

1. Introduction

The reference

1.1. On 24 May 1991 the federal Attorney-General, Mr Michael Duffy MP, asked the Law Reform Commission and the Companies and Securities Advisory Committee (the Review) to carry out a thorough review of the regulatory framework for prescribed interests and 'like collective investment schemes'. The terms of reference are set out at the front of this report. They require the Review to report by 1 November 1992.

The issues paper

1.2. In September 1991 the Review published a comprehensive issues paper on the area.¹ That paper identified the scope of the collective investments industry and discussed the importance of the industry for both national retirement incomes policies and capital formation in Australia. It set out the issues, so far as the Review saw them, and called for submissions.

Superannuation — interim report requested

1.3. In September 1991, just before IP 10 was published, the Attorney-General wrote to the Review asking for an interim report on superannuation issues. Specifically, he asked that the report

traverse the regulation of superannuation investments products under the Corporations Law. As part of that report it would also be desirable, where appropriate, to consider the regulatory arrangements applying to comparable investment products which are not currently regulated by the Corporations Law.

Background to the superannuation inquiry

Superannuation guarantee levy legislation

1.4. The background to the request for the interim report on superannuation is the Commonwealth's retirement incomes policy, including the superannuation guarantee levy legislation, and the increasing awareness of the need to ensure that the regulation of superannuation schemes provides a proper level of protection for scheme members. The implications of these developments for the regulation of superannuation schemes are further considered in chapter 3.

1. ALRC IP 10.

Collective investments and superannuation

1.5. The term 'collective investments' covers any type of investment scheme in which a number of investors hand over their money to professional managers who manage the total fund to produce a return. A common form of collective investment is the unit trust, but there are many others.² They do not necessarily take a corporate form, but they often involve issues and interests similar to those that arise in relation to capital formation through corporations. Some are subject to regulation under the Corporations Law as 'prescribed interests'.³ Superannuation is a form of collective investment.

Superannuation and retirement income policy

1.6. The Commonwealth's retirement incomes policy involves two major components: privately funded superannuation and the old age pension. Recently, there has been an increasing emphasis on the privately funded superannuation component of retirement income. The Commonwealth's policy now looks to long term savings by individuals to provide a capital base from which they can generate income. In conjunction with the publicly funded pension, this will provide a higher level of retirement income than would otherwise be the case. Superannuation is also an increasingly important source of financial intermediation in the Australian economy. As a result of increased participation by the workforce in superannuation schemes, total superannuation assets have quadrupled in the last decade to \$139 billion. Given the focus on compulsory participation in superannuation schemes contained in the Commonwealth's retirement incomes policy, the value of these assets may quadruple again by the turn of the century.

Discussion Paper 50

1.7. In January 1992, the Review published a discussion paper setting out preliminary proposals for the regulation of superannuation.⁴ The discussion paper was widely circulated and over 100 submissions were received from a wide range of individuals and organisations. The Review gratefully acknowledges their interest. A list of those who made formal submissions is in Appendix 2.

2. eg trustee common funds, shares, Friendly Society bonds and investment linked insurance products.
3. ALRC IP 10 para 1.1-1.5. For a further discussion of the regulation of prescribed interests under the Corporations Law see ch 4.
4. ALRC DP 50.

The Review's work

Assistance and acknowledgments

1.8. Soon after the Attorney-General's request to report on superannuation was received, the ALRC engaged Mr Paul Klumpes, Lecturer, Faculty of Commerce, Australian National University, to provide the Review with an overview of the superannuation industry, its existing regulatory framework and the inconsistencies within that framework. The material prepared by Mr Klumpes formed the basis for parts of DP 50 and of this report. The Review will soon publish a Research Paper setting out in more detail this overview. The ALRC also engaged Mr Ian Ramsay, Lecturer, Faculty of Law, University of New South Wales, to prepare a paper on trustees' duties, company directors' duties and the issues involved in the incorporation of trustees.

