



Superannuation Legislation Amendment Act 1999

No. 38, 1999

**An Act to amend the law relating to
superannuation, and for related purposes**

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Superannuation Legislation Amendment Act 1999

No. 38, 1999

An Act to amend the law relating to superannuation, and for related purposes

[Assented to 31 May 1999]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Superannuation Legislation Amendment Act 1999*.

2 Commencement

- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
- (2) Part 2 of Schedule 2 commences on the 28th day after the day on which this Act receives the Royal Assent.

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- (3) Part 3 of Schedule 2 is taken to have commenced on 5 June 1997, immediately after the commencement of the *Superannuation Contributions Tax (Consequential Amendments) Act 1997*.
 - (4) Part 4 of Schedule 2 commences, or is taken to have commenced, on 1 July 1999.
 - (5) Part 5 of Schedule 2 commences on the first day after the end of the period of 6 months beginning on the day on which this Act receives the Royal Assent.

3 Schedule(s)

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendment of the Bankruptcy Act 1966

1 At the end of subparagraph 116(2)(d)(iii)

Add:

or (C) an exempt public sector superannuation scheme
(within the meaning of that Act);

2 After sub-subparagraph 249(6)(a)(ii)(B)

Insert:

(BAA) a payment from an exempt public sector
superannuation scheme (within the meaning of
that Act); or

3 After sub-subparagraph 249(7)(a)(ii)(B)

Insert:

(BAA) a payment from an exempt public sector
superannuation scheme (within the meaning of
that Act); or

4 After sub-subparagraph 249(8)(a)(ii)(B)

Insert:

(BAA) a payment from an exempt public sector
superannuation scheme (within the meaning of
that Act); or

Schedule 2—Amendment of the Superannuation Industry (Supervision) Act 1993

Part 1—Amendments commencing on date of Assent

1 Subsection 10(1) (at the end of the definition of *relevant person*)

Add:

; or (e) a person who is a custodian in relation to the fund or trust.

2 Before paragraph 28(2)(a)

Insert:

(aa) the trustee has requested in writing that the approval be revoked; or

3 Subsection 28(3)

Omit “The Commissioner”, substitute “Except in a case covered by paragraph (2)(aa), the Commissioner”.

4 Subsection 59(1)

Omit “The governing rules”, substitute “Subject to subsection (1A), the governing rules”.

5 After subsection 59(1)

Insert:

(1A) Despite subsection (1), the governing rules of a superannuation entity may, subject to the trustee complying with any conditions contained in the regulations, permit a member of the entity, by notice given to the trustee in accordance with the regulations, to require the trustee to provide any benefits in respect of the member on or after the member’s death to a person or persons mentioned in the notice, being the legal personal representative or a dependant or dependants of the member.

6 Paragraph 60(2)(a)

Omit "an individual", substitute "a person other than a constitutional corporation".

7 Section 72

Repeal the section, substitute:

72 How this Part applies if there are 2 or more employer-sponsors of whom at least one is an unrelated employer-sponsor

- (1) For the purposes of this section:
 - (a) a standard employer-sponsor (the *first employer-sponsor*) of a superannuation fund is an unrelated employer-sponsor of the fund if, and only if, there is no other standard employer-sponsor of the fund who is an associate of the first employer-sponsor; and
 - (b) 2 or more standard employer-sponsors of a superannuation fund are related to each other if they are associates.
- (2) For the purposes of this section:
 - (a) the class of the in-house assets of a fund that corresponds to a particular unrelated employer-sponsor is the class of in-house assets that consists of loans to, or investments in, the employer-sponsor or an associate of the employer-sponsor; and
 - (b) the class of the in-house assets of a fund that corresponds to 2 or more employer-sponsors who are related to each other is the class of in-house assets that consists of loans to, or investments in, any of them or any associates of any of them.
- (3) Subsections (4) and (5) apply if:
 - (a) there are 2 or more unrelated employer-sponsors of a superannuation fund (whether or not there are also any employer-sponsors of the fund who are related to each other); or
 - (b) there are 2 or more employer-sponsors of a superannuation fund who are related to each other and there are also one or more unrelated employer-sponsors of the fund.

