the value of the assets of the scheme.
2. The law should provide that the responsible entity of an industry fund must not knowingly lend to, or make an investment in, 2 or more of the employer sponsors of the fund or in an associate of such an employer within the meaning of the Income Tax Assessment Act if the total amount of the loans and value of the investments is more than the prescribed percentage of the total of the value of the assets of the scheme.
3. Contravention of this provision should be an offence on the part of the responsible entity.
4. Values should be worked out as provided in OSS Regulations reg 16A.
5. The prescribed percentage should be such that, by 30 June 1998, it is 5%.

### **11.5. *Borrowing by superannuation funds etc.***

1. The law should provide that the responsible entity for a superannuation fund or an ADF must not borrow, or maintain a borrowing of, money, whether on security

or not. Non-compliance should be an offence. There should be a defence that the borrowing was temporary and made only to enable the scheme or ADF to pay benefits due to its members.

2. The law should provide that the responsible entity for a PST must not borrow, or maintain a borrowing of, money. Failure to comply should be an offence. There should be a defence that the borrowing was temporary and made only to enable the PST to meet its buy-back obligations.

#### **11.6. Use of futures etc.**

1. The law should provide that the responsible entity for a superannuation fund, an ADF or a PST must not invest in a futures contract or a derivative instrument except

- for hedging purposes or
- for risk management or
- for duration management of fixed interest portfolios or
- as a substitute for the outright purchase of other assets.

Failure to comply should be an offence.

2. The law should provide that, if, because of an investment in a futures contract or a derivative instrument, the fund, ADF or PST becomes geared, the responsible entity is guilty of an offence.

#### **11.7. Certifying solvency**

The law should provide that the responsible entity for a superannuation scheme, an ADF or a PST must, within 2 months after the beginning of a financial year, certify in writing to the regulator whether the expected liabilities of the fund, ADF or PST for that year can be met as they fall due without recourse to borrowing. Non-compliance should be an offence.

#### **11.8. Redemption periods for personal schemes**

The law should provide that personal schemes must have assets appropriate to their redemption periods. No specific sanction is required as the question is dealt with under recommendation 9.2.

## **12. Members' rights**

### **12.1. Personal superannuation funds: transferability restrictions**

There should be no change to the law in relation to the ability of members of personal superannuation funds to transfer or withdraw their benefits.

### **12.2. Employer sponsored and industry schemes: transferability restrictions**

1. There should be no change to the law in relation to the ability of members of employer related superannuation funds to transfer or withdraw their benefits: these should continue to be governed by the provisions of the deed or other instrument constituting the fund.

2. The law should provide that, despite any provision in the deed or other instrument constituting the fund, the date as at which the amount of a payment to which a member of an employer related superannuation fund is entitled on withdrawing from the fund otherwise than on ceasing the employment to which his or her membership relates is to be worked out is the date on which the member completes all that is required of him or her to withdraw from the fund. If payment is made after that date, interest, at a rate to be prescribed, should be payable on the amount outstanding.

### **12.3. Outlawing victimisation**

The law should make provision similar to the *Industrial Relations Act 1988* (Cth) s 301 protecting persons who are members of the board of management of a responsible entity for a superannuation fund by making it an offence to threaten, coerce or intimidate, or prejudice in connection with their employment or otherwise, such a person on account of the exercise by the person in good faith of a power or duty as member of the board of management.

### **12.4. Employee representation**

The law should provide that the conditions under which a employer related superannuation fund that has 50 or more members attracts a tax concession include a condition that the deed or other instrument constituting the fund makes appropriate provision to ensure that

- the responsible entity for the fund not be an individual and
- the board of management of the responsible entity for the fund have at least one half of its members appointed (whether by election or otherwise) by the members of the fund.

This provision should take effect from 1998.

### **12.5. Members' power to replace responsible entity**

The law should provide that the responsible entity for a superannuation scheme may be replaced as follows:

- 10% or more of the members of the fund, may, by notice in writing given to the responsible entity, require a ballot to be held for the removal of the responsible entity and the appointment of another person as responsible entity; the other person must consent to appointment as the responsible entity and give the declaration required by recommendation 8.7

- the responsible entity must then arrange for a postal ballot to be held on the question; if all members of the fund will have a reasonable opportunity to attend a meeting at which the question can be put, the responsible entity may arrange for such a meeting instead
- the responsible entity must, if it arranges such a meeting, also include in the notice of meeting a statement of the procedure to be put to the meeting as the procedure to be adopted by the meeting for conducting the meeting and for taking votes
- the question is not to be taken as having been agreed to unless at least 25% of the members cast a vote and the votes in favour of it amount to at least 75% of the members voting.

