Superannuation Reform package

IMPROVING ACCOUNTABILITY AND MEMBER OUTCOMES IN SUPERANNUATION

Issue date 28 September 2017

ABOUT INDUSTRY SUPER AUSTRALIA

Industry Super Australia (ISA) is an umbrella organisation for the industry super movement. ISA manages collective projects on behalf of a number of Industry SuperFunds with the objective of maximising the retirement savings of five million industry super members. Please direct questions and comments to:

Litsa Tsitsis
General Counsel and Senior Policy Manager

ISA Pty Ltd ABN 72 158 563 270 Corporate Authorised Representative No. 426006 of Industry Fund Services Ltd ABN 54 007 016 195 AFSL 232514

Introduction

Industry Super Australia (ISA) appreciates the opportunity to provide comment on the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.1) Bill 2017 (Bill) and associated Explanatory Memorandum released by the Minister of Financial Services.

On face value the high level objectives of the Bill seem quite reasonable, but regrettably this reform package requires significant amendment to deliver on its potential to improve member outcomes, accountability and transparency:

1. It fails to include all superannuation products in the strengthened outcomes test and assessment framework. The vast majority (83 percent) of bank-owned and other retail superannuation assets are held outside MySuper and will be excluded from the requirement.[1] This is the case notwithstanding that such products on average underperform MySuper products, where the majority of industry super fund assets are held.
2. It provides APRA with new powers to administer the superannuation sector, but in a manner that seems ineffective when it comes to bank owned and other vertically integrated retail super funds. In particular:
   - The enhanced power to issue directions to "connected entities" would typically exclude the bank-owned funds' parent companies and related-party service providers
   - The "look through" reporting requirements for operating expenses have been modelled on the "look through" reporting requirements for investment, which have allowed two-thirds of the super funds owned by the big four banks, Macquarie and AMP to disclose absolutely zero investment expenses or member investment fees.
3. It fails to address the key areas of longstanding inefficiency and opacity in the system. In particular:
   - The long-term systemic underperformance of the retail sector which has reduced retirement savings across the system to the tune of $135 billion since 1996,[2] and increased fiscal impost on the Federal Budget in the form of increased age pension outlays
   - The costs and other impacts of conflicts arising from vertically integrated structures
   - The full economic costs of bank-owned superannuation intermediation to members.
4. It amends the current law, so that choice products that contain multiple investment options (an inherent element of platform products) are not required to disclose portfolio holdings disclosure.

The reform package would increase the regulatory burden on industry and other not-for-profit super funds, yet allow bank-owned and other retail funds to resist scrutiny and reform.

The reform package is an example of both the Government's inability and unwillingness to impose real reform on the big banks, and its determination to shoulder industry and other not-for-profit funds out of their way.

Despite the fact that the reform package is promoted as a Bill that covers the superannuation industry, in reality it gives retail funds and bank-owned funds a leave pass on its most critical aspects, such as:

- Not requiring an annual outcomes assessment for choice products

[1] ISA analysis of APRA annual fund-level statistics and annual MySuper statistics, June 2016.

[2] If the average retail fund had performed, on average, as well as the average industry super fund for every quarter between June 1996 and March 2017, Australia's national savings would be $135 billion dollars higher than they are today which is around 8 per cent of GDP. Source: ISA analysis of APRA Quarterly Superannuation Performance, March 2017.

- Failing to empower APRA with adequate powers to deal with integrated structures prevalent in bank owned funds
- Excluding many bank-owned funds from complying with the revised portfolio disclosure by excluding platforms from the disclosure requirements.

Research by RiceWarner[3] demonstrates that the majority of switching occurring over a four year period left fund members who exercised choice worse off either due to higher fees, lower investment returns or both.

The Government's legislation fails to extend the proposed disclosures and other consumer protections to bank-owned choice superannuation products. At the same time, the Government is encouraging members to exercise choice of fund. The practical effect of this approach is that members will leave the heavily-regulated default system, which has delivered higher average long term net returns, for Choice products which are predominantly offered by bank-owned super funds, are subject to less regulation, and have underperformed. This is not in the public interest, and this reform it is not credible public policy.

Aside from these major concerns, there are technical improvements that could be made:

- The outcomes test, which would replace the scale test should require:
  - giving clear prominence to net returns
  - trustees to assess whether the product's fees are appropriate for the asset allocation and investment approach used
  - trustees to assess whether there is not just sufficient scale but whether the scale benefits flow through fully to beneficiaries
  - comparison benchmarking of product net returns to other products with similar fees, costs and taxes
  - comparison benchmarking of fees and costs to other products with similar asset allocation and risk profiles
  - benchmarking of product net returns to system averages or naïve portfolios to ensure the product is sufficiently efficient to be a reasonable instrument of social policy consistent with system policy objectives

It is also of concern that the reforms:

- Lack uniformity with the approval and revocation powers for RSE licensees and, by making it easier for APRA to revoke MySuper authorisations, missing the opportunity to align APRA's powers with the RSEL provisions and failing to better administer the whole superannuation sector
- Lack certainty, the drafting is ambiguous and raises concerns with how these reforms will be implemented, particularly given many of the enhanced power provisions are far-reaching
- Lack consistency with provisions in the Corporations Act, including in relation to the proposed director liabilities and general member meeting requirements.

Replacement of the 'scale test' with an 'outcomes test'

The stated purpose of the proposed outcomes test, which would replace the scale test, is to *strengthen* the obligation on superannuation trustees to consider the *appropriateness* of their MySuper product offering. This objective should equally apply to all superannuation products. Determining that a superannuation product is appropriate should not be limited to MySuper products.

---

[3] RiceWarner, Member Switching Report, dated 12 September 2017.

All providers of superannuation products – MySuper or otherwise – have to satisfy duties detailed in section 52 of the *Superannuation Industry (Supervision) Act* 1993 (SIS Act). Many of the section 52 covenants lend themselves to requiring trustees to ensure they offer appropriate products, including the:

- General covenants, such as best interest, prioritisation of conflicts and standard of care
- Investment covenants, such as the requirement to formulate a strategy, consider risks, composition of investment options offered, to exercise due diligence in developing an offering and reviewing regularly each investment option; ensuring investment options offered to each beneficiary allow adequate diversification
- Insurance covenants, such as the requirement to formulate an insurance strategy, consideration of levels, types, costs of insurance, only offering or acquiring insurance that does not inappropriately erode the retirement income of beneficiaries.

If a trustee is not able to determine their product offering is "appropriate" then it is difficult to envisage how a trustee is discharging existing obligations. Given choice providers have to comply with the above requirements, it is difficult to accept any argument that an outcomes test is not equally applicable to choice products.

More importantly, all superannuation products are instruments of social policy, and should exist only to deliver better living standards to Australians in retirement. The public policy need for superannuation products to be as efficient and appropriate as possible does not diminish whether a product happens to have a MySuper badge.

The reforms unnecessarily limit the obligation on superannuation trustees to apply a strengthened assessment framework to MySuper products. This type of test is equally pertinent – if not more pertinent – to the choice sector because:

- Choice products have generated lower average net returns than MySuper products since inception;
- Sixty-two percent of system assets are outside MySuper products.

