



Superannuation Industry (Supervision) Act 1993

EXPLANATORY MEMORANDUM

ACCOMPANYING

MODIFICATION DECLARATION No 25

PURPOSE OF DECLARATION

1. The purpose of Modification Declaration Number 25 is to allow an associate of an employer-sponsor to be an “independent trustee”, subject to conditions.

BACKGROUND

2. Part 9 of the *Superannuation Industry (Supervision) Act 1993* (the “Act”), which contains sections 86 to 93A, sets out rules about equal representation of employers and members in relation to the management and control of standard employer-sponsored funds.
3. Paragraphs 92(3)(a) and 93(3)(a) of the Act stipulate that, if the funds to which the section applies are public offer superannuation funds, those funds must have an “independent trustee”, which is defined in section 10 of the Act to mean, inter alia, a trustee who is neither an “employer-sponsor” of the fund nor an “associate” of such an employer-sponsor.
4. An “employer-sponsor” is defined in section 16(1) of the Act to be an employer who contributes to the fund (or who would, apart from a temporary cessation of contributions, contribute to the fund) for the benefit of a member of the fund who is an employee of the employer or an associate of the employer.
5. Section 12 of the Act defines “associate” by reference to the *Corporations Act 2001*. Briefly, an associate of a person is someone who is in partnership with the person, or who is a trustee of a trust under which the person benefits, or who is a director of a company of which the person is also a director, or who acts or proposes to act with or is or proposes to be associated with the person in respect of a particular matter to which the statutory provision in which reference is made to “associate” relates.
6. The purpose of paragraphs 92(3)(a) and 93(3)(a) is to promote trustee independence. However, these requirements also have a somewhat harsh effect in that they preclude the employees of a professional trustee, or of a subsidiary or holding company of the professional trustee, or of a company

associated with the professional trustee in some other way, from joining a public offer fund operated by the professional trustee.

7. Section 93A of the Act was inserted in 1995 to give some relief from these strict independence requirements. It operates to allow a trustee who is an employer-sponsor of a fund to still be an independent trustee, provided certain conditions are met. These conditions are that the number of members in the fund employed by either the trustee or associates of the trustee must not exceed 10 per cent of the total number of fund members, and the value of accrued benefits of those members must not exceed 10 per cent of the total assets of the fund.

EXPLANATION AND EFFECT OF DECLARATION

8. Modification Declaration Number 25 modifies section 93A of the Act to extend the relief provided by section 93A to an associate of an employer-sponsor.
9. The Australian Prudential Regulation Authority (“APRA”) believes that just as an across-the-board prohibition on employees of professional trustees from being members of public offer superannuation funds operated by the professional trustee restricts the freedom of choice of the employees and is not in their interest, so to does the prohibition on employees of associates of the professional trustee. APRA is of the view that such employees can join public offer funds of which an associate of their employer is the trustee while still maintaining the effective independence of the trustee from both the employer-sponsors (taken as a group) and the members (taken as a group).
10. By extending the reach of section 93A to associates of employer-sponsors, employees will not have to join a public offer fund operated by competitors of their employer, nor will the employer sponsor, or its associates, be required to establish separate non-public offer funds for their employees when they already operate a suitable public offer fund.
11. The effect of this declaration is that an associate that is a trustee can now be considered an “independent trustee” if:
 - (a) the trustee together with any employer-sponsors of the fund who are associates of the trustee are not employer-sponsors of more than the allowable percentage of the members of the fund; and
 - (b) the value of the accrued benefits of those members of the fund who have as an employer-sponsor either the trustee or an associate of the trustee is not more than the allowable percentage of the value of the assets of the fund; and
 - (c) the trustee satisfies the requirements in paragraphs (a), (c), (d) and (e) of the definition of *independent trustee* in section 10.
8. Subsections 93A(2) to (6) will operate in respect of associates of employer-sponsors

COMMENCEMENT OF THE DECLARATION

9. The declaration is taken to have commenced to have effect on 1 July 2002.