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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SUPERANNUATION AMENDMENT BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Finance,
Senator the Hon Peter Walsh)

SUPERANNUATION AMENDMENT BILL 1988

OUTLINE

The aim of the Bill is to change the supervisory mechanisms that apply to the provision of superannuation benefits to Commonwealth sector employees.

Currently, Section 167A of the Superannuation Act 1976 requires the written approval of the Minister for Finance to be obtained before superannuation benefits can be provided to statutory office-holders, employees of statutory authorities and employees of certain Commonwealth owned or funded bodies. The Minister's approval is also required to the details of any superannuation schemes that provide benefits to such persons.

The Bill introduces a further supervisory mechanism whereby the Minister may issue guidelines in relation to the provision of superannuation benefits to Commonwealth sector employees.

More specifically, the Bill will repeal the current Section 167A and replace it with a new Part XA comprised of four sections:

Section 153AA - contains definitions and a number of interpretative provisions;

Section 153AB - sets out the circumstances in which superannuation benefits can be provided together with specifying the effect of providing benefits contrary to either the Minister's approval or approved guidelines;

Section 153AC - allows the Minister to set guidelines for the provision of superannuation benefits to certain Commonwealth employees. Employers will have complete freedom to operate within set guidelines. Only proposals outside the guidelines will require the Minister's specific approval; and

Section 153AD - contains provisions for dealing with contraventions of the Part.

The Bill also contains a consequential amendment to the Superannuation Benefit (Interim Arrangements) Act 1988.

FINANCIAL IMPACT STATEMENT

There are no direct financial effects resulting from this Bill. However, to the extent that these amendments facilitate improvements in the rate of return of Government Business Enterprises (GBEs), there should be increases in revenue to the Government in the form of increased dividends. It is not possible to quantify the amount of any increased dividends.

NOTES ON CLAUSES

Clause 1 - Short title and Principal Act

1. Provides for the Act to be referred to as the Superannuation Amendment Act 1988 and specifies that in the remainder of the Act the Superannuation Act 1976 is referred to as the Principal Act.

Clause 2 - Commencement

2. The amendments made by the Bill will come into effect upon Royal Assent.

Clause 3 - Commissioner for Superannuation

3. This clause excludes the proposed Part XA from the administrative responsibility of the Commissioner for Superannuation, who administers most of the Principal Act. Part XA will be administered by the Minister for Finance.

Clause 4 - Part XA Superannuation under other laws

4. This clause inserts a new Part containing four sections, Sections 153AA to 153AD, into the Principal Act to replace the existing Section 167A, which is repealed by Clause 5.

Section 153AA Interpretation

5. Section 153AA regulates the meaning of various terms and words used in the Part.

6. Subsection (1) contains definitions of terms used in the Part.

7. Subsection (2) provides that a reference in the Part to a person being employed includes a reference to a person holding an appointment or office under a law or in a body. This simplifies the language of the remainder of the Part as well as ensuring that the Part applies to statutory office-holders.

8. Subsection (3), to remove any doubt, provides that a director of a company or corporation shall be taken to be an employee of that company or corporation.

9. Subsection (4) seeks to remove any possible ambiguity as to who is an employer for the purposes of the new Part by providing that the Minister may declare that the person holding or occupying a particular office or appointment is to be taken to be the employer of specified persons. Upon publication in the Gazette the person so declared shall be taken to be the employer for the

purposes of the Part. The provision will be used, for example, where a statutory office-holder, who legally may have no "employer" is covered by Section 153AC. In this case, the Minister responsible for the relevant Act could be declared as the office-holder's employer. This subsection does not require the Minister to make a declaration for every employer. Where an employer is identifiable the provision will only apply if the Minister decides to specify the holder of an office or appointment to be the employer. For example, the chief executive of a company could be declared as the employer of the company's staff, as opposed to the company itself.

