4 Dec 2013

Response to the ASFA Discussion Paper Consultation Questions

3.1 Do you believe that trustee boards should consider the appointment of a number of independent/non-aligned board members, subject to appropriate changes being made to the SIS Act (as per question 3.2 below)?

Trustees should be able to consider such appointments where the trustee board decides it has a need for a particular expertise or other attributes.

3.2 Should the SIS Act be amended to allow trustee boards that comply with the equal representation rules to appoint more than one independent board member?

It is not necessary for the SIS Act to be amended as (1) Funds can do this of their own volition now and 2) APRA already has the power to amend a particular RSE licence to enable such funds to have more than one independent director and they presently utilise this power.

3.3 What is your view of the proposition that, rather than enforcing structural tests of independence, in order to improve governance greater focus should be placed on the skills/experience of board members, the quality of interaction between board members and the overall decision-making process of the board?

We are supportive of a greater focus on skills/experience compared to independence. APRA already deals with issues of independence using their existing regulatory tools where required.

3.4 What benefits and/or challenges do you believe the appointment of multiple independent board members would deliver to superannuation funds (or specific industry sectors)?

All Directors should be independent in the sense that their deliberations are unencumbered by external/related party considerations.

There has not been sufficient evidence to substantiate the benefits independent directors provide to superannuation fund boards and more research needs to be conducted in this regard before any *mandating* of independence is considered.

Anecdotally, it's worth noting that independent directors on superannuation fund boards have NOT stopped the following misconduct from occurring in relation to funds under their stewardship:

- Large scale international fraud on the investments of superannuation funds
- Receipt of commissions by third parties for conflicted advice to members of these superannuation funds
- The unforseen freezing of redemptions from investments made by retirees in superannuation leaving them without income to live on.

3.5 What is your view regarding the appropriateness or otherwise of the Coalition's position that at least one-third of the directors on superannuation boards should be independent?

We reiterate that all Directors should be independent in their deliberations. The current regulatory settings support this therefore there is no need for mandating that one third of directors on boards need to be independent. As such, we do not support this position of the Coalition Government.

AustralianSuper is further concerned that this proposal only considers the concept of independence in relation to equal representation boards, not public offer boards that do not comply with equal representation. To require independence for one sector and not another is potentially partisan and creates an un-level playing field in terms of regulatory compliance.

3.7 Do you support the proposed (more comprehensive) definition of 'independence' (below) as one that is better suited to the needs of the superannuation industry in the post-Stronger Super reform world? Or do you believe the SIS legislation definitions of 'independent director' and 'independent trustee' adequately deal with this?

Proposed alternative definition:
An individual should be taken to be 'independent' in the context of a superannuation fund trustee board if he/she has not, in any capacity within the last three years, been employed by the fund, an employer sponsor of the fund, a sponsoring organisation, a material service provider/consultant/professional adviser to the fund or any organisation representing the interests of one or more members or employer-sponsors of the fund (nor an associate of any such entities, as defined in section 10 of the SIS Act).

For the avoidance of doubt, a sponsoring organisation includes a financial institution operating a public offer fund.

AustralianSuper is concerned that this definition is too far reaching to be easily complied with by large multi-employer funds. AustralianSuper has over 200,000 sponsoring employers, most of whom have no relationship with AustralianSuper which relates to, or has any specific influence on the governance of AustralianSuper. It is burdensome and serves no regulatory benefit to insist that any future 'independent director' of AustralianSuper cannot have been employed by any of 200,000 Australian employers who contribute to the fund on behalf of their employees. Perhaps this test should be limited instead to employers who have had or do have representation on the fund at board level only.

We also suggest that a sponsoring organisation should not only include a public offer entity but a related entity (within the Corporations Act 2001 meaning) of a public offer entity. It should be clear that the requirement for independence applies wider than to just equal representation funds.

3.8 Do you agree with the removal from the definition of the requirement of an individual not to be a member of the fund in order to be considered independent Please provides the basis for your response?

AustralianSuper agrees with this proposal as the interests of board directors should be aligned with their interests as a fund member.

4.1 Should trustee boards be required (in the prudential standards or elsewhere) to document the duties of the Chair and establish appropriate appointment procedures, including a mechanism for succession planning?

AustralianSuper believes that it is not necessary for this to be done by regulatory guidance – it is a board obligation.

4.2 Do you support the proposition that the roles of the Chair and Chief Executive Officer should not be exercised by the same individual? If so, does this requirement need to be enshrined in legislation or stipulated in the prudential standards?

AustralianSuper supports this proposal and suggests it apply to Managing Directors and Fund Secretaries as well. It should be stipulated in prudential standards with an appropriate timeframe for transition allowed.

4.3 Do you support the proposition that the Chair should have the ability to vote and have a casting vote if necessary (ie an extra vote to break a deadlock on an issue)?