- (4) This Part does not apply in relation to the fund in relation to the in-house assets of the fund as a whole.
- (5) However:
- (a) this Part applies in relation to the fund separately in relation to each of the corresponding classes of in-house assets of the fund; and
 - (b) for the purposes of this Part as so applying in relation to each of the corresponding classes of in-house assets of the fund, that corresponding class of in-house assets is to be treated as the whole of the in-house assets of the fund.

8 At the beginning of Division 3 of Part 8

Insert:

80A Division not applicable to certain funds

A superannuation fund is taken not to have been required to comply with this Division in respect of a year of income if:

- (a) Division 3A applied to the fund in respect of that year of income; and
- (b) an actuary has certified that the fund complied with that Division in respect of that year of income.

9 After Division 3 of Part 8

Insert:

Division 3A—Limit on in-house assets of certain defined benefit funds

83A Definitions

In this Division, unless the contrary intention appears:

base amount, in relation to a defined benefit fund at a particular time, means 120% of:

- (a) the fund's liabilities in respect of vested benefits; or
 - (b) the fund's accrued actuarial liabilities;
- at that time, whichever is the greater.
-

defined benefit fund means:

- (a) a public sector superannuation scheme that:
 - (i) is a regulated superannuation fund; and
 - (ii) has at least one defined benefit member; or
- (b) a regulated superannuation fund (other than a public sector superannuation scheme):
 - (i) that has at least one defined benefit member; and
 - (ii) some or all of the contributions to which (being contributions out of which, together with earnings on those contributions, the benefits are to be paid) are not paid into a fund, or accumulated in a fund, in respect of any individual member but are paid into and accumulated in a fund in the form of an aggregate amount.

defined benefit member means a member entitled, on retirement or termination of his or her employment, to be paid a benefit defined, wholly or in part, by reference to either or both of the following:

- (a) the amount of:
 - (i) the member's salary at a particular date, being the date of the termination of the member's employment or of the member's retirement or an earlier date; or
 - (ii) the member's salary averaged over a period before retirement;
- (b) a specified amount.

fund's accrued actuarial liabilities, at a particular time, means the total value, as certified by an actuary, of the future benefit entitlements of members of the fund in respect of membership up to that time based on assumptions about future economic conditions and the future of matters affecting membership of the fund, being assumptions made in accordance with applicable professional actuarial standards (if any).

fund's liabilities in respect of vested benefits, at a particular time, means the total value of the benefits payable from the fund to which the members of the fund would be entitled if they all voluntarily terminated their service with their employers at that time.

listed public company means a company any of the shares in the capital of which are listed for quotation in the official list of a stock exchange in Australia or elsewhere.

maximum permitted amount, in relation to a defined benefit fund at a particular time, means the sum of:

- (a) an amount equal to the prescribed percentage of the base amount in relation to the fund at that time; and
- (b) the amount (if any) by which the market value of the fund's assets at that time exceeds that base amount.

prescribed percentage means:

- (a) where the expression is used in relation to a time that occurs during the 1998-99 year of income or the 1999-2000 year of income—10%; or
- (b) where the expression is used in relation to a time that occurs during a later year of income—5%.

voting share has the same meaning as in the Corporations Law.

83B Application of Division

- (1) This Division applies to a superannuation fund in respect of the fund's 1998-99 year of income or a later year of income if, and only if:
 - (a) the fund is a defined benefit fund; and
 - (b) at the end of that year of income the employer-sponsor was a listed public company or an associate of a listed public company; and
 - (c) the market value of the fund's assets at the end of that year of income was not less than the base amount in relation to the fund at that time; and
 - (d) the trustee of the fund has decided that this Division is to apply to the fund in respect of that year of income.
- (2) If the trustee of the fund makes a decision referred to in paragraph (1)(d), the trustee is to record the decision in writing.

83C Maximum permitted market value of in-house assets

The market value of the fund's in-house assets at the end of a year of income must not exceed the maximum permitted amount in relation to the fund at that time.