The law should provide that this provision does not prevent other business being transacted at the meeting.

### **12.6. Mergers**

1. The law should provide that the conditions under which a superannuation fund attracts a tax concession include a condition that the deed or other instrument constituting the fund not prevent or restrict a merger of the fund with another fund, restrictions implied by the responsible entity's fiduciary obligations to the members of the fund apart.

2. The law should provide that the responsible entity of a superannuation fund must not put into effect a merger of the fund with another superannuation fund unless the entity has given written notice of the proposed merger

- to the regulator and
- to the members of the fund.

The period of notice is to be not less than 3 months. Failure to comply should be an offence.

3. The law should provide that if 10% or more of the members of either fund, by notice in writing given to the responsible entity before the end of the 3 months, require a ballot to be held on the motion that the merger not proceed

- the responsible entities must then arrange for a postal ballot to be held on the question; if all members of a fund will have a reasonable opportunity to attend a meeting at which the question can be put, the responsible entity may arrange for such a meeting instead
- the responsible entity must, if it arranges such a meeting, also include in the notice of meeting a statement of the procedure to be put to the meeting as the procedure to be adopted by the meeting for conducting the meeting and for taking votes
- the question to be taken as having been agreed to by the members, unless at least 25% of the members of a fund cast a vote and the votes against the merger amount to at least 75% of the members voting in a scheme in which 25% of the members cast a vote.

The law should provide that this provision does not prevent other business being transacted at the meeting.

4. If the motion is passed, the merger is not to proceed.

#### **12.7. Superannuation Advisory Service**

1. A Superannuation Advisory Service should be established with the function of providing education and information to members of superannuation schemes about the operation of schemes and their entitlements as members.

2. The Superannuation Advisory Service should establish a panel of conciliators, able to provide conciliation services to assist in resolving disputes between members of superannuation funds, ADFs and DAs and the responsible entities for, or providers of, the schemes.

#### **12.8. Internal dispute resolution**

1. Responsible entities for superannuation funds and ADFs and providers of DAs should be strongly encouraged to maintain a fair, easily accessible internal dispute resolution mechanism that is free to members.

2. The law should provide that the responsible entity for a superannuation fund, or an ADF and the provider of a DA, must include in each prospectus, member booklet or offer document issued to members or prospective members the prescribed particulars of the internal dispute resolution mechanism, if any.

#### **12.9. Superannuation Review Panel**

1. The law should establish a Superannuation Review Panel, with the function of adjudicating disputes between members of superannuation funds or ADFs and the responsible entities of the funds.

2. The Panel should have no more than 3 members, appointed by the Minister on the nomination of interested groups. At least one member should have to have experience and knowledge of superannuation matters.

3. The Panel should be able to review any decision in relation to the member made by the responsible entity for the fund in the exercise or purported exercise of a power it has as responsible entity.

4. The Panel should only be able to make orders as follows:

- if the Panel finds that the power has been not been exercised improperly —  
an order affirming the decision
- if the Panel finds that the power has been exercised improperly  
— an order referring the matter back to the responsible entity to reconsider the matter and make a fresh decision in accordance with directions given by the Panel

- an order varying the decision
- an order substituting for the decision its own decision.

Without limiting the circumstances in which the Panel may find that the exercise of a power by a responsible entity was improper, the Panel should so find if it finds that the responsible entity, in making the decision

- failed to take a relevant consideration or matter into account or
- took an irrelevant consideration or matter into account or
- acted in bad faith or with malice.

5. A member of a scheme should not be able to apply to the Panel unless

- he or she agrees not to take proceedings in equity in relation to the subject matter of the application, but the Constitution (that is, the prerogative writs (Constitution s 75(v)) and the ability to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1975* (Cth) of the Panel's decision on the application, should not be affected
- either
  - there is no internal review mechanism established for the scheme
  - the decision concerned has been reconsidered in accordance with the internal review mechanism established for the scheme or
  - the Panel determines that the internal review mechanism is unlikely to assist or there are special circumstances that justify the application being made.

