10. Disclosure: a critical obligation

Introduction

Scope of chapter

10.1. This chapter explores the rationale for requiring comprehensive disclosure to members and to the regulator as a central feature of a system of prudential supervision. It includes proposals to clarify and extend the current disclosure requirements.

Importance of disclosure

10.2. Adequate disclosure is the fundamental requirement of any system of prudential supervision. As the Review noted in IP 10

> the goal of investor protection requires, as a minimum, adequate disclosure to enable the investor or potential investor to make an informed judgment about his or her investment.[1]

In the context of superannuation schemes, disclosure is important in three respects

- to prospective members, particularly of personal schemes
- to existing members of all schemes during membership of the scheme and on exit from the scheme
- to the regulator, to enable it to monitor schemes' compliance with the law.

In his statement of 20 August 1991 the Treasurer proposed additional disclosure requirements for superannuation schemes with more than five members.[2] The Review notes that the Treasurer's statement provides for a considerable expansion in the level of disclosure required in each case. The Review supports these proposals. In some cases the Review considers that, additional disclosure is required. The Review's additional requirements are set out below.

Inconsistencies in disclosure regimes

10.3. Consistency and increased competition. A principal objective of the Commonwealth's prudential framework for superannuation is to foster competition within the superannuation industry.[3] This objective will not be achieved if

1. IP 10 para 2.26.
2. See para 5.7 for a summary of the current disclosure requirements and Appendix 1 for additional disclosure requirements proposed by the then Treasurer, Mr John Kerin MP on 20 August 1991.
3. Treasurer's statement, paper 1 para 20.

members or potential members, as a result of different disclosure requirements, cannot compare superannuation schemes. Moreover, responsible entities may be encouraged to structure their schemes to take advantage of any inconsistencies in disclosure requirements, further disadvantaging potential scheme members. Removing these inconsistencies will enhance competitive neutrality, thereby making competition more likely.[4]

10.4. ***Proposal.*** In DP 50 the Review proposed that the quantity and quality of information provided by life companies in respect of superannuation policies should be increased to that required for prescribed interests under the Corporations Law.[5] This proposal received widespread support,[6] except from life insurance companies, who all considered that the disclosure required under the ISC circulars to be adequate. The Review acknowledges that compliance with ISC circulars 290 and 291 has greatly improved the level of disclosure required by life companies. To the extent that there are differences remaining, the Review considers they should be eliminated. The Review understands that these inconsistencies are also being addressed by the ISC as part of its review of the *Life Insurance Act 1945* (Cth). To the extent that they are eliminated as a result of that review, the concerns held by this Review will be addressed. The Review, therefore, limits its recommendation in respect of disclosure by life offices to the elimination of the remaining differences between the ISC circulars and the disclosure requirements under the Corporations Law and the application of the additional disclosure requirements recommended in this chapter. This is particularly important for investment linked products where the investment risk is borne by the investor.

10.5. ***Recommendation.*** Chapter 6 sets out differences and inconsistencies between the disclosure requirements imposed by the Corporations Law and by the other laws, such as OSSA, affecting superannuation schemes. The publication of the Treasurer's statement August 1991, and ISC circulars 290 and 291, would suggest that the Commonwealth recognises the need to bring up to the standard imposed by the Corporations Law disclosure requirements affecting schemes not regulated by the Corporations Law. The Review endorses the principle that disclosure requirements under the Corporations Law s 1022 are an appropriate standard to apply to disclosure for superannuation schemes. It construes the Treasurer's statement in August 1991 as an announcement of the

4. The Treasurer indicated that it is now a priority of the Commonwealth to ensure that similar superannuation schemes are subject to the same regulatory requirements irrespective of the institution providing the scheme: Treasurer's press release No 73, 20 August 1991.
5. DP 50 proposal 6.6.
6. eg Permanent Trustee Company Ltd *Submission* February 1992; Westpac Financial Services *Submission* February 1992; Securities Institute of Australia *Submission* February 1992; Australian Shareholders' Association *Submission* February 1992.

Government's intention to apply this standard to schemes currently regulated by OSSA. The Review recommends that all superannuation schemes should conform to this standard of disclosure. At present, the standard is imposed by law only on those schemes regulated by the Corporations Law. In particular, it is not imposed by law on schemes that are subject only to circulars 290 and 291. These circulars are advisory and do not impose legal obligation.[7] It should be imposed by law on all schemes.

Recommendation 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.

Application of disclosure requirements to small schemes

10.6. The additional disclosure requirements proposed by the Treasurer are only to apply to schemes with five or more members. The Review considers that the information that is referred to in paragraph 10 of the Treasurer's statement is information that is relevant to arms length members of superannuation schemes. It is information that is probably already available to members under the general principles of trust law.[8] To require responsible entities to distribute it to members automatically may be too costly. Accordingly, the Review recommends that information only be provided at the request of a member. All schemes with less than five members, at least one of whom is an arms length member, should be required to enclose, with members benefit statements, a notice to the effect that it is available on request. Single member schemes where the member is the responsible entity should not be subject to any disclosure requirements.

Recommendation 10.2: Disclosure to single member schemes

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

7. The Review understands that there is widespread compliance with the standards embodied in these circulars.
8. In ch 9 the Review suggests that this principle be clarified and modified.

Reporting and disclosure — general principles

Disclosure to members

10.7. ***Comprehensible and consistent.*** The disclosure requirements imposed on superannuation schemes, ADFs and DAs are designed to inform members and the regulator about the activities of the schemes. They should enable members of superannuation schemes, ADFs and DAs (and, where appropriate, the regulator) to make meaningful comparisons between competing schemes, ADFs and DAs. To achieve these objectives, the requirements must satisfy the following general criteria:

- they must ensure that the information to be provided is comprehensible as well as comprehensive and
- they must, wherever possible, apply consistently across all competing schemes to allow comparisons.

10.8. ***Useful information.*** Simply providing members with more information about their superannuation scheme does not guarantee that they are able to understand it or make better decisions. Indeed, too much information may only serve to confuse members.

Disclosure to the regulator

10.9. Ensuring that the regulator receives all relevant information about superannuation schemes is an integral part of the regulatory framework for superannuation. Without that information, the regulator would be unable to use its investigative and enforcement powers effectively and fully. During consultations the view was expressed to the Review that if there are strict requirements to inform the regulator, members will become complacent and fail to protect their interests. For this reason it was put forward that no more information should be given to the regulator. On this view, members would be more alert and vigilant if they did not know that information about the scheme was being sent to the regulator as well as to them. The Review does not agree that information supplied to the regulator results in complacency. But member involvement in superannuation is undoubtedly an important element in the supervision and monitoring of superannuation. Members cannot always adequately supervise the superannuation industry themselves. The regulator must be involved. To be involved it must have information.

Plain language

10.10. There is little point in disclosure which uses technical jargon or sophisticated concepts not readily understood by the community. Even plain language documents may not measure up to the standard required if the true yardstick is the ability of members to comprehend the document. ISC circulars already provide that information must be provided by insurance companies in 'clear and not ambiguous language'.

