

**2004 – 2005**

**THE PARLIAMENT OF THE COMMONWEALTH OF  
AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**SUPERANNUATION BILL 2005**

**EXPLANATORY MEMORANDUM**

(Circulated by the authority of the Minister for Finance and Administration,  
Senator the Hon Nick Minchin)

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## GENERAL OUTLINE

### SUPERANNUATION BILL 2005

#### OUTLINE

This Bill provides for a number of matters relating to superannuation arrangements for new Australian Government employees and office holders and certain other employees and office holders who commence employment or appointment on or after 1 July 2005. In particular the Bill provides for:

- the establishment of the Public Sector Superannuation Accumulation Plan (PSSAP) as a scheme separate from the Public Sector Superannuation Scheme (PSS) as established under the *Superannuation Act 1990* (the 1990 Act);
- new employees to be able to have choice of funds consistent with arrangements for most private sector employees;
- the PSSAP to be the employer (default) fund for persons employed under the *Public Service Act 1999* and other persons prescribed by the Minister; and
- PSSAP membership arrangements that are consistent with the arrangements in place before the commencement of the Bill.

The Bill and this Explanatory Memorandum should be considered in conjunction with the Superannuation (Consequential Amendments) Bill 2005 (the Consequential Bill).

The Bill includes a number of features that are due to commence from as early as 1 July 2005. This commencement date is necessary to avoid a number of technical difficulties that would arise if the PSSAP was separated from the PSS following the commencement of the PSSAP which will otherwise occur on 1 July 2005 as part of the PSS.

#### **Separate Scheme**

The Bill will provide for the PSSAP to be a new and separate scheme established by Trust Deed signed by the Minister. The PSSAP will be available to most new Australian Government employees and office holders and certain other employees and office holders who commence employment or appointment on or after 1 July 2005.

This will replace the arrangements under the 20<sup>th</sup> Amending Deed, which will amend the Trust Deed and Rules under the 1990 Act to establish the PSSAP as a sub plan of the PSS from 1 July 2005.

The 1990 Act has provided superannuation arrangements for all new employees since its commencement on 1 July 1990 and, following passage of this Bill and the Consequential Bill, will continue to provide superannuation benefits as a defined benefit scheme for most existing Australian Government employees at 30 June 2005 and certain new employees with a relevant existing interest in the earlier superannuation arrangements such as a PSS preserved benefit.

The Bill will retain the same features as the 1990 Act as far as practical and appropriate for a fully funded accumulation scheme. Following the commencement of this Bill, it is intended that the Trust Deed for the new scheme will provide for a PSSAP that is essentially the same in form as the accumulation plan established by the 20<sup>th</sup> Amending Deed under the 1990 Act and which will otherwise apply to new employees from 1 July 2005.

The Bill retains those features that are necessary for the new scheme. However, as the new scheme will not provide for unfunded defined benefits (as provided in the PSS), many of the features under the 1990 Act are no longer necessary and have been omitted. The Table at Schedule 1 lists the provisions from the 1990 Act that have been retained, amended or omitted. As noted in the Table, certain provisions have been amended or omitted to ensure that the PSSAP is able to operate as far as possible on an equivalent basis to other similar superannuation funds.

The Bill provides that the PSS Board will continue to be responsible for the PSSAP (and the new Fund (the PSSAP Fund) to be established by the Bill) and the Commissioner for Superannuation will continue to be required to provide administrative services to the Board in respect of the new scheme. This is similar to the legal structure currently existing for the PSS.

### **Choice**

The Bill, together with the Consequential Bill, will provide that, from 1 July 2006, Australian Government employers will be required to offer new employees choice of fund in accordance with the arrangements in the *Superannuation Guarantee (Administration) Act 1992* (SG Act). Like most private sector employers, Australian Government employers will comply with the choice of fund requirements in the SG Act if they are contributing to:

- a chosen fund (within the meaning of the SG Act) in accordance with an employee's choice;
- a fund in accordance with arrangements under a certified agreement or Australian Workplace Agreement; or
- an employer (default) fund because the employee does not have a chosen fund.

The SG Act currently provides that an employer contributing to the PSS (including the PSSAP) is taken to comply with the choice of fund requirements. Following the establishment of the PSSAP as a separate scheme, the

Consequential Act will amend the SG Act to provide that employers will be taken to comply with the choice of fund requirements in respect of contributions made to the PSSAP until 30 June 2006. However, this Bill will allow employers to offer choice of funds to PSSAP members from as early as 1 July 2005 if they wish.

### **Default Fund**

The Bill will provide that the PSSAP will be the employer (default) fund for persons employed under the *Public Service Act 1999* and certain other persons prescribed by the Minister. Employers of other relevant employees will be allowed to select their own employer (default) fund to offer to employees, which can be a complying superannuation fund, such as the PSSAP, or a Retirement Savings Account.

### **Membership arrangements**

The Bill provides that PSSAP membership is consistent with the PSS membership arrangements under the 1990 Act. Persons employed by the Commonwealth or an Approved Authority (within the meaning of the Act) or who hold a statutory office will generally be eligible to become members, or may be required to become members in certain circumstances.

The new Bill will provide that a person continues to be a PSSAP member until their benefit or the last of their benefit is paid to or in respect of the person. PSSAP membership will be absolute in so far as a person will be able to be a member in respect of one or more concurrent or successive periods of relevant employment or appointment. Also, a person will be able to continue membership even when not in relevant employment or holding a relevant office (although, like the PSSAP which will otherwise commence on 1 July 2005, the proposed Trust Deed and Rules will not permit contributions to be accepted in respect of the member during such times).

The Bill will introduce a concept of ordinary employer-sponsored member. Where a PSSAP member becomes an ordinary employer-sponsored member in respect of their employment or appointment, the person's employer will be required to make contributions in accordance with the Rules for the PSSAP. A person may choose to become an employer sponsored member in respect of their employment or appointment (for example, by choosing that the PSSAP is the person's chosen fund in accordance with the SG Act), or may be required (mandated) to become an ordinary employer-sponsored member (for example, before 1 July 2006, if they are not a temporary employee or office holder and their employer has not offered them choice of fund).

The Bill will provide that PSSAP membership is not available to certain persons including existing Australian Government employees at 30 June 2005 (who have other superannuation arrangements provided for them), members of the Commonwealth Superannuation Scheme (CSS) and members of the PSS defined benefit arrangements under the 1990 Act. Also, PSSAP membership will continue to be unavailable to new employees who are eligible to join the CSS or

the PSS, for example where a person has a preserved benefit from that scheme because of earlier Australian Government employment.

**Financial Impact Statement**

The Bill will not have a financial impact.

## TERMS USED IN NOTES ON CLAUSES

“**20<sup>th</sup> Amending Deed**” means the 20th Amending Trust Deed made on 23 March 2004 in accordance with section 5 of the **1990 Act**.

“**1990 Act**” means the *Superannuation Act 1990*.

“**APS**” means the Australian Public Service established by section 9 of the *Public Service Act 1999*.

“**APS employee**” means an APS employee as defined in section 7 of the *Public Service Act 1999*.

“**Bill**” means the Superannuation Bill 2005.

“**Board**” means the Board established under section 20 of the **1990 Act**.

“**Consequential Bill**” means the Superannuation (Consequential Amendments) Bill 2005.

“**choice of fund requirements**” means requirements in respect of an employer making contributions in respect of an employee in compliance with Part 3A of the **SG Act** as amended by the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*.

“**CSS**” means the Commonwealth Superannuation Scheme established under the *Superannuation Act 1976*.

“**Productivity Benefit Act**” means the *Superannuation (Productivity Benefit) Act 1988*.

“**PSS**” means the Public Sector Superannuation Scheme established by trust deed under the **1990 Act**.

“**PSSAP**” means the Public Sector Superannuation Accumulation Plan which would be established under the **Trust Deed**.

“**PSSAP Fund**” means the fund established, and vested in the Board, by the **Trust Deed**.

“**RSA**” means a Retirement Savings Account as provided for in the *Retirement Savings Accounts Act 1997*.

