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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**GOVERNANCE OF AUSTRALIAN GOVERNMENT**

**SUPERANNUATION SCHEMES BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Finance and Deregulation,  
The Honourable Lindsay Tanner MP)

## Glossary

The following abbreviations and acronyms are used in this Explanatory Memorandum.

<b>Abbreviation/acronym</b>	<b>Definition</b>
Act	<i>Governance of Australian Government Superannuation Schemes Act 2010</i> as passed by the Parliament
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
ACTU	Australian Council of Trade Unions
ARIA	Australian Reward Investment Alliance
Bill	Governance of Australian Government Superannuation Schemes Bill 2010
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CRF	Consolidated Revenue Fund
CSC	Commonwealth Superannuation Corporation
CSS	Commonwealth Superannuation Scheme
DFRB	Defence Forces Retirement Benefits Scheme
DFRDB Authority	Defence Force Retirement and Death Benefits Authority
DFRDB	Defence Force Retirement and Death Benefits Scheme
Finance Department	Department of Finance and Deregulation
Finance Minister	Minister for Finance and Deregulation
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
MSB Board	Military Superannuation and Benefits Board of Trustees No. 1
MSB	Military Superannuation and Benefits Scheme
PNG scheme	the scheme under the Papua New Guinea (Staffing Assistance) (Superannuation) Regulations 1973
PSS	Public Sector Superannuation Scheme
PSSAP	Public Sector Superannuation Accumulation Plan
SIS legislation	<i>Superannuation Industry (Supervision) Act 1993</i> and regulations under that Act
1922 scheme	the scheme under the <i>Superannuation Act 1922</i>

## Outline

The *Governance of Australian Government Superannuation Schemes Bill 2010* (the Bill) gives effect to the Government's announcement in October 2008 to merge the Australian Reward Investment Alliance (ARIA), the Military Superannuation and Benefits Board (MSB Board) and the Defence Force Retirement and Death Benefits Authority (DFRDB Authority) to form a single trustee body from 1 July 2010.

The Bill is part of a package of three Bills giving effect to Government decisions in 2008 and 2009 to modernise Australian Government superannuation and establish governance arrangements for the Commonwealth superannuation schemes that are effective and more consistent with the broader superannuation industry. The other two Bills in the package are:

- the *ComSuper Bill 2010*, which makes changes the governance framework for superannuation administration arrangements for the main civilian and military superannuation schemes; and
- the *Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010*, which contains the consequential and transitional provisions necessary to facilitate the merger, the changes to superannuation administration and the modernisation of specific aspects of Australian Government superannuation to better align with the broader superannuation industry.

Following the merger of ARIA, the MSB Board and the DFRDB Authority, the single trustee will be responsible for managing the main Commonwealth civilian and military superannuation schemes. These schemes are:

- the Commonwealth Superannuation Scheme;
- the Public Sector Superannuation Scheme;
- the Public Sector Superannuation Accumulation Plan;
- the Military Superannuation and Benefits Scheme;
- the Defence Force Retirement and Death Benefits Scheme; and
- the Defence Forces Retirement Benefits Scheme.

The single trustee will also be responsible for the superannuation scheme established by the 1922 scheme and the Papua New Guinea scheme. These schemes were previously the responsibility of the Commissioner for Superannuation. The position of Commissioner for Superannuation is being replaced with a Chief Executive Officer position, and ComSuper will be established as a Commonwealth agency, from 1 July 2010 by virtue of the *ComSuper Bill 2010*.

Consolidation of the trustee arrangements will bring more than 650,000 members and pensioners under a single trustee board with funds under management of nearly \$19 billion (based on figures as at 30 June 2009).

The consolidation of trustee arrangements is aimed at strengthening governance and providing opportunities for increased efficiencies in trustee operations, consistent with trends in the broader superannuation industry. The ability for the trustee to consolidate funds under management will, in particular, provide opportunities for increased scale of operation and more effective and streamlined investment operations. Increased scale should also assist to attract and retain quality board members and staff and provide access to higher service levels and better investment opportunities.

These outcomes provide an opportunity for benefits to all scheme members and the Commonwealth through lower costs and, potentially, higher investment returns. It will also provide a more sustainable and cost-effective platform for delivering Commonwealth superannuation into the future.

Under the broader superannuation framework, the single trustee has a responsibility to act in the best interests of all members. Accordingly, civilian and military interests are represented on its governing board.

Importantly, consolidation will not affect members' superannuation benefits in any way. Each scheme will retain its own legislative base and provisions.