Section 153AB Restrictions upon the Provision of Superannuation

10. Section 153AB restricts the circumstances in which superannuation benefits can be provided to persons employed or appointed within the broad Commonwealth sector. In particular, the Section gives to the Minister the exclusive power to prospectively permit the provision of superannuation to persons, except in the special circumstance where a law of the Commonwealth or the Australian Capital Territory under which a person is employed specifically refers to the provision of superannuation.

11. Subsection (1) provides that superannuation benefits can only be provided to persons employed under a "relevant law" (that is, all laws of the Commonwealth and the Australian Capital Territory) in one of three circumstances:

- (a) those benefits are provided in accordance with guidelines or approvals determined under Section 153AC;
- (b) the relevant law under which the person is employed or another relevant law that applies to the person contains provisions expressly providing for the benefits; or
- (c) there is sufficient authority in the law under which the person is employed or another law that applies to the person to allow the benefits to be provided (for example, the law contains a power to set terms and conditions of employment) and the Minister approves the provision of those benefits.

12. The Minister's approval under the subsection can only be prospective. Any retrospective approvals must be made under Section 153AD. The subsection does not give the Minister an independent power to provide superannuation benefits, it merely allows an existing power to be used.

13. Subsection (2) provides that superannuation benefits can only be provided to persons employed by a "relevant body" (a Commonwealth owned company or a Commonwealth

funded body that is either an "approved authority" for the purposes of the Principal Act, that is, some of its staff are contributors to the superannuation scheme established by the Principal Act, or is declared by the Minister to be a "relevant body") in one of three circumstances:

- (a) the provision of benefits is permitted under subsection (1);
- (b) the benefits are provided in accordance with guidelines or approvals determined under Section 153AC; or
- (c) the body has the power to provide benefits and the Minister has approved the provision of those benefits.

14. Subsection (3) provides that where the provision of benefits is allowed under subsections (1) and (2), those benefits may be provided either under a superannuation scheme that will provide benefits only to people employed under the relevant law or by the relevant body in question or under a scheme which will also apply to other people. For example, a Commonwealth employer could participate in a superannuation scheme covering all employees in a particular industry.

15. Subsection (4) provides that where the Minister approves the provision of superannuation benefits under paragraphs (1)(c) and (2)(c) a superannuation scheme, or a subsequent amendment to a scheme, that is to provide those benefits has no force or effect unless it is also approved by the Minister. This means that the Minister's approval is required both for the provision of benefits and for a scheme that is to deliver those benefits. The provision relating to amendments requiring approval does not apply to schemes which will also provide benefits to persons who are not Commonwealth sector employees.

16. Subsection (5) provides that where superannuation benefits are provided in accordance with guidelines approved by the Minister under Section 153AC, a superannuation scheme, or a subsequent amendment to a scheme, that is inconsistent with the guidelines is of no force or effect to the extent of the inconsistency. In addition, this subsection provides that a superannuation scheme that also provides benefits to persons who are not Commonwealth sector employees or a subsequent amendment to such a scheme which is contrary to the guidelines is, to the extent of inconsistency, of no force or effect in its application to the Commonwealth sector employees to which it applies.

17. Subsection (6) makes provision for the case where a superannuation scheme has been established contrary to subsections (1), (2), (4) or (5). Where superannuation benefits are purportedly provided without the approval of the Minister under subsections (1), (2), (4) or (5) a superannuation scheme intended to deliver those benefits has no force or effect.

18. Subsection (7) provides that subsections (1) or (10), both of which prevent the provision of superannuation benefits, do not apply to schemes that were in existence on 23 April 1978, the date of effect of the original Section 167A.

19. Subsection (8) provides that subsections (2) or (10), both of which prevent the provision of superannuation benefits, do not apply to a superannuation scheme established by a relevant body before it became a relevant body.

20. Subsection (9) provides that while a scheme that only applies to Commonwealth sector employees covered by subsection (7) or (8) does not require the Minister's approval, an amendment to such a scheme made after the Part comes into effect does.