“**Rules**” means the rules governing the PSSAP, which are included in the **Trust Deed**.

“**SG Act**” means the *Superannuation Guarantee (Administration) Act 1992*.

**“Trust Deed”** means the trust deed which would be made under the terms of the Bill.

**“trustee”** means trustee appointed to the PSS Board in accordance with the trust deed made under section 4 of the 1990 Act, by which the PSS has been established.



## NOTES ON CLAUSES

### PART 1 - INTRODUCTION

#### Clause 1: Short title

1. **Clause 1** provides for the short title of the Act to be the *Superannuation Act 2005* (the Act).

#### Clause 2: Commencement

2. **Clause 2** is the commencement provision for the Bill. It provides that clauses 1 and 2 will commence on the day the Act receives the Royal Assent. The remaining provisions will commence on the later of the day the Act receives the Royal Assent and on the day that the *Superannuation (Consequential Amendments) Act 2005* receives the Royal Assent, but will not commence if the *Superannuation (Consequential Amendments) Act 2005* does not receive Royal Assent.

#### Clause 3: Simplified Outline

3. **Clause 3** gives a simplified outline of the Bill.

#### Clause 4: Definitions

4. **Clause 4** defines several terms which are to be used in the Bill.

#### Clause 5: Public sector employees

5. **Clause 5** defines the term public sector employee to be used in the Bill. A public sector employee who is not an exempt overseas employee is eligible to be a member of the PSSAP. Unlike the 1990 Act this Bill does not distinguish between permanent and temporary employees, as the intent is to provide the same membership arrangements irrespective of employment status.

6. A person is a public sector employee if the person is employed by the Commonwealth or an approved authority (Clause 8) or is a holder of a statutory office (Clause 7). A person is not a public sector employee if they are engaged or appointed for employment outside Australia only, unless they are specified in a written declaration by the Minister.

7. A declaration of an exempt overseas employee is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The declaration is subject to disallowance by the Parliament under section 42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation relating to legislative instruments (other than regulations) from the disallowance process does not apply. Part 6 of that Act provides that an instrument relating to

superannuation such as a declaration under this clause is not subject to sunseting.

**8.** A declaration can be made with retrospective effect for up to 12 months before the making of the declaration or an earlier date from which basic employer contributions were accepted in respect of a person to whom the declaration relates, even though those contributions were not then validly accepted.

**9.** Retrospective effect for instruments that have the effect of requiring or permitting membership of the PSSAP will ensure that relevant employees are not disadvantaged when employment conditions are changed, without making equivalent changes to superannuation legislation, or in circumstances where it may be necessary to give validity to employer contributions that have been incorrectly paid to the scheme.

**10.** It is intended that a declaration will be made before 1 July 2005 to reflect the content of existing declarations made under the 1990 Act.

#### **Clause 6: Extended meaning of *employed***

**11.** Clause 6 describes how directors of a company or other body corporate that is an approved authority (clause 8) and is incorporated under a law of the Commonwealth or of a State or Territory, can be regarded as being employed by that company or body corporate for the purposes of the Bill. Persons employed by such a company or body corporate are public sector employees (clause 5) and therefore may be eligible to become PSSAP members in accordance with clause 13.

**12. Subclause 6(1)** provides that a full-time director is regarded to be employed by the company or body corporate unless the Minister otherwise declares.

**13. Subclause 6(2)** enables the Minister to declare that a director, other than a full-time director, is employed by a company or body for the purpose of this Bill.

**14.** The declarations under subclauses 6(1) and 6(2) are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

**15.** The declarations are subject to disallowance by the Parliament under section 42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation relating to legislative instruments (other than regulations) from the disallowance process does not apply. Part 6 of that Act provides that an instrument relating to superannuation such as a declaration under this clause is not subject to sunseting.

#### **Clause 7: Statutory offices**

**16. Clause 7** describes where an office is taken to be a statutory office, including an office determined by the Minister to be a statutory office. As noted by clause 5 a person who is a holder of a statutory office is a public sector employee for the purpose of this Bill.

**17.** A declaration by the Minister under this clause is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Subsection 7(3) will

specifically provide that the declaration is subject to disallowance by the Parliament under section 42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation relating to legislative instruments (other than regulations) from the disallowance process does not apply. Part 6 of that Act provides that an instrument relating to superannuation such as a declaration under this clause is not subject to sunseting.

**18.** A declaration can be made with retrospective effect for up to 12 months before the making of the declaration or an earlier date from which basic employer contributions were accepted in respect of a person to whom the declaration relates, even though those contributions were not then validly accepted.

**19.** Retrospective effect for instruments that have the effect of requiring or permitting membership of the PSSAP will ensure that relevant employees are not disadvantaged when employment conditions are changed, without making equivalent changes to superannuation legislation, or in circumstances where it may be necessary to give validity to employer contributions that have been incorrectly paid to the scheme.

**20.** It is intended that a declaration will be made before 1 July 2005 to reflect the content of any current declarations made under equivalent provisions of the 1990 Act.

#### **Clause 8: Approved authorities**

**21.** **Clause 8** describes when an authority or body is an approved authority. As noted by clause 5 a person who is employed by an approved authority is a public sector employee for the purpose of this Bill. This clause enables the Minister to declare that a certain authority or body is an approved authority for the purpose of this Bill. Approved authorities under the 1990 Act at 30 June 2005 are approved authorities under this Bill unless excluded by declaration of the Minister.

**22.** The Minister may declare an authority or body is an approved authority if the authority or body satisfies the provisions as set out in that clause. Those provisions refer to a range of authorities or bodies that are established by or under Commonwealth or Territory legislation or that have a significant relationship with the Commonwealth, a Territory or an approved authority. The type of authorities or bodies that may be an approved authority for the purposes of the Bill are the same as those that can be approved authorities for the purposes of the 1990 Act.

**23.** A declaration by the Minister under this clause is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and may be made with retrospective effect of up to 12 months.

**24.** Retrospective effect for instruments that have the effect of requiring or permitting membership of the PSSAP by declaring that an authority or body is an approved authority will ensure that relevant employees are not disadvantaged when employment conditions are changed, without making equivalent changes to superannuation legislation, or in circumstances where it may be necessary give to validity to employer contributions that have been incorrectly paid to the scheme.

**25.** Subsection 8(6) will specifically provide that the declaration is subject to disallowance by the Parliament under section 42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation relating to legislative instruments (other than regulations) from the disallowance process does not apply. Part 6 of that Act provides that an instrument relating to superannuation such as a declaration under this clause is not subject to sunseting.

**Clause 9: Application of Act**

**26.** Clause 9 enables the Act to apply both within and outside Australia.

**PART 2 – THE TRUST DEED**

**Clause 10: Deed to establish PSSAP etc.**

**27.** Clause 10 provides that the Minister, on behalf of the Commonwealth, must execute a Trust Deed before 1 July 2005 that establishes the PSSAP for the benefit of its members.

**28.** The Trust Deed is also to establish a fund for the PSSAP that is vested in the PSS Board and set out the functions and powers of the Board in relation to the PSSAP and PSSAP Fund.

**29.** The Trust Deed is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*. It is not a disallowable instrument under section 42 of the *Legislative Instruments Act 2003*. Part 6 of that Act provides that an instrument relating to superannuation such as a declaration under this clause is not subject to sunseting.

**30.** It is intended that, as far as practical, the Trust Deed will provide the same superannuation arrangements as currently reflected in the 20th Amending Deed made by the Minister under the 1990 Act or any subsequent Amending Deeds made for a similar purpose before the commencement of the PSSAP in accordance with this Bill.

**Clause 11: Amendment of Trust Deed**

**31.** Clause 11 enables the Minister, by instrument, to amend the Trust Deed referred to in clause 10. However an amendment to the Trust Deed is invalid if it has the effect that the PSSAP would no longer be a regulated superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* or would no longer comply with that Act.

