4. Regulation under the Corporations Law

Introduction

Scope of chapter

4.1. This chapter traverses the existing regulation imposed on superannuation schemes by the Corporations Law. Later chapters deal with the way other laws, such as the *Life Insurance Act 1945* (Cth) and *OSSA*, regulate superannuation, and draw out the differences and gaps between them. This chapter discusses the principles underlying the Corporations Law controls, and the details of controls imposed on investments, prospectuses, dealers and fund-raising activity.

Overview

4.2. The Corporations Law does not apply to all superannuation schemes. Nor does it regulate those to which it does apply in a uniform way. Depending upon the nature and structure of the particular superannuation scheme, all or only some of the following provisions may apply:

- Pt 7.3: licensing of dealers and investment advisers
- Pt 7.11: conduct in relation to securities
- Pt 7.12 Div 2: prospectuses
- Pt 7.12 Div 5: prescribed interests
- general provisions governing public management companies and any incorporated trustees.

Pt 7.3 prohibits persons from carrying on a securities or investment advice business except with a statutory licence; Pt 7.11 imposes civil and criminal liability for breach of the prospectus provisions; Pt 7.12 Div 2 prohibits any offer or invitation to subscribe for or buy securities except under a prospectus and Pt 7.12 Div 5 places similar restrictions on prescribed interests.

Corporations Law principles

4.3. Before the Corporations Law, the view was that, in most cases, offers or invitations to contribute to superannuation schemes or ADFs, or for these schemes to subscribe for units in PSTs, did not constitute offers or invitations 'to the public.' The prospectus and prescribed interest requirements in the now superseded Companies Act and Codes, which only regulated 'offers to the public', therefore had only limited application. Under the Corporations Law, regulation is no longer based on the concept of 'offer to the public'. Instead, s 1065 provides that no person shall 'issue, offer for subscription or purchase or issue invitations to subscribe for or buy any prescribed interest', except in compliance with the Pt 7.12 Div 5 (prescribed interests). A 'prescribed interest' is defined to include a 'participation interest'. Superannuation schemes, ADFs and PSTs fall within the definition of 'participation interests' and thus are prescribed interests, unless the exceptions for life insurance policies apply.[1] Prescribed interests are 'securities' and an offer or invitation to subscribe for or acquire securities can only be made pursuant to a prospectus.[2] The statutory requirements concerning prospectuses and prescribed interests, and other provisions in Pt 7 regulating securities, therefore apply to these superannuation arrangements. In all cases these requirements are subject to specific exceptions, either statutory or because of the exercise of the ASC's discretionary powers.

Schemes outside the Corporations Law

4.4. Superannuation schemes in which the rights of scheme members constitute an 'interest in, or arising out of, a policy of life insurance' are excluded from the definition of 'participation interest', and consequently from the definition of 'prescribed interest', in s 9.[3] They fall outside the ambit of the Corporations Law and are regulated principally under the *Life Insurance Act 1945* (Cth) and OSSA.[4]

Schemes subject to the Corporations Law

Investments in superannuation funds and ADFs

4.5. The prospectus and prescribed interest provisions in the Corporations Law Pt 7.12 apply to offers or invitations to contribute to superannuation schemes and ADFs, except those excluded under the Corporations Law[5] and those that the ASC exempts as a matter of discretion. The main categories that are excluded are offers or invitations by

1. Superannuation schemes, ADFs and PSTs involve investment arrangements that constitute 'investment contracts' as defined in s 9, or otherwise fall within para (a)-(c) of the definition of 'participation interests' and, consequently, 'prescribed interests' in s 9.
2. Corporations Law s 1018, s 92 apply to 'securities of a corporation'. 'Corporation' is defined in s 9 to include any body corporate. Section 92(4) provides that 'a provision of Pt 7.12 that applies in relation to securities of a body corporate also applies in relation to prescribed interests made available by a person or body other than a body corporate'.
3. For what is 'a policy of life insurance', see, eg, *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694; *Cutten & Harvey v Sun Alliance Life Assurance Ltd* (1986) 4 ANZ Insurance Cases 60-742.
4. See further ch 5.
5. s 66.

