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superannuation.policy@apra.gov.au

Helen Rowell  
General Manager, Policy Development  
Policy, Research and Statistics  
Australian Prudential Regulation Authority  
GPO Box 9836  
SYDNEY NSW 2001

Dear Ms Rowell,

**RE: APRA Discussion Paper on Prudential standards for superannuation.**

AustralianSuper provides this submission in response to the above-named APRA Discussion Paper on Prudential Standards.

**About AustralianSuper**

AustralianSuper is a superannuation fund that is regulated by APRA.

AustralianSuper is a fund that is run only to benefit members. With 1.8 million members and \$42 billion in members' assets, we use our scale to provide the best possible retirement outcome for members.

AustralianSuper supports the introduction of Prudential Standards in superannuation as a means for APRA to provide timely regulatory responses to prudential issues that arise in superannuation.

We are preparing for the introduction of the Standards and for the resulting consequences for our fund. For example, AustralianSuper has already set aside an operational risk reserve that will meet the requirements of an APRA Prudential Standard.

We are also preparing for the Stronger Super reforms and the development of a MySuper product within AustralianSuper fund.

Our submission relates primarily to the alignment of the proposed Prudential Standards with these impending reforms. We also suggest that Prudential Standards should apply only to truly prudential matters and should not unduly fetter the proper governance of superannuation funds that have been subject to, and always complied with the legislative and trustee duties that apply to superannuation funds. We will provide comments on draft legislation in this regard in the future.

**Issues**

There are some key issues within the APRA Discussion Paper which give the impression that some of the Prudential Standards and Guidance work being developed by APRA is not in step with the pending Stronger Super reforms. This is particularly the case in the following areas:

- Equal representation on trustee boards
- Tenure and renewal of boards
- Governance and Independent Directors
- MySuper and Prudential standards

- Conflicts Policy
- Remuneration Policy

### **Equal Representation on Trustee Boards**

Trustees of APRA regulated superannuation funds are subject to legislative requirements about their board representation set out in Part 9 of the Superannuation Industry (Supervision) Act 1993 (“ SIS Act”).

This Part sets out rules about the representation of employers and members in relation to the management and control of standard employer sponsored funds and also public offer funds. Compliance with this Part is achieved where the fund has a single corporate trustee and the board of the corporate trustee consists of equal numbers of employer representatives and member representatives.

Employer representatives may, under this part be nominated by organizations representing employers, and member representatives may be nominated by organizations representing members consistent with the equal representation requirements set out in Part 9 of the SIS Act.

AustralianSuper understands that APRA Prudential Standards will be able to effectively amend subordinate legislation passed by Parliament, such as operating standards. We assume however, that where an elected Government has rejected reform of the equal representation requirements that this will be complied with and reflected in the development of prudential standards and prudential guidance by APRA as an agency of Government. We would be grateful if APRA could confirm their approach to the development of prudential standards in this regard.

(The Cooper Review recommended that the SIS Act be amended so that it is no longer mandatory for trustee boards to maintain equal representation in selecting its trustee directors. (Recommendation 2.4). The Government response to the Cooper Review recommendations (The Stronger Super proposals) rejected such reform of the equal representation requirements).

### **Tenure and renewal policies**

It is proposed that SPS 510 would require RSE licensees to define an appropriate maximum term for its directors, and that boards should have clear policies in place setting out their expectations with regard to board terms and succession planning. We question whether this requirement is consistent with prudential standards requirements for other APRA regulated entities. The comparable requirement for other regulated entities is to have a formal policy on Board renewal, and to give consideration to whether directors have served on the Board for a period that could materially interfere with their ability to act in the best interests of the regulated institution.

We suggest also that maximum terms may at times be inconsistent with the nominating features of industry funds. In some circumstances the tenure of a Board Director of a superannuation fund may be related to their tenure in their role at a nominating organization. In other circumstances the Board Director may have been nominated by their nominating organization because of specific specialized skills.

Further, the proposed SPS 510 should specifically reflect the current legislative arrangements for representation on trustee boards in superannuation. That is, the Prudential Standard should at the very least be consistent with, and aligned with the legislative requirements for equal representation on boards pursuant to Part 9 of the SIS Act and the operating standard on equal representation under Part 4 of the SIS Regulations.

### **Governance and Independent Directors**

APRA's Prudential Standard on Governance does *not* affect the composition of an RSE licensee board where its composition conforms with the fund's governing documents which in turn comply with the equal representation requirements under Part 9 of the SIS Act.

However, APRA intends to introduce a new broader objective, principles-based concept of independent director to 'sit aside' the existing definition in section 10 of the SIS Act. While APRA's discussion paper says they will not be *requiring* that boards have independent chairs or a minimum number of independent directors, it appears to suggest that independent director appointments lead to higher standards of governance.

It is good public policy to ensure that both the proposed prudential standards and also the prudential guidance are consistent with the legislated requirements of the SIS Act and do not conflict or contrast with them. (There are of course legal consequences in relation to conflict).