**32.** An instrument to amend the Trust Deed is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Subsection 11(4) will specifically provide that an instrument to amend the Trust deed is subject to disallowance by the Parliament under section 42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation legislative instruments (other than regulations) from the disallowance process does not

apply. Part 6 of that Act provides that a declaration under this clause is not subject to sunseting.

### **Clause 12: Family law interest splitting**

**33. Clause 12** enables the Rules to include provisions in relation to the splitting of a superannuation interest in the PSSAP between a member and a non-member spouse upon the Board receiving a splitting agreement or splitting order in respect of those persons following a marriage breakdown.

**34.** Where both parties to the marriage are already members of the PSSAP, the splitting arrangements can be addressed in the Rules to the Trust Deed made in accordance with clauses 10 or 11.

## **PART 3 – MEMBERS OF PUBLIC SECTOR SUPERANNUATION ACCUMULATION PLAN (PSSAP)**

**35.** Part 3 of the Bill deals with the circumstances in which a person is eligible to be, becomes or remains as a member of the PSSAP.

**36.** Persons eligible to become a PSSAP member are public sector employees and other prescribed persons. Certain persons are excluded from eligibility including persons specified in a declaration by the Minister.

**37.** There are two situations in which an eligible person may join the PSSAP. An eligible person may choose to join the PSSAP or they will be required (mandated) to become a PSSAP member such as where the employee does not choose a fund offered by their employer and the PSSAP is the employer (default) fund.

**38.** The PSSAP will be the employer (default) fund for an Australian Public Service employee or a person prescribed by the Minister who has not chosen a superannuation fund.

**39.** A person continues to be a PSSAP member until the benefit or the last of a person's benefit is paid to or in respect of them or until the person has died. However, in accordance with Part 4 of the Bill employer contributions will only be paid to the PSSAP if the person is an ordinary employer-sponsored member of PSSAP.

### **Clause 13: Eligibility for membership of PSSAP**

**40. Subclause 13(1)** sets out the circumstances where a person is eligible to become a member of the PSSAP subject to subsections 13(2) and 13(3). They are where the person is:

- a public sector employee as defined in clause 5 of the Bill; or
- any person declared by the Minister in writing.
- This subclause includes a note that a declaration by the Minister can be taken to include a declaration in respect of a class of persons.

- This subclause is similar in structure to subsection 6(1) of the 1990 Act. That Act provides for a person or a class of persons to be included as PSS members pursuant to a declaration (the Superannuation (PSS) Membership Inclusion Declaration) made by the Minister for that purpose. It is intended that, in respect of the PSSAP, the Minister will make a similar membership inclusion instrument before the commencement of the PSSAP to provide similar eligibility arrangements for new employees from 1 July 2005 who would otherwise be a person or a person in a class of persons described in the existing instrument.

**41. Subclause 13(2)** provides that certain persons are not eligible to be members of the PSSAP. This clause excludes:

- Persons who are PSS members, or have an interest in the PSS (such as a PSS preserved benefit) or who are a PSS invalidity pensioner or a person who is eligible to join the PSS because of their employment or appointment at 30 June 2005 (subparagraphs 13(2)(a) to (d));
- those persons who are excluded from PSS membership under the 1990 Act (subparagraphs 13(2)(e) to (g), such as a CSS member or a person to whom the *Judges' Pensions Act 1968* applies; and
- a person who is declared by the Minister.

**42.** The note to this subclause confirms that such a declaration by the Minister can be taken to include a declaration in respect of a class of persons.

**43.** This subclause is similar in structure to subsection 6(2) of the 1990 Act. That Act provides for a person or a class of persons to be excluded as PSS members pursuant to a declaration (the Superannuation (PSS) Membership Exclusion Declaration) made by the Minister for that purpose. It is intended that, in respect of the PSSAP, the Minister will make a similar membership exclusion instrument before the commencement of the PSSAP to provide similar arrangements for new employees from 1 July 2005 who would normally be excluded from PSS membership.

**44. Subclause 13(3)** provides that a person is not eligible to become a member of PSSAP before 1 July 2005.

**45. Subclause 13(4)** provides that a declaration specifying who is eligible to become a member of the PSSAP as declared in subclause 13(1) or who is not eligible because of subclause 13(2) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**46. Subclause 13(5)** specifically provides that the declaration is subject to disallowance by the Parliament under section 42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation legislative instruments (other than regulations) from the disallowance process does not apply. Part 6 of that Act provides that a declaration under this clause is not subject to sunseting.

**47.** This is consistent with the existing arrangements for instruments made under subsections 6(1) and 6(2) of the 1990 Act which are also legislative instruments that are subject to disallowance.

**48. Subclauses 13(6) and 13(7)** provide that a declaration under subclause 13(1) specifying who is eligible to be a member of the PSSAP may have effect up to 12 months before the making of the declaration or an earlier date if basic employer contributions within the meaning of the Rules were accepted or purportedly accepted in respect of a person to whom the declaration relates.

**49.** This provision is consistent with an existing power under section 45 of the 1990 Act (in respect of an instrument made under subsection 6(1) of that Act) and is in keeping with the intent of the legislation to validate a person's PSSAP membership in certain circumstances where it may have been incorrectly assumed that the person has become or continued as a PSSAP member. For example, an Australian Government employer may continue a person's PSSAP following machinery of government changes even though the person may not meet the definition of public sector employee. Like the 1990 Act this provision is not intended to disadvantage a person but may impose a retrospective obligation on employers to make basic employer contributions.

#### **Clause 14: Becoming a member of PSSAP**

**50. Subclause 14(1)** explains that this section provides that there are two situations in which a person can become a member of PSSAP. These are where the person chooses to become a member (subclauses 14(2) and (3) or where PSSAP membership is mandated in respect of the person (subclause 14(4)).

**51. Subclauses 14(2) and 14(3) (Choice to become a member)** enable a person who is eligible to become a member, to choose to become a member of PSSAP. As noted in Part 4, a choice to become a PSSAP member may result in a person becoming an ordinary employer-sponsored member within the meaning of that Part, consequently triggering a requirement on their designated employer to make basic employer contributions in accordance with the Rules.

**52. Subclause 14(4) (PSSAP is the person's mandated fund)** outlines the circumstances where at a particular time a person is required to become a PSSAP member. This will occur where the person is eligible to become a member in relation to a particular employment or appointment and is not already a PSSAP member.

**53.** This subclause relies on the choice of fund requirements in the SG Act to determine where a person is required to become a member. For example, a person would be mandated as a PSSAP member if there is no chosen fund for the employee within the meaning of the SG Act and, assuming the person became a PSSAP member, the employer would rely on:

- subsection 32C(2) of the SG Act (which provides that contributions made to an employer (default) fund, referred to as an eligible choice fund in that Act, are taken to comply with the choice of fund requirements);

- subsection 32C(4A) of the SG Act as inserted by the Consequential Bill (which provides that employer contributions to the PSSAP before 1 July 2006 are taken to comply with the choice of fund requirements); or
- subsection 32C(6) of the SG Act (which provides that contributions made in accordance with a certified agreement or Australian Workplace Agreement are taken to comply with the choice of fund requirements).

**54.** Where a person's employer is complying with the choice of fund requirements under the SG Act, by making contributions to another complying superannuation fund or Retirement Savings Account in respect of the person, it is not intended that the person would be required to become a member of the PSSAP in respect of that employment. For example, an employer could be contributing to an eligible choice fund other than the PSSAP in accordance with subsection 32C(2) of the SG Act. However, this subclause 14(4) includes a note that Clause 16 provides that the PSSAP is the sole eligible choice fund for the purposes of subsection 32C(2) of the SG Act in relation to APS employees and certain other persons.

**55. Subclause 14(5)** sets out that subclause 14(4) does not apply to a person if their employer gives or has given or is proposing to give them a standard choice form (within the meaning of Part 3A of the SG Act) that sets out the name of a fund other than the PSSAP that the employer will contribute to if the person does not make choice.