No – this whole aspect of governance needs to be considered in the context of equal representation funds requiring two thirds majority votes for resolutions to pass making such a deadlock issue problematic.

5.1 Do you support the position that trustee boards need the flexibility to be able to create a structure that is the most effective for their fund and, as such, need discretion on the size of their trustee board?

Yes flexibility is required having regard to the type of fund (retail, multi-employer vs corporate). As such we have not provided comment on further questions on this issue.

6.1 Should trustee boards have to conduct an objective assessment of their composition, including gender diversity, and set medium-to-long term goals with respect to female representation? Should a broader definition of diversity be considered by trustee boards (ie in addition to gender diversity)?

AustralianSuper supports boards setting goals on gender diversity – recruitment based upon skills and expertise alone has not produced sufficient and reasonable representation of women to date.

6.2 Do you believe 40 per cent female representation on trustee boards is an appropriate/achievable target for the superannuation industry? If so, what is an appropriate timeframe that funds should set to achieve such a target? If not, what is an appropriate/achievable target in your view?

AustralianSuper supports a default target of 40 per cent minimum representation of either gender on trustee boards by 2020. If funds are unable to achieve this by that date they should disclose this on an "if not why not" basis.

6.3 What impediments currently exist, if any, that would prevent a fund (or the industry in general) from achieving such a target? How can such impediments be overcome?

One of the impediments is an assumption that there are not enough qualified women. This could be overcome by ensuring that board vacancies are sought to be filled transparently and by merit, even within the nomination process of sponsoring organisations. It should be made clear that women should express their interest for the role as this will assist in recruiting women to these roles. Boards can look outside of existing networks to achieve this. To look for new talent only in existing networks does not achieve social change and does not help with reasonable succession planning either.

6.4 For funds with equal representation, whose members are predominantly male or female, would a requirement to set and disclose a target on female representation pose any significant challenges for the fund or its members?

This stance incorrectly assumes board expertise is derived solely from fund membership or should somehow reflect fund demographics. This point can be dealt with by disclosure on an "if not why not" basis.

6.5 Should trustee boards be compelled to disclose to their members how they are tracking against their target on female board representation and, if they have no women directors, disclose why this is the case? If so, what is the best way to disclose this information to members (method, frequency etc)?

Yes – superannuation funds should be transparent on this issue.

6.6 If you believe that setting an industry-wide goal of achieving greater female representation on trustee boards is appropriate, how can such a goal be realised?

Refer to 6.3

7.1 Other than as a result of being a disqualified person or failing the fit and proper test, from a good governance perspective are there other factors that trustee boards should consider in determining whether to remove non-performing board members (eg unresolved conflicts, lack of engagement due to time constraints, non-contribution or overly dominating, ongoing health issues or any other reasons?

Trustees should be concerned only with the directors' ongoing ability to do the job outlined. All the issues outlined here are subsets or are causative to the issue of the ongoing ability of the director. Issues such as health and even time constraints should not be singled out as these can be considered discriminatory in some circumstances. It should all be about doing the job appropriately.

7.2 Is greater prescription required to specify the various factors that should be considered by trustee boards in assessing performance/underperformance of individual directors? If so, what should these factors include (and what exceptions should be put in place with respect to these factors)?

It is not necessary to impose greater prescription in this area – more flexibility would assist directors in this regard.

7.3 Should the SIS Act and Regulations be amended to remove the requirement that independent or member-representative directors generally can only be removed in the same manner they were appointed?

There is no demonstrated concern with these requirements. The fit and proper requirements address all relevant and legitimate issues of concern that boards may have in relation to other directors.

7.4 What challenges, if any, do trustee boards face in being able to remove non-performing directors? How can these challenges be overcome?

Refer to 7.3

7.5 How can/do trustee boards deal with any areas of dysfunction in order to improve the competency/performance of individual directors and/or the overall functioning of the board?

8.1 Notwithstanding the fact that the obligation to maintain a documented Remuneration Policy approved by the trustee board is already a requirement under SPS 510, what challenges, if any, do trustee boards face in addressing all the relevant arrangements (eg. performance-based remuneration and its alignment with prudential risk-taking, fixed/variable components, sources of remuneration etc) within their Remuneration Policy?

We have not experienced such challenges and have sought to comply with the relevant requirements in this area.

8.2 What other challenges, if any, do trustee boards face in terms of complying with this requirement?

As above. We do not see that there are other concerns and we currently disclose remuneration.

8.3 Is three years an optimal period of time in which to review the trustee board's Remuneration Policy or could such a review, in your opinion, be adequately undertaken more/less frequently?

Three years seems to be an appropriate time.

8.4 What challenges, if any, exist in trustee boards having to disclose on the fund's website both the nature and amount of remuneration paid to trustee directors?

