

CORPORATE SUPER ASSOCIATION

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Dr Richard Grant
Acting Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600

Email: corporations.joint@aph.gov.au

Dear Dr Grant

**INQUIRY INTO THE SUPERANNUATION LEGISLATION AMENDMENT
(SERVICE PROVIDERS AND OTHER GOVERNANCE MEASURES) BILL
2012 (“THE TRANCHE 4 BILL”)
COMMENT FROM THE CORPORATE SUPER ASSOCIATION**

Thank you for your letter of 4 December 2012.

Background – Corporate Superannuation Association

Established in 1997, the Association is the representative body for large corporate not-for-profit superannuation funds and their employer-sponsors. We represent 35% of corporate fund assets and 30% of members of corporate superannuation funds. In general, these funds are sponsored by corporate employer sponsors with membership restricted to employees from the same holding company group, but we also include in our membership a few multi-employer funds with similar employer involvement and focus. A number of our funds have defined benefit divisions.

Our funds typically are established without shareholder interests in the governing body, and no profit is derived from the operations of our funds. The funds are run as mutual entities, where the decisions are the responsibility of a trustee board. The board typically provides equal representation for employer and employee interests. There is a high level of trustee integrity and an alignment of the interests of the trustee with those of the members.

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The Tranche 4 Bill

We would like to register some concerns regarding:

- Infringement notices;
- SCT time limits;
- Actions against trustees.

Infringement notices

“Reasonable grounds”

We note that under proposed section 224 the officer is required to have “reasonable grounds” for a belief that a person has contravened a provision subject to an infringement notice under proposed Part 22. We would like to see a requirement that the officer provide details of the “reasonable grounds” for believing that a provision has been contravened. Otherwise, the ability of the trustee or other affected person to challenge the notice may be impaired.

Additional provisions specified by regulations

Subsections 223A (1) and (2) set out provisions under which infringement notices may be issued. However, proposed subsection 223A (3) provides that regulations may specify any other provision of the SIS Act, or regulation, with the result that an offence under that provision or regulation may be subject to an infringement notice. We are concerned that a regime which is intended to provide APRA with the power to issue infringement notices for minor and straight-forward breaches of the Act may end up providing APRA with power to issue notices in relation to more complex matters and that this may be undesirable in view of the ease of issue and the summary treatment of alleged offenders. We would prefer that the offences in relation to which infringement notices may be issued remain specific or at least that the types of offences be more precisely specified.

SCT time limits

Time limits for requesting written reasons in relation to a complaint

Under proposed paragraphs 101(1) (c) and (d) a person can require a trustee to provide written reasons for a decision. Although it is proposed that the trustee must respond within 28 days, there is no time limit for making such a request. In view of the exposure of the trustee to a requirement to respond promptly in relation to potentially very old decisions, it is suggested that some time limit be placed on the complainant’s/inquirer’s ability to request reasons. We support the 90 day limit proposed by the Law Council of Australia.

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Trustee exposure: subsection 55(5)

We are concerned that recent and currently proposed changes to subsection 55(5) broaden the exposure of trustees to actions by members and others in relation to investment decisions. We were already concerned that enacted changes to subsection 55(5) now make any defence to action for loss or damage contingent on the director's or trustee's compliance with every covenant, and with all the obligations in sections 29VN and 29VO. The proposed replacement under the Tranche 4 Bill of "in relation to the investment", by "in relation to each act, or failure to act, that resulted in the loss or damage," does not assist. Subsection 55(5) formerly provided a defence for a trustee that had followed the requirements of the (former) covenant to formulate establish and monitor an investment strategy that took account of certain specified requirements, including the requirement to ensure adequate diversification. Where diversification was well applied, it was accepted that certain investments would do better than others at any particular time, and part of the strategy was that diversification by investment type, by geographical exposure and by sectoral exposure would limit losses by the overall portfolio at any particular time. The amended provisions do not appear to provide trustees and directors with the former protection but instead provide the trustee with a defence only if numerous requirements (compliance with which will be hard to establish) are met. In effect trustees are now deprived of the former protection in the event of loss of value of individual investments, where the investments were undertaken as part of a suitably diversified portfolio. The trustee now appears to be exposed in the event of loss of value of any investment (regardless whether undertaken as part of a diversified portfolio) and must provide a defence, in the event of loss of value, based on compliance with all covenants as well as sections 29VN and 29VO.

We believe that this makes the exposure of trustees and directors very awkward and complex and will deter individuals from acting as directors and trustees. The liability exposure will increase trustee costs and hence reduce members' benefits. There is still an opportunity to mitigate the effects of altered s 55(5), and we urge that the subsection and s 55(6) be re-phrased to replace the former protection available to trustees who implemented and maintained a suitably diversified investment strategy.

We trust that the above provides some indication of our concerns in these areas.

Yours sincerely

Chief Executive Officer
Corporate Super Association