6. The law should provide that the conditions under which a superannuation scheme or an ADF attracts a tax concession include that the responsible entity must agree to be bound by any decision of the Superannuation Review Panel, but without prejudice to its rights to take proceedings under the Constitution (that is, the prerogative writs (Constitution s 75(v)) or *Administrative Decisions (Judicial Review) Act 1975* (Cth) in relation to the Panel's decision on the application.

#### 12.10. *Qualifying and vesting periods*

1. The law should provide that the conditions under which a superannuation fund attracts a tax concession include that the qualifying period for access to benefits under the scheme be no more than 3 months. This should be phased in over 3 years.

2. The law should provide that the conditions under which a single employer sponsored or industry superannuation fund attracts a tax concession include that employer contributions to the fund in excess of those to be required under the Superannuation Guarantee Levy Bill 1992 vest in the employee at the rate of 20% each year. This requirement should be introduced in 3 years.

#### 12.11. *Unclaimed benefits procedure*

1. The law should provide that the responsible entity for a superannuation fund or ADF, and the provider of a DA, must establish a procedure, conforming to guide-

lines published by the regulator by notice in the *Gazette*, for finding members of the scheme who do not claim benefits that are due to them, or whom the responsible entity or provider cannot locate.

2. The law should provide that the responsible entity for a superannuation scheme must ensure that the each member booklet, prospectus or offer document for the scheme include particulars of this procedure.

#### **12.12. *Unclaimed benefits***

An arrangement for an unclaimed benefits scheme (UBS) should be established as an ADF. However, disclosure requirements, reporting to member requirements and member representation requirements should not apply to the UBS. The law should provide for a UBS as follows:

- the regulator should keep a register of 'lost' members notified to it by responsible entities
- the regulator should not manage or administer the money covered by the UBS and should regularly put these functions out to competitive tender
- the UBS, or its agents, should be able to accept money from any scheme
- the administration costs of the UBS should be paid out of the gross earnings of the funds in the UBS
- the responsible entity for an eligible superannuation scheme or eligible ADF
  - may transfer unclaimed benefits to the UBS after the member has been lost (to their scheme) for six months and
  - must transfer unclaimed benefits to the UBS as soon as practicable after the member has been lost (to their scheme) for a total of two years.

#### **12.13. *Unclaimed benefits not to be put to reserves***

The law should provide that it is an offence for the responsible entity for a superannuation fund to transfer the amount of benefits not claimed by the members entitled to them to the reserve established for the fund.

#### **12.14. *Hardship cases***

The law should provide that a provision in the deed or other instrument constituting a superannuation fund that permits a member to withdraw money from the fund, on the ground of hardship is of no effect.

#### **12.15 *Bankruptcy of scheme member***

1. The law should provide that, except as recommended below, on bankruptcy of a member of a superannuation fund or an ADF, none of the amount standing to a person's account in the fund or ADF is capable of being taken by the trustee in bankruptcy as part of the person's estate.

2. The law should provide that, on becoming aware that a member of the superannuation fund is bankrupt, the responsible entity for the fund must apply so much of



the amount standing to a person's account in the fund as represents the contributions required to be made under SGL, and the earnings thereon, to buy an annuity for the member, either immediate or deferred (depending on the member's age).

3. The law should provide that the income from the annuity is protected income under the *Bankruptcy Act 1966* (Cth) and that the deferred annuity is not property of the member divisible among the creditors.

4. A court having jurisdiction in bankruptcy should be able, on application by the trustee in bankruptcy or the Official Receiver of a bankrupt's estate, to declare, by order, that some or all of the amounts standing to a bankrupt's account in a superannuation fund or ADF that is

- more than the amount referred to in 2 and
- represents contributions made within the previous 2 years, and the earnings thereon,

is property divisible among creditors.

#### **12.16. *Bankruptcy of employer***

The law should provide that the regulator, on becoming aware that the employer in a single employer sponsored superannuation fund has become bankrupt or, in the case of a company, become an externally administered body corporate, must, by written instrument, remove the responsible entity from office and appoint another responsible entity in its stead.

#### **12.17. *Superannuation on divorce or separation***

1. The *Family Law Act 1975* (Cth) should be amended to empower a court exercising jurisdiction in proceedings with respect to the property of parties to a marriage to direct the responsible entity of an accumulation scheme of which one of the parties is a member to split the account of the contributing spouse and roll the amount (if any) awarded to the non-contributory spouse into an ADF. The proportion of the fund allocated to the non-contributory spouse should, unless the court orders otherwise, be half the value of that part of the fund accumulated during cohabitation. The ADF must be fully preserved. The order should have to be obeyed despite anything in the deed or other instrument establishing the scheme.

