

First State Superannuation Legislation Amendment (Conversion) Bill 2005

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

(a) to amend the *Superannuation Administration Act 1996* to enable the FSS Trustee Corporation (**FTC**) established by that Act to become a proprietary company limited by shares under the *Corporations Act 2001* of the Commonwealth, and

(b) to amend the *First State Superannuation Act 1992* and the *Superannuation Administration Act 1996* to enable the First State Superannuation Scheme to become a superannuation scheme regulated under Commonwealth legislation, and

(c) to amend the First State Superannuation Trust Deed to enable the Deed to be varied in order for the First State Superannuation Scheme to meet the requirements for regulation under Commonwealth legislation, and

(d) to make consequential amendments to certain Acts and regulations.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of provisions of the proposed Act (other than Schedules 1 and 4 and other amendments to uncommenced provisions) on a day or days to be appointed by proclamation. Schedules 1 and 4 are to commence on the date of assent to the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts and regulations set out in Schedules 2 and 3.

Clause 5 repeals a savings and transitional regulation as a result of amendments made by the proposed Act.

Clause 6 is a formal provision that gives effect to the amendment to the First State Superannuation Trust Deed set out in Schedule 4.

Schedule 1 Amendment of Acts to convert FTC into proprietary company

Schedule 1.1 replaces the definition of **FTC** in the *First State Superannuation Act 1992* with a new definition that will reflect the new status of FTC as a proprietary company limited by shares under the *Corporations Act 2001* of the Commonwealth (the **Corporations Act**) on its registration as such.

Schedule 1.2 [1] inserts section 128C in the *Superannuation Administration Act 1996*, which gives effect to Schedule 2A.

Schedule 1.2 [2] inserts Schedule 2A in the *Superannuation Administration Act 1996*, which makes provision for the conversion of FTC into a proprietary company limited by shares under the Corporations Act. The Schedule contains the following provisions:

Part 1 General

Clause 1 defines certain words and expressions used in the Schedule. In particular, it defines the following words and expressions:

Corporations legislation is defined to mean the Corporations legislation to which Part 1.1A of the Corporations Act applies. Section 5D of the Corporations Act provides that Part 1.1A of that Act applies to the following Commonwealth legislation:

(a) the Corporations Act (including regulations made under that Act),

(b) Part 3 of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth (and regulations made under that Act for the purposes of that Part).

FTC is defined to mean the FSS Trustee Corporation as originally established by the *Superannuation Administration Act 1996*.

transition period is defined to mean the period commencing at the beginning of the day on which FTC is registered as a proprietary company under the Corporations Act and ending at the end of the day that is the third anniversary of that day.

Part 2 Overview of corporate conversion of FTC

Clause 2 contains a summary of the steps involved under the Schedule to convert FTC into a proprietary company limited by shares under the Corporations Act.

Part 3 Registration of FTC as proprietary company under Corporations Act

Division 1 Corporate conversion of FTC

Clause 3 provides that FTC is a deemed registration company for the purposes of section 5H of the Corporations Act and that, for the purposes of that section:

(a) the day on which FTC is to be taken to be registered as a company is the day specified in a registration order made under clause 4 (the **registration day**), and

(b) the type of company that FTC is to be registered as is a proprietary company limited by shares, and

(c) the company's proposed name is "FSS Trustee Corporation".

Section 5H of the Corporations Act provides that a body is taken to be registered under that Act as a company of a particular type under section 118 of that Act if a law of a State or Territory to which that Act applies provides that the body is a deemed registration company for the purposes of the section and specifies the registration day, the type of company the body is to be registered as under the Act and the company's proposed name.

Clause 4 enables the Minister, by order published in the Gazette, to specify a registration day (being the day on which FTC is taken to be registered as a proprietary company limited by shares for the purposes of section 5H of the Corporations Act).

