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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SUPERANNUATION LEGISLATION AMENDMENT
(SUPERANNUATION SAFETY AND OTHER MEASURES) BILL
2005**

EXPLANATORY MEMORANDUM

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

GENERAL OUTLINE

SUPERANNUATION LEGISLATION AMENDMENT (SUPERANNUATION SAFETY AND OTHER MEASURES) BILL 2005

OUTLINE

The Superannuation Legislation Amendment (Superannuation Safety and Other Measures) Bill 2005 (the Bill) includes amendments to three Acts. The amendments are a consequence of the Government's Safety of Superannuation reforms as well as changes required to facilitate the application of negative interest rates to the Commonwealth Superannuation Scheme (CSS). The Bill also includes provisions to validate the payment of benefits to particular members of the CSS. In addition the Bill makes a number of minor amendments to include members of the staff of the Boards of the CSS and the Public Sector Superannuation Scheme (PSS) in the delegation powers of the Boards, and to allow the Boards to send to employers any document or written information that, under the relevant scheme Act or any other Act, they are required to send to the member.

This Bill will amend the:

- *Superannuation Act 1976* (the 1976 Act);
- *Superannuation Act 1990* (the 1990 Act); and the
- *Superannuation Act 2005* (the 2005 Act).

These Acts provide for occupational superannuation schemes for persons employed by the Commonwealth and for certain other persons.

Schedule 1 - Amendments to the 1976 Act, the 1990 Act and the 2005 Act

The Bill will provide for the appointment and termination of members of the CSS Board to comply with the new fitness and propriety standard under the *Superannuation Industry (Supervision) Act 1993* (SIS) introduced as part of the Government's Safety of Superannuation reforms. The Bill will also provide for the appointment of acting members to the CSS Board to comply with SIS.

The amendments will require that substantive and acting appointments to the CSS Board do not contravene the SIS fitness and propriety operating standard. Also, that a contravention of the standard would allow the Minister for Finance and Administration to terminate an appointment to the Board.

The proposed amendments allow for reduced reliance on acting members of the Board when substantive members are absent from Australia and provide for members to participate in, vote on and disclose conflicts of interest at Board meetings through proxies.

Similar amendments will be made to the PSS in the scheme's Trust Deed and Rules through an amending deed in respect of the above matters.

The Bill also includes amendments to the 1976 Act, the 1990 Act and the 2005 Act to allow the CSS and PSS Boards to delegate powers to their staff. This will improve the administrative efficiency of the Boards. Other amendments to the 1976 Act and the 1990 Act will allow the Boards to send to the designated employer of a member of the relevant scheme any document or written information that, under the relevant scheme Act or any other Act, they are required to send to the member. This change is necessary as the Boards are now required to provide information to members under other Acts.

Schedule 2 - Amendments to the 1976 Act

The Bill will allow negative crediting rates to be applied to CSS member accounts. This initiative has the effect that members will bear the investment risk relating to their account balances, as is appropriate. It will also provide the CSS Board with greater capacity to equitably distribute earnings between members who leave the scheme and those who stay.

Schedule 3 - Amendments to the 1976 Act

The Bill will include provisions to rectify the situation where a group of CSS members have received benefits in breach of superannuation laws. They were deferred benefit members who had ceased contributory membership by joining an alternative superannuation arrangement offered by their employer. After they had reached preservation age they received payment of the benefits without meeting certain conditions such as terminating their employment or reaching age 65 as required. The amendments in the Bill will effectively validate these payments.

Financial Implications

This Bill has no financial implications.

TERMS USED

“**1976 Act**” means the Superannuation Act 1976.

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

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

“**ACTU**” means the Australian Council of Trade Unions.

“**Bill**” means the Superannuation Legislation Amendment (Superannuation Safety and Other Measures) Bill 2005.

“**CSS**” means the Commonwealth Superannuation Scheme.

“**PSS**” means the Public Sector Superannuation Scheme.

“**RSE**” means registrable superannuation entity.

“**SIS**” means the *Superannuation Industry (Supervision) Act 1993*.

NOTES ON CLAUSES

Clause 1: Short title

Clause 1 provides for the short title of the Act to be the *Superannuation Legislation Amendment (Superannuation Safety and Other Measures) Act 2005*.