**56.** This subclause ensures that a person will not automatically become a PSSAP member if the employer intends to nominate a fund other than the PSSAP to which employer contributions will be paid if the employee does not make a choice. This avoids the unintended consequence of an employee becoming a PSSAP member and subsequently having employer contributions paid to another fund in accordance with subclause 32C(2) of the SG Act. However, this clause cannot apply in respect of APS employees and certain other persons to whom section 16 applies as the relevant employer will be permitted only to nominate the PSSAP as the eligible choice fund in these circumstances.

**57. Subclause 14(6)** sets out that subclause 14(4) does not apply to certain persons who are the holder of a statutory office or a temporary employee within the meaning of the 1990 Act.

**58.** Section 6 of the 1990 Act currently provides that a statutory office holder or a temporary employee is permitted to elect to become a PSS member in accordance with sections 7 and 8 of that Act respectively. Where an employee or office holder does not make an election, superannuation arrangements are provided for that person in accordance with the Productivity Benefit Act. Subclause 14(6) ensures that these employees and office holders continue to have the option to become PSSAP members or be covered by the Productivity Benefit Act while that Act remains open to new employees and office holders until 1 July 2006 (the Consequential Bill will provide that the Productivity Benefit Act will be closed to new employees and office holders from that date). From that date, these employees and office holders will continue to be eligible to choose PSSAP membership and may be required to become PSSAP members if they come within the provisions of subsection 14(4).



**59.** This subclause also makes it clear that it will only apply in respect of a statutory office holder during the term of that employment. Once the office holder commences new employment or a new term of office on or after 1 July 2006, the person may be required to become a PSSAP member if subsection 14(4) applies. Similarly, subsection 14(4) may apply in respect of a temporary employee once the employee takes up new employment or a new term of employment.

**Clause 15: Duration of membership of PSSAP**

**60. Subclause 15(1)** sets out that membership in the PSSAP continues until the last of the occasions on which a benefit is paid to or in respect of a member in accordance with the Rules. The occasion can be one payment or the last of a series of benefit payments.

**61.** The subclause also provides that PSSAP membership will cease on the death of the person if the death occurs before all of a benefit is paid to or in respect of the person. This provision clarifies that, even though a person logically ceases to be a PSSAP member at this point the PSSAP Rules would still need to apply in order to provide for a payment of any residual benefit in respect of the person that was not paid before the person's death.

**62. Subclause 15(2)** provides that membership does not cease because a person ceases to be eligible to become a member in accordance with Clause 13. Also, subclause 15(3) provides that if a person ceases to be a member of the PSSAP, that person would not be prevented from again becoming a PSSAP member.

**Clause 16: PSSAP is the sole eligible choice fund in relation to APS employees etc for certain purposes**

**63. Subclause 16(1)** provides that the PSSAP is the sole eligible choice fund for the purposes of subsection 32C(2) of the SG Act for a person who is eligible to become a PSSAP member (or would be eligible if the person was not already a member) and who is an APS employee or is included in a determination by the Minister. Effectively, this section provides that the employer (default) fund for an APS employer is the PSSAP. Such employers will not be permitted or required to nominate an employer fund other than the PSSAP in respect of an employee who does not have a chosen fund. The PSSAP will also be the employer (default) for an employer of a person included in a determination by the Minister. This arrangement will continue provided that the PSSAP meets the requirements of an eligible choice fund for the purposes of the SG Act.

**64.** This clause is not intended to prevent an employer of a person who is not an APS employee, and is not included in a determination of the Minister, from nominating the PSSAP or any other fund or RSA as the eligible choice fund. Also, this clause is not intended to prevent an employee having employer contributions paid on their behalf to another superannuation fund or RSA in accordance with the choice of fund requirements (for example where the employee has chosen a fund other than the PSSAP).

**65. Subclause 16(2)** provides that a determination by the Minister under subparagraph 16(1)(b)(ii) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**66. Subclause 16(3)** specifically provides that the determination is subject to disallowance by the Parliament under section 42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation legislative instruments (other than regulations) from the disallowance process does not apply. Part 6 of that Act provides that a declaration under this clause is not subject to sunseting.

**67. Subclause 16(4)** provides that, in this clause, employment has the same meaning as in the SG Act. Although not specifically defined in that Act, the term is taken to have a common meaning through its use throughout that Act. This is in accordance with section 18A of the *Acts Interpretation Act 1901*.

## **PART 4 – CONTRIBUTIONS**

**68.** Part 4 of the Bill describes when contributions payable under the Rules are payable in respect of a PSSAP member and who is the responsible employer for making those contributions.

**69.** The Part describes the circumstances where a PSSAP member is an ordinary employer-sponsored member for the purposes of the Act. Once a PSSAP member has become an ordinary employer-sponsored member, the person's employer is required to make contributions in accordance with the rules of the scheme (for example, basic employer contributions). A PSSAP member can be an ordinary employer-sponsored member in respect of more than one concurrent employment or appointment.

**70.** Part 4 also describes a designated employer for the purposes of ensuring that any obligation to meet costs imposed on an employer (such as the basic employer contributions in respect of an ordinary employer-sponsored member) are attributed to the appropriate entity.

### **Clause 17: Contributions to PSSAP by designated employers**

**71. Clause 17** provides that a designated employer (within the meaning of Clause 19) of an ordinary employer-sponsored member (as described in Clause 18) must pay contributions in respect of that member to the Board in accordance with the Rules.

### **Clause 18: Ordinary employer-sponsored member of PSSAP**

**72. Clause 18** provides that this section will continuously test a person's eligibility to be an ordinary employer-sponsored member in relation to their employment or appointment at any given particular time.

**73. Subclause 18(1)** sets out the three situations in which a person is an ordinary employer-sponsored member of PSSAP. This occurs when the:

- PSSAP is the person's chosen fund (subsection 18(2)); or
- PSSAP is the person's mandated fund (subsection 18(3)); or
- the person is a PSSAP member in respect of whom the SG Act does not apply and the person has not opted out of being an ordinary employer-sponsored member (subsection 18(5)).

**74. Subclause 18(2)** provides that an employer is an ordinary employer-sponsored member of the PSSAP if the PSSAP is an employee's chosen fund within the meaning of section 32F of the SG Act.

**75.** This would occur if an employer were to make contributions to the PSSAP which would satisfy the choice of fund requirements under subsection 32C(1) of the SG Act in respect of an employee who is a member of PSSAP or would be eligible to become a PSSAP member because of a particular employment or appointment.

**76. Subclause 18(3)** provides that an employer is an ordinary employer-sponsored member of the PSSAP if at a particular time the PSSAP is an employee's mandated fund. This subclause provides that a PSSAP member would become an ordinary employer-sponsored member if at the particular time, the person would be eligible to become a PSSAP member if they were not already a member, there is no chosen fund within the meaning of the SG Act and, assuming that the person was to become a member of the PSSAP, the person's employer would comply with the choice of fund requirements by contributing to:

- an employer (default) fund referred to as an eligible choice fund (where there is no chosen fund for a employee) (subsection 32C(2)); or
- the PSSAP before 1 July 2006 (subsection 32C(4A)); or
- to a fund under, or in accordance with an Australian Workplace Agreement or a certified agreement (subsection 32C(6)).

**77. Subclause 18(4)** sets out that subclause 18(3) does not apply to a person if the person's employer gives, or has given, or is proposing to give the person a standard choice form (within the meaning of Part 3A of the SG Act that sets out the name of a fund other than the PSSAP that the employer will contribute to if the person does not make choice. This ensures that, for those employers that are able to nominate an employer (default) fund other than the PSSAP and wish to nominate another fund, a person would not become an ordinary employer-sponsored member of the PSSAP immediately before then becoming a member of a chosen fund or an employer (default) fund other than the PSSAP.

**78. Subclause 18(5)** provides that a person is an ordinary employer-sponsored member of PSSAP if an employee is not covered by the SG Act.

**79.** This would occur if an employee is a member of PSSAP or is eligible to become a member in respect of a particular employment or appointment and the employee is not covered by the Act. For example, an employer would not have a superannuation guarantee obligation (and consequently would not be required to

provide choice of funds) in respect of a person under 18 years of age who is not working more than 30 hours per week.

