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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

GOVERNANCE OF AUSTRALIAN GOVERNMENT

SUPERANNUATION SCHEMES BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Finance and Deregulation,
Senator The Honourable Penny Wong)

Glossary

The following abbreviations and acronyms are used in this Explanatory Memorandum

Abbreviation/acronym	Definition
1922 scheme	the scheme under the <i>Superannuation Act 1922</i>
Act	<i>Governance of Australian Government Superannuation Schemes Act 2011</i> as passed by the Parliament
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
ACTU	Australian Council of Trade Unions
ARIA	Australian Reward Investment Alliance
Bill	Governance of Australian Government Superannuation Schemes Bill 2011
Board	Board of Commonwealth Superannuation Corporation
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CDF	Chief of the Defence Force
CRF	Consolidated Revenue Fund
CSC	Commonwealth Superannuation Corporation
CSS	Commonwealth Superannuation Scheme
Defence Minister	Minister for Defence
DFRB	Defence Forces Retirement Benefits Scheme
DFRDB	Defence Force Retirement and Death Benefits Scheme
DFRDB Authority	Defence Force Retirement and Death Benefits Authority
DFSPB	Defence Force (Superannuation) (Productivity Benefit) Scheme
Finance Department	Department of Finance and Deregulation
Minister	Minister for Finance and Deregulation
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
MSB	Military Superannuation and Benefits Scheme
MSB Board	Military Superannuation and Benefits Board
PNG	the scheme provided for under regulations made by the <i>Papua New Guinea (Staffing Assistance) Act 1973</i>
PSS	Public Sector Superannuation Scheme
PSSAP	Public Sector Superannuation Accumulation Plan
SIS legislation	<i>Superannuation Industry (Supervision) Act 1993</i> and regulations under that Act

Outline

The Governance of Australian Government Superannuation Schemes Bill 2011 (the Bill) gives effect to the Government's announcement in October 2008 to merge the Australian Reward Investment Alliance (ARIA), the Military Superannuation and Benefits Board (MSB Board) and the Defence Force Retirement and Death Benefits Authority (DFRDB Authority) to form a single trustee body.

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

- the ComSuper Bill 2011, which makes changes to the governance framework for superannuation administration arrangements for the main civilian and military superannuation schemes
- the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2011, which contains the consequential and transitional provisions necessary to facilitate the merger, the changes to superannuation administration and the modernisation of specific aspects of Australian Government superannuation to better align with the broader superannuation industry.

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

- the Commonwealth Superannuation Scheme (CSS)
- the Public Sector Superannuation Scheme (PSS)
- the Public Sector Superannuation Accumulation Plan (PSSAP)
- the Military Superannuation and Benefits Scheme (MSB)
- the Defence Force Retirement and Death Benefits Scheme (DFRDB)
- the Defence Forces Retirement Benefits Scheme (DFRB)
- the Defence Force (Superannuation) (Productivity Benefit) Scheme (DFSPB).

The single trustee will also be responsible for the superannuation scheme established by the *Superannuation Act 1922* and the scheme provided for under regulations made by the *Papua New Guinea (Staffing Assistance) Act 1973*. These schemes were previously the responsibility of the Commissioner for Superannuation. The position of Commissioner for Superannuation is being replaced with a Chief Executive Officer position, and ComSuper will be established as an agency, from 1 July 2011, by virtue of the ComSuper Bill 2011.

Consolidation of the trustee arrangements will bring more than 680,000 members and pensioners under a single trustee with funds under management of more than \$21 billion (based on figures as at 30 June 2010).

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

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

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

The obligation for trustees to act in the best interests of all members override any obligation to the group who chose them as trustee representatives.

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

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

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

remuneration of members of the Board will be set by the Remuneration Tribunal

- sets out the procedures for meetings of the Board, including requirements for a quorum that meet the minimum requirements specified in the SIS legislation
- allows CSC to employ staff and engage consultants on terms and conditions determined by the Board
- sets out the financial and reporting requirements in relation to the superannuation schemes for which CSC is responsible. These requirements broadly replicate the current arrangements that are set out in the existing scheme legislation
- deals with a number of miscellaneous issues relating to the operation of CSC, including:
 - the application of Commonwealth and State taxes to CSC and to the superannuation funds for which it has responsibility
 - the source of funds for remuneration of the Chair and other directors
 - the immunity and indemnification arrangements for the Chair and other directors
 - the delegation arrangements for CSC.

Financial Impact Statement

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

GOVERNANCE OF AUSTRALIAN GOVERNMENT SUPERANNUATION SCHEMES BILL 2011

NOTES ON CLAUSES

Part 1—Preliminary

Clause 1 – Short title

Clause 1 provides for the Act to be cited as the *Governance of Australian Government Superannuation Schemes Act 2011*.