We have not experienced such challenges.

8.5 Does the fact that this disclosure needs to cover both cash and non-cash benefits and show amounts paid to trustee directors by the fund as well as amounts paid by others for services to the fund pose any significant difficulties?

We have not experienced such challenges

8.6 The regulations require a trustee board to disclose, for each executive officer, the percentage of the bonus or grant for the financial year that was forfeited because the person did not meet the service and performance criteria. Does the disclosure of such potentially sensitive information pose a challenge for funds (particularly as there are multitude of different reasons why a bonus might not have been paid, but these will not be apparent from the disclosure)?

We have not experienced such challenges

8.7 The list of remuneration items to be disclosed is extensive. It includes short term employee benefits such as salary, fees (eg. director fees), bonuses and profit sharing, post-employment benefits such as pensions and superannuation benefits, other long-term employee benefits, signing on bonuses and share based payments. Are these remuneration items sufficiently clear or do some elements need to be defined/clarified? Would the provision of examples be of assistance?

We are concerned to see a clearer definition of 'executive officer' for compliance purposes.

Further, as with the ASX remuneration disclosure, greater clarity and simplicity on remuneration received/granted in the year would be helpful as well.

9.1 Do you agree with the advantages and disadvantages of setting maximum tenure periods that have been listed? Are there any other advantages or disadvantages that you believe exist which have not been listed?

We oppose maximum tenure as it is potentially a forced removal of expertise from superannuation trustee boards. We believe that the capacity to do the job properly is the sole relevant consideration here.

9.2 Do you support the view that the advantages of setting a maximum tenure on boards (ie regular infusion of fresh and perspectives etc) outweigh any disadvantages? If so, what is an appropriate number? If not, why not?

We do not support the view that setting maximum tenure is advantageous.

9.3 In your view, would the introduction of maximum tenure requirements result in experienced trustee directors being lost to the industry? Or would it result, to some extent, in experienced trustee directors moving from one fund's trustee board to another at the end of their tenure?

Yes, a maximum tenure requirement would result in experienced directors being lost to the industry. It does not seem to be apparent that such directors would necessarily move between superannuation funds to deal with the issue of tenure, as other factors come into play.

9.4 Would setting fixed renewable terms … be a practical way for a fund to implement a maximum tenure period? If not, how else could such an outcome be achieved?

For the reasons outlined above we oppose maximum tenure.

9.5 Are there any implications around a trustee board having to specify the circumstances where it may step outside the terms of its tenure policy?

This should be flexible to allow for a range of possible circumstances.

9.6 Would you support a requirement that would limit the ability of directors to serve on boards based on a maximum age? That is, is age an appropriate measure/proxy for an individual's capability to serve as a trustee director or a suitable indicator that a director has been on a board for a sufficiently long period of time? If so, what would be an appropriate age limit in your view?

AustralianSuper would not support this as it is discriminatory.

9.7 Alternatively, are there any other factors (other than age or health issues) that could serve as an appropriate measure/proxy for an individual's ability to serve as a trustee director? Or do you believe that a person's ability to serve as a trustee director should be measured solely on their performance and their ongoing capacity to perform their duties as trustee director?

A trustee board should be responsible for assessing the performance of the board, and ongoing capacity of individual directors to perform their duties only, rather than identifying factors that may or may not affect that performance and ongoing capacity.

10.1 Are there any additional legislative or prudential requirements that can/should be introduced, over and above the current obligations under sections 52 and 52A of the SIS Act, SIS Regulation 2.38(2)(m) and SPS 521, that could potentially enhance the way in which trustee boards manage actual or potential conflicts? That is, are there any gaps or ambiguities in the current legislative and prudential requirements on conflicts that require further discussion?

AustralianSuper is supportive of stringent requirements relating to conflicts of interest and conflicts of duty. We note that these new requirements are not yet twelve months old and it would be prudent to give some time for these requirements to be fully integrated into trustee decision making frameworks before imposing any new and additional requirement in this area.

10.2 Can the potential conflicts of interest and duty caused by multiple trusteeships of superannuation funds be managed as required under the conflicts covenants in the SIS Act and the Prudential Standard?

Like other potential conflicts of interest, these can be managed by seeking to comply with the relevant legislative requirements and Prudential Standard.

10.3 Are there any circumstances in which an individual serving on multiple trustee boards of APRA-regulated superannuation funds would not give rise to a potential conflict of interest and duty?

Where it is clear that both funds concerned do not materially compete with each other because of Award and industrial considerations.

Where it is clear that both funds concerned do not materially compete whether the funds are public offer superannuation funds or not.

Where the individual is a director of a corporate trustee board that is common to a number of funds, such as small APRA funds, that do not compete against each other but act as trustees of small superannuation funds for families or business partnerships.