The degree to which the proposed reforms exclude the majority of super system assets from scrutiny is illustrated in Table 1 below.

Table 1 – MySuper vs Choice assets and returns

	Assets ($,000)	% of assets	3 year returns
MySuper	473,650,547	38	8.92
Choice	768,547,618	62	7.67
Total	1,242,198,165	100	

Assets from APRA annual fund level statistics and annual MySuper statistics to June 2016 with ISA analysis
Returns are weighted averages using SuperRatings FCRS data with ISA analysis
Note: Choice assets are calculated using system totals and deducting MySuper and accrued default assets

The effect of limiting the application of these reforms to MySuper products is that many members will not benefit from the strengthening of trustee obligations as almost two thirds of APRA assets are in choice investment options.

In addition to leaving the majority of assets outside the enhanced assessment framework, MySuper products are the area of the system where average financial performance has been relatively better, suggesting that the need for trustee scrutiny of products is greater in the choice sector (see Table 1). Thus, excluding choice products from the outcomes test is at odds with the proposition that this reform package is intended to improve member outcomes.

We note that the majority of MySuper products are offered by industry and other not-for-profit funds, as shown in Table 2. Therefore, the practical effect of the legislation would be to apply greater scrutiny to industry and not-for-profit funds, while excluding the part of the system that is underperforming and happens to be dominated by bank-owned funds outside the enhanced assessment framework.

If there was a genuine interest in improving the outcomes for consumers, then the reform would be sector neutral and equally apply to choice products.

Table 2 – Distribution of MySuper: Not-for-profit vs retail

MySuper	Not-for-profit	Retail	% of MySuper in not-for-profit
Products	69	46	60
Assets	419,036,563	54,613,984	88
Accounts	11,622,343	3,289,052	78

APRA annual MySuper statistics to June 2016 with ISA analysis

The Explanatory Memorandum does not argue, and it cannot be credibly argued, that protections for choice products should be lower because individual consumers are able to ensure for themselves that they choose products of a high standard. This is not the case. The study of behavioural economics has established that financial services are “sold, not bought.” The idea that rational consumer demand drives superannuation providers to deliver optimal products and services has long been debunked in superannuation. Indeed, research by RiceWarner estimates that members that switch to choice products end up worse off because:

- On aggregate fee outcomes from members switching funds results in a net increase in fees of $137 million p.a. and retail funds account for 92% of this increase[4]
- The aggregate estimated impact on net investment returns is a decrease is of $208 million p.a. and retail funds account for 87% of the decrease in returns[5].

In a functioning market, one would expect members to be motivated to switch to funds with lower fees and higher returns based on the best available disclosure. The fact that this is not occurring suggests that other factors – such as sales practices of providers, inadequate disclosure, and consumer behavioural biases – are influencing members to “choose” inferior funds, which are not in their interests.

The social policy objective of the superannuation system does not differentiate between individuals who hold choice products and MySuper products. Ultimately taxpayers foot the bill when members end up in underperforming choice products, leading to increased reliance on the age pension.

The argument that choice products are different or too complex to be included in an outcomes test also does not withstand scrutiny. If a product design renders a product too complicated to assess the appropriateness of, then it should not be part of a compulsory retirement system. If the trustees with the best information about a product, supported by professionals, cannot determine the appropriateness of their products then what chance do consumers have?

All trustees should be able to justify the appropriateness of the products they are offering, especially in a compulsory retirement savings system. We should not accept the excuses of “we are different”, “the compliance burden is too much” or ‘’it is too hard” to dictate the standards we expect in the offering of superannuation products. Sound public policy demands, and the law should ensure, that consumers are not

[4] RiceWarner Report, p 3

[5] RiceWarner Report, p 4

being sold into products that cannot satisfy an "appropriateness'' test. A simple way to make this reform effective would be to have an identical or modified outcomes test for choice investment options.

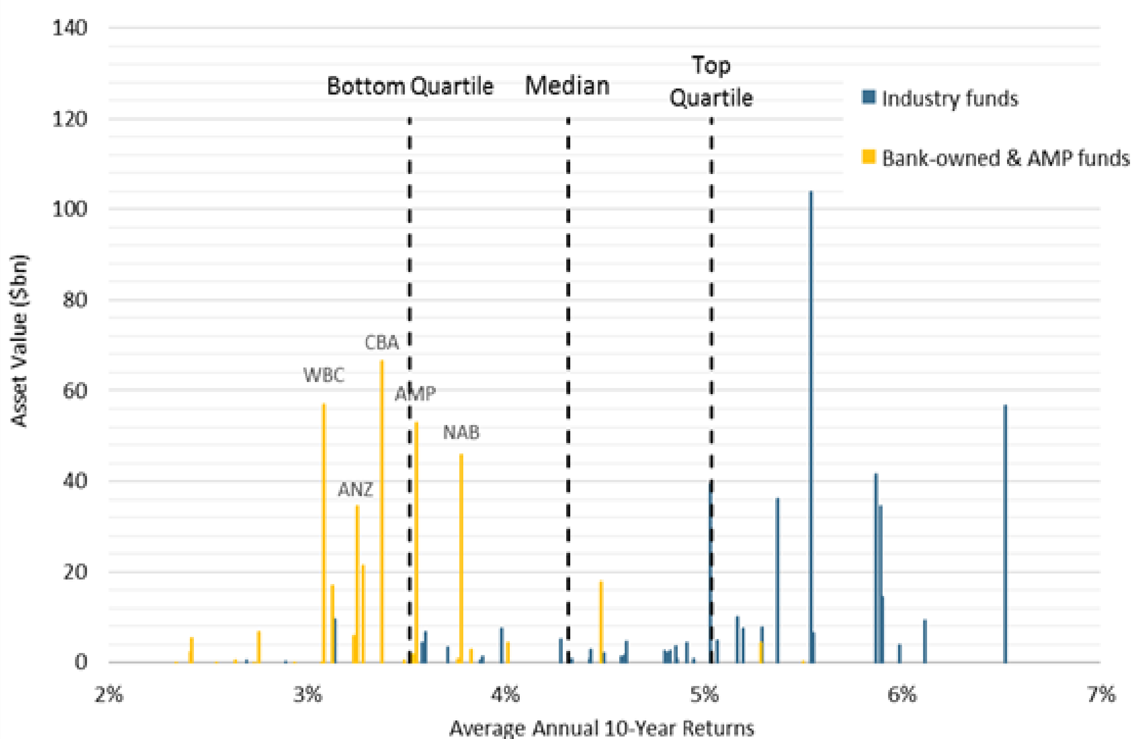
Given its limited application, this reform will not lead to improved member outcomes for the vast number of participants. If the reform package was genuinely concerned about strengthening the obligation on superannuation trustees to consider the appropriateness of their product offering it would cover all APRA regulated trustees, be product neutral, and sector neutral.

However, even if the outcomes test was applied across the system, it would still suffer from a number of significant issues that would need to be resolved if it is to deliver the objective of optimising outcomes to members. In its current form the outcomes test falls short of achieving this for the reasons set out below:

(a) Limitations of the scale test are not addressed

One of the key shortcomings with the current scale test is that it does not require scale efficiencies to be passed onto members. This is inconsistent with the reform's stated aims of optimisation of member outcomes. The effect of this is that for profit funds, such as bank owned funds, may satisfy the scale test without optimising member benefits because scale benefits are not being passed on to members. The reality of this is demonstrated clearly in Figure 1, which shows the extent to which the largest bank owned and AMP funds are clustered around the bottom quartile of long-term performance.