Clause 2: Commencement

2. **Clause 2** provides that the Act commences on the day on which it receives Royal Assent with the following exceptions:

- a. amendments to allow negative crediting rates to be applied to CSS member accounts to take effect from 1 January 2006; and
- b. amendments to allow negative crediting rates to be applied to refunds of money paid by mistake into the CSS Fund and for refunds to be not less than the amount paid by mistake to take effect immediately after the other amendments to allow negative crediting rates.

Clause 3: Schedule(s)

3. **Clause 3** provides that each Act that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Act has effect according to its terms.

SCHEDULE 1 – AMENDMENTS RELATING TO THE CSS BOARD AND THE PSS BOARD

4. Schedule 1 includes amendments to ensure that substantive and acting appointments to the CSS Board do not contravene the new SIS fitness and propriety operating standard, and that a contravention of the standard would allow the Minister for Finance and Administration to terminate an appointment to the Board. The amendments also allow for reduced reliance on acting members of the Board when substantive members are absent from Australia and provide for members to participate in, vote on and disclose conflicts of interest at Board meetings through proxies.

5. The Schedule also includes amendments to the 1976 Act and the 1990 Act to allow the CSS Board and PSS Board to delegate powers to their staff and to allow the Boards to send to designated employers any document or written information that, under the relevant scheme Act or any other Act, they are required to send to scheme members.

Superannuation Act 1976

Item 1 – SIS fitness and propriety standard

6. **Item 1 of Schedule 1** inserts a definition of SIS fitness and propriety standard into section 27E of the 1976 Act to mean the operating standard prescribed under Part 3 of SIS which sets out the requirements for the fitness and propriety of trustees of regulated superannuation funds and RSE licensees.

Item 2 – Membership of the CSS Board

7. **Item 2 of Schedule 1** inserts new subsection 27F(1B) into the 1976 Act to provide that a person is not eligible for appointment as a member of the CSS Board if the appointment would result in a contravention of the SIS fitness and propriety standard.

8. The 1976 Act provides only for the appointment of two members of the CSS Board as the other five members of the Board are automatically CSS Board members by virtue of their appointment to the PSS Board.

Items 3 to 5 – Appointment of Acting Members of the CSS Board

9. **Item 3 of Schedule 1** omits the words “or from Australia” from paragraph 27H(1)(b) of the 1976 Act so that members of the CSS Board who are overseas at the time of a meeting of the Board are still able to participate in the meeting. This will reduce the need for acting members of the Board to participate where such circumstances arise.

10. **Item 4 of Schedule 1** makes it clear that the amendment of paragraph 27H(1)(b) of the 1976 Act made by Schedule 1 only applies to an appointment made after the commencement of this item.

11. **Item 5 of Schedule 1** inserts new subsection 27H(1C) into the 1976 Act to provide that a person is not eligible for appointment as an acting member if the appointment would result in a contravention of the SIS fitness and propriety standard.

Items 6 and 7 – Termination of appointment of members of the CSS Board

12. **Item 7 of Schedule 1** inserts new subsections 27M(6) and 27M(7) into the 1976 Act. New subsection 27M(6) provides that if the continuation in office of an appointed member of the CSS Board would contravene a SIS fitness and propriety standard, the Minister may terminate the appointment of the member. New subsection 27M(7) provides that subsections 27M(1) and (2), which list circumstances in the event of which the Minister may terminate the appointment of a member, do not limit subsection 27M(6).

13. **Item 6 of Schedule 1** amends subsection 27M(3) of the 1976 Act to provide that the consent of the ACTU to the termination of the appointment of a member who was

nominated for appointment by the ACTU, is limited to the circumstances set out under subsections 27M(1) and (2).