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

Clause 2 – Commencement

2. **Clause 2** provides for commencement of the Bill on 1 July 2011.

Clause 3 – Objects

3. **Clause 3** sets out the objects of the Bill. These are two fold:

- to provide for the administration of certain superannuation schemes, including military schemes, under a single body
- to ensure CSC has regard to the unique nature of military service, as recognised by the schemes set out in the military superannuation legislation, including retirement, death and invalidity benefits provisions, when it is performing a function under the military superannuation legislation. The clause is intended to provide assurance to military stakeholders that the Bill will not erode the unique nature of military service as reflected in the features of the military schemes. CSC's consideration of the unique nature of military service would not impact or compromise its primary considerations required under the *Superannuation Industry (Supervision) Act 1993*.

Clause 4 – Definitions

4. **Clause 4** provides definitions of the terms and expressions used in the Bill. While these terms are largely self-explanatory, the following defined terms are noted:

- **Act administered by CSC** means each of the relevant schemes' governing legislation.
- **CSC** is short for Commonwealth Superannuation Corporation and is the body corporate that was formerly referred to as ARIA. The body corporate is continued in existence by clause 5 of the Bill.
- **governing deed** is a reference to the governing legislation of the MSB, PSS and PSSAP that is set out in a Trust Deed under the relevant Superannuation Act. The other schemes administered by CSC operate fully under the relevant primary Act, that is, they do not have a Trust Deed.
- **military schemes** which includes each one of the DFRB, DFRDB, DFSPB or MSB or all of the DFRB, DFRDB, DFSPB and MSB together.

- **relevant organisation** is defined to include an organisation in which a large number of its members are members of a superannuation scheme administered by CSC and whose principal purpose is in relation to the interests of members in matters concerning their employment.

The definition also includes an organisation which has the principal purpose of protecting beneficiaries of these schemes in matters concerning their entitlements as beneficiaries. For beneficiaries of the civilian schemes, an example of such an organisation could be the Superannuated Commonwealth Officers' Association, and for beneficiaries of the military schemes, examples could be the Returned and Services League of Australia, the Defence Force Welfare Association or other ex-service military organisations.

- **superannuation fund administered by CSC** means the CSS Fund or the MSB Fund or the PSS Fund or the PSSAP Fund, noting that not all of the schemes that are administered by CSC have a fund.
- **superannuation scheme administered by CSC** is a list of the schemes that are administered by CSC and is a reference to any of the schemes listed.
- **superannuation scheme and superannuation fund administered by CSC** is a reference to all of the schemes and funds that are administered by CSC.

Part 2—Commonwealth Superannuation Corporation

Division 1—Establishment and constitution of CSC

Clause 5 – Establishment

6. **Clause 5** provides that the board formerly known as ARIA, established under section 20 of the *Superannuation Act 1990*, will continue as the same body corporate under the new name CSC. That is, the current ARIA body corporate will continue in existence but is being renamed as CSC.

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

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

9. The application of the conduct of officers provisions in Division 4 of Part 3 of the CAC Act recognises the role of directors and senior officers for the performance of CSC. It will ensure that individual directors and senior managers of CSC are able to be held accountable for failing to act with care and diligence or good faith, and for misusing their position or information obtained by virtue of their position. Civil and

criminal penalties will be able to be imposed in respect of persons in contravention of the provisions. Corporate trustees are currently subject to similar obligations under the *Corporations Act 2001* (as well as statutory obligations under the SIS legislation).

10. Note 1 at the end of clause 5 assists the reader by referring to section 25B of the Acts Interpretation Act, which relates to alterations of names and constitutions of bodies.

11. Note 2 informs the reader that the CAC Act applies to CSC, subject to clause 6.

Clause 6 – Modification of the Commonwealth Authorities and Companies Act 1997

12. **Clause 6** of the Bill modifies the application of the CAC Act in relation to CSC's role in managing and investing scheme funds. This recognises that CSC is the corporate trustee of the superannuation schemes for which it has statutory responsibility and that money in the superannuation funds is held on trust by CSC for the benefit of members.

13. Specifically, clause 6 of the Bill states that section 15 of the CAC Act will not apply in relation to the management and investment of scheme funds by CSC.

14. Section 15 of the CAC Act places an obligation on a Commonwealth authority to notify the Minister of significant events, which include (but are not limited to):

- the formation, or participation in the formation, of a company
- participation in a significant partnership, trust, unincorporated joint venture or similar arrangement
- acquiring or disposing of a significant shareholding in a company.