2. The *Family Law Act 1975* (Cth) should be amended to empower a court exercising jurisdiction in proceedings with respect to the property of parties to a marriage to direct the responsible entity of a defined benefit scheme of which one of the parties is a member to pay the entitlement of the non-contributing spouse, determined by the court, into an ADF. The entitlement of the member should be divided between the parties according to a prescribed formula.

3. The court should be able to depart from the prescribed shares (that is, 50/50 for accumulation schemes, as prescribed for defined benefit schemes) in limited circumstances. The parties should be able to vary the shares by agreement, subject to the protection recommended in the ALRC's report *Matrimonial Property* (ALRC 39) and subject to court approval. In deciding whether to depart from the prescribed shares, or to approve an agreement to that effect, the superannuation position of the non-contributing spouse should be considered.

4. The transfer should not be subject to any tax or duty.

#### **12.18. Superannuation and breakdown of de facto relationships**

The law should provide that, on the breakdown of a de facto relationship, the superannuation entitlements of the parties to the relationship should be re-allocated on the same basis as provided for in recommendation 13.15. Jurisdiction in respect of proceedings under this recommendation should be conferred on the Family Court, the Family Court of Western Australia and on the Supreme Courts of the States and Territories.

### **13. Power of the regulator**

#### **13.1. Random audits**

The regulator should conduct a program of random audits of responsible entities and investment managers for superannuation funds, ADFs and PSTs and the providers of DAs. Enough resources should be provided to the regulator to ensure that such a program can be established and maintained.

#### **13.2. Investigation powers**

In addition to any powers of investigation the regulator may have at present, the law should provide that the regulator has the power to

- require from a responsible entity's external auditors information obtained by them in the course of the audit
- require from any person the production and explanation of documents relating to the affairs of a superannuation scheme and take copies or extracts of them
- enter upon and obtain full and free access within premises for the purpose of obtaining relevant information
- obtain and execute search warrants
- conduct examinations of relevant persons.

#### **13.3. Privileges**

The privileges from disclosure, the immunities from use in evidence and the liabilities for non-compliance should be similar to those applicable under the Corporations Law and the *Australian Securities Commission Act 1989* (Cth), as proposed to be amended by the *Corporations Legislation (Evidence) Amendment Bill 1992* (Cth).

**13.4. Auditors to report suspected breaches etc.**

1. The law should provide that an auditor who, in the course of dealing with, or auditing, a superannuation fund, an ADF or a PST, suspects on reasonable grounds that the responsible entity, or an investment manager engaged by the responsible entity, has contravened the laws governing superannuation, a prescribed law or the deed or other instrument constituting the scheme must report the matter without delay to the regulator. Failure to comply should be an offence.

2. The law should provide that an auditor who, in the course of dealing with, or auditing, a superannuation scheme, ADF or PST, forms the opinion that the steps taken by the responsible entity to limit the risk of loss to prudent levels are not achieving their apparent objectives must report the matter without delay to the regulator. Failure to comply should be an offence.

3. The law should provide that an auditor who makes either such report has protection similar to that provided under the Corporations Law s 332(9)-(10) and s 1289.

**13.5. Qualified auditors**

1. The law should provide that a person who does not have the proper qualifications must not

- act or purport to act as auditor of a superannuation fund, an ADF, a PST or
- hold himself or herself out as willing or able so to act.

Non-compliance should be an offence. A person should be taken to have the proper qualifications only if the person

- has satisfactorily completed a course of instruction approved by the regulator by notice in the *Gazette* or
- has experience of a kind, gained over a period, specified by the regulator by notice in the *Gazette*

or if the regulator is satisfied that the person has enough knowledge and experience to conduct such audits competently and so certifies in writing; the regulator may give a person such a certificate, with or without an application.

2. An application for a certificate should have to be in accordance with a form approved by the regulator. If an application does not contain enough information to allow the regulator to consider the application properly, the regulator should be able, by notice in writing given to the applicant, request the applicant

- to give further information or
- to produce to the regulator a specified document.

Non-compliance with a request should not be an offence, but the regulator should be able to decline to deal further with the application.

3. On an application, the regulator should grant or refuse to grant the certificate. The decision should be reviewable by the AAT.