> The use of ambiguous terms, or industry terms which are not explained in ordinary simple language and are not readily understood by the public at large, should be avoided.[9]

DP 50 proposed that all disclosure documents should be written in clear easily understandable language and presented in a reasonable way.[10] This proposal received widespread support.[11] Some concern was expressed during consultations about how successfully this proposal could be implemented, given the current complexity of superannuation. The Review does not see this as a problem. Common sense should prevail. There is a considerable body of literature on the principles of producing plain language documents[12] and there are several bodies with rapidly developing expertise in the area.[13] The Review recommends that the law should require that disclosure documents be written in clear and simple language. There should not be a criminal sanction, or tax sanction, for a contravention. That would be unrealistic. Instead, the regulator should be able to direct that certain terminology or expressions not be used by a responsible entity. Responsible entities may be helped by model disclosure guidelines. They would need to be modified for individual schemes but would provide some guidance. ASFA has already made commendable efforts in this area. It has published a reporting standard and has initiated annual communications awards.

> We believe there is a continuing role for bodies such as ASFA in promoting 'best practice' in the industry and encouraging innovation through acknowledgment of outstanding achievement.[14]

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9. ISC circular 291.
10. DP 50 proposal 6.3.
11. eg Permanent Trustee Company Ltd *Submission* January 1992; LIFA *Submission* February 1992; Australian Federation of Consumer Organisations *Submission* February 1992.
12. eg Eagleson *Writing in Plain English* AGPS Canberra, 1990.
13. eg the Law Foundation Centre for Plain Legal Language based at Sydney University.
14. ASFA *Submission* March 1992.

The Review recommends that the regulator, in conjunction with ASFA and other industry associations, establish guidelines as to best practices in providing information in clear and unambiguous language and encourage schemes to comply.[15]

Recommendation 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.

Community languages

10.11. DP 50 included a proposal that members of superannuation schemes should be able to obtain, on request, basic information that is required to be disclosed, or a summary of it, in a relevant community language.[16] This proposal received some support.[17] It was criticised, however, mainly on the grounds of excessive cost and uncertainty as to how much information would be required to be provided in other languages.[18] The Review has refined the proposal in the light of those comments but remains of the view that because superannuation is increasingly becoming a matter of public policy, the government should take responsibility for ensuring that members of superannuation schemes get at least a minimum standard of information in a limited range of languages. It should prescribe a list of languages in which a member of a scheme may request information. The regulator should prepare a prescribed statement to be supplied to responsible entities free of charge, on request. Members should

15. The ISC has already expressed interest in working with the industry to establish guidelines: *Submission* March 1992.
16. DP 50 proposal 6.4.
17. eg Permanent Trustee Company Ltd *Submission* January 1992; DSS *Submission* February 1992; Office of Queensland Cabinet *Submission* February 1992.
18. AMP Society *Submission* February 1992; ASFA *Submission* March 1992; Mercer Campbell Cook & Knight *Submission* February 1992.

advise the responsible entity on joining a scheme if he or she would like information to be provided in one of the prescribed languages. The responsible entity should then include a prescribed statement, in the language the member chose, when sending to the member his or her benefit statement. The prescribed statement should point out that the benefit statement is an important document and that the member should seek help to have it translated if he or she cannot read it. Information about translation services should be made available at the Superannuation Advisory Service.[19]

Recommendation 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.**

19. See recommendation 12.7.

Information about benefits

10.12. ***Proposal that present day values be given.*** It is important that members of superannuation schemes understand the real purchasing power of the lump sum or pension they expect to receive some years hence on retirement. They are less likely to take an active interest in the effective management of their scheme or to make sensible investment decisions if they have been lured into false expectations of a 'pot of gold'. To try to enhance this understanding, DP 50 proposed that the information about prospective benefits reported to members should be expressed in real terms, that is, in present day dollar values, and that the assumptions on which all matters disclosed to members are based should be disclosed.[20] This would help people understand the actual purchasing power of their future benefit.

10.13. ***Response.*** Considerable support was expressed for both these proposals.[21]

> It is agreed that prospective benefits should be expressed in real terms. It is essential that the regulator provide guidance as to the appropriate discount or inflation rate to be used. The method and basis of calculation of prospective benefits should be disclosed prominently and in close proximity to the projections.[22]

The Department of Finance suggested that the proposal should not apply to defined benefit schemes.[23] The Review agrees that a special rule is necessary for defined benefit schemes. Several submissions referred to ISC circulars 290 and 291, which relate to the benefit illustrations of single and regular premium life insurance policies, and urged that they be 'given time to work' before further recommendations are made.[24] The Review does not consider that it is appropriate to set one standard for disclosure by one sector of the superannuation industry and a different standard for the rest of the industry unless the difference can be justified. There is no reason to set different standards in this instance. Nor is there any reason to have these standards imposed on one sector by law, but only set out in non-enforceable guidelines for another sector.

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20. DP 50 proposals 6.1, 6.2.
21. eg ASC *Submission* March 1992; Westpac Financial Services *Submission* February 1992; Australian Friendly Societies Association *Submission* February 1992.
22. Australian Shareholders Association *Submission* February 1992.
23. Department of Finance (Cth) *Submission* February 1992.
24. eg LIFA *Submission* March 1992; National Mutual *Submission* February 1992; Prudential Assurance Company Ltd *Submission* February 1992; AMP Society *Submission* February 1992.

10.14. ***Recommendation.*** To the extent, if any, that the disclosure standards suggested by ISC circulars for superannuation schemes operated by life insurance companies differ from the Review's recommendations, they should be modified. Furthermore, the standards involved should apply to both sectors of the industry by law. The Review recommends that, in a defined benefit scheme, if information is provided about the amount of benefit available under a scheme, and, under the scheme, the benefit is worked out only by reference to final average salary, the benefit should have to be expressed primarily as a multiple of final average salary. The benefit, expressed in this way, should have to be disclosed in a prominent way. If it is also expressed in some other way, that expression must be clearly distinguishable as secondary, for example, provided in smaller print. For all schemes, if benefits are expressed in dollar amounts, the Review recommends they should be expressed in both real and nominal terms. The information should also include a statement of the assumptions about inflation, the scheme's earning rate, and wages growth, used to work out the benefit, and a statement to the effect that the amounts stated as benefits available are not guaranteed.[25]

Recommendation 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**

25. The Review envisages that this statement would be similar to the footnotes required to be included by ISC circular 290 in benefit illustrations for investment linked policies to the effect that the value of units may rise and fall; that the results shown are illustrations only; that the performance of the fund is not guaranteed and depends on economic conditions, investment management and future taxation and that care should be exercised in using past performance as a basis for assessing long term future performance.

- **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.**

10.15. ***Regulator to publish guidelines.*** Trying to standardise the reporting of benefits, or at least to make them such that comparisons may usefully be made between schemes, will be effective only if some limit is placed on the assumptions regarding inflation and wage rates that can be used in the calculation of benefits. The Review recommends that the regulator should issue a range of estimates to be used in such calculations. Approval of the regulator should be required to use rates outside that range.