15. Unlike other bodies, a core part of the functions of a superannuation trustee is the management and investment of superannuation funds. The investment function can involve the above transactions in the ordinary course of business. Accordingly, this section, if applied literally, would impose overly onerous and unnecessary requirements on CSC when carrying out these activities.

16. Importantly, the management and investment of scheme funds by CSC is regulated by the *Superannuation Industry (Supervision) Act 1993* and regulations. The SIS legislation contains the prudential standards that are applicable for the management and investment of superannuation savings. Accordingly, the modification in respect of section 15 of the CAC Act will not affect the interests of members in the superannuation schemes for which CSC is responsible.

17. Clause 6 also allows flexibility for regulations to be made to further modify the application of the CAC Act should evidence be provided by CSC that a particular requirement of the CAC Act impedes the management and investment of scheme funds by CSC.

18. **Subclause 6(2)** reinforces that CSC is a Commonwealth authority for the purposes of the CAC Act even if, at any time, the only money that it holds forms part of a superannuation fund for which it is responsible.

Clause 7 – CSC’s constitution

19. **Clause 7** provides that CSC is required to have a seal, which is to be kept according to the custodial directions of the Board of CSC and used only as authorised by the Board. All persons acting judicially (including courts and judges) are required to take judicial notice of CSC’s seal on a document and to treat the document as being properly sealed. CSC may acquire, hold and dispose of real and personal property. It may also sue and be sued in the name “Commonwealth Superannuation Corporation”.

Clause 8 – CSC’s functions

20. **Subclause 8(1)** provides that CSC is responsible for the functions assigned to it by this Act and by each of the Acts that it administers. The Acts administered by CSC are described in the definitions and are the governing Acts for each of the superannuation schemes for which CSC is responsible.

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

22. **Subclause 8(2)** clarifies that, when CSC is performing a function under any of the Acts it administers, it is doing so under that Act (rather than this Act). The functions of CSC in respect of each of the relevant superannuation schemes are set out in the scheme governing Acts.

23. **Subclause 8(3)** ensures CSC has regard to the unique nature of military service, as recognised by the schemes set out in the military superannuation legislation, including retirement, death and invalidity benefits provisions, when it is performing a function under the military superannuation legislation. CSC’s consideration of the unique nature of military service would not impact or compromise its primary considerations required under the *Superannuation Industry (Supervision) Act 1993*.

24. **Subclause 8(4)** provides that CSC has a broad power to do whatever is required or convenient for, or in relation to, the performance of its functions.

Division 2—Board of CSC

Subdivision A—Establishment and function

Clause 9 – Establishment

25. **Clause 9** requires there to be a Board of CSC. The function, membership and operation of the Board are set out in the Bill in the following clauses.

Clause 10 – Function

26. **Clause 10** provides that the role of the Board is to ensure that CSC performs its functions in a proper, efficient and effective way. The Board is able to do anything necessary or convenient for, or in relation to, this role. Anything done by the Board for, or on behalf of, CSC is treated as having been done by CSC.

Clause 11 – Membership

27. **Subclause 11(1)** sets out the membership of the Board as consisting of a Chair and 10 other directors.

28. The note at the end of subclause 11(1) assists the reader by referring to subsection 38(2), which enables the regulations to prescribe a different number of other directors.

29. The combined effect of subclauses 11(1) and 11(2) is that, in line with the equal representation requirements in the SIS legislation, the Board of CSC consists of an equal number of employer and member directors. There is also an independent director, being the Chair.

30. Under **subclause 11(2)**, the member directors are nominated, in writing, by:

- the President of the Australian Council of Trade Unions (ACTU) who represents the interests of members of the civilian schemes and nominates 3 directors
- the Chief of the Defence Force (CDF) who represents the interest of members of the military schemes and nominates 2 directors.

31. The Minister is responsible for choosing the remaining 5 employer directors and represents the employer-sponsor of the relevant civilian and military superannuation schemes, being the Commonwealth. In selecting suitable candidates to act as employer directors, the Minister is required to consult with the Defence Minister.

32. The note at the end of subclause 11(2) assists the reader by clarifying the Minister's role in choosing the remaining five directors.

33. **Subclause 11(3)** requires nominees to meet the fitness and propriety standards set out in the SIS legislation. If the person's appointment would result in a contravention of a fitness and propriety standard, that person is not eligible for nomination in the first instance.

34. Under **subclauses 11(4) and 11(5)**, the President of the ACTU and the CDF are required to consult with one or more relevant organisations, as defined by clause 4, before making a nomination. This is a requirement on the President of the ACTU and the CDF prior to nominating a person. Once the nomination has been made, it is not intended that the Minister, in making the appointment, would have any obligation to satisfy him or herself that the President of the ACTU and the CDF have consulted with one or more relevant organisations. That is, the Minister may treat nominations by the President of the ACTU and the CDF as being properly made.