4. The regulator should notify the applicant in writing without delay after making the decision on the application. If the decision is unfavourable to the applicant, the notice should state the reasons for the decision. If the regulator has not notified the applicant in writing of the decision on an application

- within 28 days after the application was received or
- if the regulator has given the applicant a notice under paragraph 2 — within 28 days after the notice is complied with

the application should be taken to have been refused.

5. The regulator should be able to direct a qualified auditor not to act or to offer or hold himself or herself out as able to act as auditor of a particular superannuation scheme, ADF or PST. The direction should be in writing and should only be given if the regulator is satisfied that, because of the risk of a contravention of the law imposing prudential control over the scheme, ADF or PST, or the Corporations Law, the *Life Insurance Act 1945* (Cth) or a prescribed law, the direction ought to be given. A decision to give the direction should be reviewable by the AAT.

### **13.6. Actuarial certificates**

1. The law should provide that the responsible entity for a superannuation fund that is a defined benefit fund must have a current actuarial certificate no more than 3 years old. Failure to comply should be an offence.

2. The law should provide that the regulator may, by notice in writing given to a responsible entity for a defined benefit superannuation fund, require the responsible entity to obtain another actuarial certificate within such time as is specified in the notice, or such longer time as the regulator allows. Failure to comply with the requirement should be an offence.

3. The law should provide that a certificate is not effective for the purposes of this recommendation unless it includes or has attached to it a statement of the assumptions on which the actuarial calculations to which it relates are based.

### **13.7. Preservation remedies**

The law should provide that the regulator have preservation powers, including the power to seek injunctions, similar to those now available to the ASC.

### **13.8. Temporary responsible entity**

1. The law should provide that the Federal Court, or the Supreme Court of a State or Territory, may, by order, on application by the regulator, the responsible entity for or a member of a superannuation fund, an ADF or a PST, appoint a temporary responsible entity for the scheme. The order should specify the powers of the responsible entity and be subject to such terms and conditions, including as to period of appointment, as are specified in the order.

2. Such an order should not be made unless the court finds that the responsible entity is not able to fulfil, or has not fulfilled, its obligations as responsible entity.

**13.9. Regulator may enforce members' rights**

The law should provide that the regulator may, without the consent of the members of a superannuation fund, an ADF or a PST, take the same proceedings for relief against the responsible entity that a member of the scheme may take. "Relief" does not include damages or compensation.

**13.10. Regulator may enforce contracts against investment managers**

1. The law should provide that the regulator may, without the consent of the responsible entity for, or members of, a superannuation fund, take, in the name and on behalf of the responsible entity, the same proceedings for relief against an investment manager engaged by the responsible entity as the responsible entity may take. 'Relief' includes damages and compensation.

2. The law should provide that the regulator is to be bound, in taking such proceedings, by the same obligations to the members as bind the responsible entity.

3. The law should provide that the regulator's taking those proceedings is not to affect any liability of the responsible entity for a breach of fiduciary obligation in failing to act.

**13.11. Regulator may sue for compensation for members**

1. The law should provide that the regulator has the power to take proceedings on behalf of a member of a superannuation fund, an ADF or a PST for compensation for loss or damage suffered by the member by conduct of the responsible entity that constitutes a contravention of the law regulating superannuation funds, ADFs and PSTs or the deed or other instrument constituting the scheme.

2. The law should provide that such an action may not be taken on behalf of a member except with the written consent of the member.

3. The law should provide that such a proceeding may be commenced in respect of an alleged contravention even though another proceeding has been commenced against the responsible entity in respect of the alleged contravention.

4. The law should provide that the court may find on the balance of probabilities, for the purposes of the proceeding, that a contravention has occurred.

**13.12. Removal and banning orders**

The law should give the regulator powers to ban or remove a responsible entity, a member of an unincorporated responsible entity or a director of an incorporated responsible entity. The law should provide that the regulator is able to suspend, indefinitely or for such period as it may specify, a person who is a director or

member of a responsible entity of a superannuation scheme from the board of the responsible entity. This power should be exercisable if, in the regulator's opinion

- the person ought to be removed having regard to the risk posed of non-compliance with the relevant law, either by the director or the member of the responsible entity or
- the person is unable to fulfil, or has failed to fulfil, his or her duties or functions under the law or under the deed or other instrument constituting the scheme.

### **13.13. Regulator may direct investment managers not to act**

1. The law should provide that the regulator may, by notice in writing served on a person, direct the person not to act or to continue to act as investment manager for the responsible entity for a superannuation fund. Non-compliance with the direction should be an offence. The direction should be reviewable by the AAT.