Recommendation 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.

10.16. ***Free look period.*** An investor in a superannuation scheme marketed by a life company will usually have a 14 day 'free look' period after signing the contract. During this period the investor may change his or her mind and cancel the policy. This allows people who have been the subject of high pressure sales

tactics from insurance agents the opportunity to reconsider their commitment.[26] The Review proposed in DP 50 that instead of a free look period, offer documents for superannuation schemes marketed by life insurance companies should include a copy of the contract.[27] Submissions indicated overwhelming support for the retention of a free look period of 14 days.[28] The general view is that a free look is a better protection and safeguard for investors than providing a copy of the contract would be. The Review, therefore, recommends that life companies continue to give superannuation investors a 14 day free look period. This should be made compulsory by amending the *Insurance Contracts Act 1984* (Cth) s 64.

10.17. ***Extending the free look.*** There was such support for the free look period that the Review considered its extension to personal superannuation schemes not issued by life companies. Where a person has no choice whether to join or leave a scheme, that is, where membership of the scheme is a condition of holding the job, a free look period is not required. For personal schemes, however, where individuals have a choice about investing in a particular scheme, the Review recommends a 14 day free look period. Protection against abuse (by members withdrawing without penalty if there is a downturn in the scheme during the free look period) is needed for all situations where a free look period applies. The Review understands that the ISC has recommended that, for investment-linked business, the policy holder should bear the investment risk during the 14 day period.[29] This recommendation is consistent with the Review's thinking on this issue. The Review recommends that the withdrawal sum should be calculated at the date of the withdrawal request. No fees or charges should be imposed by the responsible entity on the investment if the withdrawal request is made within the 14 days.

Recommendation 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.

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26. Superannuation contracts are excluded from the requirement under the *Insurance Contracts Act 1984* (Cth) s 64 to provide a 14 day free look period but most life insurance companies seem to provide it for their superannuation policies voluntarily.
27. DP 50 proposal 6.7.
28. eg, D Knox *Submission* February 1992; Commonwealth Bank Group Financial Services *Submission* February 1992; Australian Friendly Societies Association *Submission* February 1992; LIFA *Submission* March 1992.
29. *Australian Financial Review*, 18 March 1992, 27.

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.

Advertising by superannuation schemes

Laws regulating advertising of superannuation schemes

10.18. ***Proposal to preclude misleading advertising.*** The Review is strongly of the view that it is most important to regulate advertising to ensure that a product or service provider does not mislead prospective purchasers and that information provided is truthful and realistic. In DP 50 it was proposed that, to the extent that they did not already apply, the *Trade Practices Act 1974* (Cth) s 52,[30] the Corporations Law s 995[31] and equivalent fair trading legislation[32] should apply to the marketing of superannuation schemes. This proposal would involve amending the *Insurance Contracts Act 1984* (Cth) s 15 so that those laws would apply to schemes marketed by life insurance companies.

10.19. ***Submissions support proposal.*** This proposal received almost unanimous support in submissions.[33] A few submissions disagreed with the proposal as it relates to life insurance companies, on the basis that matters of 'fair dealing' are adequately covered by ISC circular 291.[34] As this report has already noted, however, ISC circulars are not binding on life insurance companies and provide no redress for members who have suffered as a result of a breach of the standards set out in a circular.

10.20. ***Recommendation.*** The Review recommends that, to the extent that they do not apply, the *Trade Practices Act* s 52 and the Corporations Law s 995 should apply to the advertising of superannuation. In addition, the *Trades Practices Act* s 52A should apply.[35] The ALRC recommends in its report *Multiculturalism and the Law* that the *Insurance Contracts Act 1984* (Cth) be amended so as not to affect

30. This section prohibits misleading or deceptive conduct in trade and commerce.
31. This section prohibits misleading conduct.
32. *Fair Trading Act 1987* (NSW); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1985* (Vic); *Fair Trading Act 1987* (WA).
33. eg Women's Economic Think Tank *Submission* February 1992; County Natwest *Submission* February 1992; Westpac Financial Services *Submission* February 1992.
34. LIFA *Submission* March 1992; National Mutual *Submission* February 1992.
35. This section prohibits unconscionable conduct. The Review also recommends that s 52A should apply to contracts between responsible entities and investment managers: recommendation 8.13.

the operation of the *Trade Practices Act 1974* (Cth) Part V Division 1.[36] The Review supports that recommendation. The amendment should be extended, however, to apply the Corporations Law to contracts of insurance.

Recommendation 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.

10.21. ***State fair trading legislation.*** The *Trade Practices Act* does not apply to the Crown in the right of any State, nor to any instrumentality of any government of any State.[37] Prima face, therefore, a State government superannuation scheme would not be subject to the Trade Practices Act.[38] The Review considers that the principles of fair trading should apply to State government superannuation schemes. This could be done by removing the exemption from the Trade Practices Act for State superannuation schemes or by leaving them subject to the various State fair trading Acts.[39] The disadvantage of the latter option is that the State fair trading Acts are not uniform. The Review does not consider it as appropriate that the application of these principles not be uniform throughout Australia. Accordingly, the Review recommends that the TPA be amended to remove the exemption for State government superannuation schemes.

Recommendation 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.

10.22. ***Trade Practices Act s 74.*** This section, which implies into a contract for the supply of services by a corporation to a consumer a warranty that the services will be rendered with due care and skill, is specifically excluded from

36. That includes s 52, s 52A. ALRC 57 para 12.30.
37. *Bradken Consolidated Ltd v BHP* (1979) 145 CLR 107.
38. Depending on the interpretation of the intention of the establishing legislation. It was held, for example, that the State Superannuation Board, a Victorian Statutory Corporation, had been established with such independence from government control that it was not entitled to immunity from the Trade Practices Act: *State Superannuation Board v Trade Practices Commission* (182) 60 FLR 165.
39. See fn 32.

applying to contracts of insurance.[40] It has been suggested that this should not be the case.[41] The Review agrees in principle. It sees no reason why such a warranty should not be implied into contracts of insurance that are superannuation business of life companies. Competitive neutrality between superannuation offered by life companies and superannuation not offered by life companies demands this. The Review is aware that the ISC is reviewing the *Insurance Contracts Act 1984* (Cth) and that it may be considering, in the context of that review, lifting the limitations on the applicability of the Trade Practices Act to insurance contracts. To the extent that the ISC review does not conclude so, the Review recommends that insurance contracts that represent superannuation business of life companies should be subject to the Trade Practices Act s 74.

Recommendation 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.