35. **Subclause 11(6)** requires written nominations made by the President of the ACTU and the CDF to specify the duration of the appointment, which can be up to a maximum of three years.

36. **Subclause 11(7)** makes it clear that the Board can still operate if there is a vacancy on the Board.

Subdivision B—Appointment etc. of directors

Clause 12 – Appointment of directors

37. **Subclause 12(1)** provides that the Minister appoints directors on a part-time (as opposed to full-time) basis by making a written instrument.
38. The note at the end of subclause 12(1) assists the reader by clarifying that a director is eligible for reappointment to the Board in view of subsection 33(4A) of the Acts Interpretation Act, which provides that, in any Act, ‘appoint’ includes ‘re-appoint’.
39. **Subclause 12(2)** provides that a person is not eligible for appointment as a director if this would breach the fitness and propriety standards of the SIS legislation. This is similar to the requirement for nominations set out in subclause 11(3).
40. **Subclause 12(3)** requires the Minister to appoint a person nominated by the President of the ACTU or the CDF for the period specified in the written nomination. That is, subject to the 3 year maximum term in subclause 11(6), the Minister does not have a role in determining the length of appointment of a person nominated by the President of the ACTU or the CDF.
41. **Subclause 12(4)** requires the Minister to consult the Defence Minister in relation to the appointment of the directors who are not nominated by the President of the ACTU or the CDF.
42. For these five directors and Chair, the Minister is required to consult with the Defence Minister before making the appointment. This requirement reflects the Defence Minister’s current role in appointing directors to the existing military boards. It is appropriate, therefore, that the Defence Minister also has a role in relation to the appointment of employer directors on the Board of CSC.
43. Under **subclause 12(5)** the Minister is responsible for proposing a person for appointment as Chair, but must obtain the Board’s agreement to the appointment. The requirement for the Minister to obtain the Board’s consent is in line with the application of the SIS legislation equal representation requirements in respect of an independent director. In the case of the Board, the independent director is the Chair.
44. The requirement for the Minister to obtain the Board’s consent does not apply to the appointment of the person as the first Chair because the Board does not commence until 1 July 2011.
45. The note at the end of subclause 12(5) assists the reader by referring to section 23 of the Act, which sets out requirements for voting at board meetings.
46. **Subclause 12(6)** makes it clear that a defect or irregularity in the appointment of a person as director does not render the appointment invalid.

Clause 13 – Term of appointment

47. **Subclause 13(1)** provides that a director is appointed for the term specified in the instrument of appointment. That term may be up to a maximum of three years.
48. **Subclause 13(2)** provides that a director is unable to serve continuously on the Board for more than 9 years. The intention of this provision is to provide for a structured rotation of directors. It recognises the need to balance the benefits of

continuity on the Board with providing an opportunity to enhance the Board through refreshment and the introduction of new ideas.

Clause 14 – Remuneration and allowances

49. **Clause 14** provides that the Remuneration Tribunal determines the level of remuneration of the directors. In the absence of a Remuneration Tribunal determination, directors are remunerated in line with the regulations. Directors also receive allowances set out in the regulations. This section operates subject to the *Remuneration Tribunal Act 1973*.

Clause 15 – Leave of absence

50. **Clause 15** enables the Minister to allow the Chair to take a leave of absence from the Board. The Chair's leave of absence is on terms and conditions set by the Minister. Similar arrangements apply in relation to the other directors. However, in the case of the other directors, the Chair has the discretion to grant a leave of absence and sets the terms and conditions that are to apply.

Clause 16 – Resignation

51. **Clause 16** sets out requirements in relation to the resignation of directors, including the Chair. The clause requires resignations to be provided to the Minister in writing. A resignation comes into effect on the day that it is received by the Minister unless a later day is specified in the resignation, in which case it applies from that day.

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

Clause 17 – Termination of appointment

53. **Subclauses 17(1) to 17(5)** set out the grounds on which the appointment of directors may be terminated.

54. Under **subclause 17(1)** the appointment of a director automatically terminates if he or she is a “disqualified person” for the purposes of the SIS legislation. The grounds for such automatic disqualification include the person being convicted of a dishonesty offence, the person is insolvent or under administration or the making of a civil penalty order against the person.

55. **Subclause 17(2)** enables the Minister to terminate the appointment of a director if the director is not a disqualified person, but the director:

- applies to take the benefit of a law that provides for relief from bankruptcy or insolvent debtors or
- compounds with his or her creditors or
- assigns his or her remuneration to his or her creditors.

