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Superannuation Legislation Amendment (Trustee Governance) Bill 2015 – Submission to the Senate Economics Legislation Committee

14 October 2015

Australian
Chamber of Commerce
and Industry

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Australian Chamber of Commerce and Industry

Summary of Recommendations

The Australian Chamber of Commerce and Industry welcomes the *Superannuation Legislation Amendment (Trustee Governance) Bill 2015* and supports its passage. The Australian Chamber thanks the Senate Economics Legislation Committee for the opportunity to make a submission to and, subject to the three specific recommendations below, is hopeful that the Committee as a whole concludes that it is able to recommend the Bill's passage.

The Chamber's submission discusses aspects of Schedule 1 of the Bill, identifies why it makes the three following recommendations and explain why it supports the Bill's passage and its objects.

Recommendation 1:

That the Committee give consideration to the question of whether there should be a consequential amendment to s 344(12) which inserts paragraph (m) into the exceptions to the general rule confining a person affected by a reviewable decision to a trustee. This would enable an unsuccessful trustee candidate to request a review of the s 88 decision against his or her independence from the RSE licensee.

Recommendation 2:

That the Committee give consideration to recommending that subsection 63(8) is further amended by replacing the words "…either of those subsections" with the words "…subsection (7)".

Recommendation 3:

That the Committee give consideration to recommending that the Bill is amended by

1. Inserting a further amendment item 15A to insert a note following s 63(8)

   Note: Section 23(2A) of the *Superannuation Guarantee (Administration) Act 1992* provides that an employer must contribute any contribution returned under this provision to a complying superannuation fund within 14 days of receiving the returned contribution.

2. Inserting a further amendment item 15B to insert a note following s 63(9)

   Note: Section 23(2A) of the *Superannuation Guarantee (Administration) Act 1992* provides that an employer must contribute any contribution returned under this provision to a complying superannuation fund within 14 days of receiving the refunded contribution.

3. Inserting a further amendment item 15C to amend subsection (11) by inserting the words "…and has not been contributed on behalf of the employee to a complying fund

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which is an eligible choice fund within 14 days of the refund," following the words "…if a contribution is refunded under this section,".

4. Inserting a consequential amendment to the *Superannuation Guarantee (Administration) Act 1992* which inserts a new subclause 23(2A)

(2A) If a fund retums a contribution because required to do so under s 63(8) of the *Superannuation Industry (Supervision) Act 1993* the reduction in the charge percentage calculated under subsection (2) is unchanged provided the employer makes a contribution of the same amount on behalf of the affected employee to another complying fund which is an eligible choice fund within 14 days' of receiving the returned contribution.

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1 Introduction

1.1 The Bill

On 16 September 2015 the Government tabled the *Superannuation Legislation Amendment (Trustee Governance) Bill 2015* (**the Bill**) in the House and on 17 September the Bill was referred to the Senate Economics Legislation Committee (**Committee**) for its assessment. The Australian Chamber of Commerce and Industry (**the Australian Chamber**) supports the passage of the Bill and it thanks the Committee for presenting the opportunity to make these submissions.

The Bill comprises two schedules. The first deals with amendments affecting the trustees of registrable superannuation entities (**RSE**s) which are the actual holders of the license, the registration, which is issued by APRA (**RSE licensees**). Basically RSEs are superannuation funds or schemes which have elected to be regulated under the *Superannuation Industry (Supervision) Act 1993* (**SI(S) Act**). A RSE may also be an approved deposit fund or pooled superannuation trust. RSE licensees may be supervised by either individual trustees or board of directors of the trustee.

Schedule 1 of the Bill seeks to reform the governance structure for RSE licensees. A self managed superannuation fund (**SMSF**) is not a RSE, and SMSFs are not affected by the Bill.

The second schedule of the Bill deals with amendments to the *Governance of Australian Government Superannuation Schemes Act 2011* so as to reform the composition of the board of the Commonwealth Superannuation Corporation (**CSC**) by reducing the size of the board from eleven to nine and requiring five independent directors including the chair. Beyond noting that the proposed Schedule 2 amendments would operate consistently with the Bill's Schedule 1 amendments, the Australian Chamber does not intend to address Schedule 2 of the Bill.