**80.** This clause is needed as a person who is not covered by the SG Act is not required to be given choice by their employer even though they may be eligible and have chosen to become a PSSAP member. This clause ensures that a person in this circumstance who has chosen to become a PSSAP member will become an ordinary employer-sponsored member in respect of particular employment or appointment which will result in the person's designated employer making contributions in accordance with the Rules.

**81. Subclause 18(6)** provides that subclause 18(5) does not apply to a PSSAP member if the person has chosen not to be an ordinary employer-sponsored member of PSSAP.

### **Clause 19: Designated employers**

**82. Clause 19** defines the designated employer of a PSSAP member. The table in clause 19(2) is intended to be looked at in sequence beginning from item 1.

- For example in Item 1 the designated employer would be that agency in respect of which money is appropriated if the member is employed by the Commonwealth, is not employed in a Parliamentary Department and their remuneration is paid wholly or mainly out of money from an annual Appropriation Act to that agency.
- In Item 2 the designated employer would be the Parliamentary Department in respect of which money is appropriated if the member is employed by a Parliamentary Department in which the remuneration is paid wholly or mainly out of money from an annual Appropriation Act.
- In Item 3 the designated employer would be an agency or Parliamentary Department determined by the Minister. The agency would need to come within the meaning of *Public Service Act 1999* if the member is employed by the Commonwealth, not a Parliamentary Department and the remuneration is paid wholly or mainly out of money appropriated by an Act other than an annual Appropriation Act.
- In Item 4 the designated employer would be an approved authority if the member is the holder of a statutory office and the remuneration in respect of the office is paid by an approved authority.
- In Item 5 the designated employer would be an agency (within the meaning of *Public Service Act 1999*), a Parliamentary Department, or a person as determined by the Minister. This would occur where the member is a holder of a statutory office and the remuneration in relation to that office is not paid by an approved authority.
- In Item 6 the designated employer is the authority or body by which the member is employed if Items 1 to 5 do not apply.

**83.** A determination under item 3 or 5 made by the Minister under this clause is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. These determination are subject to disallowance by the Parliament under section

42 of the *Legislative Instruments Act 2003* and, as a consequence, Item 39 of the table under section 44 of the *Legislative Instruments Act 2003*, which exempts superannuation relating to legislative instruments (other than regulations) from the disallowance process does not apply. Part 6 of that Act provides that an instrument relating to superannuation such as a determination under this clause is not subject to sunseting.

## **PART 5 – ADMINISTRATION**

### **Division 1 – The Board**

#### **Clause 20: Functions and powers**

**84. Clause 20** provides for the Board’s functions and powers in relation to PSSAP and the PSSAP Fund to be set out in the Trust Deed and for the Board to be responsible for the general administration of the Act.

**85.** The Board for the PSSAP will be the PSS Board established under the 1990 Act.

#### **Clause 21: Trustee Act of ACT to apply**

**86. Clause 21** this clause provides that the *Trustee Act 1925* (ACT) applies in relation to the members of the Board.

**87.** This provision differs from the provision in section 25 of the 1990 Act, which refers to the *Trustee Act 1957* (ACT). Section 25 currently contains a reference to the *Trustee Act 1957* (ACT) which applied the *Trustee Act 1925* (NSW) to the ACT. The *Trustee Act 1957* was repealed by the *ACT Statute Law Amendment Act 2001* (No.2). The remaining provisions of the *Trustee Act 1957* providing for the operation of the *Trustee Act 1925* in the ACT were incorporated into the *Trustee Act 1925* (ACT). The Consequential Bill has therefore made a technical amendment to the 1990 Act to reflect this outcome.

#### **Clause 22: Exemption from taxation**

**88. Clause 22(1)** provides that neither the Board in relation to its functions and powers relating to the PSSAP nor the PSSAP Fund are subject to taxation under a law of a State or Territory to which the Commonwealth is not subject. The Board is not liable to taxation under a law of the Commonwealth other than:

- the *A New Tax System (Goods and Services Tax) Act 1999*; or
- the *Income Tax Assessment Act 1936*; or
- the *Income Tax Assessment Act 1997*; or
- the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*.

**89. Subclause 22(2)** provides that the Board, in respect of its functions and powers relating to the PSSAP (including the PSSAP Fund), or the PSSAP Fund may be subject to taxation under any other law specified in the regulations.

**90. Subclause 22(3)** provides that the regulations also may modify the section or may provide that the section ceases to have effect at a specified time. This authority to make regulations is included to allow modifications to be made to this provision or for the provision to cease to apply if necessary to allow the

PSSAP to operate on the same basis as other similar superannuation schemes in relation to taxation.

**91.** Part 6 of the *Legislative Instrument Act 2003* provides that regulations amending this clause are subject to sunseting. However, a regulation that provides that this section ceases to have effect (effectively repealing this section) is not subject to sunseting thereby ensuring that the section cannot be revived.

#### **Clause 23: Banking**

**92.** **Clause 23** provides that all money received by the Board in respect of the PSSAP Fund must be paid into an account maintained by the Board with a bank (within the meaning of the *Commonwealth Authorities and Companies Act 1997*).

#### **Clause 24: Accounting records**

**93.** **Clause 24** provides that the Board must keep proper accounts and records of the PSSAP Fund's transactions and affairs, in accordance with the accounting principles generally applied in commercial practice. The Board must ensure that all payments out of the PSSAP Fund are correctly made and authorised and there is adequate control over the assets and liabilities of the PSSAP Fund.

#### **Clause 25: Audit**

**94.** **Subclauses 25(1) to 25(3)** provide that at least once a financial year the Auditor-General is to inspect and audit the accounts and records of the PSSAP Fund's financial transactions and records relating to Fund assets and report the results to the Minister. The Auditor-General may decide to dispense with all or any part of the detailed inspection and audit. The Auditor-General is to report to the Minister on any irregularity found by the inspection and audit that is considered significant.

**95.** **Subclause 25(4)** is included to assist readers by confirming that the reports are not legislative instruments for the purpose of the *Legislative Instruments Act 2003*.

#### **Clause 26: Annual report and financial statements**

**96.** **Subclause 26(1)** requires the Board, as soon as practicable after the end of the financial year starting on 1 July 2005 and in each subsequent financial year, to report to the Minister on the performance of its functions in relation to the PSSAP and financial statements in respect of its management of the PSSAP Fund.

**97.** **Subclause 26(2)** requires the financial statements to be submitted to the Auditor-General before being given to the Minister. The Auditor-General is required to report to the Minister on a number of specified matters in relation to the financial statements.

**98. Subclause 26(3)** requires the Minister to table copies of the Board's report and financial statements and the Auditor-General's report within a specified timeframe.

**99. Subclauses 26(4) to (6)** requires the Board to give the Minister an interim report and financial statements, but not an Auditor-General's report, if it does not provide the final reports within 6 months after the end of the particular financial year. The Minister must table the interim report and statements within 15 sitting days of receiving them and make them publicly available.

**100. Subclause 26(7)** is included to assist readers by confirming that these reports and interim reports are not legislative instruments for the purpose of the *Legislative Instruments Act 2003*.

**Clause 27: Money in the PSSAP Fund is not public money etc.**

**101. Clause 27** is included to avoid doubt that the money standing to the credit of the PSSAP Fund is not public money, and the assets of the Fund are not public property, for the purposes of the *Financial Management and Accountability Act 1997*.

**102.** This provision is not intended to infer that the moneys and assets in other Commonwealth superannuation funds (such as the CSS Fund under the *Superannuation Act 1976* and the PSS Fund under the 1990 Act) are public moneys or public property for the purposes of the *Financial Management and Accountability Act 1997*.

**Clause 28: Delegation by Board**

**103. Clause 28** sets out the persons to whom the Board may delegate all or any of its powers under the Act, regulations under that Act or the Trust Deed. The delegates may also sub delegate these powers to certain persons. The *Acts Interpretation Act 1901* applies to and in relation to a sub-delegation in a corresponding way as if it were a delegation.