21. Subsection (10) expands upon the meaning of the term "no force or effect" used in subsections (4), (5), (6) and (9). The subsection provides that superannuation benefits are not to be provided under a scheme, or an amendment to a scheme, that has no force or effect because of those subsections. This subsection is intended to be inclusive rather than exhaustive on the meaning of "no force or effect".

21. Subsection (11) limits the effect of subsection (5) by providing that where, under subsection 153AC(4), the Minister gives special approval to an aspect of a superannuation scheme which would otherwise be contrary to guidelines issued under Section 153AC, that aspect will, for the purposes of subsection (5), not be taken to be inconsistent with the guidelines and will, therefore, have force and effect.

Section 153AC Provision of Superannuation in Accordance with Ministerial Guidelines

22. This section allows for the provision of superannuation benefits in accordance with guidelines approved by the Minister. Superannuation benefits may be provided in accordance with approved guidelines without further reference to the Minister. Subsection 153AB(5) provides that where benefits are provided outside the guidelines a superannuation scheme or a subsequent amendment to a scheme which purports to provide those benefits has no force or effect to the extent that it is

inconsistent with the guidelines or approvals given under Section 153AC. Where an employer seeks to provide benefits outside existing guidelines, the Minister may, either:

- (a) alter the guidelines;
- (b) give a special approval under subsection 153AC(4); or
- (c) require the proposal to be dealt with under Section 153AB.

23. Subsection (1) allows the provision of superannuation benefits to persons employed under an "applicable law". This will include employees of statutory authorities as well as individual statutory office-holders. An "applicable law" is a law of the Commonwealth or the Australian Capital Territory that is declared by the Minister in the Gazette to be an "applicable law". Accordingly, the guidelines will only apply to persons employed under specified laws. Benefits may be provided under the applicable law in question or under terms and conditions of employment determined under any other law, but must be in accordance with guidelines determined under subsection (3). Where no guidelines are in place, no benefits may be provided. If the Minister, under subsection (4), approves an aspect of the provision of superannuation benefits for persons employed under an applicable law which is not in accordance with the guidelines then the employer of those persons must comply with the Minister's approval in respect of that aspect and with the guidelines in all other respects.

24. Subsection (2) allows the provision of superannuation benefits to persons employed by an "eligible body". The Minister may declare a "relevant body" (a Commonwealth owned or funded body, including wholly-owned companies) to be an "eligible body" for the purposes of the Part by a notice published in the Gazette. Accordingly, the guidelines will only apply to the employees of certain specified bodies. Eligible bodies may provide superannuation benefits for their employees provided those benefits are in accordance with guidelines determined by the Minister under subsection 3. Where no guidelines are in place, no benefits may be provided. If the Minister, under subsection (4), approves an aspect of the provision of superannuation benefits for employees of an eligible body which is not in accordance with the guidelines then the eligible body must comply with the Minister's approval in respect of that aspect and with the guidelines in all other respects.

25. Subsection (3) allows the Minister to determine guidelines for the provision of superannuation benefits for the purposes of subsections (1) and (2). These guidelines may be made both for particular eligible bodies or applicable laws or for specified persons employed under an applicable law or by an eligible body, as the case may be. The Minister is required by this subsection to serve a copy of the guidelines on the employer of the persons to whom the guidelines are to apply, either personally or by post, as soon as practicable after the guidelines have been determined.

26. Subsection (4) allows the Minister to approve an aspect of the provision of superannuation benefits which, if it were to be implemented, would be inconsistent with the guidelines determined by the Minister. This provides a mechanism for prospective approvals by the Minister of aspects which would otherwise be contraventions of the guidelines and thereby void under Section 153AD.

27. Subsection (5) requires that any guidelines determined by the Minister under subsection (3) and any approval by the Minister under subsection (4) must be consistent with regulations made under the Occupational Superannuation Standards Act 1987. This will ensure that the tax concessions available to a superannuation scheme cannot be jeopardized by compliance with any valid Ministerial guidelines.