83D Limit on in-house assets

- (1) The market value of the fund's in-house assets (other than shares in the capital of listed public companies) at the end of a year of income must not exceed the prescribed percentage of the base amount in relation to the fund at that time.
- (2) The fund's in-house assets at the end of a year of income must not include more than 5% of the voting shares in any listed public company that is the employer-sponsor or is an associate of the employer-sponsor.

83E Acquisition of in-house assets prohibited in certain circumstances

If the market value of the fund's in-house assets at the end of a year of income exceeds the prescribed percentage of the base amount in relation to the fund at that time, the trustee of the fund must not buy, or enter into any contract to buy, on behalf of the fund any in-house assets until the time when an actuary certifies that the market value of the fund's in-house assets has ceased to exceed the prescribed percentage of the base amount in relation to the fund.

10 Subsection 84(1)

Omit "Divisions 2 and 3", substitute "Division 2, and either Division 3 or 3A (whichever is applicable)".

11 Paragraph 112(1)(ba)

Omit "subsection", substitute "paragraph".

12 After subsection 117(3)

Insert:

(3A) Subsection (3) does not apply in circumstances where:

- (a) its application would result in the acquisition of property from a person otherwise than on just terms; and
- (b) the acquisition would be invalid because of paragraph 51(xxxi) of the Constitution.

13 Subsection 126C(5)

Omit “126D(2)”, substitute “126D(3)”.

14 Subsection 131(4)

Repeal the subsection, substitute:

- (4) The Commissioner must cause particulars of the disqualification order to be published in the *Gazette* as soon as practicable after it is made.
- (4A) If the Commissioner’s decision to make the disqualification order is varied or revoked by the Commissioner as a result of a reconsideration under subsection 344(4), the Commissioner must cause particulars of the variation or revocation to be published in the *Gazette* as soon as practicable after the decision is made.
- (4B) If:
 - (a) the Commissioner’s decision to make the disqualification order is confirmed or varied by the Commissioner as a result of a reconsideration under subsection 344(4); and
 - (b) the decision as so confirmed or varied is varied or set aside by the Administrative Appeals Tribunal;the Commissioner must cause particulars of the Tribunal’s decision to be published in the *Gazette* as soon as practicable after it is given.

15 Subsection 131(10)

Repeal the subsection, substitute:

- (10) If the Commissioner revokes a disqualification order under subsection (5), the Commissioner must cause particulars of the revocation to be published in the *Gazette* as soon as practicable after it occurs.
-

16 Subsection 171(4)

Omit “to the applicant when redeeming the interest”, substitute “in respect of the redemption of the interest”.

17 After subsection 171(4)

Insert:

(4A) If:

- (a) the public offer entity is a public offer superannuation fund or an approved deposit fund; and
- (b) an amount (the *relevant amount*) that constituted the whole or a part of the amount paid for the interest:
 - (i) was rolled over into the fund or was transferred to the fund from another superannuation fund or an approved deposit fund or RSA; and
 - (ii) was, under the regulations, a restricted non-preserved benefit or a preserved benefit;

a provision that requires the trustee to pay to a superannuation fund, approved deposit fund or RSA nominated by the applicant so much of the amount payable in respect of the redemption of the interest as is related to the relevant amount.

(4B) If:

- (a) the public offer entity is a public offer superannuation fund or an approved deposit fund; and
- (b) an amount (the *relevant amount*) that constituted the whole or a part of the amount paid for the interest:
 - (i) was rolled over into the fund or was transferred to the fund from another superannuation fund or an approved deposit fund or RSA; and
 - (ii) was, under the regulations, an unrestricted non-preserved benefit;

a provision that requires the trustee to pay so much of the amount payable in respect of the redemption of the interest as is related to the relevant amount to, or in accordance with the directions of, the applicant.

(4C) If an amount (the *relevant amount*) that constituted the whole or a part of the amount paid for the interest:

- (a) was paid by the employer of the applicant; and
- (b) was not so paid out of money payable by the employer to the applicant;

a provision that requires the trustee to pay so much of the amount payable in respect of the redemption of the interest as is related to the relevant amount to, or in accordance with the directions of, the employer.

(4D) A provision that requires the trustee, in cases not covered by subsection (4A), (4B) or (4C), to pay the amount payable in respect of the redemption of the interest to, or in accordance with the directions of, the applicant.