**104.** While it is acknowledged that it is current practice for delegation provisions to apply seniority limitations on delegations, it is not appropriate to apply seniority limits in respect of the Board's delegation powers as most such powers are highly administrative and may require involvement of junior staff.

**Clause 29: Indemnification of trustees etc.**

**105. Subclauses 29(1) and (2)** indemnifies a person against personal liability for anything done, or not done, in good faith in the performance of their functions or duties under the Act or the Trust Deed as:

- a trustee;
- the Commissioner for Superannuation;
- a member of the staff assisting the Commissioner for Superannuation;
- a delegate of the Board; or



- a member of a Reconsideration Advisory Committee established under the Trust Deed.

**106.** This does not, however, preclude the Board itself from being subject to any action, liability, claim or demand.

**107. Subclauses 29(3) and 29(4)** provide that money becoming payable by the Board in respect of any action, liability, claim or demand in relation to this Act, the regulations or the Trust Deed is to be paid out of the PSSAP Fund, except where this is prohibited by the *Superannuation Industry (Supervision) Act 1993* or regulations under that Act. Where such an amount is paid from the PSSAP Fund, the Fund is reimbursed by the Consolidated Revenue Fund, which is appropriated for this purpose.

**108. Subclauses 29(5) and 29(6)** provide that the regulations can modify or cease the operation of the section. This authority to make regulations is included to allow modifications to be made to this provision or the provision to cease to apply if necessary to allow the PSSAP to operate on the same basis as other similar superannuation schemes in relation to indemnities.

**109.** Part 6 of the *Legislative Instrument Act 2003* provides that regulations amending this clause are subject to sunseting. However, a regulation that provides that this section ceases to have effect (effectively repealing this section) is not subject to sunseting thereby ensuring that the section cannot be revived.

## **Division 2 – Commissioner for Superannuation**

### **Clause 30: Functions of Commissioner for Superannuation**

**110. Subclauses 30(1) and 30(2)** provide that the Commissioner of Superannuation is responsible for the provision of administrative services to the Board in the performance of its functions in relation to PSSAP and in providing these services, must act in accordance with any policies and directions given by the Board.

**111. Subclauses 30(3) and 30(4)** provide that the regulations can modify or cease the operation of the section. This authority to make regulations is included to allow modifications to be made to this provision or the provision to cease to apply if necessary to allow the PSSAP to operate on the same basis as other similar superannuation schemes in relation to administration services.

**112.** Part 6 of the *Legislative Instrument Act 2003* provides that regulations amending this clause are subject to sunseting. However, a regulation that provides that this section ceases to have effect (effectively repealing this section) is not subject to sunseting thereby ensuring that the section cannot be revived.

### **Clause 31: Other functions of Commissioner for Superannuation not to be prejudiced**

**113. Clause 31** provides that the Commissioner for Superannuation is not required under this Division to do anything that would prejudice the performance of the Commissioner's functions under any other Act or regulations made under

an Act. The Commissioner has other functions under the Superannuation Acts 1922, 1976 and 1990 and Acts relating to the military superannuation schemes.

### **Division 3 – Ministerial Powers**

#### **Clause 32: Making of certain legislative instruments**

**114. Clause 32** provides that the Minister may not make a declaration, determination or instrument that is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* without the consent of the Board unless it relates to:

- a payment by an employer sponsor (or designated employer in the terms of the Act) within the meaning of the *Superannuation Industry (Supervision) Act 1993* that would be required or is permitted under the Act; or
- the termination of the PSSAP Fund; or
- is made in circumstances covered by regulations made for the purpose of subparagraph 60(1)(b)(iii) of the *Superannuation Industry (Supervision) Act 1993*.

**115.** This clause does not apply to instruments made under section 10, relating to the establishment of the Trust Deed, or section 16 which allows the PSSAP to be prescribed as the sole eligible choice fund for certain PSSAP members.

#### **Clause 33: Delegation by Minister**

**116. Clause 33** enables the Minister to delegate all or any of his or powers under the Act or regulations to the Board or certain specified persons. It is intended that any delegation made under this provision will be made only to the Board or senior officers of the Department at Secretary or Senior Executive level.

### **Division 4 – Costs of Administration**

#### **Clause 34: Costs of administration of Act etc.**

**117. Subclause 34(1)** provides for the costs of the administration of the Act and the Trust Deed, including the costs of and incidental to the Board's management and investment of the PSSAP Fund, are to be paid as determined by the Minister.

**118. Subclause 34(2)** provides that a determination under section 34(1) is to identify those cost payable by the Commonwealth and those costs payable by the Board out of the PSSAP Fund.

**119. Subclauses 34(3) and 34(4)** provide that this section has effect subject to any modifications prescribed by the regulations. The regulations also may provide that this clause ceases to have effect at a specified time. This authority to make regulations is included to allow modifications to be made to this provision or the provision to cease to apply if necessary to allow the PSSAP to

operate on the same basis as other similar superannuation schemes in relation to administration charges.

**120.** Part 6 of the *Legislative Instrument Act 2003* provides that regulations amending this clause are subject to sunseting. However, a regulation that provides that this section ceases to have effect (effectively repealing this section) is not subject to sunseting thereby ensuring that the section cannot be revived.

**121. Subclause 34(5)** provides that a determination under section 34(1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* but disallowance in accordance with section 42 of that Act does not apply.

### **Clause 35 – Estimates**

**122. Clause 35** provides that the Board may prepare an estimate of the costs of the administration of the Act and the Trust Deed that are likely to be incurred in a financial year. The Board must also prepare an estimate containing any information requested by the Minister in respect of those costs.

### **Clause 36: Certain authorities to pay part of estimated costs of administration**

**123. Clause 36** provides that if the Board prepares an estimate of costs for a financial year under subsection 35(1), the Minister may direct an authority or body to pay to the Commonwealth such part of that cost. The period specified in the direction must be the financial year or part of the financial year to which the estimate relates. The Minister must not direct an authority or body unless during the specified period the authority or body is or will be a designated employer of ordinary employer-sponsored members of PSSAP.

**124.** This section has effect subject to any modifications prescribed by legislation. The regulations may also provide that this clause ceases to have effect at a specified time. This authority to make regulations is included to allow modifications to be made to this provision or the provision to cease to apply if necessary to allow the PSSAP to operate on the same basis as other similar superannuation schemes in relation to the recovery of administration costs from participating employers.

**125.** Part 6 of the *Legislative Instrument Act 2003* provides that regulations amending this clause are subject to sunseting. However, a regulation that provides that this section ceases to have effect (effectively repealing this section) is not subject to sunseting thereby ensuring that the section cannot be revived.

### **Clause 37: Payment of fees**

**126. Subclauses 37(1) to 37(3)** enable regulations to be made to allow the Board to charge a fee to a person who seeks reconsideration of a Board's decision or about the refund of such fees. The power to prescribe fees is not intended to impose a taxation within the meaning of section 55 of the Constitution.

**Clause 38: Board liable to pay surcharge under the *Superannuation Contributions Tax (Assessment and Collection) Act 1997***

**127. Clause 38** provides that to avoid doubt, for the purposes of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, the Board in its capacity as a superannuation provider is an entity distinct from the Commonwealth and is subject to pay surcharge on the surchargeable employer contributions of members of PSSAP under that Act. The *Superannuation Contribution Tax (Assessment and Collection) Act 1997* provides for the assessment and collection of the superannuation contributions surcharge on surchargeable employer superannuation contributions for high-income individuals.

**Division 5 – Other administrative matters**

**Clause 39: Amounts payable to the Board**

**128. Subclause 39(1)** provides that the Board may recover an amount owing to it (including an amount of contributions) in a court of competent jurisdiction as a debt.

**129. Subclause 39(2)** enables the Board to require where interest is to be paid on an amount owing to the Board to determine the rate of interest.

**130. Subclause 39(3)** confirms that the determination is a legislative instrument for the purpose of the Legislative Instruments Act 2003 but disallowance under section 42 of the Act does not apply.