Figure 1 – Distribution of 10-year returns compared to assets



Source: ISA analysis of APRA Annual Fund-level Superannuation Statistics, June 2016

If the object of the reform is to improve member outcomes then scale itself is not enough. The law must provide that all scale benefits be passed on to members.

The reforms should be unambiguous. Scale benefits (and other benefits) must be passed onto the members by way of increased net returns.

This anomaly should be rectified given that the scale test continues to be part of the outcomes test.

(b) Risk of watering down the importance of "net returns to members"

Although it is accepted that scale should not be the sole determinative factor in assessing the promotion of financial interest of members, and a more fulsome list of factors could better achieve this, care needs to be taken not to give prominence to factors that ultimately do not improve member retirement benefits. Net return to member must be at the centre of any appropriateness assessment of superannuation products. Maximising retirement outcomes is why the products exist. Consumers expect their superannuation fund to provide a retirement benefit sufficient for a comfortable standard of living by reasonable community standards. Thus the objective of promoting the financial interest of the members, from a consumer perspective and from the view point of trustees, must go hand in hand with ensuring maximisation of net returns to members.

The importance of net returns and what it means to the standard of one's retirement should be central. Accordingly, the reforms must ensure that the net returns to members receive commensurate importance relative to other factors, otherwise the ability to promote financial interest of members may be severely compromised. After all, the sole purpose of a superannuation fund is to provide retirement benefits and, while ancillary benefits are permissible, the bells and whistles do not and should not take precedence over the key objective.

Despite Minister O'Dwyer asserting that *"… the outcomes test will not weaken or lessen a trustee's primary obligation to promote the financial interests of their MySuper members, including through net returns …".*[6], the outcomes test in the Bill is insufficiently clear about the priority of returns and this needs to be rectified in order to avoid harm to members.

(c) Other flaws

Other issues with the outcomes test that need to be resolved include:

- It fails to require trustees to assess whether the product's fees are appropriate for the asset allocation and investment approach utilised
- It fails to require trustees to assess whether there is not just sufficient scale but whether the scale benefits flow through fully to beneficiaries
- The comparison fails to require benchmarking of product net returns to other products with similar fees, costs and taxes
- The comparison fails to require benchmarking of fees and costs to others with similar asset allocation and risk profiles
- The comparison fails to require benchmarking of product net returns to system averages or naïve portfolios to ensure the product is sufficiently efficient to be a reasonable instrument of social policy consistent with system policy objectives.

The assessment of the appropriateness of product cannot be undertaken accurately if the above factors are overlooked or are not adequately weighted to reflect their importance. Appropriate weightings cannot be left to chance.

[6] Second reading speech, Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.1) Bill 2017, p 5.

(d) Reforms ignore the elephant in the room

The Explanatory Memorandum provides that "*we need to ensure that there is confidence in the system…*''. Research in fact shows that:

> *"Few believe that the views of banks on ensuring that the superannuation system works in the best interests of ordinary Australians can be seen as trustworthy:*
>
> - *Only 31% say that they trust the views of the banks on this issue.*
> - *38% say that they have at least some trust in the Federal Government in this area*
> - *61% trust the views of the Fair Work Commission*
> - *69% trust the views of the Industry SuperFunds".*[7]

This research illustrates that there is a lack of confidence in part of the system, but not on the part that this reform package focuses on. The reforms focus on MySuper products, which in effect means a focus on the not-for profit sector (because it is the sector with the most MySuper assets and accounts) yet community concerns relate predominately about banks and by extension, bank-owned superannuation funds. Retail funds (of which 69 percent are in bank-owned super funds) hold 42 percent of all APRA-regulated superannuation assets and yet are largely ignored in this reform package.[8]

If this reform package truly seeks to improve accountability and member outcomes in superannuation, then it would focus on:

- Underperformance of bank-owned super funds and why this is continuing
- Vertically integrated structures, potential conflicts, and whether member interests are being served
- The lack of visibility of profits and margins in retail funds and their related entities, including how much the retail fund is spending on related-party transactions the impact to the net return to member
- Transparent and comparable disclosure practices across the sector (such as disclosures of executive remuneration and portfolio holdings)
- Ensuring that all super funds are run only to benefit their members
- Transparency and accountability measures are sector neutral.

All trustees should have the same duty to prioritise members and act with appropriate care and diligence.

Overall, this proposed reform falls short in achieving its goal because it is not sector neutral, fails to give prominence to net returns, and avoids accountability and transparency in the areas that need it most.

[7] Essential Research, commissioned by Industry Super Australia, Banks & Super Customers – February 2017

[8] ISA analysis of APRA annual fund-level statistics, 2 June 2016.

Prudential standards vs legislative amendment

A fatal flaw in this Bill is the obvious omission of core accountability obligations extending to trustees of choice products.

On 11 August 2017 APRA issued a letter to all RSE Licensees[9] outlining proposed changes to its prudential framework. The letter included the following statement:

> "*To this end, APRA intends to* ***consult*** *on a proposal to require all RSE licensees to regularly assess whether the RSE licensee has provided, and is likely to continue to provide, quality, value for money* ***outcomes*** *for beneficiaries in all of its RSEs and products. The proposed assessment would include consideration of net* investment *returns, expenses and costs, insurance, and other benefits and services provided*". [Emphasis added]

In attempting to justify the fundamental law (i.e. the omission of an outcomes test for choice products) and Minister O'Dwyer said:

> *"During consultation, some stakeholders said the outcomes test should be extended to all superannuation choice products, not just* default *MySuper products. There are fundamental legal differences between the default MySuper and the "choice" sector*.
>
> *On 11 August this year, APRA wrote to all RSE licensees to advise that it intends to consult on a proposal to apply to an outcomes test to all products, not just default MySuper products. As with the MySuper outcomes test, this would include consideration of net investment returns, expenses and costs, insurance, and other benefits and services provided to choice members.*
>
> *The Government believes this is an efficient means through which the choice sector can be strengthened for the benefit of members and agrees with APRA's proposal and expects it to be implemented.*[10]"

In defending the decision to legislate additional requirements only on MySuper products, some might suggest that APRA has fixed the anomaly by issuing its 11 August 2017 letter. This is mistaken. APRA's letter does nothing more than indicate APRA's **intention** to **consult** on proposed changes to prudential standards. Prudential standards a far cry from legislative requirements – for example, the content of new APRA standards – if any – are unknown and can be weakened or otherwise changed without Parliamentary involvement. Considering that the legislation would omit Choice products, which have had lower average net performance, higher average fees, and are predominantly offered by institutions with greater incidence of misconduct, leaving their regulation to hypothetical prudential standards that have not even been consulted is irresponsible.

The reality is there may be certain (limited) differences in duties between MySuper and Choice products, however overall the fundamental duties apply regardless of product type. Likewise, there is no material difference in the nature of superannuation savings between MySuper and choice products and no difference in the tax laws, corporate laws or trust laws that apply. In an economic sense they are also the same, MySuper and choice funds are sourced primarily from superannuation guarantee contributions, subject to the same preservation laws, and compete in the same market place.