18 Subsection 171(5)

Omit “to the applicant”, substitute “in respect of the redemption of the interest”.

19 After subsection 171(5)

Insert:

(5A) A payment under a provision referred to in subsection (4A) or (4B) is taken to be the payment of a benefit.

(5B) A payment under a provision referred to in subsection (4C) or (4D) is not taken to be the payment of a benefit.

20 Division 1 of Part 25 (heading)

Repeal the heading, substitute:

Division 1—Preliminary

21 At the end of Division 1 of Part 25

Add:

253A Notices may be given to former relevant persons

Any provision of this Part that empowers a notice to be given to a relevant person in relation to a fund or trust also empowers such a

notice to be given to a person who has at any time been a relevant person in relation to the fund or trust.

22 At the end of section 255

Add:

- (4) The powers of the Commissioner or an authorised person under this section may be exercised in relation to a superannuation entity even though an investigation of the whole or a part of the affairs of the entity is being conducted under section 263.

23 Subsection 264(1)

Omit "or is being", substitute ", is being, or is proposed to be,".

24 Subsections 264(2), (3) and (4)

Repeal the subsections, substitute:

- (2) The Commissioner may, by written notice given to a person who is a relevant person in relation to the entity, require the person, within a stated period, to give to the Commissioner or to an authorised person such information, or a report on such matters, relating to the affairs of the entity as are set out in the notice.
- (3) The Commissioner may, by written notice given to the trustee or investment manager, direct that person, subject to such conditions (if any) as are stated in the notice:
 - (a) not to acquire assets on behalf of the entity; or
 - (b) not to dispose of, or otherwise deal, or deal in a particular way, in:
 - (i) any of the assets of the entity; or
 - (ii) any of the assets of the entity included in a specified class of assets; or
 - (iii) a specified asset or assets of the entity;until the notice is revoked or for a period, or until the occurrence of an event, referred to in the notice.

Note: For example, the Commissioner may direct a trustee not to make any withdrawals from a bank account without prohibiting the making of deposits to the credit of the account.

(4) The Commissioner may, by written notice given to a person (other than the trustee or investment manager) who has possession, custody or control of an asset or assets of the entity, direct the person, subject to such conditions (if any) as are stated in the notice, not to dispose of, or otherwise deal, or deal in a particular way, in:

- (a) if the person has possession, custody or control of a single asset—that asset; or
- (b) if the person has possession, custody or control of 2 or more assets:
 - (i) any of those assets; or
 - (ii) any of those assets that are included in a specified class of assets; or
 - (iii) such of those assets as are identified in the notice;

until the notice is revoked or for a period, or until the occurrence of an event, referred to in the notice.

Note: For example, the Commissioner may direct a person not to make any withdrawals from a bank account without prohibiting the making of deposits to the credit of the account.

(4A) To avoid any doubt, the power of the Commissioner under subsection (3) or (4) to direct a person not to deal in a particular way in assets of an entity includes power to direct a person not to remove from Australia assets of the entity that are in Australia.

25 Subsection 264(6)

Omit “this section”, substitute “subsection (3) or (4)”.

26 Section 276

Omit “270(b)”, substitute “270(d)”.

27 Section 285 (penalty)

Repeal the penalty, substitute:

Penalty:

- (a) in respect of a requirement under subsection 264(3) or (4)—imprisonment for 2 years; or
- (b) otherwise—30 penalty units.

28 Section 286 (penalty)

Repeal the penalty, substitute:

Penalty: Imprisonment for 2 years.

29 After subsection 287(2)

Insert:

(2A) Subsection (2) does not apply to a person that is a body corporate if the claim relates to a requirement made after the commencement of this subsection.

30 Paragraph 290(2)(b)

Repeal the paragraph, substitute:

(b) the person is an individual who, before making the statement, claimed that it might tend to incriminate him or her or make him or her liable to a penalty.

31 Section 349

After “meaning of the”, insert “*Australian Federal Police Act 1979* or the”.

Note: The heading to section 349 is replaced by “**This Act and the regulations to be subject to certain superannuation orders**”.