The draft of the Bill before the Committee follows an earlier exposure draft which released for consultation. The Australian Chamber made submissions concerning that draft and notes that the tabled Bill has been revised from the exposure draft in a number of respects. The changes made are welcome. Importantly, the Bill more clearly defines what is required of a director or trustee to be independent from the RSE licensee, than did the exposure draft.

Clause 2 of the Bill provides that, if enacted, it would come into effect upon Royal Assent. This commencement date also applies to Schedule 1. However, the effective operative date for the proposed independent director/trustee requirements in Schedule 1 is affected by Part 3, *Transitional provisions*, of Schedule 1. Part 3 provides a three year transitional period. Providing for a certain three year transitional period was recommended by the Australian Chamber in its exposure draft submissions, and is welcomed.

Apart from being a major pillar of the national retirement income system, superannuation is a major component of the Australian financial services sector with a huge asset base, revenue stream and investment capacity. The superannuation system is complicated and there are many actors involved which means that there are many diverse interests which are affected by its operation and regulation. It is rare for changes to be made with universal support. For this reason the Australian Chamber feels it important that it explains its interest in superannuation.

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1.2 The Australian Chamber's engagement with the superannuation system

The superannuation system impacts every Australian employer and the Australian Chamber has a long history of engagement on behalf of employers with the superannuation system and its regulation.

1.2.1 The Nature of the Australian Chamber's interest

The Chamber's interest in superannuation is directed towards employers' role in the superannuation system and the obligations imposed on employers by it.

Employers are the major source of contributions to superannuation funds but their legitimate interests extend beyond that fact. Superannuation contributions are an incident of the employment relationship and impact on that relationship when things go wrong or go badly. Employers have a legitimate interest in funds maximising members' return from their contributions and employers want the superannuation system to be as good as it can be at converting contribution into account balance. In the areas of efficiency and outcome employers and employee fund members share a strong common interest.

Given the size of the superannuation system, its asset and contributions base, and its role in supporting Australians' retirement income, maximising contributions outcome is clearly an appropriate policy objective.

Its representational interest aside, the Australian Chamber does not have other material interests in the superannuation system.

1.2.2 The Australian Chamber's material interests in the superannuation system

The Australian Chamber itself has no direct material interest in any fund, or fund type, and it does not nominate to nor sit on any RSE licensee.

The Australian Chamber's primary membership comprises employer organisations. These are either state multi-industry chambers of commerce and industry or national industry organisations. A number of Australian Chamber members, but not all, have nominating rights to RSE licensees and these will most likely be boards of industry or corporate funds. The Australian Chamber also has a number of direct employer members and some of these members have nomination rights under fund rules.

Australian Chamber policy is developed collectively and so far as possible by consensus, but where that is not possible, by majority support. Chamber members retain the right to advocate a different position where they regard it as appropriate for their membership.

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2 Schedule 1 of the Bill

2.1 Current RSE licensee structure

An employer sponsored fund is one which accepts contributions from employers and an employer which makes a contribution to a fund on behalf of an employee is an "employer-sponsor". If the employer contributes under an arrangement it has with the RSE licensee of the fund it is a "standard employer-sponsor" (sometimes called a "participating employer"). If a fund can accept a contribution for a fund member from an employer which is not a standard employer-sponsor it is a public offer fund. If the fund can only accept contributions from standard employer-sponsors it is not a public offer fund.

Currently, Part 9 of the SI(S) Act, *Equal Representation of Employers and Members – Employer Sponsored Funds* (ss 86 – 93A), provides that the RSE licensee of public offer funds (a fund which is able to accept contributions from an employer which is not a participating employer) must either have equal employer-member representation (the "basic equal representation rules") or equal representation policy committees at participating employer workplaces with 50 or more members (and at smaller workplaces where requested).

Non-public offer funds (funds which do not permit contributions by employers which are not participating employers) must observe the basic equal representation rules.

The basic equal representation rules allow employer and/or member representatives to request the appointment of an independent director/trustee so long as that person does not have a casting vote, and so long as is consistent with the fund's rules. An independent director appointed in this way does not require policy committees to be established. APRA can approve additional independent directors.

An independent director/trustee is someone who is not a member of the fund, not employed by a participating employer, and not a representative of an organisation which represents fund members or participating employers [s 10 SI(S) Act].