56. **Subclause 17(3)** enables the Minister to terminate a director's appointment if:

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

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

58. **Subclause 17(4)** enables the Minister to terminate, subject to subclauses 17(7), (8) and (9), the appointment of a director:

- for misbehaviour or physical or mental incapacity or
- if the director fails to attend three consecutive Board meetings and does not have a leave of absence or
- if the director breaches section 22 of the Act, which sets out requirements for the disclosure of interests to the Board, and does not have a satisfactory reason for this.

59. **Subclause 17(5)** enables the Minister to terminate, subject to subclauses 17(7), (8) and (9), the appointment of one or all of the directors if the Minister considers that the directors have breached their obligations under the CAC Act to keep the Minister informed on matters relating to the operation of the Commonwealth authority.

60. **Subclause 17(6)** requires the Minister to consult the Defence Minister on the termination of a director, other than a director nominated by the President of the ACTU or the CDF, if the circumstances set out in subclauses 17(2), (3), (4) or (5) apply in relation to the director.

61. **Subclauses 17(7) to 17(9)** set out additional requirements on the Minister when terminating a director who has been nominated by the President of the ACTU or the CDF.

62. **Subclause 17(7)** requires the Minister to obtain the consent of the President of the ACTU when terminating a director on a ground mentioned in Subclauses (4) or (5).

63. **Subclause 17(8)** requires the Minister to obtain the consent of the CDF when terminating a director on a ground mentioned in Subclauses (4) or (5).

64. Where consent of the President of the ACTU or the CDF has been given, **subclause 17(9)** requires the Minister to terminate the relevant appointment.

Clause 18 – Acting appointments

65. **Subclause 18(1)** enables the Minister to appoint a person to act as a director if there is a vacancy on the Board (regardless of whether the position has previously

been filled), or during a period when the director is absent from duty, travelling overseas or for any other reason not able to perform his or her duties as a director.

66. **Subclauses 18(2) to 18(6)** set out arrangements for appointing a person to act as a director. These are broadly consistent with the arrangements for appointing directors.

67. **Subclause 18(7)** provides that anything done by, or in relation to, a person claiming to be an acting director is not invalid because the Minister has not yet appointed the person, or there was a defect or irregularity in relation to the person's appointment, or the person's appointment had ceased, or the time to act had not arisen or had passed.

68. The note at the end of subclause 18(7) assists the reader by referring to the Acts Interpretation Act, which is relevant to acting appointments.

Subdivision C—Meetings of the Board

Clause 19 – Holding of meetings

69. **Clause 19** requires the Board to meet as often as necessary to fulfil its role. The Chair has the discretion to arrange a meeting at any time. However, the Chair is required to arrange a meeting within 30 days after receiving, from another director, a request for a meeting.

70. The note at the end of clause 19 assists the reader by referring to section 33B of the Acts Interpretation Act, which permits a body to allow its members to participate in meetings by telephone, closed-circuit television or any other means of communication. Where a member is participating in a meeting under such permission, the person is taken to be present at the meeting.

Clause 20 – Presiding at meetings

71. **Clause 20** provides that the Chair is in charge of all meetings of the Board that he or she attends. If the Chair is not present at a meeting, a director nominated by the Chair takes charge at the meeting. In the event that the Chair does not nominate a director to perform this role, the directors in attendance at the meeting are required to choose one among them to preside over the meeting.

Clause 21 – Quorum

72. **Subclause 21(1)** requires at least 9 directors to be at a meeting in order for there to be a quorum.

73. **Subclause 21(2)** provides for 8 directors to constitute a quorum in limited circumstances. This is where:

- a quorum is no longer present because a director is not able to participate in the consideration of a matter due to him or her disclosing an interest in that matter for the purposes of section 22 of this Act or section 27J of the CAC Act
- there are 8 other directors who are present at the meeting who can be counted as making up a quorum.

74. **Subclause 21(3)** provides for at least one director nominated by the CDF to be present when the Board is considering a matter that relates only to the military

schemes. The purpose of this subclause is to protect the interests of members of the military schemes where the Board is considering an issue that relates only to the military schemes.

75. The reference to a matter that relates ‘only to the military schemes’ is intended to limit the requirement as appropriate, so as not to create practical difficulties for the operation of the Board.

76. The type of matter that would relate only to the military schemes could include where CSC makes a decision or exercises a power or discretion under the military scheme legislation on issues such as the payment of military death and disability benefits. It would also include instances where CSC is considering whether there is an issue with the governing rules of the military schemes that may need to be raised with the Defence Minister for further consideration.

77. However, matters concerned with the management and investment of scheme funds by CSC, including money constituting the MSB Fund, would not typically relate only to the military schemes and would therefore not be subject to the additional quorum requirements. Similarly, where the matter concerns administrative practices that are applicable to both the civilian and military schemes, the matter would typically not be taken to relate only to the military schemes.