To implement the merger and set out the governance framework for the single trustee, the Bill:

- establishes “Commonwealth Superannuation Corporation” (CSC) as a body corporate with a separate legal identity from the Commonwealth, by continuing in existence the body corporate that was formerly called ARIA;
- prescribes that CSC is a Commonwealth authority for the purposes of the *Commonwealth Authorities and Companies Act 1997* (CAC Act);
  - The Bill provides for some modification of the application of the CAC Act to CSC with regard to managing and investing scheme funds;
  - The SIS legislation will apply to CSC in relation to its role as a corporate trustee.
- sets out the functions and powers of CSC, noting that the “trustee” functions of CSC in relation to the relevant superannuation schemes are set out in the scheme legislation;
- establishes a governing board of CSC. The role of the governing board is to ensure that CSC carries out its functions in a proper, efficient and effective manner;
  - The governing board (Board) consists of a Chair and ten other directors, all appointed on a part-time basis. The Finance Minister will be responsible for the appointment and removal of directors in accordance with the criteria set out in the Bill. The remuneration of members of the Board will be set by the Remuneration Tribunal;
- sets out the procedures for meetings of the Board, including requirements for a quorum that meet the minimum requirements specified in the SIS legislation;
- allows CSC to employ staff and engage consultants on terms and conditions determined by the governing board;

- sets out the financial and reporting requirements in relation to the superannuation schemes for which CSC is responsible. These requirements broadly replicate the current arrangements that are set out in the existing scheme legislation;
- deals with a number of miscellaneous issues relating to the operation of CSC, including:
  - the application of Commonwealth and State taxes to CSC and to the superannuation funds for which it has responsibility;
  - the source of funds for remuneration of the Chair and directors;
  - the immunity and indemnification arrangements for the Chair and directors; and
  - the delegation arrangements for CSC.

## **Financial Impact Statement**

- There is a cost of \$1.1 million to ARIA, the MSB Board and the DFRDB Authority associated with implementing the merger of these boards. The cost relates to tasks such as undertaking due diligence and conducting a communication campaign for scheme members.
- Each superannuation scheme for which CSC is responsible will remain the same – member entitlements and benefits will not change.

# GOVERNANCE OF AUSTRALIAN GOVERNMENT SUPERANNUATION SCHEMES BILL 2010

## NOTES ON CLAUSES

### Part 1—Preliminary

#### **Clause 1 – Short Title**

**Clause 1** provides for the Act to be cited as the *Governance of Australian Government Superannuation Schemes Act 2010*.

**Note:** The clauses in the Bill will become sections of the Act on Royal Assent.

#### **Clause 2 – Commencement**

**Clause 2** provides for commencement of the Bill on 1 July 2010.

#### **Clause 3 – Definitions**

**Clause 3** provides definitions of the terms and expressions used in the Bill. While these terms are largely self-explanatory, the following defined terms are noted.

*Act administered by CSC* means each of the relevant schemes' governing legislation.

*CSC* is short for Commonwealth Superannuation Corporation and is the body corporate that was formerly referred to as the Australian Reward Investment Alliance (ARIA). The body corporate is continued in existence by clause 4 of the Bill.

*governing deed* is a reference to the governing legislation of the MSB, PSS and PSSAP that is set out in a Trust Deed under the relevant superannuation Act. The other schemes administered by CSC operate fully under the relevant primary Act, that is, they do not have a Trust Deed.

*relevant organisation* is defined to include an organisation in which a large number of its members are members of the PSS, PSSAP or CSS and its principle purpose is in relation to the interests of members in matters concerning their employment. An example of such an organisation could be the Community and Public Sector Union.

The definition also includes an organisation which has the principle purpose of protecting beneficiaries of these schemes in matters concerning their entitlements as beneficiaries. An example of such an organisation could be the Superannuated Commonwealth Officers Association.

*superannuation fund administered by CSC* means the CSS Fund or the MSB Fund or the PSS Fund or the PSSAP Fund, noting that not all of the schemes that are administered by CSC have a fund.

*superannuation scheme administered by CSC* is a list of the schemes that are administered by CSC and is a reference to any of the schemes listed.

*superannuation scheme and superannuation fund administered by CSC* is a reference to all of the schemes and funds that are administered by CSC.

## **Part 2—Commonwealth Superannuation Corporation**

### **Division 1—Establishment and constitution of CSC**

#### **Clause 4 – Establishment**

**Clause 4** provides that the board formerly known as ARIA, established under section 20 of the *Superannuation Act 1990*, will continue as the same body corporate under the new name Commonwealth Superannuation Corporation (CSC). That is, the current ARIA body corporate will continue in existence but is being renamed as CSC.

CSC is a Commonwealth authority for the purposes of the CAC Act. The CAC Act regulates certain operational aspects of Commonwealth authorities. In particular, it has detailed rules about reporting and accountability in relation to the money and financial affairs of a Commonwealth authority – which, for CSC, should be distinguished from money in the superannuation funds for which it is responsible. The CAC Act also deals with matters regarding the conduct of officers of a Commonwealth authority, including directors.

In broad terms, the application of the CAC Act to CSC provides a single overarching governance framework within which it will operate, subject to any specific obligations imposed on it by other legislation, including the Bill, the Commonwealth superannuation Acts and the SIS legislation. In this way, it is expected that CSC will operate much like a corporate trustee in the broader superannuation industry that is governed by the *Corporations Act 2001*.