The Minister may make such an order only if the Minister is satisfied that:

(a) the FTC Board has approved a constitution for registered FTC in accordance with the provisions of Part 3 of Schedule 2A, and

(b) the FTC Board has approved persons to be members of registered FTC and the shares to be issued to those persons in accordance with the provisions of Part 3 of Schedule 2A, and

(c) FTC has complied with section 5H (2) of the Corporations Act.

Division 2 Procedural preconditions to corporate conversion of FTC

Clause 5 enables the FTC Board to approve, by resolution of the Board, a constitution for FTC to take effect on its registration as a proprietary company (**registered FTC**).

Clause 6 enables the FTC Board to approve, by resolutions of the Board:

(a) the number and classes of shares that are to be issued in respect of registered FTC on its registration as a proprietary company limited by shares under the Corporations Act, and

(b) the persons to whom the shares are to be issued, and

(c) the amounts that are payable for shares to be issued in registered FTC and whether or not the amounts must be paid in full by the registration day.

Clause 7 authorises the FTC Board to cause a notice referred to in section 5H (2) of the Corporations Act to be lodged with ASIC before the registration day if:

(a) the Board has approved a constitution for registered FTC in accordance with the provisions of Part 3 of Schedule 2A, and

(b) the Board has approved the issue of shares in registered FTC in accordance with the provisions of Part 3 of Schedule 2A, and

(c) the Minister has consented in writing to the lodgment of the notice.

Part 4 Provisions consequent on corporate conversion of FTC

Clause 8 provides that registered FTC is taken for all purposes, including the rules of private international law, to be a continuation of, and the same legal entity, as FTC. In particular, it provides that the registration of FTC as a proprietary company limited by shares under the Corporations Act does not:

(a) create a new legal entity, or

(b) affect FTC's existing assets, rights or liabilities (except as against the members of FTC in their capacity as members), or

(c) render defective any legal proceedings by or against FTC or its members, or

(d) affect the employment, or entitlements as an employee, of a person who was a member of staff of FTC immediately before the registration day.

The provisions of this clause are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of the Corporations legislation generally. Section 5G of the Corporations Act provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

Clause 9 authorises registered FTC to use the name "FSS Trustee Corporation" as its corporate name without the words "Pty Limited" being included in that name.

The provisions of the clause are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of Part 2B.6 of that Act, which would otherwise require registered FTC to use the words "Pty Limited" as part of its name. Section 5G (6) of the Corporations Act provides that the provisions of Part 2B.6 and Part 5B.3 of that Act (which relate to the use of names) do not:

(a) prohibit a company or other body from using a name if the use of the name is expressly provided for, or authorised by, a provision of a law of a State or Territory, or

(b) require a company or other body to use a word as part of its name if the company or body is expressly authorised not to use that word by a provision of a law of a State or Territory.

Clause 10 provides that any alteration to the constitution of registered FTC during the transition period with respect to the number, manner of appointment or manner of removal of directors of the company does not have effect unless the Minister consents in writing to the alteration.

The provisions of the clause are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of the Corporations legislation generally. Section 5G (10) of the Corporations Act provides that if a provision of a law of a State or Territory provides that additional requirements must be met for an alteration of a company's constitution to take effect, the alteration does not take effect unless those requirements are met.

Clause 11 provides that the provisions of the *Public Finance and Audit Act 1983* (the **Audit Act**) cease to apply in relation to registered FTC on the registration day, except as provided by the clause. The clause continues to apply certain provisions of the Audit Act so as to enable the Auditor-General to conduct performance audits and particular audits under that Act on the First State Superannuation Fund during the financial years in which the transition period occurs. The clause also enables the Auditor-General to carry out auditing functions for FTC, if engaged to do so at any

time.

The provisions of this clause are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of the Corporations legislation generally. Section 5G of the Corporations Act provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

Clause 12 provides that immediately before the registration day:

- (a) FTC ceases to be a statutory body representing the Crown, and
- (b) the FTC Board is dissolved and each member (including any acting member) of the Board ceases to hold office as such, and
- (c) the chief executive officer (or an acting chief executive officer) of FTC ceases to hold office and the provisions of the *Public Sector Employment and Management Act 2002* cease to apply to his or her employment.