Advertising standards

10.23. ***Proposal for published criteria.*** For single employer sponsored and industry schemes, marketing of the scheme through advertising is not significant. For other schemes, however, advertising is common. The Review proposed in DP 50 that advertisements for personal schemes should meet criteria approved by the regulator.[42] This proposal did not involve the regulator ensuring compliance with the advertising criteria prior to release of each advertisement. Instead, it envisaged that the regulator should be able to act on complaint, that is, the regulator should be able to require the withdrawal of an offending advertisement and to impose a penalty on the responsible entity for issuing an advertisement that did not comply with advertising criteria approved and published by the regulator.[43] The majority of submissions that commented on this proposal agreed with it.[44]

10.24. ***Regulator may object to an advertisement.*** While the Review does not recommend that the regulator should have to approve advertisements for superannuation schemes, the regulator should be able to require an advertise-

40. *Trade Practices Act 1974* (Cth) s 74(3)(b).
41. Attorney-General's Department Submission to the Senate, October 1991.
42. DP 50 proposal 6.10.
43. cf *Life Insurance Act 1945* (Cth) s 77 which empowers the Life Insurance Commissioner to object to an advertisement for a life company only on the basis of the material in the advertisement, not on the basis of information alluded to by the advertisement.
44. eg DSS *Submission* February 1992; McNelis *Submission* February 1992; IFA *Submission* February 1992; ISC *Submission* March 1992.

ment to be submitted to it for inspection. It should have the power to object to an advertisement if it is of the opinion that the advertisement is likely to mislead.[45] It should be an offence to distribute an advertisement that has been objected to by the regulator.

Recommendation 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.

Application to join a scheme

10.25. Under the Corporations Law an investor may only apply to invest in a prescribed interest on a form attached to a prospectus.[46] This is a useful way of ensuring that investors receive the prospectus prior to investing in the scheme. Many employer related superannuation schemes follow a similar practice by attaching an application form to join the scheme to the back of the member booklet issued to prospective members. In view of the importance attached by the Review to the disclosure standards for prospective members set out in this report, it considers that it is appropriate to impose a similar requirement to that contained in the Corporations Law s 1020 on all superannuation schemes.

Recommendation 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.

45. This is similar to the power of the Commissioner under the *Life Insurance Act 1945* (Cth) s 77 in respect of forms of proposal or policy.
46. Corporations Law s 1020.

Recommendation 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.**

Advertisements to identify responsible entities

10.26. ***Proposal.*** The responsible entity will be accountable to members for the administration and management of a superannuation scheme. The identity of the responsible entity should, therefore, be highlighted. The Review proposed in DP 50 that the responsible entity's name, and nobody else's, appear at the beginning of any advertisement for a superannuation scheme or on the front of any member booklet or prospectus produced in relation to the scheme.[47] It also proposed that near the name should appear a statement that the responsible entity is the organisation primarily responsible to members and whom they should approach with any complaints or queries.

10.27. ***Submissions.*** Some submissions disagreed with this proposal on the grounds that other names (for example, of the employer, an associated company or product provider) should also be allowed to be displayed.[48] The Review agrees that the name of the scheme should be allowed to appear, provided the name of the responsible entity is prominently displayed as well. The aim in highlighting the name of the responsible entity is to stress its fundamental role and primary responsibility. Most other information can be provided later in the document. The Review recommends that the name of the responsible entity be required by law to be displayed at the beginning of any advertisement or on the front of any document. The only other name to appear in that place should be the name of the scheme.

10.28. ***Further information to be disclosed.*** It is clear that the information which needs to be disclosed in member booklets, offer documents and prospectuses

47. DP 50 proposal 6.11.
48. Commonwealth Bank Group Financial Services *Submission* February 1992.

should do more than identify the name of the responsible entity. Several of the Treasurer's proposals require the annual notice to members to include further information about the responsible entity and other relevant parties, for example, the names of the trustees and advice as to who appointed them, the names of any investment managers or other financial advisers or consultants that have been appointed to control the investment of all or any part of the fund. Under the Treasurer's proposals that information will be available to members before they enter a scheme because prospective members will receive a copy of the annual notice last issued to members.[49]

10.29. ***Recommendation.*** The Review supports the disclosure of this information to prospective and existing members. It recommends that, in addition to the responsible entity's name, the names of the members or directors of the board of management of the responsible entity, and information whether there is institutional backing for the responsible entity or for the scheme and details of that backing, should be disclosed on the inside cover of any member booklet, offer document or prospectus.

Recommendation 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.

Recommendation 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**

49. Treasurer's statement, paper 2 para 10(g), 10(i), 13(a).

- **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.

Disclosure to prospective and existing members

Contents page

10.30. An important part of being able to make the best use of available information is the ability to ascertain the key features quickly and easily. In DP 50 the Review proposed that detailed information booklets, offer documents or prospectuses provided to members or prospective members should include a summary of the information provided.[50] Whilst receiving much support,[51] this proposal was criticised in several submissions on the basis that providing a summary may result in the provision of too much information, to the detriment of the members' understanding.[52] It was suggested that a comprehensive contents page which lists the important issues for the member in plain language would help people to find the information they needed and would perhaps be more useful. The Review recommends that responsible entities that publish or distribute detailed member booklets, prospectuses or offer documents to members or prospective members should be encouraged to provide a comprehensive contents page.

Recommendation 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.

50. DP 50 proposal 6.5.
51. LIFA *Submission* March 1992; Permanent Trustee Company Ltd. *Submission* January 1992.
52. Department of Finance (Cth) *Submission* February 1992; ASFA *Submission* March 1992.

Enhanced disclosure

10.31. ***Enhanced disclosure for corporations.*** In 1991 the Advisory Committee released a report on enhanced disclosure by corporations.[53] The report proposed that 'disclosing entities' should be required to disclose all material matters to the ASC and, where appropriate, the Australian Stock Exchange (ASX).[54] A material change includes

- any change in, or reassessment of, the entity of which equity or debt holders would reasonably require disclosure for the purpose of their making an informed assessment of the disclosing entity
- any matter that is likely to affect 'materially' the price of the disclosing entity's debt or equity securities or the disclosure of which is necessary to avoid the establishment, or continuation, of a false market in those securities.

The rationale for the enhanced disclosure regime is that it will promote investor confidence in the integrity of Australian capital markets. The requirement is also seen as complementary to the requirement for disclosure to potential investors in securities in the Corporations Law s 1022. Under the report's proposals, superannuation schemes already subject to the prescribed interest provisions of the Corporations Law will, if they are large enough, have to meet the enhanced disclosure requirements.

10.32. ***Enhanced disclosure for superannuation schemes proposed.*** In DP 50 the Review proposed that an enhanced reporting regime similar to that proposed to be introduced into the Corporations Law should be applied to personal superannuation schemes where appropriate. Disclosure would be made to the regulator. It also proposed that the regulator should be able to order the responsible entity to report any of these material changes to the members where the regulator considered that is appropriate.[55] The rationale for applying an enhanced disclosure regime to single employer sponsored and industry schemes of the requisite size was less obvious to the Review. Given that membership of these

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53. Companies and Securities Advisory Committee *Report on an Enhanced Statutory Disclosure System*, Sydney, 1991.
54. 'Disclosing entities' include
    - all listed companies or limited trusts
    - all public companies with 50 or more members or holders of debentures
    - all companies and prescribed interests with total (gross) assets in excess of $10 million
    - public sector corporations that carry on a business.
55. DP 50 proposal 6.8.

schemes is, in many cases, mandatory, it was argued that no immediate purpose is served in making information about material changes in the scheme's situation available to people who cannot act upon it. The Review accepted that the cost of enhanced disclosure may outweigh the benefits in this situation.