The application of the conduct of officers provisions in Division 4 of Part 3 of the CAC Act recognises the role of directors and senior officers for the performance of CSC. It will ensure that individual directors and senior managers of CSC are able to be held accountable for failing to act with care and diligence or good faith, and for misusing their position or information obtained by virtue of their position. Civil and criminal penalties will be able to be imposed in respect of persons in contravention of the provisions. Corporate trustees are currently subject to similar obligations under the *Corporations Act 2001* (as well as statutory obligations under the SIS legislation).

Note 1 at the end of clause 4 assists the reader by referring to section 25B of the Acts Interpretation Act, which relates to alterations of names and constitutions of bodies.

Note 2 informs the reader that the CAC Act applies to CSC, subject to clause 5.

#### **Clause 5 – Modification of the Commonwealth Authorities and Companies Act 1997**

**Clause 5** modifies the CAC Act in relation to CSC's role in managing and investing scheme funds. This recognises that CSC is the corporate trustee of the superannuation schemes for which it has statutory responsibility and that money in the superannuation funds is held on trust by CSC for the benefit of the members.

- The Bill places specific obligations on CSC in relation to the management and administration of the superannuation schemes for which it is responsible.

- The SIS legislation places specific obligations on CSC in relation to the regulated superannuation funds for which it is responsible. The SIS legislation is aimed at ensuring that superannuation funds are managed prudently, in the interests of members and are kept secure until members retire from the work force. The CSS, PSS, PSSAP and MSB Funds are regulated funds for the purposes of the SIS legislation.
- The Australian Prudential Regulation Authority is responsible for the prudential supervision of the financial services sector (including superannuation) through the administration of the SIS legislation.

Specifically, clause 5 of the Bill states that section 15 of the CAC Act (which places an obligation on a Commonwealth authority to notify the responsible Minister of significant events) will not apply in relation to the management and investment of scheme funds by CSC.

Clause 5 also allows flexibility for regulations to be made to further modify the application of the CAC Act should evidence be provided by CSC that a particular requirement of the CAC Act impedes the management and investment of scheme funds by CSC.

**Subclause 5(2)** reinforces that CSC is a Commonwealth authority for the purposes of the CAC Act even if, at any time, the only money that it holds forms part of a superannuation fund for which it is responsible.

### ***Clause 6 – CSC’s constitution***

**Clause 6** provides that CSC is required to have a seal, which is to be kept according to the custodial directions of the governing Board of CSC and used only as authorised by the Board. All persons acting judicially (including courts and judges) are required to take judicial notice of CSC’s seal on a document and to treat the document as being properly sealed. CSC may acquire, hold and dispose of real and personal property. It may also sue and be sued in the name “Commonwealth Superannuation Corporation”.

### ***Clause 7 – CSC’s functions***

**Subclause 7(1)** provides that CSC is responsible for the functions assigned to it by this Act and by each of the Acts that it administers. The Acts administered by CSC are described in the definitions and are the governing Acts for each of the superannuation schemes for which CSC is responsible.

CSC is also responsible for the general administration of these Acts, and for doing anything incidental or conducive to the performance of its functions. This responsibility includes ensuring that benefits payable to persons entitled to receive them are paid in accordance with the Acts (under which the schemes are established).

**Subclause 7(2)** clarifies that, when CSC is performing a function under any of the Acts it administers, it is doing so under that Act (rather than this Act). The functions of CSC in respect of each of the relevant superannuation schemes are set out in the scheme governing Acts.

**Subclause 7(3)** provides that CSC has a broad power to do whatever is required or convenient for, or in relation to, the performance of its functions.

## **Division 2—Board of CSC**

### ***Subdivision A—Establishment and functions***

#### ***Clause 8 – Establishment***

**Clause 8** requires there to be a governing board of directors (Board) of CSC. The function, membership and operation of the Board are set out in the Bill in the following clauses.

#### ***Clause 9 – Function***

**Clause 9** provides that the role of the Board is to ensure that CSC performs its functions in a proper, efficient and effective way. The Board is able to do anything necessary or convenient for, or in relation to, this role. Anything done by the Board for, or on behalf of, CSC is treated as having been done by CSC.

#### ***Clause 10 – Membership***

**Subclause 10(1)** sets out the membership of the Board as consisting of a Chair and 10 other directors.

The note at the end of subclause 10(1) assists the reader by referring to subsection 36(2), which enables the regulations to prescribe a different number of other directors.

The combined effect of subclauses 10(1) and 10(2) is that, in line with the equal representation requirements in the SIS legislation, the Board of CSC consists of an equal number of employer and employee directors (sometimes referred to as “employer representatives” and “member representatives”, respectively). There is also an independent director, being the Chair.

Under **subclause 10(2)**, the employee directors are nominated, in writing, by:

- the President of the ACTU who represents the interests of members of the civilian schemes and nominates 3 directors; and
- the Chief of the Defence Force who represents the interest of members of the military schemes and nominates 2 directors.