The clause also provides that the provisions of Part 2 of the *Superannuation Administration Act 1996* (with certain exceptions) cease to apply in relation to registered FTC on the registration day. These provisions will be repealed on the commencement of Schedule 2 to the proposed Act.

Schedule 2 Amendment of Acts relating to conversion of First State Superannuation Scheme
Effect of Schedule

The amendments made by Schedule 2 are consequent on the conversion of the First State Superannuation Scheme from an exempt public sector superannuation scheme under the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth (the **Commonwealth superannuation Act**) to a regulated superannuation fund under that Act. The First State Superannuation Scheme is currently constituted under the *First State Superannuation Act 1992*, which regulates the persons who may be members of the scheme (public sector employees and some associated persons) and provides for the constitution and administration of the First State Superannuation Fund and other matters relating to benefits under the scheme. The scheme is currently exempted from the requirement to comply with the regulatory regime under the Commonwealth superannuation Act, although the scheme generally complies with its requirements (as required under an agreement between the State and the Commonwealth). The trustee of the scheme is the FSS Trustee Corporation, a statutory corporation established under the *Superannuation Administration Act 1996*. As discussed above, Schedule 1 provides for the conversion of the trustee to a proprietary company under the Corporations Act. Schedule 2 amends the *First State Superannuation Act 1992* to remove provisions regulating the First State Superannuation Scheme and the *Superannuation Administration Act 1996* to remove provisions relating to the constitution, functions and duties of the FSS Trustee Corporation.

The amendments to Schedule 2 will commence when the FSS Trustee Corporation is registered as a proprietary company limited by shares and the First State Superannuation Fund becomes a regulated superannuation fund under the Commonwealth superannuation Act. From that time the First State Superannuation Fund will be regulated by Commonwealth law rather than State law and will be subject to the same requirements and regulation as non-public sector superannuation funds.

The provisions in the *First State Superannuation Act 1992* which require payment by public sector employers of a mandatory superannuation contribution (currently 9% of salary or wages within the meaning of that Act) are to be retained, with the First State Superannuation Fund being the default scheme for payment of the contribution

(if no other complying superannuation fund, complying approved deposit fund or retirement savings account is nominated).

Amendment of First State Superannuation Act 1992

Schedule 2.1 [1] amends the long title to the *First State Superannuation Act 1992* (the *Principal Act*) to reflect the fact that the Act will no longer establish a public sector superannuation scheme.

Schedule 2.1 [2] removes a note that is no longer relevant.

Schedule 2.1 [3]–[9] amend section 3A of the Principal Act, which defines **salary or wages**, to reflect that the Principal Act will now apply to specified employees rather than members of the First State Superannuation Scheme.

Schedule 2.1 [11] omits Parts 2–5A of the Principal Act (these Parts relate to membership of the First State Superannuation Scheme, contributions to the Scheme, the trust deed for the Scheme, death and incapacity benefits for firefighters and the transfer of certain members and benefits to the Scheme). All of these provisions, to the extent that they are still relevant and are not re-enacted, will be dealt with by the trust deed and rules of the Scheme after its conversion to a regulated superannuation fund.

Proposed Part 2 is inserted, containing provisions setting out the obligation of employers to whom the Principal Act applies to make compulsory employer superannuation contributions for their employees.

Proposed section 6 specifies the employers to whom the obligation will apply (these are the employers who are currently also employers under the First State Superannuation Scheme).

Proposed section 7 enables the list of employers in Schedule 1 to the Principal Act to be changed by order of the Governor published in the Gazette.

Proposed section 8 sets out the obligation of employers to contribute an amount equal to 9% of the salary or wages of employees as a superannuation contribution.