A guiding principle that has been applied in the past to the regulation of RSE licensees has been the adoption of a common approach to markets and products, unless there are clear grounds for a different approach. The Minister's response to this fundamental issue begs the question. There is no good public policy reason why the Bill does not include an outcomes test for choice products. Nor is there a valid

---

[9] APRA letter dated 11 August 2017 to all RSE Licensees regarding "Strengthening operational governance of RSE LICENSEES – upcoming consultation.

[10] Second reading speech, Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.1) Bill 2017, p6.

explanation as to why the choice product accountability obligations should not be subject to proper legal or Parliamentary scrutiny (as is the case with MySuper obligations).

For this Bill to have any integrity it needs to include an outcomes text for choice products, which prioritises the financial interests of all members. This necessarily requires choice outcomes assessments to give priority weighting to long-term net returns.

The reality is trustees determine not only the choice products that are offered, but also the distribution strategy that results in members obtaining those products, and the execution of that strategy. Therefore, in assessing the member outcomes for choice products, the trustee would need to consider not just the value-for-money of the product, but also the distribution strategy and execution of the product, to ensure the product is in the best interests of those beneficiaries who are in it. In practice, a trustee would need to assess: (i) the relative value-for-money of its options against substantially similar options in terms of performance, fees, and the like, and (ii) whether the trustee's distribution strategy and execution of in respect of choice products result in beneficiaries being in choice products that are in the beneficiaries' financial interests.

In addition to prioritising fund-level net returns and benchmarking them, as part of the outcomes assessment trustees should also be required to undertake a number of specific evaluations including:

- Benchmarking of whole of fund net returns to asset class benchmarks based on the fund's actual asset allocations to identify the efficiency of the fund in delivering net returns to members based on the exposure to underlying assets. Such analysis would reveal potential deficiencies in investment manager selection and disclosed and undisclosed costs of investment and operational expenses
- Whether the product's fees are appropriate to the asset allocation and investment approach being utilised
- Whether the scale benefits that may accrue to a fund are being fully passed-on to beneficiaries
- Benchmarking of product net returns to other products with similar fees, costs and taxes
- Benchmarking of fees and costs to others with similar asset allocations and risk profiles
- Benchmarking product net returns to asset class benchmarks based on the product's actual asset allocation to identify the efficiency of the product
- Benchmarking of product net returns to system averages or naïve portfolios to ensure the product is sufficiently efficient to be a reasonable instrument of social policy consistent with system policy objectives.

A Band-Aid solution (i.e. prudential standards to include an outcomes test for choice products) is an inefficient and ineffective way to address a significant shortcoming in the Bill. Additionally two implementation channels (a legislated MySuper regime and an as-yet unknown prudential standard choice regime) – with concomitant variances in methodology, weighting and factors for superannuation products creates confusion, will result in different levels of member protection, will not drive positive outcomes for members and is bad public policy. It is inconceivable that consumers could reasonably be expected to somehow be cognisant of the legal distinctions being created between choice and MySuper product accountability. The outcomes test should ensure the consumer is in the best retirement option, and trustees are satisfied the options they offer are in the best financial interests of members, regardless of the distribution model elected by the trustee.

The sensible approach is for the Bill to be sector neutral, include choice under the regime, and protect the integrity of the system.

Expansion of APRA powers

The Bill substantially expands APRA's powers. The breadth of the expansion, the sensitivity of the powers to discretion, and the fact that some of the powers are not prudential in nature mean that the powers could achieve both good outcomes as well as bad ones, with little public safeguards to ensure the former. As a result, the proposals are not without risks.

Some of the most significant risks in the Bill arise from the new and expanded APRA direction powers because the circumstances in which these powers could be deployed are not clear. These risks could be mitigated if the triggers for the powers were better defined.

Specifically, the Bill enables APRA to issue a direction to:

1. an RSE Licensee where "the failure to issue a direction would materially prejudice … the reasonable expectations of beneficiaries of a registrable superannuation entity of the RSE licensee"
2. an RSE Licensee because it has reason to believe it is "necessary in the interests of beneficiaries", or
3. "connected entity" because it has reason to believe "that the failure to issue a direction would materially prejudice the interest of beneficiaries of the RSE".

Typically, prudential powers to issue directions seek to ensure that an entity maintains safety and soundness, and meets its obligations. The "reasonable expectations of beneficiaries" and "interests of beneficiaries" could be interpreted very broadly, to encompass matters that might better be considered business conduct or otherwise within the jurisdiction of ASIC. As such it risks undermining the twin peaks regulatory framework.

The power to direct entities to act or not to act are typically reserved to the judiciary or law makers – providing them to a regulator is appropriate, but their use should be extraordinary and clearly circumscribed. The risks of misuse of these extraordinary powers are real. APRA has previously exercised its powers in a manner that was overturned by the Administrative Appeals Tribunal.[11] In that case, commentators queried whether APRA reacted the way it did because of criticism it received in relation to the HIH collapse.[12] Care needs to be exercised to not create the expectation that these sweeping powers can and should be exercised without great caution.

Likewise the use of these powers must avoid and be seen to avoid arbitrary or capricious application. As explained in greater detail below, APRA currently has the power to require "look through" investment expenses disclosure, yet two-thirds of bank-owned and AMP super funds disclose zero investment fees and expenses. This disclosure is simply not credible; its existence raises questions that relate to matters which could undermine public confidence. Importantly, it shows a possible propensity for bank-owned funds to seek to structure funds to avoid disclosure, and an apparent willingness on the part of APRA and the Government to accept this non-disclosure.

Capacity to refuse or cancel MySuper authorisation

Under section 29G of the SIS Act, APRA has the power to cancel an RSE license, if among other things APRA has reason to believe that the RSE Licensee will breach a condition imposed on the license, the RSE has failed to comply with a direction under section 29EB or APRA has reason to believe that the RSE licensee will fail to comply with a direction by APRA under section 29EB. The use of the word "will" in the section, necessitates APRA forming its view with a degree of **certainty** before, for example, canceling an RSE license.

The proposed enhancement to APRA's capacity to refuse or cancel a MySuper Licence is at first blush a reasonable proposition. The enhancement provides APRA with the ability to refuse or cancel a MySuper authorisation where APRA has reason to believe the RSE Licensee may fail to meet its MySuper trustee

---

[11] *VBN and Ors and Australian Prudential Regulation Authority and Anor* [2006] AATA 710; (2006) 92 ALD 259.

[12] Stephen Bartholemeusz, Overlook the spin: APRA got it wrong, *Sydney Morning Herald*, 24 August 2006.

obligations, or may fail to meet the general fee rules and the fees rules in MySuper products, etc. The use of the word "may" in this section requires APRA to form the view that there is the **possibility** of a breach.

The new drafting enhances APRA's ability but it is questionable why the same enhancement was not mirrored in the provisions dealing with APRA's ability to cancel or refuse a RSE License. The use of the word "will" (in section 29G) means that it is more difficult for APRA to exercise its power to cancel or not approve a RSE License than it is to cancel or not approve a MySuper authorisation.