2. The law should provide that the regulator is not to serve such a notice unless it is of the opinion that

- having regard to the risk of non-compliance with the law, the regulations or the deed or other instrument constituting the fund, the person ought not to act as investment manager for the fund or
- the investment manager has not fulfilled or cannot fulfil its duties and functions as investment manager.

3. The law should provide that, if such a notice is served, the person on whom it is served is not to charge the responsible entity any fee in connection with the repayment or return of funds or assets to the responsible entity (that is, no exit fees).

### **13.14. Stop orders**

The law should provide that the regulator may issue a stop order preventing the responsible entity for as personal superannuation scheme or an ADF or the provider of a DA from issuing further units or interests in the scheme. Subject to a hearing requirement, the regulator should be able to issue a final stop order. The provision should be modelled on the Corporations Law s 1033.

### **13.15. Stop orders: life agents**

The law should provide that the regulator may issue a stop order to a life insurance company preventing the company from continuing to use a particular life insurance agent in so far as the agent is involved in selling superannuation. If the regulator does not seek to confirm the order within a specified period the order should lapse.

### **13.16. Instituting prosecutions**

An information, charge, complaint or application in relation to any proceedings for an offence against a superannuation law may be laid or made by the regulator or a delegate of the regulator.

### **13.17. Issues of criminal liability**

The criteria for criminal liability of individuals, or directors of bodies corporate or members of the board of the responsible entity for breach of duty should, in principle, be the same as is proposed in the *Corporate Law Reform Bill 1992*. An act or omission of an individual, a director or member of a responsible entity that would, if done or omitted by a director of a company, attract the civil penalty orders provisions proposed to be inserted in the Corporations Law by the *Corporate Law Reform Bill 1992* (proposed Pt 9.4AA, Div 2) should attract similar liability under the proposed new law.

### **13.18. Merger of superannuation schemes**

1. The law should not require the prior approval of a court or the regulator for mergers of superannuation schemes.

2. The law should provide that a proposed merger should have to be notified to the regulator, who should be able to issue, within 21 days, an interim stop order to prevent the merger proceeding. The regulator should be required to initiate court proceedings within 14 days of issue to have the order confirmed.

### **13.19. Funding the regulator**

The regulator should be funded solely from Consolidated Revenue. The funding should be fully independent of any levy that government may choose to impose on the superannuation industry.

## **14. Surpluses and reserves**

### **14.1. Surpluses not to be repatriated**

The law should provide that it is an offence for the responsible entity for a superannuation fund pay to a person who is liable to make contributions to the fund, except a member, any amount representing the whole or some of a surplus in the fund except as follows:

- an actuary has certified that there is a surplus in the fund
- the amount, or the sum of the amounts paid since the certificate was given, must not be more than 50% of the amount certified by the actuary as the amount of the surplus unless the regulator, subject to review by the AAT, has given written approval to making the payment
- the responsible entity must have given to the members of the fund written notice of its intention to make the payment not less than 2 months before the payment is made.

### **14.2. Deeds etc. to make provision for surpluses**

The law should provide that a provision in the deed or other instrument constituting a superannuation fund that makes provision inconsistent with Recommendation 14.1 is void to the extent of the inconsistency.

**14.3. Employers to disclose intention about deficits in defined benefits schemes**

The law should provide that, if an actuary certifies, in relation to a single employer defined benefit superannuation scheme, that the employer must make a particular contribution, or a contribution of not less than a particular amount, to the fund to ensure that benefits reasonably likely to become payable by the scheme will be able to be paid

- the responsible entity for the scheme must, without delay, request in writing from the employer advice as to whether the employer proposes to make such payments
- the employer must give a written reply containing that advice within 3 months after the request is given
- the next annual report to members must include a statement of the effect of the actuary's certificate, and a copy of the employer's response.

Failure to comply should be an offence.

**14.4. Deficits in defined benefits fund to be reported**

The law should provide that, if an actuary certifies to the responsible entity for a defined benefit fund that there will be a deficit in the fund, the matter must be reported without the delay to the regulator, and the responsible entity must inform the regulator how it proposes to deal with the matter. Failure to comply should be an offence.

**14.5. Reserving not to be a breach of trust**

The law should provide that a responsible entity for an eligible scheme does not contravene their fiduciary obligation to the members imposed by law, merely because the responsible entity credits amounts to reserves in the scheme in accordance with a policy that itself is prudent.