32 Section 375

Repeal the section, substitute:

375 Application of section 153 during the transitional period

Section 153 applies in relation to the Part 31 entity during the transitional period as if subsection (1) were omitted and the following subsection substituted:

- (1) The trustee of a public offer entity must not, intentionally or recklessly, issue a superannuation interest in the entity to a person unless:
- (a) the issue is pursuant to an application made to the trustee by the person, or by a standard employer-sponsor of the entity on the person’s behalf; and

Schedule 2 Amendment of the Superannuation Industry (Supervision) Act 1993
Part 1 Amendments commencing on date of Assent

(b) either:

- (i) if the application was made by the person—the person was a member of the entity on 1 July 1994; or
- (ii) if the application was made by a standard employer-sponsor—the standard employer-sponsor was a standard employer-sponsor of the entity on 1 July 1994.

Part 2—Amendments commencing 28 days after date of Assent

33 Subsection 10(1)

Insert:

asset means any form of property and, to avoid doubt, includes money (whether Australian currency or currency of another country).

34 Subsection 10(1) (paragraphs (d) and (e) of the definition of *insolvent under administration*)

Repeal the paragraphs, substitute:

- (d) a person who has executed a deed of assignment under Part X of the *Bankruptcy Act 1966* or the corresponding provisions of the law of an external Territory or of the law of a foreign country, if a certificate has not been given under section 232 of that Act or the corresponding provision of the law of the external Territory or foreign country, as the case may be, in respect of the deed; or
- (e) a person who has executed a deed of arrangement under Part X of the *Bankruptcy Act 1966* or the corresponding provisions of the law of an external Territory or of the law of a foreign country, if a certificate has not been given under section 237A of that Act or the corresponding provision of the law of the external Territory or foreign country, as the case may be, in respect of the deed; or
- (f) a person whose creditors have accepted a composition under Part X of the *Bankruptcy Act 1966* or the corresponding provisions of the law of an external Territory or of the law of a foreign country, if a certificate has not been given under section 243A of that Act or the corresponding provision of the law of the external Territory or foreign country, as the case may be, in respect of the composition.

35 Subsection 10(1)

Insert:

invest means:

- (a) apply assets in any way; or
- (b) make a contract;

for the purpose of gaining interest, income, profit or gain.

36 Subsection 10(1) (definition of *investment*)

Repeal the definition.

37 Subsection 10(1) (definition of *investment manager*)

Repeal the definition, substitute:

investment manager means a person appointed by the trustee of a fund or trust to invest on behalf of the trustee.

38 Subsection 109(1)

Omit “invest money of the entity”, substitute “invest in that capacity”.

39 Paragraph 109(1A)(a)

Omit “invests money of the entity”, substitute “invests in that capacity”.

40 After subsection 117(5)

Insert:

- (5A) The requirement in paragraph (5)(d) is taken not to have been fulfilled unless the notice is given in a way that enables the trustee to be reasonably satisfied that the notice came to the attention of all the members of the fund other than members who are *lost members* within the meaning of the regulations.

41 Section 168

Omit “(the *applicant*)”.

42 Subsection 169(1)

Omit “on trust for the applicant in accordance with the regulations”, substitute “on trust, in accordance with the regulations, for the person on whose behalf the money was received”.

**Part 3—Amendments that are taken to have
commenced on 5 June 1997**

43 Paragraph 299Z(2)(a)

After “1997,” insert “or after that commencement but before 5 June 1998,”.

44 Paragraph 299Z(3)(a)

After “1997,” insert “or after that commencement but before 5 June 1998,”.

Part 4—Amendment commencing on 1 July 1999

45 After section 69

Insert:

69A Sub-funds to be treated as funds

A sub-fund within a regulated superannuation fund is taken for the purposes of this Part to be a regulated superannuation fund if the sub-fund satisfies the following conditions:

- (a) the sub-fund has separately identifiable assets and separately identifiable beneficiaries; and
- (b) the interest of each beneficiary of the sub-fund is determined by reference only to the conditions governing that sub-fund.