10.33. ***Submissions.*** The principle of continuous disclosure received considerable support in submissions.[56] The ASC favoured the principle being extended to all schemes.[57] Concern was expressed, however, about what would constitute 'material change'[58] and the minimum size of schemes that would be caught by the proposal. The Review notes that the Treasurer's statement proposes that, for schemes with five or more members

> details of any significant or material change subsequent to the date of the annual notice will be required to be provided by addendum to the annual notice to members.[59]

The Review understands that it is intended that material change will be advised to members on a timely basis.

10.34. ***Recommendation.*** The Review supports the Treasurer's view that it is important that adverse material changes are advised to members of all superannuation schemes. For members of schemes in which benefits are not transferable, disclosure of that information may assist members to evaluate the actions of the responsible entity and, maybe, take steps to have it dismissed. It recommends that responsible entities should be obliged to notify members of material changes to the scheme. The actual steps taken to advise members should, however, be left for the responsible entity to decide on the basis of what is reasonable in the circumstances. For some schemes, a notice on the workplace noticeboard may suffice, for others, a letter to all members. This will provide some flexibility for responsible entities and help to keep costs to a minimum. The Review recommends that the following constitute adverse material change for the purpose of this recommendation:

- in the case of defined benefit superannuation schemes — any adverse development which would reasonably be likely to be taken into account by a person in determining whether the fund will be able to meet its obligations as and when they fall due

56. eg Jacques Martin Industry *Submission* February 1992; ASFA *Submission* March 1992.
57. ASC *Submission* March 1992.
58. eg AMP Society *Submission* February 1992; D Knox *Submission* February 1992.
59. Treasurer's statement, paper 2 para 9.

- in the case of other superannuation schemes — any change in, or reassessment of, the scheme which members and prospective members would reasonably require for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the scheme.

In principle, a responsible entity and its members, or directors, should be subject to whatever civil liability is imposed under any continuous disclosure obligations introduced into the Corporations Law. Some modifications for superannuation schemes may be necessary.

10.35. ***Large schemes to notify ASC database.*** The Review also recommends that, if a scheme with more than 200 members suffers an adverse material change, the responsible entity should have to supply the information to the ASC database as well as take reasonable steps to notify the members. This will be very simple for the responsible entity to do and will provide the public with information about larger schemes. The database will provide an additional avenue for members to find information, at virtually no cost to the scheme.

Recommendation 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 able so to meet its obligations to members as and when they fall due.

Performance history

10.36. ***Taking a longer term view.*** Superannuation is intended to be a long term undertaking. To assess a scheme's performance, information over a suitably long period needs to be provided. Otherwise the members may focus their attention on the recent annual performance of the scheme and compare it with volatile short term interest rates available from DTIs. Making inappropriate comparisons may lead members to draw conclusions about the performance of their scheme that are unwarranted given the objective of providing an adequate lump sum or pension for the member's retirement. On joining a scheme members must get details of the kinds of benefits provided by the scheme (such as a death benefit) and the conditions relating to them.[60] They are not entitled to a resume of the scheme's performance history. Under the proposals announced by the Treasurer, the annual notice for schemes with five or more members will include advice as to the actual rate (or amount) of earnings of the scheme in the relevant year of income and the previous two years of income. Prospective members of schemes with five or more members will receive a copy of the scheme's last annual notice and, where a benefit is determined on the basis of actual or credited earnings, information on the earnings rate and crediting rate of the scheme over the last three years.[61]

10.37. ***Proposal.*** The Review suggested in DP 50 that information covering five years of performance is more likely to be relevant to a long term investment. It proposed that information to prospective members should prominently display details of the long term performance of the scheme so as not to focus solely on short term performance and suggested that information should include details for each of the previous five years plus an average.[62] The addition of two years of data was not expected to add significantly to the cost involved in meeting the requirement compared to the benefit obtained.

60. OSS Regulations reg 17(g).
61. Employer sponsored schemes will be able to give this information as soon as is practical after a member has joined the fund: Treasurer's statement, paper 2, para 13.
62. DP 50 proposal 6.12.

10.38. ***Submissions.*** A number of submissions supported this proposal.[63] Others were concerned to ensure that the proposal did not prevent disclosure of performance over a longer period than five years.[64] The Department of Finance expressed doubt that even five years would provide members with the incentive to focus on long term performance and suggested disclosure of average earning rates over 10, 20, 30 and 40 years.[65] A number of submissions disagreed with the need to provide information for more than the previous three years, on the basis that a period of three years had been decided upon by the government and 'should be given an opportunity to work' and then be evaluated at some later stage.[66] Several submissions pointed out that the obligation to give information on returns for five years should not apply to schemes that have been in existence for less than five years.[67]

10.39. ***Recommendation.*** The Review remains of the view that it is important to try to get members to take a longer term attitude to superannuation. Whilst the Department of Finance argument has some merit, the Review is satisfied that making the minimum number of years performance to be disclosed five instead of three will go some way towards achieving this, without imposing significant costs on schemes. Schemes may choose to provide details of past performance for more than five years. If a scheme has not been in operation for five years, an average performance for the life of the scheme should be disclosed. The Treasurer's proposal applies to all schemes with five or more members. One submission suggested that the Review's proposal should not apply to small schemes or those with no arms length members.[68] In principle, the Review does not see why this information should not be available to members of schemes with two or more members. The Review is aware, however, of the costs that may be involved for smaller schemes and does not recommend that this requirement extend to schemes with fewer than five members.

63. Permanent Trustee Company Ltd *Submission* January 1992; ASC *Submission* March 1992; Shell Australia Ltd *Submission* February 1992.
64. eg County Natwest *Submission* February 1992.
65. Department of Finance (Cth) *Submission* February 1992.
66. LIFA *Submission* March 1992; National Mutual *Submission* February 1992; ASFA *Submission* March 1992.
67. Jacques Martin Industry *Submission* February 1992; Australian Friendly Societies Association *Submission* February 1992.
68. Pelham Webb & Co *Submission* February 1992.

Recommendation 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.

Performance of the scheme

10.40. ***Proposal.*** The Treasurer's statement includes a proposal to require each scheme with five or more members to report to members its investment objectives and the policy and strategies being used to meet them.[69] The Review agrees that this is a sound measure. However, it may not go far enough. The Review proposed in DP 50 that each scheme should be required to include in its statement of investment objectives performance criteria, including a benchmark rate of return for the scheme, and should be required to report the performance against these criteria, particularly the benchmark rate of return. It was felt that this would enable scheme members to assess the scheme's performance against a benchmark which had been determined by the responsible entity, specifically for its scheme.