We suggest that:

- Consistent with the Stronger Super announcements by Government, the composition of the board is a matter for each board to decide (where the governing documents allow), but note that consideration of an appropriate board structure could contemplate the possible value that independent directors might be able to add. Guidance around independent directors should be reframed in this context.
- Trustee directors have an overarching duty to the members. Where there are competing duties, the requirement to put the members first, should overcome any concerns about independence.
- Trustee directors are already required to exercise 'independence of mind' when discharging their duties on the board of an RSE licensee.
- Trustee directors will be subject to the fitness and propriety requirements as well as strengthened conflicts of interest and conflicts of duty policies (SPS 521 and SPS 520).
- The PPG should have less emphasis on independent directors, noting that trustee directors and chairs should have appropriate competencies for their board functions and should be continually improving their skills and expertise, whether they are independent or not.
- We also note that the diversity of experience and industry knowledge on the AustralianSuper board could serve to demonstrate that it is not necessary to mandate independent directors.

### **MySuper and Prudential Standards**

The introduction of a MySuper product as the product that receives all default Superannuation Guarantee contributions is a significant reform within compulsory superannuation in Australia. It applies an increased level of regulation on the MySuper product in the following areas:

- the reform of the investment objectives for MySuper products;

- the regulation of cross-subsidization between MySuper and Choice products;
- the transparency in disclosure to members and reporting to the regulator, particularly in relation to performance and cost issues.
- the exemptions for MySuper offers to employers in relation to administration efficiencies

APRA intends to issue a Prudential Standard that deals with transition to a MySuper product.

We suggest that it would be helpful for the regulated industry if APRA were able to issue a Prudential Standard that addresses some of the cost, scale, cross-subsidization and administration efficiency issues that trustees will have to address when operating a MySuper product and Choice products.

### **Conflicts Policy**

RSE licensees and their individual directors are subject to a number of legal requirements for the management of conflicts of duty and interest. Trustees are subject to obligations under the statutory covenants in Part 6 of the SIS Act, such as covenants to act in the best interests of beneficiaries and to exercise care, skill and diligence. Directors must also comply with duties imposed under the Corporations Act and the general law duties of company directors.

Trustees are presently subject to guidance on conflicts of interest under a draft APRA PPG and for AFS licensees under Regulatory Guidance 181.

Trustees will also be subject to new Stronger Super legislative requirements in this area, including the introduction of requirements applying to directors of RSE licensees and individual trustees to give priority to the interests of beneficiaries where a duty to those beneficiaries conflicts with an interest or other duty of the director or trustee.

The Stronger Super reforms will also amend the SIS Act to include a new provision that overrides any provision in the governing rules of an RSE that requires the RSE licensee to use a specified service provider in relation to any services in respect of the RSE.

AustralianSuper has developed a robust conflicts management policy which takes account current legal requirements under the SIS Act and the Corporations Act 2001. We consider that our conflicts management policy will comply with the requirements of the Stronger Super proposed legislative requirements.

Our conflicts management policy embeds processes to ensure that trustees approach their obligations with appropriate independence of mind. We suggest that any consideration by APRA of standards and guidance in this area focus on this issue and whether any residual conflicts arise, rather than focus on simple fact scenarios alone as a basis for determining whether there is a conflict.

We also do not think a Prudential Standard can prescribe the intent of trustees for example, “ensuring that all directors...*clearly understand* the circumstances that give rise to a conflict” (refer 4.4.1 of the Discussion Paper). These are matters of individual cognition that are better managed by a trustee in determining whether their policy is effective, rather than determining whether they comply with a Standard that will apply as subordinated legislation.

## **Remuneration Policy**

APRA proposes to require all RSE licensees to establish and maintain a Board Remuneration Committee and that each Board would need to have in place a remuneration policy. This remuneration policy would need to ensure “the alignment of remuneration arrangements with the ongoing capacity of each RSE under the RSE licensee’s trusteeship to meet the reasonable expectations of its beneficiaries as well as the RSE licensee’s risk management framework.”

Presumably an effective remuneration policy would free up the directors to act with independence of mind when as acting as the trustee, and for the best interests of the members of the fund concerned. Directors of trustee boards that are owned by a conglomerate group are not in a position to act with independence of mind when acting as a trustee if they are not remunerated for being a trustee.

It is often the case that senior employees in a conglomerate group will also be on a board of trustees of a superannuation fund where the trustee is a related entity to their employer, the conglomerate group or separate corporate entity. In such circumstances their remuneration relates to their functions as an employee of another corporate entity, not as a trustee. This remuneration structure is not aligned with trusteeship; it potentially influences the performance of the employee to meet the business imperatives of the conglomerate group rather than the fiduciary obligations of a superannuation trustee director.

We do not agree with the view asserted by some in the industry that the fundamental purpose of an APRA regulated RSE trustee board is a compliance function – an RSE licensee is a fiduciary, with a statutory duty to act in the best interests of members whether it is a standalone trustee as is the case with an industry fund, or whether it is a subsidiary of another corporate entity or otherwise.

We suggest instead that a remuneration policy for trustees would be better aligned with their duty to act in the best interests of fund members if they were paid specifically to carry out the functions of being a trustee. This could be a separately identified component of a salary paid by another entity – it does not necessarily have to be paid out of the fund. It would need to be disclosed as trustee remuneration and can be done so without disclosing the entire salary of the employee.

We are able to discuss these issues with APRA further if required. Please do not hesitate to contact me on 03 8648 3970 or Louise du Pre-Alba on 03 8648 3847.

Yours sincerely



For **IAN SILK**

**CHIEF EXECUTIVE**