2.2 The proposed reforms – Part 1, Schedule 1

Part 1 of Schedule 1 of the Bill is comprised of item 1. Item 1 repeals Part 9 of the SI(S) Act and replaces it with a new Part 9 comprising new ss 86 – 93B.

Proposed s 86 requires RSE licensees to have at least 1/3rd independent directors or trustees, and in the case of a board of directors, the chair must be one of the independents. In the case of a group of trustees, the chair may be an independent. Independent directors/trustees must be independent *from* the RSE licensee. This is a significant change from the SI(S) Act's current independence requirement and it is spelt out in proposed s 87.

New s 87 defines "independent". An individual is independent from a RSE licensee unless (s)he has a relevant material ownership, employment and/or business relationship with the RSE

licensee, a trustee or organisation with nominating rights to the RSE licensee. Impermissible ownership does not include an ownership interest which does not give rise to a right of, or expectation of, profit. Impermissible business or employment relationships include non-current ones which existed in the previous three years.

One consequence of the new definition of "independent" is that an ordinary member of the fund can be an independent trustee/director. This was not possible under the current definition of independent director/trustee because of the primacy given organisational representation under the current basic equal representation requirements.

Proposed s 87 also provides for regulations which prescribe other circumstances of independence or non-independence. Particularly in the case of potentially impermissible relationships, questions concerning the degree to which an impermissible factor intrudes on capacity for independence can arise. In the case of permissible non-excluded relationships there can be situations where a formally permissible relationship could nonetheless intrude on a person's independence.

Proposed s 88 gives APRA, on the request of the licensee under proposed s 89, the capacity to determine that an individual is independent from an RSE licensee where on the face of the statute or regulations, (s)he may not be. APRA is also able to refuse a s 89 request [new s 88(3)].

Under new s 90, APRA, on its own initiation, may also determine that a person is not independent where on the face of the statute and regulations (and, if operating, a s 88 determination), the person is independent.

These capacities, particularly the proposed s 90 capacity, might seem to be unusual powers in the hands of the regulator but they appear justified. This is because, both where APRA declines to determine a person is independent [new s 88] and where APRA determines a person is not independent [new s 90], a reviewable decision arises [item 6 Part 2 Schedule 1of the Bill]. Item 6 is further discussed at 2.3.1 in this submission.

Proposed s 91 addresses the filling of vacancies amongst the directors or trustees. It provides that that in the event of a vacancy the RSE licensee is deemed to be complying with the proposed s 86 independent director/trustee requirements if it is filled within 120 days. The comparable current provision [s 89(3) SI(S)Act] provides a 90 day deeming provision. Under proposed s 91 each vacancy is treated separately from the time it arises.

The additional deemed complying time is appropriate given the nature of the proposed Part 9 changes. The vacancy time line is further discussed at 2.3.2 in this submission.

Proposed s 92 addresses the consequences of not complying with the proposed s 86 independent director/trustee requirements. As at present, non-compliance does not give rise to a penalty. Under the current SI(S) Act non-compliance with the basic equal representation rules empowers APRA to issue a direction that the fund not accept contributions from an employer-sponsor.

Under the Bill non-compliance triggers a discretionary capacity in APRA to issue a direction to comply. Non-compliance with a direction issued under proposed s 92 without reasonable excuse attracts a penalty, and proposed s 93 provides that, except where the direction itself is breached, non-compliance with the independent director/trustee requirements does not invalidate a

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transaction [proposed s 93(1)]. New s 93 also retains the operation of s 63 (the power for APRA to direct that the RSE licensee a direction to not accept contributions from an employer-sponsor).

In the Chamber's view an appropriate balance has been struck.

2.2.1 Fund rules and the Part 9 amendments

Proposed s 93B provides that the proposed Part 9 requirements override fund rules to the contrary. As noted above the effect of Part 3, dealt with below, is that current fund rules continue to apply, subject to the transitional provisions themselves, until three years after the date of the Royal Assent.

2.3 Part 2 of Schedule 1 of the Bill

Part 2 of Schedule 1 (items 2 – 22) makes a number of consequential amendments to the SI(S) Act.

Items 2 – 5 are unexceptional. Item 6 amends the definition of "reviewable decision" in s 10 SI(S) Act by deleting current Part 9 reviewable decisions and inserting into the definition as new paragraphs (m) and (n) respectively, the proposed s 88 and s 90 reviewable decisions.