Some may argue that the cancellation (and or failure to approve) of an RSE License is a greater loss because it relates to the entire superannuation fund as opposed to a MySuper product (which includes some but not all members) and therefore there is a reasonable basis for the distinction. However, APRA will only cancel a RSE License and MySuper authorisation in extreme cases. Thus it is odd that policy makers would intentionally limit APRA's powers to act where APRA has grave concerns that there is a *possibility* that harm may be caused to choice members but has not yet formed that view with the requisite a degree of *certainty* required under section 29G of the SIS Act.

Surely APRA's powers should be product neutral. Members in choice or MySuper products should be afforded the same protections and APRA's powers should be consistent across product types. Policy makers should consider whether the differences in choice and MySuper obligations and seemingly arbitrary difference in APRA's powers actually improve or deteriorate the superannuation trust structure.

Given the lower average returns and higher fees in the choice sector, it would be unwise to proceed with the proposed legislation, which would result in two distinct regimes for superannuation, namely the:

- choice regime which is exempt from higher standards, responsibilities and accountabilities and restricts APRA's powers but has the greatest exposure to APRA assets and has the prevalence of underperformance in comparison to MySuper products; and
- MySuper regime which has higher standards, responsibilities and makes it easier for APRA to exercise its powers.

The case for why such distinctions improve member outcomes has not been made. In fact, artificial delineation of responsibilities and accountabilities do not serve to protect members nor does it make sense not to harmonise APRAs powers in the circumstances. A better approach is for APRA to be given the same powers when it comes to approving or revoking RSE Licenses and MySuper authorisations, and thus the RSE Licensee provisions should be amended to reflect the proposed changes relating to the MySuper authorisation.

Approval to own or control an RSE licensee

The reform package seeks to strengthen APRA's supervision and enforcement powers when a change of ownership or control of a RSE licensee takes place. The new provisions provide APRA with the following new powers to:

- Refuse authority to change ownership of an RSE licensee where it has concerns about the proposed new owner;
- Give a direction to a person to relinquish control of a RSE licensee, where control is held via the amount of shares held, or otherwise exists in practice; and
- Remove or suspend an RSE licensee where it is subject to the control of its owner.

In principle these provisions appear reasonable. There are three instances when APRA could give a direction to a person to relinquish control of a RSE licensee:

- Where a person does not have approval to hold a controlling stake in the RSE
- Where a person who does have approval to hold a controlling stake has provided false or misleading information (in a material way) to APRA in relation to their application to hold a controlling stake.

- Where APRA has reason to believe that:
  - the person has a controlling stake in the RSE licensee; or
  - the person has practical control of the RSE licensee; and
  - that because of:
    - the person's controlling stake, or practical control, of the RSE licensee; or
    - the way in which control has been, is or is likely to be exercised;
    - the RSE licensee has been, is or is likely to be unable to satisfy one or more of the trustee's obligations contained in a covenant set out in sections 52 to 53 of the SIS Act, or prescribed under section 54A of the SIS Act, or referred to in section 29VN or 29VO of the SIS Act.

In light of the definition of practical control these powers have the potential to be broadly applied. Practical control is defined as:

> *A person has practical control over an RSE licensee that is a body corporate if:*
>
> - *either of the following is satisfied:*
>   - *the directors of the RSE licensee are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person (either alone or together with associates);*
>   - *the person (either alone or together with associates) is in a position to exercise control over the RSE licensee; and*
> - *the person does not hold a controlling stake in the RSE licensee.*

Policy makers should ensure the discretion of APRA is properly exercised or circumscribed, and the expectations of how APRA would use these powers are clear.

"General" directions powers

The ability of APRA to direct RSEs and RSE licensees is currently limited and the reforms seek materially to expand APRA's directions powers. The intention of the proposed directions is to enable APRA to intervene at an early stage to address prudential concerns in a manner that ensures the actions are in the best interests of members.

APRA's proposed directions powers include a general power to issue directions, including where APRA has reason to believe that:

- an RSE has or is likely to contravened the SIS Act, regulations, prudential standard or Financial Sector (Collection of Data) Act 2001
- the direction is necessary in the interest of beneficiaries of an RSE
- there is, or there might be a material risk to the security of the assets of the RSE licensee
- there has been, or there might be, a material deterioration in the financial condition of the RSE licensee RSE entity of which it is a trustee
- to remove a responsible officer from office
- to remove an auditor.

Additionally, APRA can issue directions in relation to the conduct of a "connected entity" of the RSE licensee in circumstances similar to those set out above.

However, while these reforms do appear to provide important protection for members and enhanced powers, there are a couple of concerns. Notwithstanding noble objectives, it is unclear what type of matter would cause APRA to form the view that it must issue a direction because it is "*necessary in the interests of beneficiaries*". A nebulous directions power is problematic because the provision is capable of being understood in more ways than one, lending itself to various interpretations by different individuals. The lack of clarity about the application of this reform limits the effectiveness of the provision.

Substantial expansion of APRA powers, along with the broad discretion in the way powers are used, without direction as to how the powers are expected to be used has the potential for misuse. It is easy to see how these powers could be used to advance political interests rather than legitimate prudential purposes or to improve the for-profit sector, which is the locus for the majority of the misconduct in superannuation, and where average member financial outcomes are worst.

Far reaching and ambiguous provisions do not provide better outcomes for consumers. Policy makers should ensure the discretion of APRA is properly exercised and appropriately circumscribed. Policy makers must make the expectations of how APRA would use these powers clear.

However, while it is important to ensure that powers are not overly far reaching it is also crucial to provide APRA with the necessary powers to avoid harm being caused to members. In this regard, the direction powers relating to a "connected entity" is insufficiently restrictive. The connected entity provisions will not apply to many (if not most) of the relevant related parties of bank-owned super funds. This is because the definition of "connected entity" means "a subsidiary of the licensee", yet the banks themselves are *parent* companies of the superannuation trustees and funds, and the related-party service providers to bank-owned funds are generally entities under *common control* with the superannuation trustee, not its subsidiary.

The Minister declared that:

> *"This Bill will give APRA the ability to take preventative or corrective action where it has prudential concerns about a superannuation funds or if it is concerned that a fund is not acting in the best interests of members.*
>
> *For example, if APRA were to have serious concerns with the operations of a subsidiary company wholly owned by a superannuation fund that provides services to members, APRA can direct the subsidiary entity to undertake a particular course of action to protect member's interests"[13].*

However, the Minister omitted to mention that ordinarily bank-owned funds are not parent entities, and in fact bank-owned funds are direct or indirect subsidiaries of a parent entity (i.e. the fund is a subsidiary of the bank or bank holding company). Additionally, where there is a bank-owned superannuation fund, it is common for one or more of the superannuation fund's material service providers (such as administrators, custodians, insurers, investment managers) to also be a subsidiary of the parent. Thus, ordinarily the bank-owned superannuation fund and some of its key service providers would be under the common control of the bank. In these circumstances APRA does not have the power to take preventative action. This is a significant limitation in the Bill and continues to raise grave questions about the Government's ability to introduce good policy in an area that needs it the most.