The Finance Minister is responsible for choosing the remaining 5 employer directors and represents the employer-sponsor of the relevant civilian and military superannuation schemes, being the Commonwealth. In selecting suitable candidates to act as employer directors, it is intended that the Finance Minister would consult with Ministers in the Defence portfolio.

The note at the end of subclause 10(2) assists the reader by clarifying the Minister’s role in choosing the remaining five directors.

**Subclause 10(3)** requires nominees to meet the fitness and propriety standards set out in the SIS legislation. If the person’s appointment would result in a contravention of a fitness and proprietary standard, that person is not eligible for nomination in the first instance.

Under **subclause 10(4)**, the President of the ACTU is required to consult relevant organisations, as defined by clause 3, before making a nomination. This is a requirement on the President of the ACTU prior to nominating a person. Once the nomination has been made, it is not intended that the Minister, in making the

appointment, would have any obligation to satisfy him or herself that the President of the ACTU has consulted with relevant organisations. That is, the Minister may treat nominations by the President of the ACTU as being properly made.

**Subclause 10(5)** requires written nominations made by the President of the ACTU and the Chief of the Defence Force to specify the duration of the appointment, which can be up to three years.

**Subclauses 10(6) and 10(7)** make it clear that the above requirements also apply to the nomination of acting directors.

**Subclause 10(8)** makes it clear that the Board can still operate if there is a vacancy on the Board.

## ***Subdivision B—Appointment etc. of directors***

### ***Clause 11 – Appointment of directors***

**Subclause 11(1)** provides that the Minister appoints directors on a part-time (as opposed to full-time) basis by making a written instrument.

The note at the end of subclause 11(1) assists the reader by clarifying that a director is eligible for reappointment to the Board in view of subsection 33(4A) of the Acts Interpretation Act, which provides that, in any Act, ‘appoint’ includes ‘re-appoint’.

**Subclause 11(2)** provides that a person is not eligible for appointment as a director if this would breach the fitness and propriety standards of the SIS legislation. This is similar to the requirement for nominations set out in subclause 10(3).

**Subclause 11(3)** requires the Minister to appoint a person nominated by the President of the ACTU or the Chief of the Defence Force for the period specified in the written nomination. That is, subject to the 3 year maximum term in subclause 10(5), the Minister does not have a role in determining the length of appointment of a person nominated by the President of the ACTU or the Chief of the Defence Force.

Under **subclause 11(4)** the Minister is responsible for proposing a person for appointment as Chair, but must obtain the Board’s agreement to the appointment. The requirement for the Minister to obtain the Board’s consent is in line with the application of the SIS legislation equal representation requirements in respect of an independent director. In the case of the Board, the independent director is the Chair.

The requirement for the Minister to obtain the Board’s consent does not apply to the appointment of the person as the first Chair because the Board does not commence until 1 July 2010.

The note at the end of subclause 11(4) assists the reader by referring to section 22 of the Act, which sets out requirements for voting at Board meetings.

**Subclause 11(5)** makes it clear that a defect or irregularity in the appointment of a person as director does not render the appointment invalid.

### ***Clause 12 – Term of appointment***

**Clause 12** provides that a director is appointed for the term specified in the instrument of appointment. That term may be up to three years.

**Subclause 12(2)** provides that a director is unable to serve continuously on the Board for more than 9 years. The intention of this provision is to provide for a structured rotation of directors. It recognises the need to balance the benefits of continuity on the Board with providing an opportunity to enhance the Board through refreshment and the introduction of new ideas.

### ***Clause 13 – Remuneration and allowances***

**Clause 13** provides that the Remuneration Tribunal determines the level of remuneration of the directors. In the absence of a Remuneration Tribunal determination, directors are remunerated in line with the regulations. Directors also receive allowances set out in the regulations. This section operates subject to the *Remuneration Tribunal Act 1973*.

### ***Clause 14 – Leave of absence***

**Clause 14** enables the Minister to allow the Chair to take a leave of absence from the Board. The Chair's leave of absence is on terms and conditions set by the Minister. Similar arrangements apply in relation to directors. However, in the case of directors, the Chair has the discretion to grant a leave of absence and sets the terms and conditions that are to apply.

### ***Clause 15 – Resignation***

**Clause 15** sets out requirements in relation to the resignation of directors, including the Chair. The clause requires resignations to be provided to the Minister in writing. A resignation comes into effect on the day that it is received by the Minister unless a later day is specified in the resignation, in which case it applies from that day.

In the event that the resigning director is a nominee of the President of the ACTU or the Chief of the Defence Force, the person is also required to provide a copy of their resignation to the party responsible for their nomination. However, it is not intended that this additional requirement would impact on the effectiveness of a resignation given in writing to the Minister.