**Clause 40: Recovery of overpayments**

**131. Clause 40** provides that where, for any reason, the Board has paid an amount of benefit that was not payable, this may be recovered by the Board in a court of competent jurisdiction as a debt. The debt also may be deducted from any benefit of a person to whom the overpayment was made, if the person is receiving or is entitled to receive a benefit under the Rules.

**Clause 41: Board may rely on information supplied by employers or former employers**

**132. Clause 41** provides that the Board may presume that information provided to the Board by a designated employer or former designated employer of a person is correct for the purposes of the Trust Deed. However, a tribunal, authority or person empowered to review a decision of the Board is not bound by any such presumption made by the Board.

**Clause 42: Board may require employers to distribute information etc. to members of PSSAP**

**133. Clause 42** requires a designated employer of an ordinary employer-sponsored member of PSSAP to distribute, on behalf of the Board, certain

documents or information, provided this would not contravene chapter 7 (financial services and markets provisions) of the *Corporation Act 2001*.

## **PART 6 – MISCELLANEOUS**

### **Clause 43: Ordinary employer-sponsored member not to be retired on grounds of invalidity without Board certificate**

**134. Clause 43** provides that an ordinary employer-sponsored member of PSSAP who is under age 60 cannot be retired from employment or office or their services otherwise terminated because of invalidity, unless the Board has issued a certificate that, if retired, he or she will be entitled to invalidly benefits under the Rules.

**135.** This has effect despite anything contained in any Act, award, determination, agreement or contract of employment.

### **Clause 44: Persons subject to Rules**

**136. Clause 44** provides that to the extent that the Rules under the Trust Deed are applicable to them, the following are subject to the Rules:

- a person who is, or has ceased to be, a member of PSSAP;
- a person who is, or has ceased to be, a person to whom a benefit is payable under the family law splitting provisions of the Rules;
- an authority or body who is, or has been, the designated employer of an ordinary employer-sponsored member of PSSAP; and
- the Commonwealth, in relation to its role as the designated employer of an ordinary employer-sponsored member of PSSAP.

### **Clause 45: Regulations**

**137. Subclause 45(1)** provides that regulations may be made by the Governor-General prescribing any matters required or permitted to be made by the Act or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

**138. Subclause 45(2)** provides that the regulations cannot be made without the consent of the Board unless they:

- relate to a required or permitted payment by an employer-sponsor within the meaning of the *Superannuation Industry (Supervision) Act 1993*;
- relate to the termination of the PSSAP Fund; or
- are made in circumstances covered by regulations made for the purposes of subparagraph 60(1)(b)(iii) of the *Superannuation Industry (Supervision) Act 1993* and which include the solvency of a fund.

**139. Subclause 45(3)** provides that, for the purposes of subclause 45(2)(b)(i), a payment under the Trust Deed or the Rules is considered to be a payment by an employer-sponsor.

**Clause 46: Regulations relating to the operation of the *Superannuation Industry (Supervision) Act 1993* and certain other laws**

**140. Clause 46** provides that regulations may make any provision that is necessary to enable the PSSAP to satisfy any condition or requirements of the following laws:

- the *Corporations Act 2001*;
- the *Family Law Act 1975*;
- the *Financial Institutions Supervisory Levies Collection Act 1998*;
- the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997*;
- the *Superannuation Industry (Supervision) Act 1993*;
- the *Superannuation (Resolution of Complaint) Act 1993*; and
- the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

**141.** If regulations are inconsistent with a provision of this Act, the regulations prevail and the provision, to the extent of the inconsistency, is of no effect.

**142.** This provision is necessary because the conditions or requirements of the above laws are usually promulgated by regulations or other instruments made under those laws. Allowing regulations to be made under this Bill would allow those conditions or requirements to be met more quickly than if Act amendments were required. As with the arrangements for the 1990 Act, it is intended that should it be necessary to make regulations under this section, legislation would be introduced as soon as possible thereafter to give effect to the relevant provisions.

## Schedule 1

**Comparisons between the Superannuation Bill 2005 and the  
*Superannuation Act 1990***

<b>Provisions of <i>Superannuation Act 1990</i> (the 1990 Act)</b>	<b>Provisions of Superannuation Bill 2005</b>	<b>Comments</b>
1 (Short Title)	1	
2 (Commencement)	2	
3 (Interpretation)	4, 5, 7 and 8	Any differences result from the different scope of, and terms used in, the Bill. In particular, the Bill introduces the term public sector employee which replaces previous terms for permanent employee and temporary employee. This is because all new employees and statutory office holders, from no later than 1 July 2006, are to be treated in the same manner under the Bill.
3AA (Designated employers)	19	The new Act restructures the provision and omits references to members on leave without pay, which are not relevant in the context of the new arrangements.
3AB (Members of the ACT Fire Brigade)		An equivalent to section 3AB is not necessary in the Bill due to changes to Australian Capital Territory (ACT) legislation specifying the ACT Government as the employer of members of the ACT Fire Brigade.
3A (Application of the Act)	9	
3B (Application of the Criminal Code)		An equivalent to section 3B is not required as the PSS Board, in respect of the PSSAP, will be subject to the criminal code provisions under the <i>Superannuation Industry (Supervision) Act 1993</i> .
4 (Deed to establish Public Sector Superannuation Scheme etc)	10	Unlike the 1990 Act the Bill does not include the proposed Trust Deed as a schedule. As far as practicable the new Trust Deed will reflect the PSS Trust Deed and the Rules included in the 20 <sup>th</sup> PSS Amending Deed and any subsequent Amending Deed made before 1 July 2005 in relation to the PSSAP.

<b>Provisions of Superannuation Act 1990 (the 1990 Act)</b>	<b>Provisions of Superannuation Bill 2005</b>	<b>Comments</b>
5 (Amendment of the Trust Deed)	11 and 32	
5A (Amendments of Trust Deed to implement family law interest splitting)	12	
6 (Membership of the Public Sector Superannuation Scheme)	13, 14, 15 (also refer to Part 4 of the Bill which outlines when employer contributions are paid)	The body of the Explanatory Memorandum outlines the detail of the new membership framework as reflected in Part 3 of the Bill. This Part and Part 4 ensure that Australian Government employees and office holders are treated in the same manner as would have applied in the PSSAP (that would commence on 1 July 2005 as part of the PSS but for this Bill) as well as allowing members to have choice of fund in certain circumstances.
6A (Election by certain people to join the scheme under the Superannuation Act 1976)		Section 6A is not reflected in the Bill as it was specific to a group of people who joined the PSS before 1 October 1991 but should have been members of the CSS.
7 (Election by holder of statutory office to be a member)	14	
8 (Election for a temporary employees to be a member)	14	The Bill does not specifically provide for a temporary employee as all new employees, from no later than 1 July 2006, are to be treated in the same manner under the Bill.
9 (Employees on probation)		Section 9 clarified that certain employees on probation are taken to be permanent employees. This clarification is not necessary in the new Bill as all employees from no later than 1 July 2006, are to be treated in the same manner under the Bill.