Consultants

1.9. In accordance with its usual practice, the ALRC appointed a number of honorary consultants from the superannuation industry, the legal profession, academia and the community to help the Review. The names of the consultants are listed at the beginning of this report. The Review acknowledges, with appreciation, their contribution. They attended several lengthy meetings to discuss the Review's preliminary proposals and gave valuable assistance in other ways. The Review wishes to express its particular appreciation for the extensive contribution made by Mr Robert Ferguson, Managing Director, Bankers' Trust Australia, to the Review's work.

Consultations

1.10. In addition to formal meetings with consultants, the Review held extensive consultations with the staff of the Insurance and Superannuation Commission (ISC) and the federal Treasury. The Review wishes to acknowledge in particular the helpful advice and assistance provided by Richard Beetham, Ron Deane, Bob Glading, Frank Keenan, Nick Stuparich and Mike O'Neill from the ISC, by Donald Duval, Australian Government Actuary, and by Ian Robinson from Treasury. The Review also met on a number of occasions with the Superannuation Committee of the Law Council of Australia. It acknowledges the helpful comments and advice received from the Committee. It particularly wishes to thank the Convenor of the Committee, Andrew Fairley, for providing the Review with the opportunity to participate in the Superannuation 1992 Conference. The Review also wishes to express its appreciation to Lord Browne-Wilkinson, a Lord of Appeal in Ordinary, for his thoughtful comments on the appropriate legal framework for superannuation schemes, the distinctive

features of superannuation scheme trusts and their implications for the duties of superannuation scheme trustees. In addition, the Review would like to acknowledge the material provided by Baker & McKenzie on supervision of superannuation schemes overseas.

Further work

1.11. The Review's work on a number of matters that were raised in DP 50, and which are important for superannuation, has not been concluded. These matters, which include the regulation of financial advisers and the licensing of fund managers, will be covered further in the Review's final report on collective investments.

Form of recommendations

1.12. This report, despite the terms of reference of the Review, has been completed in too short a time to allow the Review to draft legislation to implement the recommendations. Later chapters set out the differences and inconsistencies between parts of the legislation that presently governs superannuation. The principal differences are in the areas of disclosure requirements and the powers of the regulators. One option would be to enact a comprehensive federal law covering all aspects of superannuation regulation, including those presently found in the Corporations Law. The question of the relationship between the Corporations Law and other laws that regulate superannuation will need to be addressed in drawing the legislation to implement the recommendations in this report. The Review has not addressed this matter.

Other reports, studies and reviews

1.13. The Review has had regard to a number of other government statements and agency reports dealing with specific issues relating to superannuation or to closely related areas. These include the Treasurer's statement of 20 August 1991 about prudential supervision of the superannuation industry and disclosure requirements and the Advisory Committee's Report *Enhanced Statutory Disclosure System* (1991). In view of the substantial common interests, the Review has maintained contact with the Senate Select Committee on Superannuation, chaired by Senator Nick Sherry.⁵ The Review has also maintained a close working relationship with the Special Premiers' Conference Working Party on Non-Bank Financial Institutions sub-committee on Trustee Companies, through its Convenor, Dr Paul Moy, Assistant Secretary, NSW Treasury.

5. The report of this Committee is due in May 1992.

Major issues

1.14. This report covers the following issues

- the constitutional power to regulate superannuation
- the policy implications of the changed nature of superannuation from a voluntary to a compulsory system
- standards of probity and competence for those who administer superannuation schemes
- duties of superannuation scheme trustees should be identified and included in legislation
- disclosure — to members and prospective members of superannuation schemes and to the regulator
- what, if any, investment controls should be imposed on superannuation schemes
- issues regarding the role and powers of the regulator
- problems regarding the relationship between superannuation schemes and their members, including inexpensive, non-judicial resolution of disputes
- problems concerning surpluses and reserves.