### ***Clause 16 – Termination of appointment***

**Subclauses 16(1) to 16(3)** set out the grounds on which the Minister may terminate the appointment of directors.

**Subclause 16(1)** enables the Minister to terminate the appointment of a director:

- for misbehaviour or physical or mental incapacity; or
- if the director becomes bankrupt or applies to take benefit from a law that provides for relief from bankruptcy or insolvent debtors, or if the director compounds with his or her creditors or assigns his or her remuneration to his or her creditors; or
- if the director fails to attend three consecutive Board meetings and does not have a leave of absence; or
- if the director breaches section 21 of the Act, which sets out requirements for the disclosure of interests to the Board, and does not have a satisfactory reason for this.

**Subclause 16(2)** enables the Minister to terminate the appointment of one or all of the directors if the Minister considers that the directors have breached their obligations under the CAC Act to keep the Minister informed on matters relating to the operation of the Commonwealth authority.

**Subclause 16(3)** allows the Minister to terminate a director's appointment:

- if the director's continuation on the Board would breach the fitness and propriety criteria set out in the SIS legislation; or
- if a director either fails to disclose a material personal interest as required under the CAC Act, or fails to comply with the relevant restrictions on voting under that Act where a director has such an interest.

Under **subclause 16(4)** the appointment of a director automatically terminates if he or she is a "disqualified person" for the purposes of the SIS legislation. The grounds for such automatic disqualification include the person being convicted of a dishonesty offence, the person is insolvent or under administration or the making of a civil penalty order against the person.

**Subclauses 16(5) to 16(7)** set out additional requirements on the Minister when terminating a director who has been nominated by the President of the ACTU or the Chief of the Defence Force. The additional requirements do not, however, apply in all circumstances (see below).

**Subclauses 16(5) and 16(6)** prevent the Minister from terminating the appointment of a director nominated by the President of the ACTU or the Chief of the Defence Force, on the grounds set out in subclause 16(1) and (2), unless the party responsible for the nomination has agreed to this action.

Note that the Minister is not required to seek consent for termination of an appointment where a director's continuation in office would contravene a SIS fitness and proprietary standard, where a director fails to comply with the relevant material personal interest provisions under the CAC Act, or where the appointment automatically terminates if the person is a disqualified person under the SIS legislation.

Where consent of the President of the ACTU or the Chief of the Defence Force has been given, **subclause 16(7)** requires the Minister to terminate the relevant appointment.

## ***Clause 17 – Acting appointments***

**Subclause 17(1)** enables the Minister to appoint a person to act as a director if there is a vacancy on the Board (regardless of whether the position has previously been filled), or during a period when the director is absent from duty, travelling overseas or for any other reason not able to perform his or her duties as a director.

**Subclauses 17(2) to 17(5)** set out arrangements for appointing a person to act as a director. These are consistent with the arrangements for appointing directors generally.

**Subclause 17(6)** provides that anything done by, or in relation to, a person claiming to be an acting director is not invalid because the Minister has not yet appointed the person, or there was a defect or irregularity in relation to the person's appointment, or the person's appointment had ceased, or the time to act had not arisen or had passed.

The note at the end of subclause 17(6) assists the reader by referring to sections 20 and 33A of the Acts Interpretation Act, which are relevant to acting appointments.

## ***Subdivision C—Meetings of the Board***

### ***Clause 18 – Holding of meetings***

**Clause 18** requires the Board to meet as often as necessary to fulfil its role. The Chair has the discretion to arrange a meeting at any time. However, the Chair is required to arrange a meeting within 30 days after receiving, from another director, a request for a meeting.

The note at the end of clause 18 assists the reader by referring to section 33B of the Acts Interpretation Act, which permits a body to allow its members to participate in meetings by telephone, closed-circuit television or any other means of communication. Where a member is participating in a meeting under such permission, the person is taken to be present at the meeting.

### ***Clause 19 – Presiding at meetings***

**Clause 19** provides that the Chair is in charge of all meetings of the Board that he or she attends. If the Chair is not present at a meeting, a director nominated by the Chair takes charge at the meeting. In the event that the Chair does not nominate a director to perform this role, the directors in attendance at the meeting are required to choose one among them to preside over the meeting.

### ***Clause 20 – Quorum***

**Subclause 20(1)** requires at least 9 directors to be at a meeting in order for there to be a quorum.

**Subclause 20(2)** provides for 8 directors to constitute a quorum in limited circumstances. This is where:

- a quorum is no longer present because a director is not able to participate in the consideration of a matter due to him or her disclosing an interest in that matter for the purposes of section 21 of this Act or section 27J of the CAC Act; and
- there are 8 other directors who are present at the meeting who can be counted as making up a quorum.

### ***Clause 21 – Disclosure of interests to the Board***

**Subclause 21(1)** clarifies that the provision applies to actions taken by the Board relating to CSC's function of managing and investing superannuation fund money.