10.41. ***Submissions.*** This proposal attracted considerable comment. It was criticised on various grounds, including the possibility of schemes setting high estimates to attract more investors, overemphasising the rate of return at the expense of risk, promoting short termism, cost of compliance and the fact the proposal applied to all schemes.[70] Many submissions did, however, support the proposal and, if not the exact wording, the principle of trying to increase the accountability of responsible entities.[71]

69. Treasurer's statement, paper 2 para 10(e).
70. Mercer Campbell Cook and Knight *Submission* February 1992; DSS *Submission* February 1992; BT Asset Management *Submission* February 1992; County Natwest *Submission* February 1992; Pelham Webb & Co. *Submission* February 1992.
71. Jacques Martin Industry *Submission* February 1992; GW Walker *Submission* February 1992; National Mutual *Submission* February 1992; Australian Shareholders' Association *Submission* February 1992; ACTU *Submission* February 1992.

10.42. ***Recommendation.*** The Review is convinced that there is merit in requiring responsible entities, as part of formulating a scheme's investment objectives and implementation strategy, to establish investment performance criteria that includes
expected performance in relation to an appropriate index (such as the CPI) or expected performance relative to a benchmark portfolio. The Review does not agree that this is an impossible or unrealistic task to require of a responsible entity. Indeed, one would expect that it would be an integral part of setting a policy and strategy to implement the scheme's investment objectives. Accordingly, the Review recommends that responsible entities should establish financial performance goals that the scheme will seek to achieve over the medium term. These should be determined on a rolling five year basis. The goals should specify expected performance relative to either an appropriate index or a benchmark portfolio. The annual notice to members should include a report of the scheme's performance against these goals.

Recommendation 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 achieve 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.

Disclosure of reserving policy

10.43. ***Proposal.*** There has been, and continues to be, considerable debate about the ability of responsible entities of accumulation schemes to establish reserves out of the scheme's earnings without committing a breach of trust. The Review recommends in chapter 14 that the law should make it clear that reserving is permissible, that is, that it does not constitute a breach of trust by the responsible entity. The issue of disclosing reserves was raised in DP 50 and the Review proposed that information to existing and prospective members should include the fact that the scheme has a reserving policy, if it has one, and the basis on which amounts to go to reserves are worked out.[72] This proposal is similar to a proposal in the Treasurer's statement that the annual notice to members should include a statement of the basis on which a scheme's reserves are determined.[73] Submissions overwhelmingly support the Review's proposal.[74]

10.44. ***Recommendation.*** The Review has concluded that it is important that more than just the scheme's reserving policy is disclosed to members. The amount credited to reserves and its source and the amount transferred from reserves should also be disclosed. It seems that the Treasurer's proposal will not require this; rather the member will be left to guess what the reserves may amount to on the basis of information provided about the scheme's earnings and crediting rates. The Review recommends that the information in the annual notice to members (the latest copy of which will be given to prospective members) should include whether the scheme has a reserving policy and, if it does

- how amounts to go to reserves are worked out
- the amount of funds credited to reserves and the source of those funds.
- the amount transferred from reserves.

Recommendation 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**

72. DP 50 proposal 6.14.
73. Treasurer's statement, paper 2 para 10(h).
74. eg ASFA *Submission* March 1992; Australia Retirement Fund *Submission* February 1992; Department of Finance (Cth) *Submission* February 1992; John A Nolan & Associates *Submission* February 1992. Even those who would prefer that reserving be prohibited agree that, if it is permitted, it should be disclosed to members: Shell Australia Ltd *Submission* February 1992.

- **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.**

Annual information to members

10.45. ***Additional to member benefit statements.*** Ensuring adequate information for superannuation scheme members is central to any framework of prudential supervision of superannuation schemes.[75] The Treasurer's statement of 20 August 1991 proposes that schemes with five or more members should distribute annual notices or reports to members. The proposal details a wide range of requirements for inclusion in the notice or report.[76] Prior to this announcement, the only information that had by law to be provided annually to members was that required under the OSS Regulations.[77] The new annual notice is to include information members would reasonably require, and reasonably expect to have provided, for the purpose of making an informed judgement as to the financial condition and administrative arrangements of the fund.[78] It is specifically to include information about the accounts of the scheme, details of the classes of assets of the scheme, details about investment managers appointed, advice as to the scheme's policy with regard to fees and charges and the earning rate of the scheme.[79] This annual notice is not intended, it seems, to be the same as the annual report of a company. It is not, for example, required to include the scheme's accounts. It is merely to state that the accounts and the auditor's report will be available to members. Where the audited accounts are not distributed to members with the notice, the notice is to include abridged financial information.[80]

10.46. ***Timing of the annual notice.*** The Treasurer proposes to allow schemes up to six months to prepare their annual notice, or nine months if more than one benefit statement is provided to members each year. Under the Corporations Law, a corporation's annual accounts must be provided to members within four

75. Treasurer's statement, paper 1 para 18(a).
76. Treasurer's statement, paper 2 para 10.
77. reg 17(1)(e).
78. This is very similar to the information required to be contained in prospectuses under the Corporations Law s 1022.
79. Treasurer's statement, paper 2 para 10(c), 10(e)(i), 10(g), 10(m)(i), (ii).
80. What constitutes 'abridged financial information' will be determined by the ISC.

and a half months of the end of the corporation's financial year.[81] On the basis that the general consistency with relevant provisions of the Corporations Law which is evident in the rest of the Treasurer's statement should be maintained in relation to the preparation of the annual report, the Review proposed in DP 50 that the annual notice to members should be distributed to all members within four months after the end of the relevant financial year.[82]

10.47. ***Submissions.*** Considerable criticism was levied at this proposal. Many organisations pointed out that to require reporting within four months of the end of the financial year would be very difficult given that the Australian Tax Office (ATO) does not allow substituted accounting periods for superannuation schemes. The pressure on resources of actuaries and accountants is such that reporting within even six months is often difficult. A shortened reporting time would increase costs without assisting members significantly.[83] The Review agrees that the benefit of an extra two months may not outweigh the additional costs. Accordingly, it agrees with the Treasurer's proposal so far as it requires annual notices to members to be distributed within six months of the end of the financial year. It does not, however, agree that the time for distributing an annual notice should be extended to 9 months if members of the scheme are sent more than one benefit statement a year. The ACTU submission argued that more time should be allowed in such a case.[84] Benefit statements and annual notices serve distinct purposes, however, and the provision of more than one benefit statement a year does not reduce the need for timely provision of the annual notice to members. Accordingly, the Review recommends that the annual notice be distributed to all members not later than six months after the end of the relevant financial year, no matter how many benefit statements are provided to members during the year.[85]

Recommendation 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.

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81. Under the Corporations Law s 292, 293 accounts must be circulated at least 14 days prior to a company's annual general meeting, which must, under s 245 be held no later than five months (six months for an exempt proprietary company) after the end of the financial year.
82. DP 50 proposal 6.15.
83. ASFA *Submission* March 1992; Clayton Utz *Submission* February 1992.
84. ACTU *Submission* February 1992.
85. The Review understands that the providers of ADFs and PSTs are subject to the tighter reporting timetable established by the Corporations Law and therefore do not need to be covered by this recommendation.