The Bill should be amended to ensure that the powers extend to entities that are parents to, or under common control with, the RSE licensee. This is particularly important given the prominence of vertically integrated structures in the banking sector and the stated purpose of this reform package.

This anomaly can be easily rectified by amending the reference to "connected entities" to include:

- a related body corporate of the RSE licensee;

---

[13] Second reading speech, Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.1) Bill 2017, p9.

- an entity that has a controlling stake in the RSE licensee;
- an entity that has practical control of the RSE licensee.

Director penalty regime

The director penalty regime reforms would allow a director of a RSE licensee to be subject to civil and criminal liabilities if they breach the general director covenants, or the enhanced MySuper director duties. Under the current law, a contravention of the governing rules of a superannuation entity is not an offence, and does not affect the validity of a transaction. This means a contravention does not result in a civil or criminal penalty. However, a contravention can give rise to a claim for loss or damages by the affected member.

In principle this reform is a positive step that seeks to discourage poor practices. However, consideration needs to be given to whether the case has actually been made to impose greater liability on superannuation trustees.

We observe that this director penalty regime exposes superannuation trustee directors to greater risk of personal liability than other directors. This is because the MySuper director obligations and the director covenants are **broader in scope** than other duties and would carry **both** direct liability to individual members for loss arising from a breach **and** liability for civil penalty sanctions. Policy makers should consider whether there is a sound foundation for exposing superannuation trustees to greater director liability than other directors, including directors of other financial service boards, such as banks.

Additionally, in a reform package which seeks to improve member outcomes, no attention has been given to whether certain "conflicts" such as those prevalent in vertically integrated structures should be forbidden because of the potential adverse impact to member returns and the impact on consumers' confidence in the system. The removal of conflicted practices will indisputably bring greater confidence in the system.

Reporting standards

A key objective in this reform package is to provide improved transparency to members. The proposed reporting standard amendments purport to require RSE Licensees to provide additional information to APRA about expenses included by the RSE and RSE Licensees in managing and operating the RSE on a "look through" basis. The type of information which an RSE Licensee may be required to disclose includes:

- details of the entity to which the money, consideration or other benefit is given
- the purpose for which the money, consideration of other benefit is given
- they way in which the money, consideration or other benefit is used by the entity to which it is given, and any entity with which that entity deals.

This data standard is potentially very broad and seeks to capture a broad range of transactions (with no monetary threshold). It seeks to capture both the:

- trustee and third party (primary party transaction)
- third party and any entity that the third party deals with (secondary party transaction).

This increase in information gathering is extremely broad. This information gathering power does not seem to exist for any other entities regulated by APRA or any other regulator. Insiders explaining this in the press suggest the proposal has been part of a witch hunt against unions and the not for profit superannuation

sector.[14] If the Government was serious about understanding what affects member returns and where the money trail is, it would have introduced reforms which capture the disclosure of profits and margins in retail funds and their related entities.

However, even if it is accepted that this type of disclosure is necessary, the proposed reform is modelled on the deficient "look through" reporting provisions in respect of investment expenses. As is evident in Tables 3 and 4, the current look though provision, and/or APRA's implementation, seems fundamentally flawed because it is failing to provide accurate, complete, and comparable information to the public.

The Explanatory Memorandum states that "look though reporting of investments enables APRA to obtain a full picture of how RSEs are investing member contributions and provides APRA with the ability to consider whether the investments of individual RSEs are in line with their obligations under the SIS Act". As shown in Tables 3 and 4, it would seem that APRA's implementation of the current reporting requirements don't deliver full transparency of costs to members (fees) or of costs to funds (expenses), as many super funds owned by the big four banks, Macquarie and AMP have disclosed zero investment fees and expenses.

[14] Paul Kelly, ALP-Liberal battle lines drawn in superannuation showdown, *The Australian*, 20 September 2017.

Table 3 – Bank and AMP-owned fund fees

Bank	Fund Name	Assets ($m)	Number of Accounts	Administration fees		Investment fees		Advice fees		Other fees		Total fees	
				($m)	Ratio* (%)	($m)	Ratio* (%)	($m)	Ratio* (%)	($m)	Ratio* (%)	($m)	Ratio* (%)
AMP	AMP Superannuation Savings Trust	52,757.20	2,023,686	122.0	0.2%	0.0	0.0%	0.0	0.0%	8.2	0.0%	130.2	0.2%
AMP	AMP Retirement Trust	16,437.39	297,715	21.9	0.1%	0.0	0.0%	0.0	0.0%	0.0	0.0%	113.2	0.7%
ANZ	OnePath Masterfund	34,448.10	990,851	74.8	0.2%	0.0	0.0%	0.0	0.0%	410.9	1.2%	485.7	1.4%
ANZ	Retirement Portfolio Service	835.21	3,145	6.1	0.7%	0.0	0.0%	0.0	0.0%	3.7	0.4%	9.9	1.1%
ANZ	Oasis Superannuation Master Trust	5,285.10	46,561	47.8	0.9%	2.3	0.0%	0.0	0.0%	57.0	1.1%	107.1	2.0%
ANZ	ANZ Australian Staff Superannuation Scheme	3,879.18	31,912	5.9	0.2%	12.6	0.3%	0.0	0.0%	12.0	0.3%	30.5	0.8%
CBA	Avanteos Superannuation Trust	6,647.80	26,431	27.7	0.4%	0.0	0.0%	0.0	0.0%	49.1	0.8%	76.8	1.2%
CBA	Encircle Superannuation Fund	931.93	2,133	1.8	0.2%	0.0	0.0%	0.0	0.0%	8.8	1.0%	10.6	1.2%
CBA	Star Portfolio Superannuation Fund	474.60	1,674	2.0	0.5%	0.0	0.0%	0.0	0.0%	3.0	0.7%	5.0	1.2%
CBA	Symetry Personal Retirement Fund	2,190.59	11,841	16.3	0.7%	0.0	0.0%	0.0	0.0%	23.1	1.1%	39.3	1.8%
CBA	Ultimate Superannuation Fund	254.91	1,215	1.3	0.6%	0.0	0.0%	0.0	0.0%	2.5	1.1%	3.8	1.7%
CBA	Colonial First State FirstChoice Superannuation Trust	66,395.27	776,003	174.1	0.3%	561.0	0.9%	255.5	0.4%	16.5	0.0%	1007.1	1.6%
CBA	Colonial First State Rollover & Superannuation Fund	2,843.18	41,368	3.6	0.1%	51.8	1.8%	0.3	0.0%	0.1	0.0%	55.8	1.9%
CBA	Commonwealth Essential Super	1,554.61	160,800	14.2	1.1%	5.0	0.4%	0.0	0.0%	0.7	0.1%	19.9	1.6%
CBA	Colonial Super Retirement Fund	4,206.21	178,566	24.5	0.6%	0.0	0.0%	0.0	0.0%	0.0	0.0%	24.5	0.6%
CBA	Commonwealth Bank Approved Deposit Fund	19.71	2,515	0.0	0.0%	0.0	0.0%	0.0	0.0%	0.2	1.0%	0.2	1.0%
CBA	The State Bank Supersafe Approved Deposit Fund	14.13	1,117	0.0	0.0%	0.0	0.0%	0.0	0.0%	0.2	1.0%	0.2	1.0%
CBA	Commonwealth Bank Group Super	10,196.57	74,557	16.1	0.2%	18.7	0.2%	0.0	0.0%	0.0	0.0%	34.8	0.4%
NAB	*The Universal Super Scheme^*	45,801.08	1,018,660	367.1	0.8%	183.3	0.4%	0.0	0.0%	159.1	0.3%	709.5	1.6%
NAB	DPM Retirement Service	74.55	527	1.4	1.8%	0.0	0.0%	0.0	0.0%	0.0	0.1%	1.5	1.9%
NAB	MLC Superannuation Fund	17,057.29	82,993	1.5	0.0%	0.0	0.0%	0.0	0.0%	86.5	0.5%	88.0	0.5%
NAB	Premiumchoice Retirement Service	379.94	2,610	4.6	1.2%	0.0	0.0%	0.0	0.0%	2.0	0.5%	6.5	1.7%
NAB	BHP Billiton Superannuation Fund	3,477.74	20,591	9.7	0.3%	13.8	0.4%	0.0	0.0%	0.4	0.0%	23.8	0.7%
NAB	*National Australia Bank Group Superannuation Fund A^*	4,365.08	37,552	7.8	0.2%	25.6	0.6%	0.0	0.0%	0.0	0.0%	33.4	0.8%
NAB	*Plum Superannuation Fund^*	17,792.27	151,736	60.2	0.3%	47.3	0.3%	0.0	0.0%	1.8	0.0%	109.2	0.6%
NAB	*Worsley Alumina Superannuation Fund^*	242.23	1,189	0.2	0.1%	1.2	0.5%	0.0	0.0%	0.0	0.0%	1.5	0.6%
WBC	BT Superannuation Savings Fund	9.60	628	0.0	0.1%	0.0	0.0%	0.0	0.0%	0.0	0.1%	0.0	0.2%
WBC	Westpac Mastertrust - Superannuation Division	5,796.70	247,920	15.7	0.3%	0.0	0.0%	0.0	0.0%	0.0	0.0%	15.8	0.3%
WBC	Westpac Personal Superannuation Fund	407.55	33,707	1.5	0.4%	0.0	0.0%	0.0	0.0%	0.0	0.0%	1.5	0.4%