78. **Subclause 21(4)** provides that where there is a doubt about whether a matter being considered, or about to be considered, by the Board relates only to the military schemes, the Chair is required to determine whether or not the matter relates only to the military schemes.

79. **Subclause 21(5)** clarifies that a determination by the Chair is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003* because it is administrative in character. It does not determine or alter the content of the law. This provision is included to assist readers and is merely declaratory in nature.

Clause 22 – Disclosure of interests to the Board

80. **Subclause 22(1)** clarifies that the provision applies to actions taken by the Board relating to CSC’s function of managing and investing superannuation fund money.

81. The combined effect of **subclauses 22(2) and 22(3)** is that a director with a financial or other form of interest in a matter that is being, or about to be, considered by the Board, must disclose the nature of that interest at a Board meeting as soon as possible after the director has become aware of the issue. Under **subclause 22(4)**, the disclosure is required to be noted in the minutes of the meeting.

82. **Subclause 22(5)** prevents the director from being present when the Board is considering the matter and from being involved in a Board decision on the matter, unless the Minister or the Board make a determination allowing this to occur.

83. **Subclause 22(6)** prevents the director from being present when the Board is considering making a determination under subsection 22(5), and from being involved in making such a determination.

84. Where there has been a determination by the Minister or where the Board makes a determination, **subclause 22(7)** requires this to be recorded in the minutes of the meeting.

Clause 23 – Voting at meetings

85. **Clause 23** specifies the number of directors that must agree at a board meeting in order for a decision to be made.

86. Where the circumstances in subclause 21(2) apply to allow 8 board members to constitute a quorum, the number required to agree is 8. That is, where:

- a quorum is no longer present because a director is not able to participate in the consideration of a matter due to him or her disclosing an interest in that matter for the purposes of section 22 of this Act or section 27J of the CAC Act

and

- there are 8 other directors who are present at the meeting who can be counted as making up a quorum.

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

Clause 24 – Decisions without meetings

88. **Clause 24** provides flexibility for the Board to make decisions “out of session”. However, this flexibility is subject to the Board first determining in writing that it may make decisions without a meeting and setting out the way in which directors are to indicate agreement with proposed decisions.

89. **Subclause 24(1)** provides that a decision is to be treated as having been made at a meeting if:

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

90. This subclause also places a strict obligation to inform all directors, including directors nominated by the CDF, of the proposed decision where it relates only to the military schemes. This will allow for directors who have been nominated by the CDF to participate in the decision-making process.

91. **Subclause 24(2)** provides that subclause 24(1) only applies if the Board has made a written determination that enables it to make decisions without meetings and specifies the way in which the directors are to indicate agreement.

92. Under **subclause 24(3)** the 9 directors required to indicate agreement to a proposed decision cannot include a director who is prevented from participating due to him or her having an interest in the matter under subsection 22(5) of this Act, or section 27J of the CAC Act.

Clause 25 – Minutes of meetings

93. **Clause 25** requires the Board to keep minutes of its meetings.

Division 3—Staff of CSC

Clause 26 – Staff of CSC

94. **Clause 26** enables CSC to employ whatever staff it considers necessary to perform its functions. Staff of CSC are to be engaged on the terms and conditions set out in a written determination of the Board.

Clause 27 – Consultants

95. **Clause 27** enables CSC to engage consultants to assist it to perform its functions.

Part 3—Finance and reporting requirements

Division 1—Provisions relating to finance

Clause 28 – Banking

96. **Clause 28** requires CSC to deposit all money that it receives in respect of each of the superannuation funds it administers, into a bank account which is maintained by CSC.

Clause 29 – Accounting records

97. **Subclause 29(1)** requires CSC to keep appropriate accounts and records of transactions and affairs of each of the superannuation funds that it administers. The accounts and records must be consistent with the accounting principles typically applied in commercial practice.

98. **Subclause 29(2)** requires CSC to take reasonable steps to ensure that all payments from the superannuation funds that it administers are correct and properly authorised, and that there is adequate control over the assets of these superannuation funds and its acquisition of liabilities in relation to these superannuation funds.

99. **Subclause 29(3)** provides that a director commits an offence if they are responsible for a breach of, or fail to take reasonable steps to comply with, a requirement set out in this section.

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

Division 2—Reporting requirements

Clause 30 – Annual report and financial statements

101. **Subclause 30(1)** requires CSC to provide an annual report, and financial statements in relation to its management of each of the superannuation funds that it administers, to the Minister as soon as practical after the end of the 2011-12 financial year and each subsequent financial year. Note, however, that subclause 30(1) allows regulations to prescribe a date by which CSC must provide the annual report and financial statements to the Minister. It is not intended, however, that a date would be prescribed that is more than the six month period provided for under the

Acts Interpretation Act. Rather, the regulations would allow flexibility for an earlier date to be prescribed.