Disclosure of involvement of a related party

10.48. The Treasurer's statement includes a proposal that the details of any association between an investment manager, financial adviser or consultant who has been appointed to control the investment of any of a scheme's funds and the trustee, sponsor or administrator of the scheme should be reported in the annual notice to members.[86] The Review supports this proposal. In addition, however, the Review recommends that such matters should be reported to the regulator immediately after they occur.

Recommendation 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.

Benefit statements

10.49. ***Introduction.*** The OSS Regulations require that, within six months of the end of the year of income of a scheme, trustees must give members a statement of their benefits.[87] This statement must include the amount of vested benefits at the beginning and at the end of the year, the method of determining the benefits at the end of the year, the amount of contributions for the year and the amount of the benefit that is required to be preserved. The Review recommends that several additional items of information be included in members' statements.

86. Treasurer's statement, paper 2 para 10(g).
87. OSS Regulations reg 17(1)(e).

10.50. ***Certification by employer.*** The Treasurer's statement proposes that, where employers contribute to schemes, the annual notice to members should include a statement that all contributions which, to the knowledge of the trustee, are payable by employers have been received, or if there are known to be substantial arrears, information as to any action being taken to recover those arrears.[88] The Review supports the principle of advising members whether the required contributions have been made but doubts whether the proposal, as worded, would achieve this. Unless responsible entities are given a means of ascertaining the relevant information, a statement limited to what is within the knowledge of the responsible entity may yield little worthwhile information. Accordingly, the Review recommends that benefit statements should include a statement that the employer has certified to the responsible entity that all payments required to be made to the scheme, including those that will satisfy the proposed Superannuation Guarantee Levy legislation requirements, have been made. Employers should be required to provide such certification within a specified period of request by the responsible entity. If an employer does not provide certification, this should be stated in the benefit statement. Responsible entities should have a responsibility to chase up contributions that have not been made by employers. In the case of payments made in satisfaction of the proposed SGL legislation, this would involve advising the ATO. Under the proposed SGL legislation requirements, employers will self-assess annually against the minimum standard. Advice from the responsible entity as to any underpayment will assist the ATO in its enforcement of the SGL. The Review agrees with the Treasurer that, where the responsible entity is taking any steps to recover arrears, this too should be noted in members' benefit statements.

Recommendation 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**

88. Treasurer's statement, paper 2 para 10(d).

- **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.

10.51. ***Advice as to amount of SGL contributions that actually vest.*** It will be important that employees are able to ensure that payments made in satisfaction of the SGL requirements are actually used to best advantage, and not dissipated in charges or administrative costs. Concern has been expressed about the lack of economic incentive on employers to search for a low cost product to place award payments into.[89] The Review sees this as an issue for contributions to defined benefit schemes as well as for award payments. This is important, particularly so if SGL contributions represent a wage trade off by employees. Employers will be permitted under the SGL legislation to count employer contributions to complying defined benefit schemes against the prescribed minimum level of employer support for SGL purposes.[90] Contributions will be measured, however, on a gross basis, that is, before deduction of administrative charges, tax and death and disability costs. Employers who take advantage of this offsetting should be required to state what percentage of the gross SGL contributions has been dissipated by administrative and other costs. For accumulation schemes, benefit statements should advise what proportion of the gross SGL payment has been credited to the member's account. Without such advice, a member may never know how much of the gross SGL contribution actually ends up in his or her account. This disclosure will allow for some comparison between schemes and may provide incentive for employers to try to keep administrative and other costs as low as possible.

Recommendation 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.

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89. Ross *Union Perspective on Superannuation* paper given to Superannuation 1992 Conference, Canberra, 1992, 7.
90. *Superannuation Guarantee Levy*, an information paper released by Mr John Kerin, Treasurer, December 1992.

10.52. ***Offence to deduct contribution and not transfer.*** Another consequential matter needs attention. The Review recommends that it should be a criminal offence for an employer to deduct superannuation contributions from an employee's wages or salary and not transfer them to the scheme.

Recommendation 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.

Fees and charges

10.53. ***Background and proposal.*** The Treasurer's statement on superannuation emphasises the importance of competition between superannuation schemes. This includes price competition. Accordingly, the new reporting requirements will require the annual report to include the amount (or basis of calculation) of any fees, charges or other expenses charged to the scheme. The report will also be required to include a summary of the scheme's policy on fees and charges applicable to accounts (active or dormant), including

- initial establishment charges
- continuing management, administrative or service charges (including fees levied against fund earnings) and
- termination charges.[91]

The Review fully supports such disclosure. However, disclosure should not be limited to the amount or basis of calculation of such charges. Where they are paid to outside bodies, those bodies should be identified. This will assist in generating competitive pressures which should, in turn, help to control such costs. Accordingly, the Review proposed in DP 50 that information provided to prospective and existing members of any superannuation scheme should include details of payments made by the scheme in respect of

91. Treasurers' statement, paper 2 para 10(m), 10(n).

- fees and charges of investment managers
- administration fees
- fees and charges of the responsible entity, and salaries of its directors
- commissions of intermediaries involved and not already included above.[92]

10.54. ***Submissions.*** This proposal received general support.[93] Concern was expressed by some that only directors' salaries paid out of the scheme should have to be disclosed.[94] It was never envisaged by the Review that salaries *other* than those paid directly from the scheme be disclosed. One organisation did not see the need for the fees and charges of individual managers to be disclosed at all.[95] Several submissions suggested that the amount of tax paid by the scheme, often greater than the total of other fees mentioned, should be disclosed.[96]

10.55. ***Recommendation.*** In the light of the response received, the Review confirms its view that it is important for prudential and competitive reasons that members be advised of the various costs charged to their scheme, and by whom. It therefore recommends that the annual notice to members should include, in addition to the information required under the Treasurer's proposal, details of payments made from the scheme in respect of fees and charges of each investment manager engaged by the scheme, administration fees, commission not included in the former categories, amounts paid to the responsible entity on account of its fees and charges and the total of amounts paid (and the value of benefits given) to members or director of the responsible entity direct from the scheme in respect of their membership of the responsible entity. The Review also recommends that, if at least 5% of the members so request in writing, the annual notice should also include details of amounts paid, and value of benefits given, direct from the scheme, to individual members of the board of management of the responsible entity.[97]

Recommendation 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 pay-

92. DP 50 proposal 6.16.
93. eg Westpac Financial Services *Submission* February 1992; ACTU *Submission* February 1992; ASC *Submission* March 1992.
94. eg IFA *Submission* February 1992; Australian Shareholders Association *Submission* February 1992; Securities Institute of Australia *Submission* February 1992.
95. Retirement Benefits Office *Submission* February 1992.
96. Institute of Actuaries of Australia *Submission* February 1992; National Mutual *Submission* February 1992.
97. This is consistent with the Corporations Law s 239.

ments 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.