28. Subsection (6) makes provision for the transmission of a copy of the guidelines to an employer by any electronic means whatsoever. This includes, for example, transmission by way of a facsimile machine or telex message. This subsection does not remove the requirement, imposed by subsection (3), for the Minister to serve a copy of the guidelines upon an employer. It will, however, give to the Minister the ability to deal with urgent requests for approval of guidelines.

29. Subsection (7) makes provision for the guidelines taking force. It envisages two possibilities. If a copy of the guidelines has been communicated to the employer in accordance with subsection (6) then, unless a later date is specified, the guidelines will come into force on the day on which they are communicated. Alternatively, if subsection (6) does not apply, then the guidelines come into force on the day they are served on the employer (within the meaning given to that term by the Acts Interpretation Act 1901), or on a later day if the guidelines so provide. The subsection also provides that guidelines are "disallowable instruments" for the purposes of Section 46A of the Acts Interpretation Act 1901. Accordingly, guidelines must be tabled in both Houses of Parliament and are subject to disallowance by either House.

30. Subsection (8) provides that guidelines determined by the Minister may relate to any matter connected with the provision of superannuation benefits or the administration of a superannuation scheme for the provision of those benefits. Guidelines may, in particular, limit who can contribute to or benefit from a particular superannuation scheme.

Section 153AD Effect of Contravention of Section 153AB or 153AC

31. Section 153AD contains provisions for dealing with contraventions of the other sections of the Part. In particular, the section gives to the Minister a range of powers to validate contraventions and to insist upon the recovery of monies paid outside the Minister's various approvals.

32. Subsection (1) makes any contravention of Section 153AB void to the extent of that contravention. A reference in the subsection to acts done includes failure to take action and omitting to act. Void in this subsection has its full legal meaning. Because of the construction of Sections 153AB and 153AC, an act that contravenes Section 153AC also contravenes Section 153AB and is, therefore, void by virtue of the operation of this subsection. Whether a particular act constitutes a contravention is a matter of fact to be determined in each circumstance. Disputes could, however, in the last instance, be settled in a court of competent jurisdiction.

33. Subsection (2) provides that where the Minister has approved a superannuation scheme for the provision of superannuation benefits under Section 153AB any act done in relation to the provision of those benefits which contravenes the terms and conditions of the scheme as so approved will be void to the extent of contravention.

34. Subsection (3) provides that where the operation of subsections (1) or (2) makes the payment of money by a person or body to another person or body void then that money is recoverable as a debt due to the person or body who paid it. This subsection avoids the possibility of monies being made non-recoverable by reason of the fact that their payment was an act which was made void by the provisions of subsections (1) or (2). The subsection gives the Minister the power to declare, by writing, that the subsection does not apply, in which case monies paid will remain the property of the person who has received them and, in the case of monies held on trust, will allow the intended beneficiaries to eventually receive their benefits. The subsection also allows the Minister to direct an employer who paid money made recoverable by

the subsection to take action to recover it. Upon being given notice in writing by the Minister the employer shall take action to recover any monies which have been paid. If an employer acted to recover from a trustee any monies wrongfully paid to a beneficiary then, by reliance upon the provisions of this subsection, the trustee could, in turn, institute proceedings to recover those monies from the beneficiary. The Minister cannot, however, direct trustees to recover monies.

35. Subsection (4) allows the Minister to validate superannuation schemes or amendments to superannuation schemes that only apply to Commonwealth sector employees which would otherwise be void by virtue of subsection (1) or (2). Where the Minister makes a declaration under this subsection, a scheme or an amendment of a scheme, together with all or any actions associated with the operation or establishment of the scheme, or the operation or making of the amendment, which would otherwise have no force or effect will have the same force and effect as if the scheme or amendment had been properly made in accordance with Section 153AB or 153AC. The Minister can only make such a declaration after having regard to the consequences upon those persons receiving or likely to receive benefits under the scheme or amendment. This subsection also allows the Minister to make his declaration conditional upon the employer taking such action as, in the Minister's opinion, will most effectively either:

- (a) modify the scheme's or amendment's operation so that its effect will be more in line with the operation which would have resulted if the scheme had been established in accordance with the requirements of Part XA; or
- (b) if such modifications cannot be made, restrict the scheme's operation.