2.3.1 Reviewable decisions and potential trustees

Section 344(1) of the SI(S) Act provides that a person "who is affected by a reviewable decision", which because of item 6 includes a decision to not determine that the person is independent (proposed s 88) and a determination that the person is not independent (proposed s 90), may apply to APRA for reconsideration.

"A person who is affected by a reviewable decision" is confined by s 344(12) which provides that, except for certain specified reviewable decisions which are excluded, the person who is affected by a reviewable decision is a trustee of the superannuation entity which is affected by the reviewable decision.

Under the Bill the new ss 88 and 90 reviewable decisions are not excluded from the general s 344(12) rule. A person who is affected by a reviewable s 88 or s 90 decision must be a trustee.

It seems likely that RSE licensee requests under proposed s 89 (an application for APRA's determination under s 88 that a person is independent from the RSE licensee) will be made prior to that person being appointed as a director or trustee. It also seems likely that determinations made under s 90 (APRA's determination that a person is not independent from the RSE licensee) will be made at a time that the person is sitting as a director or trustee.

The s 344(12) restriction does not seem to have any consequence for an APRA decision that a person is not independent [proposed s 90] but may have an unintended consequence where the decision is that APRA declines to determine that a person is independent under proposed s 88. A person who is being considered for appointment as a trustee would not appear to have standing to request a review under s 344(1).

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Recommendation 1:

That the Committee give consideration to the question of whether there should be a consequential amendment to s 344(12) which inserts paragraph (m) into the exceptions to the general rule confining a person affected by a reviewable decision to a trustee. This would enable an unsuccessful trustee candidate to request a review of the s 88 decision against his or her independence from the RSE licensee.

2.3.2 Reviewable decisions and timelines

The fact that s 89 requests are most likely to be made before appointment may be seen to give rise to an issue about timelines in the Bill. However, the Australian Chamber believes the Bill is appropriately balanced in this regard.

APRA must determine the RSE licensee's application within 60 days of receiving all necessary information, and it may extend the time for up to another 60 days [proposed s 89(3)(b) and s 89(4)]. If it has not done so by the end of the determination period APRA is deemed to have refused the application [new s 89(6)], thus triggering a reviewable decision. Structurally similar provisions applied to applications by funds for authorisation to offer a MySuper product.

Proposed s 91 provides that where a vacancy for an independent director/trustee occurs the RSE licensee has 120 days to fill it. During that 120 day period the RSE licensee is regarded as complying with the new independent director/trustee requirements. Particularly if APRA extends the time by which it will decide the question of whether a person is independent from the RSE licensee, the fact that the RSE licensee will be in breach of the new s 86 requirements at the end of 120 days from the vacancy arising could motivate the applicant RSE licensee to proceed with the appointment of an alternative replacement independent director/trustee. Because of the 120 day deemed compliance period, a delayed decision could have the same effect as refusing the RSE licensee's application, but without the review mechanism. Similar timing issues might arise on occasions when APRA makes a reviewable decision in response to an RSE licensee's s 89 application.

However, this risk appears offset by the operation of proposed s 92. Non-compliance is not itself a breach, it triggers the power in APRA to issue a direction to comply.

Items 7 – 14 are unexceptional.

Item 15 amends s 63(8) by deleting a reference to s 63(7B) because it was deleted by item 14. This is an appropriate consequential repeal flowing from the enactment of Schedule 1 but a further consequential amendment to s 63(8) appears required. As amended, s 63(8) refers to contravention of s 63(7). However the second sentence of s 63(8) refers to contravening "…either of those subsections", being a continuing reference to the now repealed subsection (7B) as well as to the continuing subsection (7).

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Recommendation 2:

That the Committee give consideration to recommending that subsection 63(8) is further amended by replacing the words "…either of those subsections" with the words "…subsection (7)".

Item 15 also raises the question of equitable treatment of employers.

2.3.3 Return of contributions made in the face of an APRA s 63 direction

As it currently stands s 63(1) SI(S) Act empowers APRA to issue a written notice that the RSE licensee is not to accept any contributions from an employer-sponsor. Section 63(7) provides that the RSE licensee must not contravene the direction without reasonable excuse and s 63(7A) provides that the offense is one of strict liability.