Large exposures

10.56. ***Proposal.*** The new reporting requirements following from the Treasurer's statement will include the disclosure by a scheme of all individual investments which exceed 10% of the total value of the assets of the scheme.[98] The Review proposed in DP 50 that this should be reduced to 5%.[99] There were several reasons for this. First, it would promote consistency with the recommended in-house investment limit.[100] Secondly, the 10% threshold appears to be in line with the Reserve Bank's prudential standard for the supervision of

98. Treasurer's statement paper 2 para 10(f).
99. DP 50 proposal 6.17. The Campbell Committee Report recommended not just that all investments greater than 5% be disclosed, but that they be prohibited: para 20.125.
100. See recommendation 11.4.

large credit exposures by banks.[101] The RBA requires banks to report exposures in excess of 10% of the bank's capital base, not of the bank's total assets. Ten per cent of a bank's capital would translate to approximately 1.5% of its total assets. Viewed in this light, the Review considers the 'large exposure' threshold proposed by the Treasurer to be inappropriately high. Thirdly, the Review takes the view that, as schemes grow in size (particularly if there is a degree of rationalisation within the industry), the 10% threshold will mean that many investments, which may be large in absolute terms and about which the members should be informed, will not be disclosed to members.

10.57. ***Submissions.*** Many submissions support this proposal.[102] Some favour a disclosure threshold lower than 5%.[103] Several organisations, however, recommend waiting until 1995, when the in-house investment limit is reduced to 10%, before any further changes are considered.[104] Another objected to the proposal on the basis that:

> The lower the reportable level, the more there is the opportunity to 'hide' such investments in a longer list.[105]

On the other hand, it was suggested that the details of a scheme's whole portfolio should be disclosed.[106] The Review notes that this has already been considered. The Treasurer's statement proposes that the statement of the schemes investment objectives, to be included in the annual notice to members should include details of the classes of assets in which the scheme is invested, subdivided to show the amount or proportion represented by each of those classes of assets.[107]

10.58. ***Recommendation.*** The Review is convinced that the benefits of this proposal outweigh its possible disadvantages. Nor does it see merit in delaying the implementation of something that may be of benefit to members in understanding and monitoring the operation of their schemes. Accordingly, the

101. Reserve Bank of Australia *Supervision of Banks' Large Credit Exposures* Prudential Statement No E1 August 1989.
102. See, eg Norwich Group *Submission* February 1992; ISC *Submission* March 1992; Australian Friendly Societies Association *Submission* February 1992.
103. See, eg P Burke who favoured 1%: *Submission* February 1992; D Knox *Submission* February 1992.
104. See, eg ASFA *Submission* March 1992; LIFA *Submission* March 1992; National Mutual *Submission* February 1992.
105. Mercer Campbell Cook & Knight *Submission* February 1992.
106. TCA *Submission* February 1992.
107. Treasurer's statement, paper 2 para 10(e)(i).

Review recommends that the annual notice to members of schemes with five or more members should include details of all investments the market value of which is 5% or more of the value of the total assets of the scheme.[108]

Recommendation 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.

Disclosure to lost members

10.59. The Treasurer indicated in the statement of 20 August 1991 that consideration will be given to providing some relaxation of the annual reporting requirements in a situation where it is clearly established that a member can no longer be contacted.[109] The Review agrees that this is important to prevent administrative costs eroding either the benefits of members who have lost contact with the scheme or the benefits of other members (where the reporting costs are shared amongst all members of a scheme). It proposed in DP 50 that a scheme should not have to report to members who cannot be located.[110] This proposal received support in submissions.[111] The Review therefore recommends that superannuation schemes should not have to fulfill the reporting requirements in relation to members that are lost to the scheme. Members are to be considered 'lost' if the 'lost members' procedures have been followed by the responsible entity, the member has not been contacted and at least six months have passed.[112]

Recommendation 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.

108. The Review agrees with the Treasurer that any investment in a 'pooled' arrangement should be considered a single investment.
109. Treasurer's statement, paper 2 para 11.
110. DP 50 proposal 9.10.
111. eg ASFA *Submission* March 1992; ACTU *Submission* February 1992.
112. See recommendation 12.11 for prescribed procedures.

Information to non-contributing beneficiaries

10.60. The Review is concerned that there may be a lack of information provided to scheme members who are not contributing to the scheme, for example, scheme pensioners and reversionary beneficiaries. The Review notes that the Treasurer proposes that members who are fund pensioners (including reversionary beneficiaries), or who have deferred benefits, are to be advised once a year that the annual notice is available to them on request.[113] The Review cannot see any reason why *all* members should not receive the annual notice. Non-contributing beneficiaries have a strong interest in ensuring that the scheme stays healthy. Having the requisite information about a scheme's operations is an essential part of that.

Recommendation 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.

Retirement information

10.61. The Review sought comment in DP 50 on the issue of whether schemes should be compelled to provide advisory information to members prior to their retirement.[114] Many schemes, particularly those providing only a lump sum, already provide seminars for members as they approach retirement to assist them to develop a sound investment strategy for their lump sum payment. These seminars can be crucial as poor, or no, advice could result in a superannuation scheme member losing a substantial proportion of his or her lump sum. Such a loss can no longer be made good by future earnings of the scheme. Consultations and submissions reveal that, whilst support for the provision of retirement information is high, especially among consumer groups, there was little support for responsible entities being compelled to provide retirement seminars or advice.[115] Consequently, the Review does not make a recommendation on this matter but notes that sound advice and increased information for members as they near retirement, particularly if they will be receiving a lump sum, is very important. The Review would support measures to improve the flow of information, whether by government or individual schemes or organisations.

113. Treasurer's statement, paper 2 para 12.
114. DP 50 para 6.21.
115. eg National Mutual *Submission* February 1992.

Disclosure to the regulator by life insurance companies

10.62. As noted in chapter 5, it is difficult for the ISC to reconcile the returns provided by life insurance companies to the insurance Commissioner with those they provide to the superannuation Commissioner.[116] This seems to be because the questions asked in relation to the different types of business are different. It is important that the ISC knows exactly how much superannuation business a life company has, and what assets are held by that company for that business and likewise for its insurance business. The reporting requirements and returns for life companies should be altered so as to ensure that the ISC is easily able to reconcile the returns provided in respect of superannuation business and life business.

Recommendation 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.

Liability

10.63. A breach of the disclosure requirements of the Corporations Law attracts criminal and civil liability. The Review recommends that this should continue. Civil and criminal liability should attach to a breach of the disclosure requirements issued by the ISC. This would require the ISC circulars to be replaced by legislation in the *Life Insurance Act 1945* (Cth). The sanction for breach of the requirements for disclosure to prospective members of compulsory employer related schemes should, however, be criminal only.[117]

Recommendation 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.

116. Para 5.10.

117. No civil liability should attach to such a breach because no loss flows from a failure to disclose information to members of compulsory schemes.