



# Update

## Superannuation & Funds Management

June 2010

### Removal of Trustees' right against self incrimination in disqualification proceedings

The *Financial Sector Legislation Amendment (Prudential Refinements and Other Measures) Bill 2010* (the **Bill**) was introduced to Parliament on 26 May 2010. The Bill's objective is to improve APRA's ability to regulate bodies in the financial sector.

The Bill includes proposed amendments to the *Superannuation Industry (Supervision) Act 1993* (**SIS**) including an amendment to ensure that the common law privilege against self incrimination cannot be relied on in disqualification proceedings. It also includes protection for auditors and other changes. The amendments are due to commence 28 days after the Bill receives Royal Assent.

#### DISQUALIFICATION

The Bill proposes amendments to Division 3 of Part 15 of SIS by adding a new Section 126L. Division 3 deals with disqualified persons. This amendment is in response to the High Court decision of *Rich v Australian Securities and Investments Commission* [2004] HCA 42 which overturned the view that disqualification proceedings were protective and not penal in nature. On the basis that the proceedings were penal the defendant was entitled to rely on the common law privilege against self-incrimination. Amendments have been made to the *Corporations Act*<sup>1</sup> and the Trade Practices Act to overcome the potential implications of the High Court's decision, but amendments were not made to the laws administered by APRA. The Bill includes similar changes to the Banking Act, Insurance Act and the Life Insurance Act.

The rationale behind this amendment is expressed in the Explanatory Memorandum to the Bill as follows:

*"Persons subject to disqualification proceedings under these Acts are in a position of considerable responsibility with respect to the assets of others and the stability of Australia's financial system. It would not be desirable, for example, if such a person was able through the relevant privilege to retain their position with a financial institution in circumstances where they are in fact not a fit and proper person to do so."*<sup>2</sup>

The new section 126L in SIS if passed will apply to disqualification of trustees, responsible officers, investment managers and custodians by the Regulator or the Court<sup>3</sup>. It also applies to disqualification by the Court of an approved auditor or actuary.<sup>4</sup>

The Bill provides that in the case of a proceeding under SIS for disqualification a person is not entitled to refuse or fail to comply with a requirement to:

- (a) answer a question or give information;
- (b) produce "books" (defined in SIS as including any record, accounts or accounting records regardless of how it is compiled, recorded or stored, or a document<sup>5</sup>); or
- (c) do any other act,

on the basis that compliance may make the person liable to a penalty by way of a disqualification. This section applies regardless of whether the person is a defendant or a party to the proceeding.

Existing statutory rights to the privilege against self incrimination in SIS do not apply to proceedings for disqualification.<sup>6</sup> The penalty for failure to comply with this new section includes forfeiture.

1. Section 1349 was added to the Corporations Act to ensure the privilege of self incrimination could not be relied on in proceedings where a disqualification, banning, suspension or cancellation order, or a declaration to that effect is being sought. The amendment took effect on 31 December 2007

2. Paragraph 3.7, page 28 of the Explanatory Memorandum to the Bill

3. Sections 126A and 126H of SIS

4. Section 130 D of SIS

5. Section 10(1) SIS

6. The new Section 126L(4) confirms sections 130B(2), 287(3), 290(2) and 336F(2) of SIS do not apply to disqualification under Sections 126A, 126H or 130D of SIS.

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## PROTECTION FOR AUDITORS

The Bill inserts new sections in Part 16 of SIS which impose the following new obligations and prohibitions:

### (a) Obligations of Auditors

If an auditor becomes aware of circumstances that amount to:

- an attempt to unduly influence, coerce, manipulate or mislead the auditor or a member of the audit team conducting an audit of a superannuation fund; or
- an attempt by any person to otherwise interfere with the proper conduct of the audit;

the auditor must notify the Regulator in writing as soon as practicable, but in any case within 28 days of becoming aware of those circumstances.<sup>7</sup>

The auditor is given no discretion. If he or she fails to comply they commit an offence and are liable to a **penalty of imprisonment for 12 months or 50 penalty units or both.**

All that is required is an attempt. Therefore the obligation applies even where there has been no undue influence, coercion, manipulation, interference or misleading of an auditor.

### (b) Offence for giving false or misleading information to an auditor

A trustee, responsible officer or employee of a superannuation fund who gives information, or allows it to be given, to an auditor of the fund:

- concerning the superannuation fund; and
- knows the information is false or misleading in a material particular; or
- is misleading by omission in a material respect,

commits an offence and is subject to a **penalty of 5 years in prison or 200 penalty units or both.**<sup>8</sup>

Where the person gives false or misleading information as above without taking reasonable steps to ensure it is not false or misleading in a material respect or misleading by omission they also commit an offence even though they did not know the information was false or misleading. **The penalty is imprisonment for 2 years or 100 penalty units or both.**<sup>9</sup>

### (c) Determining whether information is false and misleading

Where the information is given to the auditor in response to a question he or she has asked, the information and the question must be considered together to determine if the information is false or misleading.<sup>10</sup>

These changes if passed will bring SIS into line with similar provisions under the *Corporations Act 2001*.<sup>11</sup>

## OTHER CHANGES

The other changes to SIS include:

### (a) Investigations during wind-up

The Bill will clarify APRA's right to commence or continue an investigation after a trustee enters external administration or becomes insolvent under external administration.<sup>12</sup> This will be achieved via an amendment to Section 263.

### (b) Accounting Records

Currently Section 35A of SIS requires accounting records to be kept in Australia. The proposed amendment requires records to be kept in Australia, unless written approval is given by the Regulator to keep records in another country.<sup>13</sup>

The definition of "reviewable decision"<sup>14</sup> is amended to include a decision by the Regulator to refuse approval under the new section 35A(2)(b) or to give such an approval subject to conditions under subsection 35A(2A).

7. New Section 130BA of SIS  
8. New section 130BB(1) of SIS  
9. New section 130BB(2) of SIS  
10. New section 130BB(3) of SIS

11. Sections 311 and 1309 of the Corporations Act 2001  
12. New Section 263(3) of SIS  
13. New Section 35A(2)(b) of SIS  
14. Section 10(1) of SIS

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### POTENTIAL IMPACT ON SUPERANNUATION FUNDS

#### (a) Auditors

While the amendments provide protection for auditors who are subject to inappropriate behaviour by trustees, the sanctions imposed on auditors for failing to report the behaviour appear harsh given that the auditor in these circumstances is the victim of improper behaviour and the obligation to report applies regardless of the outcome of that behaviour. However, the amendments bring SIS into line with other legislation and reflect the importance of maintaining the independence and integrity of auditors of superannuation funds.

#### (b) Trustees and their responsible officers and employees

The penalties for provision of misleading information to an auditor are particularly harsh given that they can apply not just where the person has intentionally misled but also where he or she has failed to take reasonable steps to ensure the information is correct. The test of reasonableness will presumably not be met where there has been negligent and/or reckless behaviour.

As this applies not only to trustees but to responsible officers and employees it will be essential for trustees to be aware of these changes if they become law, and that they in turn take steps to ensure that their responsible officers and employees are also aware of their obligations and the penalties that apply.

In addition the removal of the right to the privilege against self-incrimination, regardless of whether the person is a defendant or a party to disqualification proceedings, means they may be subjected to investigations by APRA without the protection currently available under common law.

The changes reflect the Government's intention to enhance APRA's investigative powers, and if enacted will send a strong message to those who fail to meet the standards it sets.

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