The combined effect of **subclauses 21(2) and 21(3)** is that a director with a financial or other form of interest in a matter that is being, or about to be, considered by the Board, must disclose the nature of that interest at a Board meeting as soon as possible after the director has become aware of the issue. Under **subclause 21(4)**, the disclosure is required to be noted in the minutes of the meeting.

**Subclause 21(5)** prevents the director from being present when the Board is considering the matter and from being involved in a Board decision on the matter, unless the Minister or the Board make a determination allowing this to occur.

**Subclause 21(6)** prevents the director from being present when the Board is considering making a determination under subsection 21(5), and from being involved in making such a determination.

Where there has been a determination by the Minister or where the Board makes a determination, **subclause 21(7)** requires this to be recorded in the minutes of the meeting.

### ***Clause 22 – Voting at meetings***

**Clause 22** specifies the number of directors that must agree at a Board meeting in order for a decision to be made.

Where the circumstances in clause 20(2) apply to allow 8 Board members to constitute a quorum, the number required to agree is 8. That is, where:

- a quorum is no longer present because a director is not able to participate in the consideration of a matter due to him or her disclosing an interest in that matter for the purposes of section 21 of this Act or section 27J of the CAC Act; and
- there are 8 other directors who are present at the meeting who can be counted as making up a quorum.

In all other cases, a decision requires 9 directors to agree. While the SIS legislation voting requirements require a minimum agreement of two-thirds of the total number of directors, the higher requirement of 9 of 11 directors reflects the need to balance the interests of a range of stakeholders.

### ***Clause 23 – Decisions without meetings***

This clause provides flexibility for the Board to make decisions “out of session”. However, this flexibility is subject to the Board first determining in writing that it may make decisions without a meeting and setting out the way in which directors are to indicate agreement with proposed decisions.

**Subclause 23(1)** provides that a decision is to be treated as having been made at a meeting if:

- 9 directors indicate (in a method determined by the Board) that they agree with a proposed decision; and
- all directors were informed of, or a reasonable attempt was made to inform them of, the proposed decision.

**Subclause 23(2)** provides that subsection (1) only applies if the Board has made a written determination that enables it to make decisions without meetings and specifies the way in which the directors are to indicate agreement.

Under **subclause 23(3)** the 9 directors required to indicate agreement to a proposed decision cannot include a director who is prevented from participating due to him or her having an interest in the matter under subsection 21(5) of this Act, or section 27J of the CAC Act.

### ***Clause 24 – Minutes of meetings***

**Clause 24** requires the Board to keep minutes of its meetings.

## **Division 3—Staff of CSC**

### ***Clause 25 – Staff of CSC***

**Clause 25** enables CSC to employ whatever staff it considers necessary to perform its functions. Staff of CSC are to be engaged on the terms and conditions set out in a written determination of the Board.

### ***Clause 26 – Consultants***

**Clause 26** enables CSC to engage consultants to assist it to perform its functions.

## **Part 3—Finance and reporting requirements**

### **Division 1—Provisions relating to finance and audit**

#### ***Clause 27 – Banking***

**Clause 27** requires CSC to deposit all money that it receives in respect of each of the superannuation funds it administers, into a bank account which is maintained by CSC.

#### ***Clause 28 – Accounting records***

**Subclause 28(1)** requires CSC to keep appropriate accounts and records of transactions and affairs of each of the superannuation funds that it administers. The accounts and records must be consistent with the accounting principles typically applied in commercial practice.

**Subclause 28(2)** requires CSC to take reasonable steps to ensure that all payments from the superannuation funds that it administers are correct and properly authorised, and that there is adequate control over the assets of these superannuation funds and its acquisition of liabilities in relation to these superannuation funds.

**Subclause 28(3)** provides that a director commits an offence if they are responsible for a breach of, or fail to take reasonable steps to comply with, a requirement set out in this section.

The penalty for the offence is a prison sentence of 6 months or a fine, calculated based on 30 penalty units, or both.

### **Division 2—Reporting requirements**

#### ***Clause 29 – Annual report and financial statements***

**Subclause 29(1)** requires CSC to provide an annual report, and financial statements in relation to its management of each of the superannuation funds that it administers, to the Minister as soon as practical after the end of the 2010-11 financial year and each subsequent financial year. Note, however, that subclause 29(1) allows regulations to prescribe a date by which CSC must provide the annual report and financial statements to the Minister. It is not intended, however, that a date would be prescribed that is more than the six month period provided for under the Acts Interpretation Act. Rather, the regulations would allow flexibility for an earlier date to be prescribed.

Under paragraph 29(1)(c) the annual report is to address the performance of CSC's functions in relation to each superannuation scheme and superannuation fund administered by it during the year. The exceptions to this are the 1922 scheme, DFRB, DFRDB and PNG scheme because there is no superannuation fund in relation to these schemes. For these schemes, the annual report is to address the general administration of the relevant enabling Act.

The financial statements are to be in the form agreed between the Minister and the Board.

**Subclause 29(2)** prescribes the Acts for which CSC must provide a report on general administration. As noted above, these are the enabling Acts for the 1922 scheme, DFRB, DFRDB and PNG scheme.

