

**AUSTRALIAN PRUDENTIAL  
REGULATION AUTHORITY**

**SUPERANNUATION CIRCULAR  
NO. II.D.2**

**LENDING AND PROVISION OF  
FINANCIAL ASSISTANCE TO  
MEMBERS OF SUPERANNUATION  
ENTITIES**

**SEPTEMBER 1998**

## **DISCLAIMER AND COPYRIGHT NOTICE**

1. The purpose of this Circular is to provide general guidance on issues arising out of legislation administered by the Australian Prudential Regulation Authority ('APRA'). It is not exhaustive in its coverage of rights or obligations under any law.
2. This Circular is based on APRA's interpretation of the relevant legislation and has no legal status or legal effect whatsoever.
3. This Circular may be affected by changes to legislation. APRA accepts no responsibility for the accuracy, completeness or currency of the material included in this Circular.
4. Users of this Circular are encouraged to obtain professional advice on the relevant legislation and to exercise their own skill and care in relation to any material contained in this Circular.
5. APRA disclaims any and all liability or responsibility for any loss or damages arising out of any use of, or reliance on, this Circular.
6. This Circular is copyright. You may use and reproduce this material in an unaltered form only for your personal, non-commercial use or use within your organisation. Apart from any use permitted under the *Copyright Act 1968*, all other rights are reserved. Requests for other types of use should be directed to APRA.

## **IMPENDING CHANGES**

The 1998 Budget and the Assistant Treasurer's press release of 28 May 1998 foreshadowed changes covering the transfer of the responsibility for the regulation for certain small funds (currently known as excluded superannuation funds) to the Australian Taxation Office and the tightening of existing investment rules covering all superannuation funds.

These impending changes may impact on the information contained in this Circular and trustees should seek current information on the arrangements and how they apply to each entity's circumstances.

# Contents

# Paragraph

Objective	1
Introduction	3
Lending to members of regulated superannuation funds	5
Lending to members of approved deposit funds	13
Lending to unit holders of pooled superannuation funds	16
Provision of financial assistance to members of regulated superannuation funds	19
Provision of financial assistance to members of ADFs	23
Provision of financial assistance to unit holders of PSTs	26
Contraventions of the lending and financial assistance restrictions	28
Penalties	31

# Objective

1. The aim of this Circular is to provide general guidance on the rules under the *Superannuation (Industry) Supervision Act 1993* (“SIS”) relating to lending and financial assistance to members of regulated superannuation funds and approved deposit funds, and to unit-holders of pooled superannuation trusts by the trustee or investment managers of these superannuation entities.
2. This Circular replaces and updates Superannuation Circular II.D.2. entitled “Lending and Provision of Financial Assistance to Members and Unit-Holders” which was released by the former Insurance and Superannuation Commission in October 1994.

# Introduction

3. Trustees of superannuation entities are, generally, free to make properly considered investment decisions consistent with the sound and productive management of assets for the benefit of members or beneficiaries. However, SIS prohibits or limits investment practices that are inconsistent with retirement income policy objectives. Trustees who breach these provisions are exposed to significant penalties.
4. The investment restrictions help protect and enhance the retirement benefits of members by limiting the exposure of these benefits to unnecessary risk. The lending and financial assistance restrictions stop the circumvention of the SIS preservation rules by preventing early access to fund or trust benefits. The retirement income objective which characterises superannuation could also be compromised if superannuation entities were allowed to operate as sources of finance for beneficiaries in their pre-retirement years.

# Lending to members of regulated superannuation funds

## *Section 65*

5. Section 65 of SIS prohibits trustees or investment managers of regulated superannuation funds from lending fund moneys to a member or a relative of a member.
6. A “relative” of a member has the same meaning as in the *Income Tax Assessment Act 1936* (“ITAA”). A “relative” of a member is the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent or

adopted child of the member, or of the member's spouse; the spouse of the member; or the spouse of any of those relations.

7. The exception to this rule is that private sector funds (as defined in section 10 of SIS) established before 16 December 1985 may lend money to members (but not to members' relatives) if:

- the trustee had, as at 16 December 1985, an express power to lend money to members; or
- the trustee, prior to 16 December 1985, lent money to members and the governing rules did not expressly prohibit that lending.

8. This exception also applies to public sector funds (as defined in section 10 of SIS) established before 25 May 1988.

9. Notwithstanding this exception, such loans are still required to comply with other investment related provisions of SIS. These include those provisions requiring all investments to be on an arm's length basis (i.e. commercial terms) and undertaken as part of a properly formulated, documented and implemented investment strategy for the fund.

10. Section 65 also ensures that the scope of this exception cannot be widened by any amendment to the fund's governing rules. Specifically this provision provides that where:

- the trustee had, at the beginning of the fund's 1994-95 year of income (i.e. at the commencement of SIS), a power under the governing rules of the fund to lend money to members; and
- that power existed prior to the respective dates (as detailed in paragraphs 7 and 8);

then any amendment to the governing rules varying that power to lend to members is void, unless the variation is to limit or remove the power. In other words, section 65 does not permit the fund to expand the power to lend money to members.