- public sector or foreign superannuation funds
- superannuation funds operated by or on behalf of an employer, a group of employers or a trade union (that is, employer sponsored and industry schemes)
- superannuation funds or ADFs of not more than 10 members, and not promoted by or on behalf of a person whose business includes the promotion of similar funds.[6]

The ASC has a general power under s 1084 to exempt or limit the obligations of compliance with the prospectus and prescribed interest requirements. It has rejected applications for exemption from the prospectus provisions in relation to some superannuation schemes, such as schemes for self employed persons and employer sponsored superannuation schemes containing 'unsupported' members.[7] However the ASC has provided for extended life prospectuses in these cases.[8]

Investment of superannuation funds or ADFs in PSTs

4.6. Offers to superannuation funds or ADFs to invest in PSTs fall within the prospectus requirements. The main exemptions that are relevant to investment invitations by PSTs to superannuation schemes and ADFs are

- offers to invest amounts in excess of $500 000[9]
- offers to trustees of public sector or foreign superannuation schemes, that is, those constituted by or under a law of the Commonwealth or of a State, Territory or foreign country[10]
- offers to trustees of superannuation schemes or ADFs that have net assets, or control an amount, of not less than $10 million.[11]

Under the Corporations Law s 1084, the ASC has relieved PSTs from the prospectus requirements in respect of offers to existing investors, only if the relevant offer, if accepted, would result in the investor holding at least $500 000 worth of units in the trust and the offer is not capable of being accepted in

6. Corporations Regulations reg 7.12.05, 7.12.06.
7. ASC Policy Statement 12 (November 1991).
8. ASC Policy Statement 18 (March 1992) para 45, 50.
9. Corporations Law 66(2)(a); s 66(3)(a)(ba). Each amount payable must be of $500 000 or more for the exemption to apply; it does not suffice that an account balance exceeds $500 000: see also Corporations Regulations reg 7.12.06 (b).
10. Corporations Regulations reg 7.12.05(a)(iv), 7.12.06(a)(iv).
11. Corporations Regulations reg 7.12.05(a)(v),(e), 7.12.06(a)(v), (j).

respect of part only of the units offered.[12] In other circumstances, the ASC has declined to grant a total exemption for offers by PSTs.[13] Instead, it has modified the prospectus requirements for PSTs to

- relieve PSTs of the requirement to register, but not to lodge, prospectuses[14]
- allow multi-document prospectuses, incorporation by reference in rollover prospectuses and use of half-yearly and annual reports as prospectuses.[15]

Prospectus requirements

4.7. Non-exempt superannuation schemes are subject to the prospectus requirements in the Corporations Law Pt 7.12 Div 2, as modified for prescribed interest schemes.[16] They are also subject to the restrictions in s 1078 on securities hawking. A particularly significant power is that enabling the ASC to issue stop orders to prevent the further distribution of prospectuses that contravene the statutory requirements or are false or misleading. Extensive liability and recovery provisions are found in Pt 7.11 Div 2 and 4.[17]

Prescribed interest requirements

4.8. Pt 7.12 Div 5 regulates the internal structure of non-exempt superannuation schemes. It requires the division of functions between a trustee and a management company.[18] The trustee retains custody of the assets of the scheme while the management company makes the investment decisions and is usually responsible for the day to day administration of the scheme. The trustee must be approved by the ASC. The management company must be a public corporation and be licensed as a securities dealer. The trust is to be governed by a deed

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12. ASC Instrument 761/91; see also ASC Policy Statement 18 para 12(i).
13. The reasons are set out in the ASC Report on the Public Hearing on Pooled Superannuation Trusts: *ASC Digest* 1992 vol 2 PH 25-30.
14. ASC Instrument 760/91; see also ASC Policy Statement 18 para 21.
15. ASC Instrument 760/91; see also ASC Policy Statement 18 para 35(b); para 37.
16. Corporations Regulations reg 7.12.12. However, the ASC will permit some modifications to the Pt 7.12 prospectus requirements for superannuation savings plans to allow for extended life prospectuses: ASC Policy Statement 18 (March 1992) para 45; 50.
17. s 1033.
18. The Review's recommendation 8.1, that a single responsible entity be appointed for each superannuation scheme, is a fundamental departure from the requirement for a separate trustee and management company for applicable superannuation schemes. However, 'the ASC experience has suggested that a regulatory regime which requires the appointment of both a manager and a supervisory trustee leads to uncertainty in the division of responsibilities, a duplication of functions, unnecessary costs and ineffective supervision': ASC *Submission* March 1992.

approved by the ASC.[19] There are extensive statutory covenants implied into these deeds. The ability of the trustee to limit its liability for breach of trust is restricted.[20] The trustee and management company are also restricted in the exercise of their functions and powers.[21] The ASC may give an exemption from some of these statutory covenants.[22] Subscription contracts may be rescinded where contraventions have taken place and proceedings may also be brought for breach of the statutory covenants.[23]

General Corporations Law

Introduction

4.9. Independently of the prospectus and prescribed interest requirements, the activities of various persons involved in the promotion or administration of superannuation funds are subject to regulation under the Corporations Law. They are controlled by licensing requirements and by prohibitions on misleading or deceptive conduct.