**Part 5—Amendment commencing 6 months after
date of Assent**

46 Subsection 10(1) (definition of *governing rules*)

Repeal the definition, substitute:

governing rules, in relation to a fund, scheme or trust, means:

- (a) any rules contained in a trust instrument, other document or legislation, or combination of them; or
- (b) any unwritten rules;

governing the establishment or operation of the fund, scheme or trust.

Schedule 3—Amendment of the Superannuation (Resolution of Complaints) Act 1993

1 After section 7

Insert:

7A Tribunal Chairperson

- (1) The Tribunal Chairperson is the executive officer of the Tribunal and is responsible for the overall operation and administration of the Tribunal.
- (2) The Tribunal Chairperson is to:
 - (a) monitor the operations of the Tribunal to ensure that those operations are as fair, just, economical, informal and quick as practicable; and
 - (b) allocate the work of the Tribunal among the Tribunal members in accordance with guidelines under subsection (3).
- (3) The Tribunal Chairperson may formulate written guidelines for the allocation of the work of the Tribunal.

2 Subsection 9(1)

Omit “3”, substitute “one or more, but not more than 3,”.

3 After subsection 9(1)

Insert:

- (1A) After the Tribunal has been constituted for the purpose of dealing with a particular complaint and before it has made a determination in respect of the complaint, the Tribunal may be reconstituted under subsection (1) if the Tribunal Chairperson considers that the reconstitution of the Tribunal is desirable:
 - (a) to remove any perception of bias; or

- (b) to ensure the timely performance or exercise of the Tribunal's functions or powers under this Act.

4 Subsection 9(2)

Omit "other Tribunal members, whether including the Tribunal Deputy Chairperson or not," substitute "Tribunal member or Tribunal members".

5 After subsection 9(2)

Insert:

(2A) The Tribunal Chairperson:

- (a) is to formulate written guidelines setting out how the Tribunal will usually be constituted for the purposes of dealing with different classes of complaints; and
(b) is to make the guidelines available to the public.

(2B) Subsections (3) to (5) apply where the Tribunal is constituted for the purposes of the performance or exercise of its functions or powers under this Act in relation to a particular complaint by more than one member.

6 Subsection 9(4)

Omit "or (3A)", substitute ", (3A) or (3B)".

7 Subsection 14(1A)

Repeal the subsection, substitute:

(1A) This section does not apply to a decision of a trustee in respect of which a complaint can be made to the Tribunal under section 14A.

8 Subsection 24A(1)

After "believes", insert ", after reasonable inquiry,".

9 Subsection 24A(1) (penalty)

Repeal the penalty.

10 Subsection 24A(2)

After "believes", insert ", after reasonable inquiry,".

11 Subsection 24A(2) (penalty)

Repeal the penalty.

12 Subsection 24A(2A)

After “believes”, insert “, after reasonable inquiry,”.

13 Subsection 24A(2A) (penalty)

Repeal the penalty.

14 Subsection 24A(2B)

After “believes”, insert “, after reasonable inquiry,”.

15 Subsection 24A(2B) (penalty)

Repeal the penalty.

16 At the end of section 24A

Add:

(7) A person must not intentionally or recklessly fail to comply with subsection (1), (2), (2A) or (2B).

Penalty: 50 penalty units.

17 Subsection 37A(4)

Omit all the words before paragraph (a), substitute:

On reviewing a decision of the trustee that is the subject of a complaint under section 14A, the Tribunal may do all or any of the following:

18 At the end of subsection 63(2)

Add:

Penalty: 10 penalty units.

19 Paragraph 63(3)(a)

Omit “if requested by the Commissioner to do so”.

20 Subsection 63(3B)

Repeal the subsection, substitute:

- (3B) A member of the Tribunal, or a member of the Commissioner's staff made available under subsection 62(2), must not intentionally or recklessly disclose to a particular complaint-handling body:
- (a) a complaint or part of a complaint; or
 - (b) information or material relating to a complaint or part of a complaint;
- that reveals personal information relating to an individual unless the individual has consented in writing to the disclosure.

Penalty: Imprisonment for 2 years.

21 Subsection 63(5) (penalty)

Repeal the penalty.

*[Minister's second reading speech made in—
House of Representatives on 3 December 1998
Senate on 17 February 1999]*

(227/98)