Proposed section 9 requires the contribution to be paid to the First State Superannuation Fund or another complying superannuation fund, complying approved deposit fund or retirement savings account nominated by an employee.

Proposed section 10 sets out the employees for whom contributions are not required to be paid under the Principal Act, including employees who are contributors to or members of other public sector superannuation schemes. **Schedule 2.1 [20]** makes a consequential amendment.

Proposed section 11 enables employees to elect to have contributions cease where the reasonable benefit limit relating to pensions may be exceeded.

Proposed section 12 provides that employees who fund their own superannuation may base contributions on an amount of salary or wages that does not exceed the maximum contribution base.

Schedule 2.1 [12] amends section 63 of the Principal Act to omit a reference to the trust deed.

Schedule 2.1 [13] omits section 64 of the Principal Act which relates to the treatment of benefits under the First State Superannuation Scheme.

Schedule 2.1 [14] inserts proposed section 65 (later renumbered as section 14) which provides for the trust deed of the First State Superannuation Fund to continue to make provision with respect to the payment of death or incapacity benefits to firefighters in accordance with the current award.

Schedule 2.1 [15] omits sections 73 and 74 of the Principal Act which relate to the recovery of money owing to the First State Superannuation Fund and the restoration of rights, privileges and benefits under the Principal Act or the trust deed.

Schedule 2.1 [16] amends section 76 of the Principal Act to enable regulations to be made providing for the manner in which notices under the Act are to be given.

Schedule 2.1 [10], [17] and [18] renumber a heading and provisions of the Principal Act. **Schedule 2.1 [19] and [21]** make consequential amendments.

Schedule 2.1 [23] enables savings and transitional regulations to be made consequent on the enactment of the proposed Act.

Schedule 2.1 [25] inserts savings and transitional provisions in Schedule 3 to the Principal Act as a consequence of the enactment of the proposed Act. **Schedule 2.1 [22] and [24]** make consequential amendments.

Schedule 2.1 [26] substitutes the Dictionary to the Principal Act to revise current defined words and expressions to reflect the amendments made by the proposed Act.

Amendment of Superannuation Administration Act 1996

Schedule 2.2 [1] amends the long title to the *Superannuation Administration Act 1996* (the **Principal Act**) to remove the reference to the constitution of the FSS Trustee Corporation (**FTC**).

Schedule 2.2 [2] amends section 3 of the Principal Act to remove the object relating to FTC.

Schedule 2.2 [3] amends section 4 of the Principal Act to remove definitions relating to FTC.

Schedule 2.2 [4] omits section 5 of the Principal Act to remove a provision relating to the declaration of further superannuation schemes to be administered by FTC.

Schedule 2.2 [5] omits Part 2 of the Principal Act which provides for the constitution and functions of FTC. **Schedule 2.2 [19]** makes a consequential amendment.

Schedule 2.2 [6]–[17] replace references to a superannuation authority in various provisions (which refer to both FTC and the SAS Trustee Corporation) with references to the SAS Trustee Corporation.

Schedule 2.2 [18] and [20] omit references to FTC.

Schedule 2.2 [21] and [22] amend section 128 of the Principal Act to remove the First State Superannuation Fund from the public sector funds that may be subject to provisions dealing with the creation of new superannuation schemes for members of public sector superannuation schemes.

Schedule 2.2 [23] amends section 128B of the Principal Act to remove the First State Superannuation Fund from the public sector funds that may be subject to provisions dealing with the extension of new superannuation schemes to members of existing public sector superannuation schemes.

Schedule 2.2 [24] and [25] amend section 129 of the Principal Act to remove the power to make regulations relating to the administration of FTC funds and the accounts and procedure of the FTC board.

Schedule 2.2 [26] omits Schedule 1 to the Principal Act, which relates to the FTC board.

Schedule 2.2 [27] enables regulations to be made consequent on the enactment of the amendments to the Principal Act.

Schedule 3 Consequential amendment of other Acts and regulations

Schedule 3.1 removes the exemption of FTC from the operation of the *Freedom of Information Act 1989*.

Schedule 3.2 removes FTC from the bodies whose employees may make appeals under the *Government and Related Employees Appeal Tribunal Act 1980*.

Schedule 3.3 removes references to FTC in the *Housing Act 2001*.

Schedule 3.4 updates references to the First State Superannuation Fund and FTC in uncommenced provisions of the *Judges' Pensions Act 1953*.

Schedule 3.5 removes the exemption of FTC under the *Land Tax Management Act 1956* from liability for land tax for land occupied by FTC as offices.

Schedule 3.6 amends the *Police Regulation (Superannuation) Act 1906* to:

- (a) update references to the First State Superannuation Fund and FTC, and
- (b) enable a contributor who elects, on becoming an executive officer, to cease to contribute to the Police Superannuation Fund to elect to have the benefit preserved on so ceasing paid to a complying superannuation fund, complying

approved deposit fund or retirement savings account as an alternative to the First State Superannuation Fund.

Schedule 3.7 removes references to FTC from provisions of the *Public Authorities (Financial Arrangements) Regulation 2005* that prescribe FTC as an authority for the purposes of the *Public Authorities (Financial Arrangements) Act 1987* and confer investment powers under that Act on FTC.

Schedule 3.8 removes FTC from the bodies listed in Schedule 2 to the *Public Finance and Audit Act 1983*, being bodies that are subject to the general audit provisions of that Act. **Schedule 3.9** makes a consequential amendment to the *Public Finance and Audit Regulation 2005*.

Schedule 3.10 removes references to FTC from the *Public Sector Employment and Management Act 2002*.

Schedule 3.11 amends the *State Authorities Non-contributory Superannuation Act 1987* to:

(a) update references to the First State Superannuation Fund and FTC, and
(b) enable an employee who has reached the retirement age but does not wish to be paid his or her deferred or preserved benefit under the State Authorities Superannuation Fund to elect to have associated preserved benefits under the State Authorities Non-contributory Superannuation Scheme paid to a complying superannuation fund, complying approved deposit fund or retirement savings account as an alternative to the First State Superannuation Fund.

Schedule 3.12 amends the *State Authorities Superannuation Act 1987* to:

(a) update references to the First State Superannuation Fund and FTC, and
(b) enable a contributor who elects, on becoming an executive officer, to cease to contribute to the State Authorities Superannuation Scheme to elect to have the benefit preserved on so ceasing paid to a complying superannuation fund, complying approved deposit fund or retirement savings account as an alternative to the First State Superannuation Fund, and
(c) enable a contributor who has reached the retirement age but does not wish to be paid his or her deferred or preserved benefit to elect to have it paid to a complying superannuation fund, complying approved deposit fund or retirement savings account as an alternative to the First State Superannuation Fund.

Schedule 3.13 amends the *Superannuation Act 1916* to:

(a) update references to the First State Superannuation Fund and FTC, and
(b) enable a contributor who elects, on becoming an executive officer, to cease to contribute to the State Superannuation Scheme to elect to have the benefit preserved on so ceasing paid to a complying superannuation fund, complying approved deposit fund or retirement savings account as an alternative to the First State Superannuation Fund.

Schedule 3.14 updates references in the *Superannuation Administration (Electricity Superannuation Scheme Transitional Provisions) Regulation 1997* to the First State Superannuation Fund.

Schedule 3.15 updates references in the *Superannuation Administration (Local Government Superannuation Scheme Transitional Provisions) Regulation 1997* to the First State Superannuation Fund.

Schedule 3.16 omits references to FTC schemes from the *Unclaimed Money Act 1995* and makes a consequential amendment.

Schedule 4 Amendment of First State Superannuation Trust Deed

Schedule 4 amends the First State Superannuation Trust Deed to enable the Deed to be varied in order for the First State Superannuation Scheme to meet the requirements for regulation under Commonwealth legislation.