Licensing requirements

4.10. ***Dealers.*** The Corporations Law Pt 7.3 regulates participants in the securities industry, including trustees and management companies of superannuation schemes, and any external advisers. A person may not carry on a business of dealing in securities[24] unless the person holds a dealers licence or is an exempt dealer.[25] Under Pt 7.3 Div 3, representatives of dealers must hold a proper authority from their licensed principal. Pt 7.5 deals with the accounts that must be kept by the holder of a dealers licence, and with how they must be audited; Pt 7.6 regulates the manner in which licensed dealers are to manage money received; while Pt 7.7 requires licensees to maintain a register of their interests. Trustees of a superannuation scheme who deal in securities only in relation to the management and administration of that scheme are exempt from the licensing and consequential requirements of these provisions.[26] The manager of a prescribed interest scheme must hold a dealers licence. In addition, a

19. s 1065, 1066 1067(1)(2).
20. s 1076.
21. s 1069; Corporations Regulations reg 7.12.15. For instance, s 1069(1)(a), s 1069(1)(e)(i) and Corporations Regulations reg 7.12.15(1)(f) impose proper performance obligations on the manager and trustee in the exercise of their functions and powers, while s 1069(1)(g) imposes an absolute prohibition on investments in the trustee, the manager or an associate of either of them.
22. s 1069(3).
23. s 1073.
24. See s 9 "deal"; s 93 "securities business".
25. s 780-1.
26. Corporations Regulations reg 7.3.13(1).

person who, as part of a business, recommends to potential contributors that they subscribe to a superannuation scheme that is a prescribed interest scheme, is dealing in securities and accordingly also must hold a dealers licence.[27] The ASC may impose conditions on the licence[28] and require the licensee, at any time, to provide information to it.[29] This is in addition to the statutory reporting requirements.[30] The ASC's powers to suspend or revoke a licence, and impose banning orders, are found in Pt 7.3 Div 5.

4.11. *Investment advisers.* Any person who carries on a business of providing advice on securities must be licensed under s 781. The requirement applies to persons providing securities advice to superannuation funds, whether or not they are constituted as prescribed interests, and to persons giving securities advice to potential contributors.[31] Representatives of investment advisers must hold an appropriate authority. Investment advisers are subject to the licensing requirements in Pt 7.3 and the 'know your client' and disclosure of benefits rules in Pt 7.4 Div 3. The ASC may suspend or revoke a licence, and impose banning orders; these powers are found in Pt 7.3 Div 5.

4.12. *Misleading or deceptive conduct.* All superannuation schemes, whether or not exempt from the prospectus and prescribed interest requirements, are subject to s 995. This section, which is based on *Trade Practices Act 1974* (Cth) s 52, imposes a general prohibition on misleading or deceptive conduct in relation to any dealing in securities or any prospectus issued, or notice published, in relation to securities. In this context the term 'prospectus' may cover a wide range of promotional material issued in respect of superannuation funds.[32] Contravention of the provision imposes a civil liability but does not constitute a criminal offence.[33] Losses suffered in consequence of breach may be recovered against any person involved in the contravention.[34]

False or misleading statements

4.13. *False or misleading statements in prospectuses.* Superannuation schemes that are required to register or lodge a prospectus with the ASC are subject to the prohibition in s 996 on prospectuses containing material statements that are

27. The criteria for granting a licence are set out in s 783-4.
28. s 786.
29. s 788.
30. s 787, 790, 791.
31. For the definition of 'securities' see s 92; for the definition of 'investment advice business' see s 77.
32. "Prospectus" is defined in s 9 as a written notice or other instrument inviting applications or offers to subscribe for or buy the securities or offering the securities for subscription or purchase.
33. s 995(3). See generally ASC Practice Note 12: Offerings of Securities for Subscription or Purchase — Regulation of Conduct (July 1991) para 2.1 - 2.10.
34. ibid para 4; and see Corporations Law s 79 (involvement in contraventions).

false or misleading, or that contain material omissions. The section imposes criminal liability on all persons who 'authorise or cause' the issue of the prospectus, subject to stipulated defences.[35] The section does not apply to excluded offers or invitations, that is, superannuation schemes exempt from the prospectus and prescribed interest requirements.

4.14. *Misleading representations concerning future matters.* Section 765, which is based on *Trade Practices Act 1974* (Cth) s 51A, amplifies s 995 and s 996 by providing that, where a person makes a representation with respect to any future matter, and the person does not have reasonable grounds for making the representation, this shall be taken to be misleading. An onus rests on the defendant to show that he or she had such reasonable grounds.

Other provisions

4.15. Management companies and incorporated trustees of superannuation schemes are subject to the general provisions of the Corporations Law governing these bodies and their officers. For instance, directors of these companies are required to comply with applicable statutory obligations, including the fiduciary duties in s 232, while directors of corporate trustees have further potential liabilities under s 233. The ASC has extensive investigative and enforcement powers under the Corporations Law and the ASC Act in respect of these companies and their officers.

35. ibid para 3.1-3.6.