If the Minister declines to take action under this subsection, then, by virtue of subsections (1) or (2), the scheme or amendment in question will continue to be void and the only action that can be taken under the scheme is the recovery of monies under subsection (3).

36. Subsection (5) allows the Minister to validate superannuation schemes or amendments to superannuation schemes that include persons who are not Commonwealth sector employees which would otherwise be void in their application to those persons by virtue of subsection (1) or (2). Where the Minister makes a declaration under this subsection a scheme or an amendment of a scheme together with all or any actions associated with the operation or

establishment of the scheme, or the operation or making of the amendment, which would otherwise have no force or effect in its application to the Commonwealth employees who are covered by the scheme in question will have the same force and effect in its application to those employees as if the scheme or amendment had been properly made in accordance with Section 153AC. The Minister can only make such a declaration after having regard to the consequences upon those persons receiving or likely to receive benefits from the scheme or amendment. This subsection also allows the Minister to make his declaration conditional upon the employer taking such action as, in the Minister's opinion, will most effectively either:

- (a) modify the scheme's or amendment's operation so that its effect in its application to the Commonwealth sector employees to whom it applies will be more in line with the operation which would have resulted if the scheme had been established in accordance with the requirements of Part XA; or
- (b) if such modifications cannot be made to the scheme, restrict the scheme's operation in its application to the Commonwealth sector employees to whom it applies.

37. Subsection (6) requires that the Minister must cause copies of determinations made by the Minister under subsection (4) or (5) to be given to the employer concerned and also to be laid before each House of Parliament within 5 sitting days of that House after the determination has been made.

38. Subsection (7) provides for the disallowance by either House of the Parliament of a determination made by the Minister under either subsection (4) or (5). Disallowance is affected by the passing of a resolution in pursuance of a motion upon notice disallowing the determination within 5 sitting days of that House after a copy of the determination was laid before it.

39. Subsection (8) provides that a determination shall be taken to have been disallowed when a motion upon notice is given to disallow a determination and at the expiration of the period for disallowance, the motion has not been defeated, withdrawn or otherwise disposed of by the House in question.

40. Subsection (9) provides that, unless a determination is disallowed in accordance with subsection (7) or (8), the determination shall take effect on the day immediately following the last day on which a resolution disallowing the determination could have been passed, unless the determination is expressed to be conditional upon the employer taking specified action within a specified time. If the determination is conditional, it shall take effect

on the day which the Minister, by notice in writing given to the employer, declares himself or herself to be satisfied that the specified action has been taken. This must be a day after the last day for disallowance.

41. Subsection (10) provides for the circumstance in which the House of Representatives is dissolved or expires or the Parliament is prorogued before the provisions of subsections (7), (8) or (9) have been completed. In such a circumstance, the copy of the determination shall be taken to have been laid before each House on the first sitting day of that House after the dissolution, expiry or prorogation, as the case may be, and subsections (7), (8) and (9) will then apply accordingly.

42. Subsection (11) expands upon the meaning of the term "provision of superannuation benefits" by making it clear that a reference in this section to the provision of superannuation benefits includes any action done in relation to the establishment or administration of a superannuation scheme for the provision of those benefits and will include the receipt by any person of contributions under the scheme.

Clause 5 - Repeal of Section 167A of the Principal Act

43. This clause provides for the repeal of Section 167A and consequential transitional arrangements.

44. Subsection (1) repeals Section 167A of the Principal Act.

45. Subsection (2) continues in force after the repeal of Section 167A those approvals and declarations of the Minister which were in force immediately before the repeal of that Section as if they were approvals under the corresponding provisions of Section 153AB.

Clause 6 - Consequential amendment of Superannuation Benefit (Interim Arrangement) Act 1988.

46. This clause amends the Superannuation Benefit (Interim Arrangement) Act 1988 by omitting from subsection 3(6), "Section 167A" and substituting "Part XA".