Under **subclause 29(3)** CSC must provide the financial statements to the Auditor-General before giving them to the Minister. The Auditor-General is required to audit and report to the Minister on:

- whether the financial statements are based on proper accounts and records, are consistent with the accounts and records, and fairly represent the financial transactions and position of each fund administered by CSC;
- whether the receipt of money into, payment of money out of, and investment of money credited to, each superannuation fund administered by CSC have been in line with this Act, the relevant Acts administered by CSC and the relevant governing deeds; and
- other matters related to the statements that the Auditor-General considers should be reported.

**Subclause 29(4)** requires the Minister to arrange for a copy of CSC's annual report and financial statements and the Auditor-General's report on CSC's financial statements, to be tabled in the House of Representatives and the Senate. Tabling must occur no more than 15 sitting days after receiving whichever of those documents was last received by the Minister.

**Subclause 29(5)** requires CSC to give the Minister an interim annual report and interim financial statements in the event that it has not provided an annual report within six months after the end of a financial year. This is to occur within 14 days after the end of the six month period. The matters to be addressed in the interim annual report and interim financial statements are largely the same as for annual reports and financial statements respectively. However, in this case, there is no requirement to report on the general administration of the enabling Acts for the 1922 scheme, DFRB, DFRDB and PNG scheme.

Under **subclause 29(6)**, interim financial statements are to be in a form agreed between the Minister and the Board and do not have to be accompanied by a report from the Auditor-General.

Under **subclause 29(7)** the tabling requirements for interim annual reports and interim financial statements are similar to those for annual reports set out in subclause 29(4). The subclause includes an additional requirement for the Minister to make the interim report and interim financial statements available to the public.

**Subclause 29(8)** clarifies that an interim annual report is not a legislative instrument within the meaning of the Legislative Instruments Act because it is administrative in

character. It does not determine or alter the content of the law. This provision is included to assist readers and is merely declaratory in nature.

## **Part 4—Miscellaneous**

### **Division 1—Application of other laws**

#### ***Clause 30 – Trustee Act of ACT to apply***

**Clause 30** provides it is the *Trustee Act 1925* in the jurisdiction of the Australian Capital Territory that applies to directors when they are performing functions or exercising their powers under a governing deed, to the extent that it is not inconsistent with Commonwealth law.

#### ***Clause 31 – Exemption from taxation—CSC***

**Subclause 31(1)** provides for exemptions from certain Commonwealth and State and Territory taxes to apply to CSC. In particular, CSC is exempt from:

- taxes under Commonwealth laws other than the *A New Tax System (Goods and Services Tax) Act 1999*, the *Fringe Benefits Tax Assessment Act 1986*, the *Income Tax Assessment Act 1936*, and the *Income Tax Assessment Act 1997*; and
- State or Territory taxes.

**Subclause 31(2)** enables regulations to be made which reduce the scope of the CSC tax exemption, by specifying that it is subject to tax under a particular law.

#### ***Clause 32 – Exemption from taxation—superannuation schemes and superannuation funds administered by CSC***

**Clause 32** concerns tax exemptions in relation to the superannuation schemes and funds administered by CSC.

**Subclause 32(1)** provides that exemptions from certain Commonwealth and State and Territory taxes apply to CSC when it is performing functions and exercising powers in relation to the superannuation schemes and the superannuation funds that it administers, and to the superannuation funds. The exemption is slightly different to that provided to CSC under clause 31, and relates to:

- taxes under Commonwealth laws other than the *A New Tax System (Goods and Services Tax) Act 1999*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*; and
- a State or Territory tax, if the Commonwealth is not subject to the particular tax.

**Subclause 32(2)** enables regulations to be made which reduce the scope of the tax exemption provided in subclause 32(1), by specifying that CSC and the superannuation funds are subject to tax under a particular law.

**Subclause 32(3)** enables the regulations to specify that different superannuation funds are subject to tax under different laws. In this event, the tax exemptions that apply to the superannuation funds would not be the same.

**Subclause 32(4)** enables the regulations to modify the section, as it relates to the PSSAP or the PSSAP Fund, or to specify that that the section ceases to have effect in

relation to the PSSAP or the PSSAP Fund at a specific time. This regulation-making power gives flexibility to allow the PSSAP to in future operate on the same basis as other similar superannuation schemes in relation to taxation.

## **Division 2—Provisions relating to the Board**

### ***Clause 33 – Source of funds for paying remuneration and allowances***

**Clause 33** sets out the source from which the Chair and other directors of CSC are paid remuneration and allowances.

Under **subclause 33(1)**, the Chair is paid out of the superannuation fund in respect of which he or she is performing functions, consistent with the Chair's independent status. However, when performing functions in relation to the 1922 scheme, DFRB, DFRDB or PNG scheme, the Chair is paid from the Consolidated Revenue Fund because these schemes do not have a superannuation fund.