WBC	ASGARD Independence Plan Division Four	17.71	601	0.3	1.5%	0.0	0.0%	0.0	0.0%	0.1	0.3%	0.4	1.8%
WBC	ASGARD Independence Plan Division Two	21,311.79	251,533	167.2	0.8%	0.0	0.0%	0.0	0.0%	251.2	1.2%	418.3	2.0%
WBC	BT Lifetime Super	1,809.46	30,388	0.1	0.0%	0.0	0.0%	0.0	0.0%	0.9	0.0%	1.0	0.1%
WBC	Retirement Wrap	56,975.78	922,316	214.9	0.4%	69.7	0.1%	267.6	0.5%	298.7	0.5%	850.9	1.5%
MACQ	Macquarie Superannuation Plan	15,703.32	85,819	83.0	0.6%	4.7	0.0%	96.3	0.6%	1.2	0.0%	185.2	1.2%
MACQ	Macquarie ADF Superannuation Fund	268.96	6,290	3.5	1.2%	0.0	0.0%	0.0	0.0%	0.0	0.0%	3.5	1.2%

Source: APRA Annual Fund-level Superannuation Statistics June 2016

*Note: Since July 2016, ^five NAB Superannuation funds (MLC Master Key, NAB Group Super Fund A, Plum, The Universal Super Scheme & Worsley) have been merged into MLC Super Fund. *Fees ratio as percentage of cashflow-adjusted net asset.*

Table 4 – Bank and AMP-owned superannuation fund investment expenses

Bank	Fund Name	Assets ($m)	Number of Accounts	Investment expenses	
				($,000)	Ratio* (%)
AMP	AMP Superannuation Savings Trust	52,757.20	2,023,686	0	0.0%
AMP	AMP Retirement Trust	16,437.39	297,715	0	0.0%
ANZ	OnePath Masterfund	34,448.10	990,851	0	0.0%
ANZ	Retirement Portfolio Service	835.21	3,145	0	0.0%
ANZ	Oasis Superannuation Master Trust	5,285.10	46,561	2,584	0.0%
ANZ	ANZ Australian Staff Superannuation Scheme	3,879.18	31,912	14,765	0.4%
CBA	Avanteos Superannuation Trust	6,647.80	26,431	0	0.0%
CBA	Encircle Superannuation Fund	931.93	2,133	0	0.0%
CBA	Star Portfolio Superannuation Fund	474.60	1,674	0	0.0%
CBA	Symetry Personal Retirement Fund	2,190.59	11,841	0	0.0%
CBA	Ultimate Superannuation Fund	254.91	1,215	0	0.0%
CBA	Colonial First State FirstChoice Superannuation Trust	66,395.27	776,003	62	0.0%
CBA	Colonial First State Rollover & Superannuation Fund	2,843.18	41,368	2	0.0%
CBA	Commonwealth Essential Super	1,554.61	160,800	0	0.0%
CBA	Colonial Super Retirement Fund	4,206.21	178,566	0	0.0%
CBA	Commonwealth Bank Approved Deposit Fund	19.71	2,515	0	0.0%
CBA	The State Bank Supersafe Approved Deposit Fund	14.13	1,117	0	0.0%
CBA	Commonwealth Bank Group Super	10,196.57	74,557	51,873	0.5%
NAB	*The Universal Super Scheme^*	45,801.08	1,018,660	0	0.0%

NAB	DPM Retirement Service	74.55	527	0	0.0%
NAB	MLC Superannuation Fund	17,057.29	82,993	0	0.0%
NAB	Premiumchoice Retirement Service	379.94	2,610	0	0.0%
NAB	BHP Billiton Superannuation Fund	3,477.74	20,591	420	0.0%
NAB	*National Australia Bank Group Superannuation Fund A^*	4,365.08	37,552	653	0.0%
NAB	*Plum Superannuation Fund^*	17,792.27	151,736	3,562	0.0%
NAB	*Worsley Alumina Superannuation Fund^*	242.23	1,189	125	0.0%
WBC	BT Superannuation Savings Fund	9.60	628	0	0.0%
WBC	Westpac Mastertrust - Superannuation Division	5,796.70	247,920	0	0.0%
WBC	Westpac Personal Superannuation Fund	407.55	33,707	0	0.0%
WBC	ASGARD Independence Plan Division Four	17.71	601	207	1.1%
WBC	ASGARD Independence Plan Division Two	21,311.79	251,533	130,076	0.6%
WBC	BT Lifetime Super	1,809.46	30,388	13,457	0.7%
WBC	Retirement Wrap	56,975.78	922,316	75,509	0.1%
MACQ	Macquarie Superannuation Plan	15,703.32	85,819	0	0.0%
MACQ	Macquarie ADF Superannuation Fund	268.96	6,290	0	0.0%

Source: APRA Annual Fund-level Superannuation Statistics June 2016

*Note: Since July 2016, ^five NAB Superannuation funds (MLC Master Key, NAB Group Super Fund A, Plum, The Universal Super Scheme & Worsley) have been merged into MLC Super Fund. *Expenses ratio as percentage of cashflow-adjusted net asset.*

Because the model provision and/or its implementation is fundamentally flawed, policy makers should:

1. Review the current reporting standards (taking into account developments in fees and costs disclosure under the Corporations Act); the scope for variances and APRA's publication approach
2. Develop and implement an appropriate legislative framework, including aligning concepts including ''investment fees" and "investment expenses to the provision;
3. Provide clear guidance to APRA regarding how the provision should be implemented; and
4. Apply conforming changes to the proposed "look through" disclosure requirements for operating expenses, and clarification of expectations for APRA implementation.