11. For example, if the governing rules of a private sector fund as at 16 December 1985 allowed the trustees to lend money to a member up to 50% of the value of the member's balance, any amendment to extend that ability to lend beyond the 50% limit would be void.

12. The prohibition in section 65 applies to both the trustee and any investment manager of a regulated superannuation fund. However, the overall responsibility to comply rests with the trustee of a fund and the trustee must monitor the activities of any investment manager. This should include placing a restriction on lending to members in the contractual service agreement and through the reporting arrangements the trustee imposes on the investment manager.

## **Lending to members of approved deposit funds**

*Regulation 4.13(2)(a) and 4.13(3)(a)*

13. Regulation 4.13(2)(a) of SIS prohibits trustees of approved deposit funds (“ADFs”) from lending money to a member or a relative of a member of the fund. “Relative” is defined in the same way as for regulated superannuation funds as detailed in paragraph 6.

14. Regulation 4.13(3)(a) of SIS requires that trustees must also take all reasonable steps to monitor the actions of any investment manager to ensure that the investment manager does not lend money of the fund to a member or a relative of a member. Examples of reasonable steps include those detailed in paragraph 12.

15. There are no exceptions to the lending restriction applicable to ADFs.

## **Lending to unit holders of pooled superannuation trusts**

*Section 98(a)*

16. Section 98(a) of SIS prohibits trustees or investment managers of pooled superannuation trusts (“PSTs”) from lending trust moneys to unit-holders or other beneficiaries of the trust.

17. The comments in paragraph 12 relating to the trustee’s general responsibilities to monitor any investment manager also apply to this restriction.

18. There are no exceptions to the lending restriction applicable to PSTs.

## **Provision of financial assistance to members of regulated superannuation funds**

### *Section 65(1)(b)*

19. Section 65(1)(b) of SIS prohibits trustees and investment managers of regulated superannuation funds from giving members, or relatives of members, financial assistance using the resources of the fund.

20. The information in paragraph 12 relating to the trustee's general responsibility to monitor any investment manager applies to this restriction.

21. "Financial assistance" is not defined in SIS. The term arguably covers any assistance that improves the financial position of a person other than by a loan. This would be likely to include entering into agreements to provide actual or potential financial assistance to a member using the resources of the fund, for example, providing guarantees against trust property for the private loans of members, or charging fund assets for the benefit of members.

22. Examples which do not constitute financial assistance include:

- An arrangement where a regulated superannuation fund invests on commercial terms (such as buying units, shares or bonds) in a non-associated entity (such as a unit trust or company) and that entity, in its own right and from its own resources, makes loans to members of the superannuation fund.
- The payment of benefits under the ancillary purpose (such as for welfare or temporary incapacity benefits) provisions of section 62 of SIS, provided they are paid in a manner consistent with the payment standards prescribed under SIS. (Further discussion about the payments standards applying to regulated superannuation funds is contained in Superannuation Circular I.C.2 entitled "Payments Standards for Regulated Superannuation Funds").

## **Provision of financial assistance to members of ADFs**

### *Regulation 4.13(2)(b) and 4.13(3)(b)*

23. Regulation 4.13(2)(b) of SIS prohibits trustees of ADFs from giving financial assistance to members or relatives of members using any of the resources of the fund.

24. Regulation 4.13(3)(b) of SIS requires trustees to take all reasonable steps to monitor the actions of investment managers to ensure that any investment manager does not provide financial assistance to a member or a relative of the member using the resources of the fund. Again, this responsibility should be reflected in contractual service agreements with investment managers and in related reporting arrangements as outlined in paragraph 12.

25. Information in paragraphs 21 to 22 relating to the meaning of “financial assistance” has similar relevance to ADFs.

## **Provision of financial assistance to unit holders of PSTs**

### *Section 98(b)*

26. Section 98(b) of SIS prohibits the trustee or investment manager of a PST from giving financial assistance to a unit-holder or the beneficiary of a trust using the resources of the trust.

27. Information in paragraph 12 regarding monitoring, and in paragraphs 21 to 22 regarding the meaning of “financial assistance”, has similar relevance to PSTs.

## **Contraventions of the lending and financial assistance restrictions**

28. A contravention of the lending and financial assistance restrictions of SIS occurs in the year of income in which the financial assistance was provided or the loan was actually made.

29. A fund may be made non-complying under SIS in the year the loan was made or financial assistance was provided. The maintenance of the loan or financial assistance through subsequent years is not (of itself) a ground for non-compliance in these subsequent years.

30. The re-negotiation or top-up of an existing loan is a new contravention in the year of income it is effected.

## **Penalties**

31. Significant civil and/or criminal penalties may apply to trustees and investment managers contravening the lending and financial assistance restrictions.

32. In deciding the nature of the penalties that APRA might seek in relation to a contravention, APRA will have regard to the way in which the superannuation entity has met the requirements of SIS generally, and the steps taken subsequently to unwind or otherwise rectify the transaction that gave rise to the contravention.