**Subclause 33(2)** provides that other directors of CSC, when performing functions in relation to a superannuation fund, are to be paid out of the relevant superannuation fund, or the CRF or partly from each source, in line with the requirement in the relevant superannuation Act.

By way of example, section 34 of the *Superannuation Act 1990* effectively allows the Minister to determine whether costs of (and incidental to) management and investment of the PSS Fund are to be paid by the Commonwealth (from the CRF) or by CSC out of the PSS Fund. Therefore, when a director is performing functions in relation to the PSS Fund, the determination by the Minister under section 34 of the *Superannuation Act 1990* will indicate whether that director's remuneration for that work will be sourced from the CRF or the PSS Fund or partly from each source.

A similar approach would apply when the director is performing functions in relation to the CSS Fund, MSB Fund and PSSAP Fund – the relevant provision in the governing legislation for each scheme will determine the source of the director's remuneration for the functions performed in relation to each Fund.

As with the Chair, directors are paid from the CRF when performing functions in relation to the 1922 scheme, DFRB, DFRDB or PNG scheme.

**Subclause 33(3)** enables the regulations to modify or cease the operation of the section as it applies to the PSSAP and the PSSAP Fund. This provision gives flexibility to allow the PSSAP to operate on the same basis as other similar superannuation schemes in relation to the source of funds for paying the remuneration and allowances of directors.

### ***Clause 34 – Indemnification of directors etc.***

**Subclause 34(1)** provides a personal immunity to directors and delegates of the Board. It prevents a director or a delegate of the Board being personally subjected to any action, liability, claim or demand for anything that he or she has done, or not done, in good faith in performing his or her functions under this Act, an Act administered by CSC or a governing deed.

**Subclause 34(2)** clarifies that subsection (1) does not preclude CSC from being subject to any action, liability, claim or demand.

**Subclause 34(3)** provides that, if money is payable by CSC in respect of an action, liability, claim or demand that relates to an Act that it administers, regulations made under such an Act or a governing deed, the payment is, unless precluded by the SIS Act or regulations, to be made out of:

- the Consolidated Revenue Fund (CRF) in the case of the 1922 scheme, DFRB, DFRDB, and PNG scheme, which do not have a superannuation fund; and
- the relevant superannuation fund in any other case.

Under **subclause 34(4)**, an amount paid out of a superannuation fund under subclause 34(3) is reimbursed to the superannuation fund from the CRF.

**Subclause 34(5)** enables the regulations to modify or cease the operation of the section as it applies to the PSSAP governing legislation. This provision gives flexibility to allow the PSSAP to operate on the same basis as other similar superannuation schemes in relation to indemnities.

## **Division 3—Miscellaneous**

### ***Clause 35 – Delegation by CSC***

**Subclause 35(1)** details the range of persons to whom CSC may delegate all or any of its powers under an Act administered by it, or regulations made under such an Act. These persons include, among others, a director, a member of staff of CSC, the Chief Executive Officer (CEO) of ComSuper, and a member of the staff assisting the CEO of ComSuper. It also allows CSC to delegate powers to a committee made up of two or more such persons.

**Subclause 35(2)** deals with the delegation of CSC’s power to reconsider its own decisions or decisions made by its delegates. It provides that, despite the broad delegation power subsection 35(1), decisions taken by CSC and its delegates in relation to the DFRB, DFRDB, PNG scheme, 1922 scheme and CSS may only be reconsidered by the committees listed in the table. This is consistent with the arrangements applying to the other schemes – the MSB, PSS and PSSAP – which contain a similar provision in their Trust Deed.

**Subclauses 35(3) to 35(7)** set out the arrangements for the sub-delegation of CSC powers.

The effect of **subclauses 35(3) to 35(5)** is that delegates (other than committees) may sub-delegate, in writing, the powers that have been delegated to them, to a subset of the other persons referred to in subclause 35(1). The subset of persons to whom a sub-delegation may be made varies, depending on whether the delegate is a director, the CEO of ComSuper or another person mentioned in subclause 35(1).

Under **subclauses 35(6) and 35(7)**, the Acts Interpretation Act applies to and in relation to a sub-delegation as if it were a delegation.

### ***Clause 36 – Regulations***

**Subclause 36(1)** provides that the Governor-General may make regulations covering matters required to be prescribed in this Act, or matters that it would be convenient to prescribe for the purposes of this Act.

**Subclause 36(2)** enables the regulations to prescribe a number of other directors that is different to the 10 specified in paragraph 10(1)(b). In this event, **subclause 36(3)** requires further regulations to be made adjusting, in accordance with the proportions in the Act, the numbers of directors that may be nominated by the President of the ACTU and the Chief of the Defence Force, and the quorum and voting requirements.

**Subclause 36(4)** allows the regulations to prescribe a different time period after which CSC must provide an interim report and interim financial statements to the Minister under subclause 29(5). However, the regulations are not able to extend the six month period referred to in that subclause.