We note that the Government has not expressed any concern with the lack of investment expense reporting by bank-owned funds, yet has proposed other reforms that systematically have a disproportionate effect on industry and other not-for-profit funds.

In addition, it is unclear whether the reference to 'another entity' is intended to be a reference to another entity covered in the *Financial Sector (Collection of Data) Act 2001*. As a result it would seem that not all third parties are covered by the *Financial Sector (Collection of Data) Act 2001*. If the intention was to expand the operation of the Act, this should be clarified. To this end, it is vitally important that transparency is consistent across the sectors. Any reform that does not achieve this is counterproductive as it potentially could mislead consumers, interested parties and policy makers.

Tables 3 and 4 above illustrate a fundamental flaw in the implementation of the current look through disclosure. In these circumstances it is premature to expand the look through regime until there is a broad based review of all current reporting standards (taking into account developments in fees and costs disclosure under Corporations Act) and the scope of variances as well as APRA's approach. After the review is complete, changes to the reporting standards should be implemented to enhance transparency and comparability on a consistent basis across all sectors.

Portfolio holdings disclosure

The portfolio holdings disclosure rules were introduced as part of the MySuper reforms that passed into law in November 2012.[15] Since then, the commencement of the reform has been deferred by ASIC Class Orders and portfolio holdings disclosure rules were scheduled to commence on 1 July 2019 for MySuper products and 31 December 2019 for choice products.[16]

The current portfolio holdings disclosure obligations, pursuant to section 1017BB of the Corporations Act require trustees of **all** registrable superannuation entities (RSEs) to publish information about the fund's portfolio holdings on the fund's website. The key purpose of the portfolio holdings disclosure was to "provide greater transparency and allow members to understand where their superannuation is invested".[17] More broadly, the measures were introduced in response to the Super System Review's identification of a "lack of transparency, comparability and, consequently, accountability in Australia's

---

[15] *Corporations Act 2001* (Cth), section 1540.

[16] *ASIC Class Order* 14/443, section 4, which was amended by A*SIC Corporations (Amendment) Instrument 2017/569* to effect the delay.

[17] *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012* explanatory memorandum, 31, [3.5].

superannuation system" and the "unduly opaque" nature of portfolio disclosure in Australia that does not meet global best practice.[18]

This Bill seeks to amend the current requirements so that the disclosure requirement does not apply to choice products that contain multiple investment options (an intrinsic feature of platform products). This reform is ideologically driven and creates bad policy. Buried at the end of the portfolio holdings section, the Bill includes a new definition of investment option. Investment option is defined as follows:

"investment ***option*** includes:

(a) a choice product that **does not** contain multiple investment options; and

(b) a MySuper product (within the meaning of the *Superannuation Industry (Supervision) Act 1993*)".

This means there is no obligation on platform products which form the majority of the choice sector to disclose portfolio holdings to, the market generally, or APRA. It seems that this Government is resolute in delivering a half-baked reforms when it comes to ensuring accountability and transparency for choice products. The continued lowering of the regulatory bar for bank owned superannuation funds is outrageous, more so, when this Bill is being paraded as delivering greater transparency and accountability and improving member benefits.

Annual Member Meeting

Under the proposed reforms RSE Licensees will be required to hold annual members' meetings to discuss the key aspects of the fund and provide members with a forum to ask questions about all areas of the fund's performance and operations.

The Fraser Review into the Board Governance of Not-for-Profit Superannuation Funds proposed regular member meetings and conferences, and ISA supports such meetings.

The specific implementation of this reform could be improved because the practical differences between the proposed superannuation Annual Member Meeting and Annual General Meeting (AGM) (pursuant to the Corporations Act) are ignored. For example, shareholders attend an AGM to transact on business and vote on resolutions. Members of superannuation funds do not transact with the fund in the way that shareholders do; that responsibility sits with the trustee.

There are also practical matters that have not been adequately addressed in the Bill. For example, the Bill requires minutes of the annual members' meeting to be prepared, and for those minutes to include the answers to any questions asked at the meeting that a person is obliged to answer either at or **after the meeting** (because it was not reasonably practicable to answer the questions at the meeting). Finally, there is a requirement that those minutes are made available to all members on the registrable superannuation entity's website.

The primary purpose of minutes is to create an official and accurate record of the meeting. Minutes serve to both record the actions taken for those attending the meeting as well as for those who were unable to attend the meeting. The minutes are not intended to serve—nor should they serve—as an exact account of who said what and when. Nor is the purpose of minutes to document matters not actually addressed in the meeting. Including answers to questions which were not answered at a meeting in the minutes of that meeting is contrary to good governance practices.If matters are to be addressed after the meeting, then those matters do not and should not form part of the minutes, but should be documented outside the minutes.

The Bill also requires that the Chair, CEO and at least a quorum of directors must attend the meeting and are compelled to attend and answer questions put to them at the meeting, yet no such requirement exists

[18] Id, 31, [3.2] and [3.5].

for other company directors. Additionally, it unclear why it is an offence if a superannuation director does not attend or answer questions, yet this approach has not been adopted more broadly to other directors. There was no basis provided in the Explanatory Memorandum for the strangely heavy-handed approach. The Explanatory Memorandum states that the regulations may prescribe that the annual report of information on operational matters of the fund be included with the notice of the AMM, any such requirement would be inconsistent with Corporations Regulation 7.9.75BA which allows a trustee to provide the annual report by making it available on its website (i.e. the trustee is not required to send a hard copy of the annual report to its members). Unnecessary ambiguity should be avoided.

It is also worth observing that the premise in the Explanatory Memorandum that in a large number of cases fund members do not have the opportunity to ask questions of fund's performance and or management is not entirely accurate. Sections 1017C and 1017A of the Corporations Act and regulation 7.9.45 of the Corporations Regulations provide members with the opportunity request a wide range of information. Many funds receive and respond to member enquiries on a daily basis and some funds already undertake member information sessions. Nevertheless, the annual member meetings reform is an opportunity to further provide members with information they may require and to this end it is potentially beneficial. However, more consideration is need about its implementation and greater flexibility should be provided.

Conclusion

The Bill proposes 8 main reforms. Many of the reforms are bad policy. The reforms that do not apply to choice products and therefore to the vast majority of bank-owned super funds products demonstrate the purpose of this Bill is something other than to advance the public interest and help super fund members.

For the Bill to have any credibility it must at a minimum include an annual outcomes assessment test for choice products; enable APRA to issue to directions to connected entities where there are vertically integrated structures; address the underperformance of the retail sector and require portfolio holdings disclosure of all products.