102. Under paragraph 30(1)(c) the annual report is to address the performance of CSC's functions in relation to each superannuation scheme and superannuation fund administered by it during the year. The exceptions to this are the 1922 scheme, DFRB, DFRDB, DFSPB and PNG because there is no superannuation fund in relation to these schemes. For these schemes, the annual report is to address the general administration of the relevant enabling Act.

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

104. **Subclause 30(2)** prescribes the Acts for which CSC must provide a report on general administration. As noted above, these are the enabling Acts for the 1922 scheme, DFRB, DFRDB, and PNG.

105. Under **subclause 30(3)** CSC must provide the financial statements to the Auditor-General before giving them to the Minister. The Auditor-General is required to audit and report to the Minister on:

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

106. **Subclause 30(4)** requires the Minister to arrange for a copy of CSC's annual report and financial statements and the Auditor-General's report on CSC's financial statements, to be tabled in the House of Representatives and the Senate. Tabling must occur no more than 15 sitting days after receiving whichever of those documents was last received by the Minister.

107. **Subclause 30(5)** requires CSC to give the Minister an interim annual report and interim financial statements in the event that it has not provided an annual report within six months after the end of a financial year. This is to occur within 14 days after the end of the six month period. The matters to be addressed in the interim annual report and interim financial statements are largely the same as for annual reports and financial statements respectively. However, in this case, there is no requirement to report on the general administration of the enabling Acts for the 1922 scheme, DFRB, DFRDB, DFSPB and PNG.

108. Under **subclause 30(6)**, interim financial statements are to be in a form agreed between the Minister and the Board and do not have to be accompanied by a report from the Auditor-General.

109. Under **subclause 30(7)** the tabling requirements for interim annual reports and interim financial statements are similar to those for annual reports set out in subclause 30(4). The subclause includes an additional requirement for the Minister to make the interim report and interim financial statements available to the public.

110. **Subclause 30(8)** clarifies that an interim annual report is not a legislative instrument within the meaning of the Legislative Instruments Act because it is administrative in character. It does not determine or alter the content of the law. This provision is included to assist readers and is merely declaratory in nature.

Part 4—Miscellaneous

Division 1—Application of other laws

Clause 31 – Trustee Act of ACT to apply

111. **Clause 31** provides it is the *Trustee Act 1925* in the jurisdiction of the Australian Capital Territory that applies to directors when they are performing functions or exercising their powers under a governing deed, to the extent that it is not inconsistent with Commonwealth law.

Clause 32 – Exemption from taxation—CSC

112. **Subclause 32(1)** provides for exemptions from certain Commonwealth and State and Territory taxes to apply to CSC. In particular, CSC is exempt from:

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

113. **Subclause 32(2)** enables regulations to be made which reduce the scope of the CSC tax exemption, by specifying that it is subject to tax under a particular law.

Clause 33 – Exemption from taxation—superannuation schemes and superannuation funds administered by CSC

114. **Clause 33** concerns tax exemptions in relation to the superannuation schemes and funds administered by CSC.

115. **Subclause 33(1)** provides that exemptions from certain Commonwealth and State and Territory taxes apply to CSC when it is performing functions and exercising powers in relation to the superannuation schemes and the superannuation funds that it administers, and to the superannuation funds. The exemption is slightly different to that provided to CSC under clause 32, and relates to:

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

116. **Subclause 33(2)** enables regulations to be made which reduce the scope of the tax exemption provided in subclause 33(1), by specifying that CSC and the superannuation funds are subject to tax under a particular law.

117. **Subclause 33(3)** enables the regulations to specify that different superannuation funds are subject to tax under different laws. In this event, the tax exemptions that apply to the superannuation funds would not be the same.

118. **Subclause 33(4)** enables the regulations to modify the section, as it relates to the PSSAP or the PSSAP Fund, or to specify that that the section ceases to have effect in relation to the PSSAP or the PSSAP Fund at a specific time. This regulation-making power gives flexibility to allow the PSSAP to in future operate on the same basis as other similar superannuation schemes in relation to taxation.

Division 2—Provisions relating to the Board

Clause 34 – Source of funds for paying remuneration and allowances

119. **Clause 34** sets out the source from which the Chair and other directors of CSC are paid remuneration and allowances.

120. Under **subclause 34(1)**, the Chair is paid out of the superannuation fund in respect of which he or she is performing functions, consistent with the Chair's independent status. However, when performing functions in relation to the 1922 scheme, DFRB, DFRDB, DFSPB or PNG, the Chair is paid from the Consolidated Revenue Fund (CRF) because these schemes do not have a superannuation fund.