<b>Provisions of <i>Superannuation Act 1990 (the 1990 Act)</i></b>	<b>Provisions of <i>Superannuation Bill 2005</i></b>	<b>Comments</b>
10 (Australian Federal Police employees)		An equivalent to section 10 is not necessary in the Bill due to amendments contained in the <i>Australian Federal Police Legislation Amendment Act 2000</i> which provide that AFP employees are employed by the Commonwealth.
11 (Director of company etc)	6	
12 (Cases where person taken not to have ceased to be a member)	15	Section 12 provided that certain employees were not taken to have ceased membership to ensure those employees maintained their membership of a defined benefit arrangement. This section is not necessary in the PSSAP as employees will be able to retain membership during such periods and any accrued benefits can only be paid in accordance with the <i>Superannuation Industry (Supervision) Act 1993</i> which has commenced since the 1990 Act commenced.
13 (Member not to be retired on the grounds of invalidity without certificate from Board)	43	
14 (Contributions of members to Public Sector Superannuation Scheme etc. to be deducted from salary)		Section 14 of the 1990 Act is not reflected in the Bill as member contributions under the PSSAP will be voluntary.
14A (Deductions of contributions by designated employer)		Section 14A of the 1990 Act is not reflected in the Bill as member contributions under the PSSAP will be voluntary.
15 (Contributions to Public Sector Superannuation Scheme etc. by employer)	17, 18 and 39	

<b>Provisions of <i>Superannuation Act 1990 (the 1990 Act)</i></b>	<b>Provisions of <i>Superannuation Bill 2005</i></b>	<b>Comments</b>
16 (Payments to and by Commonwealth in respect of benefits payable under Public Sector Superannuation Scheme)		The Bill does not include an equivalent provision to section 16 because the PSSAP will be fully funded.
16A (Payments relating to associate benefits)		The Bill does not include an equivalent provision to section 16A because the PSSAP will be fully funded.
17 (Payments by Commonwealth to Board when invalidity pensioner again becomes a member)		The Bill does not include an equivalent provision to section 17 because the PSSAP will not pay invalidity pensions.
18 (Appropriation)		Section 18 has not been reflected in the Bill as the Commonwealth is not required to make any direct payments in respect of the PSSAP. Contributions will be paid by employers from their own resources.
19 (Payment by approved authorities etc. to the Commonwealth in respect of benefits payable to members employed etc. by authorities)		Section 19 of the 1990 Act has not been duplicated in the Bill as the benefits provided by the PSSAP are fully funded. Section 19 provides for payments by approved authorities to the Commonwealth in respect of a member's unfunded defined benefits.
20 (Establishment (of PSS Board))		An equivalent to section 20 is not necessary in the Bill as a new Board is not being created. The PSS Board established under the 1990 Act will be the trustee for the PSSAP.

<b>Provisions of <i>Superannuation Act 1990 (the 1990 Act)</i></b>	<b>Provisions of <i>Superannuation Bill 2005</i></b>	<b>Comments</b>
21 (Incorporation etc. (of PSS Board))		An equivalent to section 20 is not necessary in the Bill as a new Board is not being created. The PSS Board established under the 1990 Act will be the trustee for the PSSAP.
22 (Functions etc. (of PSS Board))	20	
23 (Membership of Board)		An equivalent to section 23 is not necessary in the Bill as a new Board is not being created.
24 (Defective appointment not invalid etc. (of PSS Board))		An equivalent to section 24 is not necessary in the Bill as a new Board is not being created.
25 (Trustee Act of ACT to apply)	21	Clause 21 of the Bill is the same as section 25 of the 1990 Act, except that the reference to the <i>Trustee Act 1925</i> has been inserted to reflect changes to ACT legislation.
26 (Exemption from taxation)	22	This Bill replicates section 26 of the 1990 Act and the regulations made under that section. Subsection 26(2) of the 1990 Act has been omitted because States and Territories are not permitted to charge income tax. This clause has also been expanded to allow modification of this clause by regulation.
27 (Banking)	23	
27A (Accounting records)	24	Subsection 27A(3) is not required as the PSS Board, in respect of the PSSAP, will be subject to the relevant criminal code provisions under section 111 of the <i>Superannuation Industry (Supervision) Act 1993</i> .
27B (Audit)	25	
28 (Annual report and financial statements)	26	The clause is the same as in the 1990 Act, except that the Minister must make any interim report and interim financial statements under subclause 26(4) available to the public.
28A (Delegation by Board)	28	

<b>Provisions of <i>Superannuation Act 1990 (the 1990 Act)</i></b>	<b>Provisions of <i>Superannuation Bill 2005</i></b>	<b>Comments</b>
29 (Functions of Commissioner)	30	This clause is the same as in the 1990 Act except that the section in the Bill will be able to be modified or its operation ceased by regulation.
30 (Other functions of Commissioner not to be prejudiced)	31	
33A to 33G (Part 8A – transfers to approved and authorised superannuation schemes)		Part 8A (Sections 33A to 33G) have been omitted as the special provisions for the transfer of funds to approved and authorised superannuation schemes are not relevant to the PSSAP rules on portability.
33AA (Board may rely on information supplied by employers or former employers)	41	
34 (Cost of administration of Act etc.)	34	This clause has been expanded to allow modification or cessation of this clause by regulation. The reference to the cost of medical examinations under section 36 of the 1990 Act has been omitted as no medical examination is required by the Rules of the scheme and in any event the cost (if any) is considered to be part of the administration costs of the scheme.
35 (Certain authorities to pay part of costs of administration)	35 and 36	Clause 37 allows for the modification or cessation of the clause by regulation.
36 (Cost of medical examination on entry into Public Sector Superannuation Scheme)		An equivalent provision is not required as entry medicals are not a feature of the PSSAP.

<b>Provisions of <i>Superannuation Act 1990 (the 1990 Act)</i></b>	<b>Provisions of <i>Superannuation Bill 2005</i></b>	<b>Comments</b>
37 (Costs – Board being assisted by panel of persons)		An equivalent provision is not required as assessment panels are not a feature of the PSSAP.
37A (Board liable to pay surcharge under the <i>Superannuation Contributions Tax (Assessment Collection) Act 1997</i> )	38	This clause is the same as in the 1990 Act, except that in the PSSAP any surcharge will be paid out of the Fund.
38 (Pre-assessment payments)		An equivalent provision is not required as pre-assessment payments are not a feature of the PSSAP.
39 (Recovery of unpaid contributions etc.)	39 and 40	
40 (Payment of fees)	37	The clause in the Bill has an addition to confirm that the clause does not authorise the imposition of taxation.
41 (Assignment of benefits)		Section 41 of the 1990 Act has been omitted as this provision is covered under the <i>Superannuation Industry (Supervision) Act 1993</i> , specifically regulation 13.12 of that Act.
42 (Member etc. bound by Rules)	44	
42A (Board may require employers to distribute information etc. to members)	42	This clause has been modified in the Bill to require an employer to comply with the provision unless doing so would breach chapter 7 of the <i>Corporations Act 2001</i> .
43 (Indemnification of trustees etc.)	29	This Bill will allow this clause to be modified or its operation ceased by regulation.
44 (Bank not liable in respect of certain payments out of account of deceased pensioner)		Section 44 of the 1990 Act has been omitted as the PSSAP does not provide for pension.

<b>Provisions of <i>Superannuation Act 1990 (the 1990 Act)</i></b>	<b>Provisions of <i>Superannuation Bill 2005</i></b>	<b>Comments</b>
44A (Declarations etc. by Minister or Board)	32	The Bill does not make provisions about Board declarations as the Board has no power to make declarations under the Bill.
45 (Disallowable instruments)	5, 6, 7, 8, 11, 13 and 32	Clause 32 differs from section 44A because of the introduction of the <i>Legislative Instruments Act 2003</i> . Also, provisions about the disallowance of particular instruments and allowing certain instruments to be made retrospectively are included in the clauses authorising those instruments.
46 (Exercise of certain powers by Minister)	32	This clause will not apply in respect of the Trust Deed for the PSSAP established by the Minister and the determination of the PSSAP as the eligible choice fund for APS employees and certain other persons.
47 (Delegation by Minister)	33	
48 (Regulations)	45	
49 (Regulations relating to the operation of the <i>Superannuation Industry (Supervision) Act 1993</i> and certain other laws)	46	

**Provisions in the Superannuation Bill 2005 not used in the *Superannuation Act 1990***

<b>Clause in <i>Superannuation Bill 1990</i></b>	<b>Comment</b>
3	Consistent with modern drafting practices, clause 3 provides an outline of the key features of the Bill.
16	Clause 16 provides that the PSSAP will be the employer (default) fund, referred to as an eligible choice fund in the SG Act for Australian Public Service employees and certain other prescribed persons who have choice of funds and do not make a choice.

<b>Clause in Superannuation Bill 1990</b>	<b>Comment</b>
27	Clause 27 is included to avoid doubt that the money standing to the credit of the PSSAP Fund is not public money, and the assets of the Fund are not public property, for the purposes of the <i>Financial Management and Accountability Act 1997</i> .