Item 14 repeals ss 63(7B)-(7D) which imposes an additional compliance rule for certain funds associated with the basic equal representation rules. This is an appropriate consequential amendment. Section 63(8) SI(S) Act provides that where the RSE licensee has accepted an employer's contribution in non-compliance with the written direction (and currently also the special ss 63(7B)-(7D) equal representation rules) it is to return the contribution(s) to the employer(s). Apart from deletion of the reference to the special equal representation rule [s 63(7B)-(7D)] s 63(8) remains unchanged by the Bill.

This retains a significant unfairness in the SI(S) Act.

Employer superannuation guarantee contribution obligations, the avoidance of a superannuation guarantee shortfall, which arise under the *Superannuation Guarantee (Administration) Act 1992* (**SG(A) Act**), centre on the employer making contributions on behalf of eligible employees to an appropriate fund and doing so within 28 days of the end of the quarter. A contribution must be made to a complying superannuation fund and the contribution is "made" when it is received by the fund.

Section 25 SG(A) Act provides that if the employer has a statement from the fund that it is not subject to a direction under s 63 SI(S) Act that is conclusive proof that the fund is complying, and therefore able to lawfully accept the employer's contributions. A fund which is accepting contributions from employers in the face of a s 63 SI(S) Act direction is unlikely to be a fund which has (so far) advised contributing employers that it is no longer not subject to a s 63 SI(S) Act direction.

Section 63(11) SI(S) Act provides that a contribution which is returned has never been "made", that is, returning a contribution which was made has the effect of "unmaking" it, which, in turn, depending on the timing, has the effect of creating a superannuation guarantee shortfall for the refunded employer. For no reason associated with the employer's actions it has incurred a significant penalty – the superannuation guarantee charge which results from not having "made"

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the contribution on time. Section 63(12) has the effect of mitigating the loss of tax deductibility normally associated with the payment of a superannuation guarantee charge, but it does not avoid the charge, nor the time based interest charge.

The Australian Chamber recognises and accepts that this inequity does not arise because of the Bill, it is there in the SI(S) Act now and the enactment of the Bill does not change that. However the Bill presents an opportunity to rectify this inequity.

Recommendation 3:

That the Committee give consideration to recommending that the Bill is amended by

1. Inserting a further amendment item 15A to insert a note following s 63(8)

   Note: Section 23(2A) of the *Superannuation Guarantee (Administration) Act 1992* provides that an employer must contribute any contribution returned under this provision to a complying superannuation fund within 14 days of receiving the returned contribution.

2. Inserting a further amendment item 15B to insert a note following s 63(9)

   Note: Section 23(2A) of the *Superannuation Guarantee (Administration) Act 1992* provides that an employer must contribute any contribution returned under this provision to a complying superannuation fund within 14 days of receiving the refunded contribution.

3. Inserting a further amendment item 15C to amend subsection (11) by inserting the words "…and has not been contributed on behalf of the employee to a complying fund which is an eligible choice fund within 14 days of the refund," following the words "…if a contribution is refunded under this section,".

4. Inserting a consequential amendment to the *Superannuation Guarantee (Administration) Act 1992* which inserts a new subclause 23(2A)

   (2A) If a fund returns a contribution because required to do so under s 63(8) of the *Superannuation Industry (Supervision) Act 1993* the reduction in the charge percentage calculated under subsection (2) is unchanged provided the employer makes a contribution of the same amount on behalf of the affected employee to another complying fund which is an eligible choice fund within 14 days' of receiving the returned contribution.

Items 16 – 22 are unexceptional.

The Australian Chamber notes that item 22 provides a significant degree of flexibility into the transitional process. Item 22 which makes Part 3 of Schedule 1 a "modifiable provision" gives APRA the capacity to exempt the operation of the transitional schedule, or a part of it, from a particular person or class of persons, particular groups of trustees or a class of groups of trustees, with or without conditions. Thus, APRA is able to address the situations where RSE licensees achieve full compliance with the proposed s 86 independent director/trustee requirements at some

time during the transition period. APRA is able to exempt these RSE licensees from the transition period and cease the operation of the prudential standards in preference to the Part 9 provisions.