Items 8 to 12 – Meetings of the CSS Board

14. **Item 8 of Schedule 1** inserts new subsections 27N(4A) and 27N(4B) in the 1976 Act. New subsection 27N(4A) provides that a member of the CSS Board may, if not able to be present at a meeting of the Board, appoint another member as his or her proxy to attend and vote on his or her behalf at the meeting. New subsection 27N(4A) also provides that the appointment of the proxy is to be in writing and signed by the appointing member. New subsection 27N(4B) provides that the proxy is not entitled to vote on behalf of the member on a proposed decision unless there is an instrument of proxy appointment which sets out the terms of the proposed decision and indicates whether the appointing member is in favour of or against the proposed decision, and the proxy member votes on the proposed decision in accordance with the indication in the instrument. A “member” of the CSS Board includes the Chairperson of the Board.

15. **Item 9 of Schedule 1** inserts new subsections 27N(5A) and 27N(5B) into the 1976 Act. New subsection 27N(5A) extends the quorum requirements for a meeting of the CSS Board. Under the new provisions a person attending as both a member of the CSS Board and as a proxy of another member will be counted once for their attendance as a member and once for each proxy held by the person. New subsection 27N(5B) provides that at least two members of the CSS Board must be present (i.e. not by proxy) at a meeting of the Board.

16. **Item 10 of Schedule 1** amends subsection 27N(6) of the 1976 Act by extending the meaning of voting at a meeting of the CSS Board to be voting whether in person or by proxy.

17. **Item 11 of Schedule 1** inserts new subsection 27N(7A) in the 1976 Act to provide for the record of a meeting of the CSS Board to note that where a member votes by proxy at the meeting, the vote was by proxy.

18. **Item 12 of Schedule 1** adds a note at the end of section 27N of the 1976 Act to direct the reader to section 33B of the *Acts Interpretation Act 1901*. This makes it clear that participation in meetings may be by telephone, or closed-circuit television, or any other means of communication, and that a member who participates in a meeting this way is taken to be present at the meeting.

Items 13 and 14 – Disclosure of interests

19. **Item 13 of Schedule 1** inserts new subsection 27P(4A) in the 1976 Act. New subsection 27P(4A) provides that disclosure of direct or indirect pecuniary interests, at a meeting of the Board in a matter being considered by the CSS Board, may be made by the member personally or by proxy.

20. Item 14 of Schedule 1 amends paragraphs 27P(5)(b) and (6)(b) of the 1976 Act to extend the meaning of taking part in making a decision or determination of the CSS Board to mean either in person or by proxy.

Items 15 to 17 – Delegation by Board

21. Item 15 of Schedule 1 inserts new paragraph 27Q(1)(aa) in the 1976 Act to include a member of the staff of the CSS Board in the persons to whom the Board may delegate all or any of its powers under the 1976 Act or the regulations under that Act, except the Board's power to reconsider its own decisions or decisions made by its delegates.

22. Item 16 of Schedule 1 amends subparagraph 27Q(3)(a)(ii) of the 1976 Act to include a member of the staff of the CSS Board in the persons to whom a delegate may sub-delegate a power of the Board.

23. Item 17 of Schedule 1 amends paragraph 27Q(3)(c) of the 1976 Act to include a member of the staff of the CSS Board as a delegate who may sub-delegate a power of the Board.

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

Items 18 and 19 – Distribution of information by employers

25. Item 18 of Schedule 1 amends paragraph 163AB(1)(a) of the 1976 Act. Subsection 163AB(1) limits the information that the CSS Board can request a designated employer to provide to eligible employees to information required to be provided under the 1976 Act or SIS. Item 18 will amend paragraph 163AB(1)(a) to allow the CSS Board to request a designated employer provide to an eligible employee any information required to be provided by the CSS Board to an eligible employee under any Act. This is necessary as the CSS Board is now required to provide information to members under other Acts, such as the *Corporations Act 2001*.

26. Item 19 of Schedule 1 amends subsection 163AB(3) of the 1976 Act so that the designated employer of an eligible employee must comply with a request of the CSS Board under subsection 163AB(1) provided this would not contravene Chapter 7 (Financial Services and Markets provisions) of the *Corporations Act 2001*.

Superannuation Act 1990

Items 20 to 22 – Delegation by Board

27. **Item 20 of Schedule 1** inserts new paragraph 28A(1)(aa) in the 1990 Act to include a member of the staff of the PSS Board in the persons to whom the Board may delegate all or any of its powers under the 1990 Act or the regulations under that Act, except the Board's power to reconsider its own decisions or decisions made by its delegates.