Where the trustee is appointed by a regulator to replace an existing trustee of a regulated superannuation fund, and acts as a replacement trustee for more than one regulated superannuation fund.

10.4 Do you believe that individuals should be allowed to serve as a director of more than one APRA-regulated superannuation fund trustee board? Please provide the basis for your response

Where the individual (or group of individuals serving as a corporate trustee board) observe and comply with the conflicts covenants and Prudential Standard dealing with conflicts then they should be allowed to serve as a director of more than one APRA regulated superannuation trustee board.

10.5 If a ban on multiple trusteeships was to be introduced, what challenges would this present to the industry or to business models currently in place?

Reasonably and under the current legislative framework, this would apply to both individual directors and corporate trustee boards as a whole – both are subject to conflict requirements under the SIS requirements.

Such a ban would mean that business models such as those of professional trustee companies may be put at risk, particularly where they are trustees of funds that are publicly offered, and not restricted to specific employer based membership.

This is particularly a concern for small APRA superannuation funds where trusteeship has been outsourced to professional trustees. Such a change may produce an undesirable outcome – an increase in SMSFs by those who would have preferred a professional trustee manage their superannuation affairs as they become older and less confident in managing.

Such a ban may also mean that individual trustee directors would resign directorships, irrespective of whether any material competitive conflicts arises between the superannuation funds for which they hold directorships. This is needlessly bureaucratic and has the potential to deprive the superannuation industry of experienced trustee directors, with no apparent regulatory benefit in doing so.

10.6 For funds that have (or have experienced) multiple trustee board memberships, how have any actual or potential conflicts of interest or conflicts of duty been resolved?

Superannuation fund trustees should seek to comply with existing legislative, covenant, prudential standards and prudential practice guidance in relation to conflicts of interest and conflicts of duty. Observance with these requirements enable trustees to deal with actual, potential or perceived conflicts of interest, noting that the corporate trustee board ultimately must be satisfied with the way that individual directors deal with such conflicts.

10.7 Do the current legislative and regulatory requirements adequately address the risks, to the fund and its members, that arise as a result of trustee boards entering into arrangements with related parties? Is further tightening of, or prescription around, the requirements needed?

Yes the current legislative and regulatory requirements have recently been implemented by superannuation funds to deal with these issues. We suggest that they be revisited in perhaps three years' time to review their effectiveness. It is premature to revisit them given that they have only just been implemented by superannuation funds.

10.8 What challenges, if any do trustee boards face in complying with the requirement to regularly monitor the performance specifically of related party service providers?

Trustee boards have traditionally found this to be a difficult task where their governing rules required that certain specified service providers be used, reducing the ability of the trustee to effectively monitor and supervise the performance of the service provider. This issue has been addressed in the Stronger Super reforms. Other concerns relating to monitoring should be dealt with by effective service provider agreements that require regular and appropriate reporting to the trustee.

10.9 Should there be an obligation to disclose the details of any related party dealings to members in the funds' annual report?

Yes.

11.1 Do you support the proposition that trustee boards should consider ESG issues as part of their broader consideration of investment/risk management issues? Please provide the basis for your response.

We support the consideration of ESG issues as a component of a comprehensive investment decision-making process. ESG issues have the ability to impact investment risk or return, therefore considering these issues benefits the long term investment interests of our members.

11.2 Should trustee boards be required to consider ESG factors as part of their broader consideration of investment/risk management issues (ie should this be a mandatory consideration?)

No this should not be mandatory. Trustees need to feel unconstrained in their consideration of all matters, including ESG as appropriate, as a component of their obligation to act in the best interests of members.

11.3 What benefits exist in superannuation funds signing up to the UN PRI principles?

It provides a framework for trustees to assess the investment implications of ESG issues and it also provides a collaborative network to assist in the implementation of EGS integration.

12.1 How easy/difficult will it be for funds to obtain details of how proxy votes have been exercised from investment managers in a timely manner (particularly with respect to voting rights exercised before the obligation to publish commenced?

As part of its voting process, AustralianSuper currently obtains this information on a timely basis from its fund managers. At the time disclosure is required AustralianSuper is already in possession of the relevant information because we have voted. We understand that this may differ for other funds who continue to delegate their vote to their fund managers.

12.2 Are there any (other) challenges faced by trustee boards with respect to complying with the requirement to publish the fund's voting policies and details of voting rights exercised?

AustralianSuper is not particularly challenged by this prospect as we voluntarily disclose our votes at this time. We encourage disclosure of votes to encourage transparency between superannuation funds and their investee companies.

12.3 What additional guidance, if any, is needed from ASIC to assist trustee boards to comply with the requirement?

ASIC needs to be clear and precise about what disclosure they require, including the level of detail required in a 'summary.'