2.4 Part 3 of Schedule 1 of the Bill

Part 3 comprises items 23 – 25 of Schedule 1 of the Bill.

Item 23 provides for a transitional period starting on the Royal Assent and concluding on the third anniversary of that day.

Transition by RSE licensees to compliance with the proposed s 86 independent director/trustee requirements is dealt with by item 24. Item 24 provides that, for RSE licensees in existence the day before the Royal Assent, where an RSE licensee complies with a prudential standard relating to the transition from the current Part 9 SI(S) Act requirements to the new Part 9 amended requirements, neither set of Part 9 provisions apply. The transitional prudential standards apply.

A RSE licensee which does not comply with the prudential standards after the transition period commences is subject to the SI(S) Act in its present form.

Item 24 applies the transition period to pre-existing RSE licensees only. Any new RSE licensee which comes into being on or after the date of Royal Assent is subject to the amended part 9 SI(S) Act. This is appropriate although there are not likely to be many, if any, instances of this.

It is likely that there will be fund amalgamations during the three year transition period but these do not give rise to new RSE licensees, they give rise to changes to existing licensees (together with the departure of existing RSE licensees). Thus in the case of fund amalgamations occurring during the transitional period the effect of Part 3 is to focus on the surviving RSE licensee.

Where an amalgamation is delayed past the end of the transition period the operation of proposed ss 92 – 93 provisions which would come into effect at the same time would provide appropriate flexibility.

Item 25 provides that to the extent that compliance with a transitional prudential standard conflicts with trust deeds, rules or other obligations applying to the appointment of directors/trustees to the RSE licensee that the transitional prudential standard displaces the obligation. As noted in the Explanatory Memorandum (paras 1.108 and 1.133) this provision operates during the transition period and its equivalent Part 9 provision, proposed s 93B, commences when the transition period ends.

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3 The Australian Chamber's support for the Bill

Chapter 2, *Regulation impact statement: Schedule 1: Governance arrangements for registrable superannuation entities*, of the Explanatory Memorandum, and particularly paras 2.1 – 2.52 (pp 31 – 42), comprehensively addresses the reasons for the proposed reforms, and the Australian Chamber does not intend to replicate this material. However, it does wish to briefly explain Chamber support for the change to RSE licensee governance requirements.

3.1 The Chamber was a member of the Cooper committee

One consequence of its long history of involvement in the superannuation system (referred to at 1.2 above) is that the Australian Chamber was a member of the panel which reviewed the governance, efficiency, structure and operation of the Australian superannuation system (**Cooper committee**).[1] This review was commissioned in May 2009 by Senator Sherry, the then Minister Superannuation and Corporate Law, and the Cooper committee issued its final report in July 2010.

In its final report the Cooper committee recommended one third independent (non-associated) directors. Despite the fact that the eight members of the Cooper committee came from diverse backgrounds, including a number from different fund sectors, there was no dissenting report nor statement of dissent within the report with respect to this or its other recommendations. The Cooper committee's recommendations have given rise to the current major reform of the superannuation system, including the MySuper and SuperStream reforms.

Its terms of reference encouraged the committee to think about the future of superannuation. In its *Preliminary Report*, which was released in December 2009, the Cooper committee said:

> […] Australia's superannuation system has grown tremendously in size and importance over the past 17 years. On most grounds, it can be regarded as having been a success. In particular, the system has demonstrated substantial resilience in one of the most severe financial market crises of the past century. Not surprisingly, many industry participants have expressed a view, that since the system 'ain't broke', there is no reason to 'fix it'. The Panel questions this view and believes that the review process is an opportunity to position the superannuation system for the challenges of the next 15 years and beyond.[2]
>
> […]
>
> Just as in 1993, when the current architecture of the system was established, it is hard to envisage exactly the course those changes will take. In 1993, total superannuation assets amounted to $183 billion, and the industry was dominated by corporate funds and by large, partly-funded public sector schemes. The self-managed superannuation fund (**SMSF**) sector, as we know it today, did not exist.[3]

Managing conflicts of interest was an issue which attracted the attention of the Cooper committee from the outset. The committee released a discussion paper in August 2009, and asked:

[1] The Chamber has also been closely involved with the post-report implementation of the Cooper committee recommendations.
[2] P 2, *Clearer Super Choices: Matching Governance Solutions – Phase 1 – Preliminary Report*, 14 December 2009.
[3] P 3, *Clearer Super Choices: Matching Governance Solutions – Phase 1 – Preliminary Report*, 14 December 2009.