28. **Item 21 of Schedule 1** amends subparagraph 28A(2)(a)(ii) of the 1990 Act to include a member of the staff of the PSS Board in the persons to whom a delegate may sub-delegate a power of the Board.

29. **Item 22 of Schedule 1** amends paragraph 28A(2)(c) of the 1990 Act to include a member of the staff of the PSS Board as a delegate who may sub-delegate a power of the Board.

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

Items 23 and 24 – Distribution of information by employers

31. **Item 23 of Schedule 1** amends subparagraph 42A(1)(a)(ii) of the 1990 Act. Subsection 42A(1) limits the information that the PSS Board can request a designated employer to provide to members of the PSS to information required to be provided under the 1990 Act or SIS. Item 23 will amend subparagraph 42A(1)(a)(ii) to allow the PSS Board to request a designated employer provide to a member of the PSS any information required to be provided by the PSS Board to a member under any Act. This is necessary as the PSS Board is now required to provide information to members under other Acts, such as the *Corporations Act 2001*.

32. **Item 24 of Schedule 1** amends subsection 42A(3) of the 1990 Act so that the designated employer of a member of the PSS must comply with a request of the PSS Board under subsection 42A(1) provided this would not contravene Chapter 7 (Financial Services and Markets provisions) of the *Corporations Act 2001*.

Item 25 – Technical Amendment

33. **Item 25 of Schedule 1** amends paragraph 43(1)(d) of the 1990 Act so that the reference to "the Act" is read as "this Act".

Superannuation Act 2005

Items 26 to 28 – Delegation by Board

34. **Item 26 of Schedule 1** inserts new paragraph 28(1)(aa) in the 2005 Act to include a member of the staff of the PSS Board in the persons to whom the Board may delegate all or any of its powers under the 2005 Act or the regulations under that Act, except the Board's power to reconsider its own decisions or decisions made by its delegates.

35. **Item 27 of Schedule 1** amends paragraph 28(2)(b) of the 2005 Act to include a member of the staff of the PSS Board in the persons to whom a delegate may sub-delegate a power of the Board.

36. **Item 28 of Schedule 1** amends subsection 28(4) of the 2005 Act to include a member of the staff of the PSS Board as a delegate who may sub-delegate a power of the Board.

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

SCHEDULE 2 – AMENDMENTS RELATING TO NEGATIVE INTEREST RATES FOR THE CSS

Superannuation Act 1976

38. Schedule 2 will allow negative interest to be applied to CSS member accounts in the event of negative earnings on their account balance in the CSS Fund. The CSS Board requested, when the proposed introduction of member investment choice was announced in 2004, that the restriction on the Board declaring negative crediting rates be removed to bring arrangements in line with industry practice.

39. The amendments will have the effect that members will largely bear the investment risk relating to their account balances. This is appropriate as the monies in question are largely the member's own accumulated contributions and interest. Under arrangements that applied for a number of years in the CSS, scheme members to a large extent bore the effect of investment losses. This is because when there were insufficient reserves to absorb investment losses in a given year and a zero crediting rate was applied to members' accounts, the resulting negative reserve had to be replenished before a positive rate could be declared in the future.

40. The amendments will therefore provide the CSS Board with greater capacity than has applied in the past to equitably distribute earnings on the funded accumulation component of members' benefits, between members who leave the scheme and those who stay. The

amendments will also allow the Board more flexibility to accurately determine interest rates.

41. From 1 January 2006, the CSS Board will be able to make negative declarations of interest, however the Board will protect the member's account balance in line with the announcement it made in September 2004 that a member's account balance in the Fund cannot fall below a certain level.

42. The protected amount from 1 January 2006 will generally be the member's account balance in the CSS Fund as at 1 July 2003 plus member contributions, including any transfer amounts, made between that date and 31 December 2005.

43. An example of how this will operate is the case of Mary. Mary had an account balance in the CSS Fund of \$200,000 as at 1 July 2003. She paid \$12,500 in contributions for the period 1 July 2003 to 31 December 2005 and has unallocated earnings of \$50,000 for that period. Mary subsequently pays \$2,500 in contributions and has \$10,000 in earnings for the period 1 January 2006 (when the amendment commenced) to 30 June 2006.

44. Mary's protected amount is \$212,500 (\$200,000 + \$12,500) and, if the CSS Board made a determination of interest as at 30 June 2006 that distributed all of the Fund earnings, giving Mary \$60,000 in interest (\$50,000 + \$10,000) her account balance will be \$275,000 as at that date.

45. The protected amount remains at \$212,500 irrespective of whether Mary was in the default investment option or the cash conservative option when the amendments commence and irrespective of any switches she makes between the two current options.

46. If Mary was a CSS deferred benefit member (and had been since before 30 June 2003) her protected amount would be \$200,000.

Items 1 and 2 – Accumulated Contributions

47. Item 1 of Schedule 2 amends the definition of 'accumulated basic contributions' in subsection 3(1) of the 1976 Act by omitting the words "interest that is payable in respect of those contributions" and substituting them with "interest on those contributions". This will allow for both positive and negative interest in relation to those contributions.

48. Item 2 of Schedule 2 amends the definition of 'accumulated supplementary contributions' in subsection 3(1) of the 1976 Act by omitting the words "interest that is payable in respect of those contributions" and substituting them with "interest on those contributions". This will allow for both positive and negative interest in relation to those contributions.

Item 3 – Meaning of Amount

49. Item 3 of Schedule 2 amends subsection 3(1) of the 1976 Act to make it clear that where the term ‘amount’ is referred to in the 1976 Act that it is taken to include a nil amount.

Item 4 – Meaning of Interest and Accruing

50. Item 4 of Schedule 2 amends subsection 3(1) of the 1976 Act to make it clear that where the term ‘interest’ is referred to in the 1976 Act that it is taken to include negative or zero interest. Item 4 also amends subsection 3(1) of the 1976 Act to make it clear that when the term ‘accruing’ is used in the 1976 Act in relation to ‘interest’ that it has a corresponding meaning.

Item 5 – Meaning of Notional Interest

51. Item 5 of Schedule 2 amends subsection 3(1) of the 1976 Act to make it clear that the term ‘notional interest’ includes negative or zero notional interest.

Items 6 to 8 – Meanings of words affected by the new subsection 3(9)

52. Item 6 of Schedule 2 amends subsection 3(1) of the 1976 Act to make it clear that the term ‘plus’ has a meaning affected by new subsection 3(9).

53. Item 7 of Schedule 2 amends subsection 3(1) of the 1976 Act to make it clear that the term ‘sum’ has a meaning affected by new subsection 3(9).

54. Item 8 of Schedule 2 amends subsection 3(1) of the 1976 Act to make it clear that the term ‘total’ has a meaning affected by new subsection 3(9).

Items 9 to 14, and 23 – When the calculation of a sum is taken to be zero

55. Item 9 of Schedule 2 inserts a new subsection 3(9) in the 1976 Act to make it clear that where in the 1976 Act a provision involves the calculation of a sum (whether the expression “sum”, “total”, “plus” or any other expression is used) which in turn involves negative interest or negative notional interest, then if apart from this new subsection the sum would be less than zero, the sum is taken to be zero.

56. Item 10 of Schedule 2 amends subsection 7A(1) of the 1976 Act by omitting the words “together with the amount of any interest that is payable in respect of the amount” and substituting them with “plus interest on the amount”. This will allow for both positive and negative interest.

57. Item 11 of Schedule 2 amends paragraphs 7A(2)(d), (e) and (f) of the 1976 Act by omitting the words “together with the amount of any interest that is payable in respect of the amount” and substituting them with “plus interest on the amount”. This will allow for both positive and negative interest.

58. Item 12 of Schedule 2 amends subsections 7A(3) and (4) of the 1976 Act by omitting the words “together with the amount of any interest that is payable in respect of the amount” and substituting them with “plus interest on the amount”. This will allow for both positive and negative interest.

59. Item 13 of Schedule 2 amends the definition of GBB in subsection 62B(4) of the 1976 Act by omitting the words “together with” and substituting them with the word “plus”. This will allow for both positive and negative interest.

60. Item 14 of Schedule 2 amends the definition of GBB in subsection 110SE(4) of the 1976 Act by omitting the words “together with” and substituting them with the word “plus”. This will allow for both positive and negative interest.

61. Item 23 of Schedule 2 amends paragraph 146MC(1)(a) of the 1976 Act by omitting the words “together with” and substituting them with the word “plus”. This will allow for both positive and negative interest.

Items 15 and 16 – Payment of amounts with interest

62. Item 15 of Schedule 2 amends subparagraph 145(7)(d)(i) of the 1976 Act by omitting the words “interest that is payable in respect of that excess” and substituting them with “interest on that excess”. This will allow for both positive and negative interest.

63. Item 16 of Schedule 2 inserts new subsection 145(7A) in the 1976 Act to provide that an amount paid under subparagraph 145(7)(d)(i) of the 1976 Act in respect of a particular excess must not be less than the amount of the excess.

64. Item 17 of Schedule 2 amends subparagraph 145(8)(a)(i) of the 1976 Act to insert “(the *principal amount*)” after “equal to the amount”.

65. Item 18 of Schedule 2 amends subparagraph 145(8)(a)(i) of the 1976 Act by omitting the words “interest that is payable in respect of that amount” and substituting them with “interest on the principal amount”. This will allow for both positive and negative interest.

66. Item 19 of Schedule 2 inserts new subsection 145(8A) in the 1976 Act. New subsection 145(8A) will provide that an amount paid into the CSS Fund under subparagraph 145(8)(a)(i) in respect of a particular principal amount must not be less than the principal amount.

67. Item 20 of Schedule 2 amends subparagraph 145(9)(a)(i) of the 1976 Act to insert “(the *principal amount*)” after “equal to the amount”.

68. Item 21 of Schedule 2 amends subparagraph 145(9)(a)(i) of the 1976 Act by omitting the words “interest that is payable in respect of that amount” and substituting them with “interest on the principal amount”. This will allow for both positive and negative interest.

69. Item 22 of Schedule 2 inserts new subsection 145(9A) in the 1976 Act. New subsection 145(9A) will provide that an amount paid into the CSS Fund under subparagraph 145(9)(a)(i) in respect of a particular principal amount must not be less than the principal amount.

Item 24 – Determination with respect to interest

70. Item 24 of Schedule 2 amends subsection 154A(1) of the 1976 Act by omitting the words “interest is payable in respect of an amount, the interest must be calculated, and is payable” and substituting them with “interest is to be calculated on an amount, that interest must be calculated”. This will allow for both positive and negative interest.

Items 25 to 27– refund of money paid by mistake

71. Item 25 of Schedule 2 amends section 156A of the 1976 Act by inserting “(1)” before “If:”.

72. Item 26 of Schedule 2 amends subsection 156A(1) of the 1976 Act by omitting the words “interest in respect of the amount“ and substituting them with “interest on the amount”. This will allow for both positive and negative interest.

73. Item 27 of Schedule 2 inserts new subsection 156A(2) in the 1976 Act so that an amount paid under subsection (1) in respect of an amount under paragraph (1)(a) must not be less than the paragraph (1)(a) amount.

Item 28 – Continuity of determinations

74. Item 28 of Schedule 2 makes it clear that the amendments made by Schedule 2 do not affect the continuity of any determination made under subsection 154A(1) or (1A) of the 1976 Act before the commencement of this provision.

Item 29 – Determinations of zero interest

75. Item 29 of Schedule 2 for the avoidance of doubt to make it clear that the amendments made by Schedule 2 do not imply that zero interest or zero notional interest could not have been determined under subsection 154A(1) or (1A) of the 1976 Act respectively before the commencement of this provision.

SCHEDULE 3 – AMENDMENTS RELATING TO THE VALIDATION OF CERTAIN BENEFITS UNDER THE SUPERANNUATION ACT 1976

76. **Schedule 3** authorises particular benefits (pensions and lump sum payments) that have breached the 1976 Act and other legislation.

77. These breaches occurred when members were paid their CSS benefits without having met a “condition of release” under the SIS and regulations under that Act, such as having a termination of employment or attaining age 65. In most cases the affected members became CSS deferred benefit members when they joined an alternative superannuation arrangement operated by their employer and, after reaching their preservation age, commenced their CSS benefits (the main component being an indexed CSS pension) without having met a SIS condition of release.

78. The amendments do this by recovering the unauthorised amounts that were paid in this manner as debts due to the CSS Board by set-off of these recovered amounts against benefits payable, equal to the unauthorised amounts previously paid. It is intended that the set-off is not likely to involve any actual payment. In the case of future pension payments, the amendments then (in effect) prospectively authorise the continued payment of the amount of the original pension that was previously unauthorised.

79. The amendments also provide that where act-of-grace payments have commenced, in lieu of CSS benefits, for a period of time before the commencement of the amendments, that only the unauthorised CSS benefit amounts paid prior to the commencement of act-of-grace payments are able to be recovered by set-off against benefits payable. However, even where act-of-grace payments have been made, the amendments (in effect) authorise the re-commencement of CSS pension payments of the amount of the previously unauthorised pension.

80. Overall the amendments have the effect of prospectively authorising benefit payments, previously made available over a number of years to certain CSS members employed by certain approved authorities, in breach of superannuation law.

81. Some examples of the effect of the amendments are set out below.

82. Thomas commenced receiving his unauthorised CSS pension of \$20,000 pa in February 2002, and he rolled over his member contributions and interest as a lump sum to another superannuation fund. In February 2005, Thomas met a SIS condition of release because he reached age 65 and so he is authorised to receive CSS payments from that date.

83. The effect of the amendments on Thomas is that:

- his unauthorised lump sum benefit is able to be recovered by set-off against a benefit of an equivalent lump sum benefit amount that is payable to him;
- the amount of the unauthorised pension paid to Thomas for 3 years from February 2002 is able to be recovered by set off against a benefit, equal to the amount of that unauthorised pension, that is payable to him; and
- future pension payments are, (in effect) prospectively authorised to continue at the (indexed) amount of the previously unauthorised pension.

84. Harriet commenced receiving her unauthorised indexed CSS pension of \$30,000 pa in January 1999 and she purchased an additional (unindexed) CSS pension of \$10,000 pa with her own contributions and interest. In March 2005 Harriet was identified as being in receipt of unauthorised CSS payments and so the payment of these pensions was ceased forthwith and immediately “replaced” with act-of-grace payments of equivalent amounts, in lieu. Harriet meets a SIS condition of release on 1 July 2005.

85. The effect of the amendments on Harriet is that:

- both her unindexed additional pension and her employer-financed indexed pension for the period January 1999 to March 2005 are able to be recovered by set-off against benefits, equal to the amount of her unauthorised pensions during that period, that are payable to her;
- they do not affect the period when act-of-grace payments were made in lieu; and
- future pension payments are, (in effect) prospectively authorised to continue at the (indexed) amount of the previously unauthorised pension.

Item 1 – Validation of pensions

86. **Item 1 of Schedule 3** validates particular pension benefits that have breached section 111A of the 1976 Act, whether or not they have also breached any other provision of that Act or any other legislation, by recovery of these payments by deduction from payments made under the new provisions that are equal in amount to the former payments and are taken not to breach particular provisions and legislation.

87. **Sub-item 1(1)** sets out the circumstances in which Item 1 will apply, specifically to a pension payment that commenced to be paid to a person, or purported to be a benefit, or part of a benefit, payable under the 1976 Act, during the period beginning on 1 July 1995 and ending on the day of Royal Assent (the interim period), although the benefit was not payable and breached section 111A, (whether or not it also breached anything else).

88. **Sub-item 1(2)** provides for the creation of a debt due and payable to the Board in respect of the pension payment in sub-item 1(1) and also allows for the recovery by the CSS Board of that debt in a court of competent jurisdiction.

89. Sub-item 1(3) makes it clear that the amount recoverable under sub-item 1(2) is not recoverable under subsection 156(4) or (5) of the 1976 Act. These provisions provide generally, in respect of an amount of benefit that has been paid to a person but is not payable or has become not payable, for recovery by the CSS Board in a court of competent jurisdiction, and for that amount to be recovered by deduction from a benefit which the person is receiving or is entitled to receive.

90. Sub-item 1(4) provides for a benefit to be paid to the person referred to in sub-item 1, equal to the total amount of pension that would have been payable to the person during the interim period if there had not been a breach of section 111A or section 110TB of the 1976 Act, SIS or the Superannuation (CSS) Former Eligible Employees Regulations. Some of the unauthorised payments were made under those Regulations which modify the 1976 Act in respect of certain classes of persons including certain former Northern Territory Government employees. In effect this substitutes an unauthorised payment (the pension referred to in sub-item 1(1)) with an authorised benefit.

91. Sub-item 1(5) allows for the debt due and payable to the Board in sub-item 1(2) to be recovered by deduction from the amount payable to the person under sub-item 1(4). It is intended that this is the primary method of recovery of the debt over recovery in a court of competent jurisdiction (as allowed by sub-item 1(2)). It is also intended that recovery by deduction is not likely to involve any actual payment but is merely intended to be a set-off of amounts payable.

92. Sub-item 1(6) states that the payment under sub-item 1(4) is taken not to have breached any of the relevant provisions.

93. Sub-item 1(7) states that the continuing payment of the pension after the commencement of this item is taken not to have breached any of the relevant provisions.

94. Sub-item 1(8) also states that the continuing payment of the pension after the commencement of this item is taken not to have breached any of the relevant provisions. This item applies where after the end of the interim period and before the commencement of this item the person became entitled to periodic payments under section 33 of the *Financial Management and Accountability Act 1997* in substitution for the pension.

95. Sub-item 1(9) states that a payment under sub-item 1(4) is taken to be a payment of pension payable under the 1976 Act.

Item 2 – Validation of lump sums

96. Item 2 of Schedule 3 validates particular lump sum benefits that have breached section 111A of the 1976 Act, whether or not they have also breached any other provision of that Act or any other legislation, by recovery of these payments by deduction from

payments made under the new provisions that are equal in amount to the former payments and are taken not to breach particular provisions and legislation.

97. **Sub-item 2(1)** sets out the circumstances in which Item 2 will apply, specifically to a lump sum payment that commenced to be paid to a person, or purported to be a benefit, or part of a benefit, payable under the 1976 Act, during the period beginning on 1 July 1995 and ending on the day of Royal Assent (the interim period), although the benefit was not payable and breached section 111A (whether or not it also breached anything else).

98. **Sub-item 2(2)** provides for the creation of a debt due and payable to the Board in respect of the lump sum payment in sub-item 2(1) and also allows for the recovery by the CSS Board of that debt in a court of competent jurisdiction.

99. **Sub-item 2(3)** makes it clear that the amount recoverable under sub-item 2(2) is not recoverable under subsection 156(4) or (5) of the 1976 Act. These provisions provide generally, in respect of an amount of benefit that has been paid to a person but is not payable or has become not payable, for recovery by the CSS Board in a court of competent jurisdiction, and for that amount to be recovered by deduction from a benefit which the person is receiving or is entitled to receive.

100. **Sub-item 2(4)** provides for a benefit to be paid to the person referred to in sub-item 2(1), equal to the total amount of the lump sum that would have been payable to the person during the interim period if there had not been a breach of section 111A, section 110TB, or section 139AA of the 1976 Act, SIS or the Superannuation (CSS) Former Eligible Employees Regulations. In effect this substitutes an unauthorised payment (the lump sum referred to in sub-item 2(1)) with an authorised benefit.

101. **Sub-item 2(5)** allows for the debt due and payable to the Board in sub-item 2(2) to be recovered by deduction from the amount payable to the person under sub-item 2(4). It is intended that this is the primary method of recovery of the debt over recovery in a court of competent jurisdiction (as allowed by sub-item 2(2)). It is also intended that recovery by deduction is not likely to involve any actual payment but is merely intended to be a set-off of amounts payable.

102. **Sub-item 2(6)** states that the payment under sub-item 2(4) is taken not to have breached any of the relevant provisions.

103. **Sub-item 2(7)** states that a payment under sub-item 2(4) is taken to be a benefit payable under the 1976 Act.