121. **Subclause 34(2)** provides that other directors of CSC, when performing functions in relation to a superannuation fund, are to be paid out of the relevant superannuation fund, or the CRF or partly from each source, in line with the requirement in the relevant Superannuation Act.

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

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

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

125. **Subclause 34(3)** enables the regulations to modify or cease the operation of the section as it applies to the PSSAP and the PSSAP Fund. This provision gives flexibility to allow the PSSAP to operate on the same basis as other similar superannuation schemes in relation to the source of funds for paying the remuneration and allowances of directors.

Clause 35 – Indemnification of directors etc.

126. **Subclause 35(1)** provides a personal immunity to directors and delegates of the Board. It prevents a director or a delegate of the Board from being personally subjected to any action, liability, claim or demand for anything that he or she has done, or not done, in good faith in performing his or her functions under this Act, an Act administered by CSC or a governing deed.

127. **Subclause 35(2)** clarifies that subsection 35(1) does not preclude CSC from being subject to any action, liability, claim or demand.

128. **Subclause 35(3)** provides that, if money is payable by CSC in respect of an action, liability, claim or demand that relates to an Act that it administers, regulations made under such an Act or a governing deed, the payment is, unless precluded by the *Superannuation Industry (Supervision) Act 1993* or regulations, to be made out of:

- the CRF in the case of the 1922 scheme, DFRB, DFRDB, DFSPB and PNG, which do not have a superannuation fund
- the relevant superannuation fund in any other case.

129. Under **subclause 35(4)**, an amount paid out of a superannuation fund under subclause 35(3) is reimbursed to the superannuation fund from the CRF.

130. **Subclause 35(5)** enables the regulations to modify or cease the operation of the section as it applies to the PSSAP governing legislation. This provision gives flexibility to allow the PSSAP to operate on the same basis as other similar superannuation schemes in relation to indemnities.

Division 3—Miscellaneous

Clause 36 – Delegation by CSC

131. **Subclause 36(1)** details the range of persons to whom CSC may delegate all or any of its powers under an Act administered by it, or regulations made under such an Act. These persons include, among others, a director, a member of staff of CSC, the CEO of ComSuper, and a member of the staff assisting the CEO of ComSuper. It also allows CSC to delegate powers to a committee made up of two or more such persons, including the Defence Force Case Assessment Panel established under Clause 100, Schedule 1, of the Consequential Amendments and Transitional Provisions Bill 2011.

132. **Subclause 36(2)** deals with the delegation of CSC's power to reconsider its own decisions or decisions made by its delegates. It provides that, despite the broad delegation power in subsection 36(1), decisions taken by CSC and its delegates in relation to the DFRB, DFRDB, PNG, 1922 scheme and CSS may only be reconsidered by the committees listed in the table. This is consistent with the arrangements applying to the other schemes – the MSB, PSS and PSSAP – which contain a similar provision in their Trust Deed.

133. **Subclauses 36(3) to 36(7)** set out the arrangements for the sub-delegation of CSC powers.

134. The effect of **subclauses 36(3) to 36(5)** is that delegates (other than committees) may sub-delegate, in writing, the powers that have been delegated to them, to a subset of the other persons referred to in subclause 36(1). The subset of persons to whom a sub-delegation may be made varies, depending on whether the delegate is a director, the CEO of ComSuper or another person mentioned in subclause 36(1).

135. Under **subclauses 36(6) and 36(7)**, the Acts Interpretation Act applies to and in relation to a sub-delegation as if it were a delegation.

Clause 37 – Review of operation of Act

136. **Clause 37** requires the Minister to initiate a review of the first five years of the operation of this Act. The Minister must consult with the Defence Minister, prior to commencement of the review, on the terms of reference for the review. A written report of the review must be provided to the Minister within 6 months after the end of the 5 year period. The Minister is required to table a copy of the report in that House of Parliament no more than 15 sitting days of the House after receiving the report.

Clause 38 – Regulations

137. **Subclause 38(1)** provides that the Governor-General may make regulations covering matters required to be prescribed in this Act, or matters that it would be convenient to prescribe for the purposes of this Act.

138. **Subclause 38(2)** enables the regulations to prescribe a number of other directors that is different to the 10 specified in paragraph 11(1)(b). In this event, **subclause 38(3)** requires further regulations to be made adjusting, in accordance with the proportions in the Act, the numbers of directors that may be nominated by the President of the ACTU and the CDF, and the quorum and voting requirements.

139. **Subclause 38(4)** allows the regulations to prescribe a different time period after which CSC must provide an interim report and interim financial statements to the Minister under subclause 30(5). However, the regulations are not able to extend the six month period referred to in that subclause.