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> **Best practice**: What is the best way to drive best practice governance across the industry, for example, in the areas of transparency, disclosure, conflicts management, environmental, social and corporate governance and shareholder participation?[4]

In the *Preliminary Report* the Cooper committee said:

> More generally, there is a need for greater focus on the mechanisms for dealing with conflicts throughout the system. Some areas (in addition to those noted above) where the potential for conflicts arise are:
>
> • Fund mergers;
>
> • Related party transactions;
>
> • Remuneration of directors on trustee boards;
>
> • Appointment of 'independent' trustees who are related to a potential service provider; and
>
> • Holders of multiple trusteeships, where those funds may compete.
>
> There is complexity inherent in all of these examples. The Panel believes that simple exhortations to 'avoid conflicts' are naïve and counter-productive. Similarly, disclosure to members is not an adequate response, given the timeframes involved, the knowledge needed to understand the implications of a conflict and the disengagement of many members in any event.[5]

Conflicted decisions are less likely to be optimal than those which are not conflicted.

The Australian Chamber does not believe that current trustee boards which comply with the basic equal representation rules readily allow trustees to act out of self-interest. Indeed, blatant examples of superannuation trustees acting in their own interest are very rare.

The problem is rather that conflicts of interest can be quite subtle and a sufficiency of independent directors makes conflicts of interest more likely to be perceived, recognised and called out. Independent directors can reshape a culture so that the board or trustees are more questioning which makes much less likely a closed culture of group think or accommodating acceptance.

3.2 Superannuation is evolving

For a range of reasons including the Cooper committee reforms, its size and the resulting challenges, the Australian superannuation system is evolving.

To date the choice of fund provisions have not been particularly successful in underpinning member-driven competition. There are several reasons for this but recent developments suggest that some of the barriers are now being addressed. For example, it is becoming easier for fund members to compare funds than it has been in the past. As well, under SuperStream many of the difficulties of roll-overs have been removed. The signs are that that there will be more competition and more challenge to individual funds to be competitive.

[4] P 6, *Phase One: Governance*, 25 August 2009

[5] P 16, *Clearer Super Choices: Matching Governance Solutions – Phase 1 – Preliminary Report*, 14 December 2009.

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A condition for being authorised to offer a MySuper product, requires RSE licensees offering MySuper to consider the scale of their product. MySuper encourages fund mergers to achieve economies of scale and a greater capacity to bear down on investment costs. As APRA noted in its *Insight* publication:

> RSE licensees that offer MySuper products are required to consider annually whether their members are disadvantaged by the fund's "scale" relative to members in other funds that offer a MySuper product. APRA expects RSE licensees to adopt a robust assessment process that considers the measures outlined above to satisfy themselves that their MySuper product meets this test and is in the long term best interests of their members.[6]

This points to a future where there will be fewer, larger funds. However, larger funds also bring risks to system efficiency because very small proportionate costs translate into large amounts of money and this is exactly where conflicts of interest, and inactive questioning, can have an impact.

3.2.1 Bigger and more complicated

APRA's June 2013 statistics publication also draws attention to the extent to which the superannuation system is changing. It said:

> The size and complexity of RSE licensees' business operations has increased over the eight years to June 2013. Firstly, the proportion of RSE licensees with multiple RSEs under trusteeship increased from 15 per cent of RSE licensees (44 RSE licensees) to 21 per cent (32 RSE licensees) as shown in Table B [not replicated here]. This is largely due to the exit of RSE licensees with a single RSE under their trusteeship. Secondly, average assets under an RSE licensee's trusteeship increased from 2006 to 2013, as shown in Figure A below [not replicated here]. The average size of the business operations of RSE licensees more than tripled over the eight years, from $1.9 billion in 2006 to $6.4 billion in 2013. Total superannuation assets of RSEs have increased by around two thirds over this same period, from $566.5 billion to $966.4 billion.[7]

Superannuation funds are becoming larger, holding more assets and there were fewer of them. By June 2013 there was also something of a greater likelihood that a RSE licensee had more than one RSE under its trusteeship. In June 2006 257 of the 301active RSE licensees (85.4%) had a single RSE under trusteeship compared to 119 of 151 active RSE licensees (78%) at June 2013.

RSE licensees are increasingly likely to hold a public offer license. In June 2006 125 of the 301 (41.5%) active licensees held a public offer licence but by June 2013 this had changed to 87 of 151 (57.6%).[8]

Looking at funds themselves the movement to public offer is even more dramatic than that shown by these RSE licensee figures. Between June 2004 and June 2013 the number of non-public offer funds declined from 1,425 to 125, whereas the number of public offer funds went from 296 to 161.

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[6] P12, *MySuper*, *Insight Issue One – 2015*, APRA

[7] P 10, *Statistics – Annual Superannuation Bulletin*, *Selected feature – RSE licensee boards*, June 2013, APRA (revised 5 February 2014).

[8] P 16, Table B, *Statistics – Annual Superannuation Bulletin*, June 2013, APRA (revised 5 February 2014)

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Much of this movement is due to the significant decrease in the number of corporate funds over that time (1,405 to 108) but that is not the whole story. In June 2004 28.3% of the then 106 industry funds were public offer; in June 2013 69.2% (of 52 industry funds) were public offer.[9]

When a fund holds a public offer licence a member is able to have his or her employer contribute into it regardless of whether that employer is a standard employer-sponsor of the fund or not. A public offer fund can be the employee's chosen fund because it is able to accept contributions from an employer which is not a standard employer-sponsor. The trend has been for funds to become public offer, and this can be expected to continue into the future.

In its *Insight* publication, APRA said:

> The size and complexity of the superannuation industry has increased significantly over the past decade. Given the fiduciary nature of superannuation, strong governance is critically important in achieving the retirement objectives of members. The new *Prudential Standard SPS 510 Governance* (SPS 510), that came into effect on 1 July 2013, introduced heightened obligations for RSE licensees in the area of governance. APRA has stepped up its engagement with boards to ensure that the industry embraces the spirit and the intent of these new requirements.
> …
>
> The FSI has recommended that RSE licensees should be mandated to have a majority of independent directors on the board of corporate trustees of public offer funds, including an independent chair. APRA's experience across all regulated industries is that the inclusion of independent directors brings additional perspectives and objectivity to board processes and decision-making, enhances the range of skills available and contributes to sound governance outcomes. Independent directors are also often better placed to hold themselves and other directors accountable for their conduct, especially in relation to managing conflicts. Irrespective of any changes that the Government may make to requirements for composition of superannuation boards, APRA will continue to encourage RSE licensees to consider the value that the appointment of independent directors may bring to the board.
>
> APRA will also monitor the disclosure of director and executive remuneration to ensure it is complete and accurate and meets the enhanced transparency obligations imposed on the industry.[10]

Finally, APRA also noted

> Conflicts management is an area which APRA has identified as historically not being well managed in the superannuation industry, potentially weakening the governance and operation of superannuation entities.[11]

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[9] P 20, Table 1, *Statistics – Annual Superannuation Bulletin*, June 2013, APRA (revised 5 February 2014)

[10] P 13, The quote is taken from the section *Governance and conflicts of interest – Board governance*, *Insight Issue One 2015*, which also contains a thematic review of conflicts of interest.

[11] P 16, *Governance and conflicts of interest – Board governance*, *Insight Issue One 2015*

Australian Chamber of Commerce and Industry

4 About the Australian Chamber

4.1 Who We are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

4.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber of Commerce and Industry

ACCI Members

AUSTRALIAN CHAMBER MEMBERS: **BUSINESS SA** CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY** **MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION** AGED CARE AND COMMUNITY SERVICES AUSTRALIA **ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW** AUSTRALIAN BEVERAGES COUNCIL LIMITED **AUSTRALIAN DENTAL INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES **AUSTRALIAN FOOD & GROCERY COUNCIL** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **AUSTRALIAN STEEL INSTITUTE** AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION **BUS INDUSTRY CONFEDERATION** CONSULT AUSTRALIA **COMMERCIAL RADIO** FITNESS AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA **MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **NATIONAL ROAD AND MOTORISTS' ASSOCIATION** NSW TAXI COUNCIL **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** SCREEN PRODUCERS AUSTRALIA **VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE**