Chapter 2

Amendments related to director liability and dispute resolution mechanisms

2.1 This chapter examines the provisions of the bill which seek to amend the SIS Act and the *Superannuation (Resolution of Complaints) Act 1993* to:

- require persons to seek leave of the court before pursuing an action against a director of a superannuation fund alleging loss or damage due to the director contravening their duties under the SIS Act;
- extend an existing defence available to trustees and directors to cover their MySuper obligations;
- amend the defences available to actions related to loss or damage as a result of the making of an investment or the management of reserves;
- increase the time limits for lodging complaints regarding total and permanent disability claims with the Superannuation Complaints Tribunal; and
- insert a requirement for trustees to provide eligible persons reasons for decisions made on a complaint, either automatically or on request depending on the matter relevant to the complaint.

Requirement to seek leave of the court for actions for breaches of directors' duties

2.2 The second tranche of the MySuper and governance reforms, the Trustee Obligations Act, made amendments to the SIS Act that will, among other things, apply new duties to directors and trustees of a superannuation fund which offers a MySuper product. However, the explanatory memorandum advises that:

> While the superannuation industry has supported heightened obligations and the need for improved accountability of directors concerns have been raised about the potential for frivolous and vexatious legal action being brought against directors.[1]

2.3 Accordingly, the bill proposes amendments to the SIS Act to require a person to seek leave of the court before bringing action against an individual director for a breach of their duties.[2] When considering applications for leave, it is proposed that the court will need to take into account whether the applicant is acting in good faith and

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1 Explanatory memorandum, paragraph 5.5.

2 Schedule 1, items 65 and 66.

whether there is a serious question to be tried.[3] There will also be a six year time limit from the day on which the cause of action arose for leave of the court to be sought.[4]

Views of stakeholders

2.4 In its submission on the exposure draft of the bill, Chartered Secretaries Australia questioned the rationale underpinning the proposed amendments:

> CSA notes that pursuing legal action is not a decision which a majority of litigant undertake lightly. Litigation is both expensive and requires a high level of advice before being commenced … While CSA understands that [the bill's] approach has been adopted to try and curb the pursuit of vexatious or frivolous legal actions, requiring a litigant to overcome a second hurdle in order to bring a legal action against a director could be unfairly prejudicial to those considering their options when confronted with potential director liability issues. CSA is particularly concerned that the extra legal costs associated with this imposition will impact upon low income earners and their legitimate rights, in some instances, to have a matter heard about the negligence or misconduct of a director, in a court of law.[5]

2.5 The Industry Super Network, however, argued that the requirement to seek leave and, therefore, to show that there is an issue to be tried 'removes the bulk of potentially vexatious litigation':

> The test beyond that, we believe, is sufficiently low to not provide a bar to the ordinary beneficiary to commence proceedings where they believe they have a cause of action. So we believe that the balance is right.[6]

2.6 The Superannuation Committee of the Law Council of Australia, while supportive of the objective of the proposed amendments, suggested that the requirement that there is a 'serious issue to be tried' could be open to question:

> We are very pleased to see that that second aspect has been addressed through the introduction of a threshold test for actions against trustee directors, that the threshold test that has been put into tranche 4 currently is whether there is a serious issue to be tried. That is the test I believe that is used for interlocutory matters before the court. However, without going into the technical detail—I have two High Court cases here with me in case you want to go into the technical detail—there is some uncertainty as to what is actually meant by the expression 'serious issue to be tried'. There is one

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3 Schedule 1, item 66, proposed subsection 4C.

4 Schedule 1, item 65, proposed subsection 4B.

5 Chartered Secretaries Australia, submission to Treasury on the exposure draft of the bill, 2 November 2012, www.csaust.com/media/447643/final_submission_exposure_draft_mysuper_further_measures.pdf (accessed 5 December 2012), pp. 3–4.

6 Mr Richard Watts, External Relations Manager and Legal Counsel, Industry Super Network, *Proof Committee Hansard*, 22 January 2013, p. 22.

> High Court case which says all it means is that you have to show that there is a relevant cause of action, which is not really a very high threshold at all. There are other authorities which say that you have to show a sufficient likelihood of success. We think it should be the second one and we think it would be clearer if, rather than using the expression 'serious issue to be tried', which does have some uncertainty about it, the legislation just said 'sufficient likelihood of success'. We think that would be more appropriate.[7]

2.7 The Australian Institute of Superannuation Trustees (AIST) supported the Law Council's argument.[8]

Committee view

2.8 The committee considers that the proposed amendments strike the appropriate balance between the rights of litigants and directors. Accordingly, they are supported.

2.9 The committee notes the evidence provided by the Law Council regarding the phrases 'serious question to be tried' and 'sufficient likelihood of success' and the possible uncertainty that is associated with the former. It appears that neither phrase is commonly used in Commonwealth legislation, although the phrase 'serious question to be tried' used in the bill can be found in paragraph 237(2)(d) of the Corporations Act. The phrase adopted in the bill is in common judicial usage and, despite the Law Council's concern, appears sufficient to address the issue identified by the explanatory memorandum, namely concern about frivolous or vexatious legal action.

Defences available to trustees and directors

2.10 Proposed changes to the legal defences available to trustees and directors are also included in the bill. Under these proposed amendments:

- the defence available in section 323 of the SIS Act that the breach was due to a reasonable mistake or due to the fault of another (and if so, that they acted with reasonable precaution and applied due diligence) will be extended to cover breaches of MySuper duties; and
- for actions for loss arising from an investment or the management of a reserve, the defences available in subsections 55(5) and (6) of the SIS Act will be amended to allow trustees and directors to rely on them if they establish compliance with the covenants and MySuper duties that are *relevant to the loss or damage*, rather than the covenants and MySuper duties that generally apply to the investment or management of the reserves.[9]

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7 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 15.

8 Australian Institute of Superannuation Trustees, *Submission 8*, p. 6.

9 See schedule 1, items 68 and 69.

2.11 The reasoning for why, in addition to leave of the court being required before an action may commence, such amendments are thought necessary was expressed by the Industry Super Network:

> Whilst all statutory and fiduciary obligations should be adhered to, ISN is concerned that the proposed regime would result in a proliferation of litigation to the overall detriment of beneficiaries. It is suggested that the onus of proof upon trustees that they have adhered to the covenants contained in s52 of the SIS will encourage broad claims of failure on the part of the trustees. Rather than mount a costly exercise of discharging their onus of proof, it is more likely that trustees will settle most claims. Whilst the requirement to seek leave from the Court to commence an action will have a welcome impact; in the absence of a requirement that there be a nexus between an alleged breach and a purported loss, it is expected that the current arrangements will encourage a significant growth in litigation.[10]

History of subsections 55(5) and (6)

2.12 It was the defences contained in subsections 55(5) and 55(6) that received the most attention in the evidence received by the committee. Therefore, before discussing the evidence received regarding these proposed amendments it is useful to outline the history of these provisions, using subsection 55(5) as an example. Prior to the MySuper and governance reforms, and until 1 July 2013, subsection 55(5) states:

> It is a defence to an action for loss or damage suffered by a person as a result of the making of an investment by or on behalf of a trustee of a superannuation entity if the defendant establishes that the investment was made in accordance with an investment strategy formulated under a covenant referred to in paragraph 52(2)(f).

2.13 The SIS Act includes trustee covenants that are automatically taken to be incorporated into the governing rules of a superannuation fund. As a result of the Trustee Obligations Act, new covenants will apply from 1 July 2013. Amendments to subsection 55(5) of the SIS Act were also made by the Trustee Obligations Act and will similarly commence on 1 July 2013. From that date, the Trustee Obligations Act will amend the subsection so it reads as follows:

> It is a defence to an action for loss or damage suffered by a person as a result of the making of an investment by or on behalf of a trustee of a superannuation entity if the defendant establishes that the defendant has complied with all of the covenants referred to in sections 52 to 53 and prescribed under section 54A, and all of the obligations referred to in sections 29VN and 29VO, that apply to the defendant in relation to the investment.

2.14 The amendments were designed to require that trustees must satisfy all of the covenants and the obligations in sections 29VN and 29VO where they are relevant to the investment before relying upon this provision as a defence. The explanatory

10 Industry Super Network, *Submission 5*, p. 2.

memorandum relevant to the Trustee Obligations Act provides the following reasoning for this approach:

> The change recognises the interdependency between the covenants. For example, where a trustee has acted dishonestly and in a conflicted manner, it would be unreasonable to have a defence for investment loss where it had otherwise complied with the investment covenant. The changes are not, however, intended to prevent trustees from accessing the defence in cases where a covenant or duty is not relevant to the particular loss as a result of making an investment.[11]

Reasons for the bill's amendments

2.15 The explanatory memorandum for this bill noted concern from the superannuation sector about the amendment made by the Trustee Obligations Act.[12] The further amendments proposed by the bill are intended to ensure there is 'a nexus between the act or omission of the director or trustee and the loss or damage which occurred'.[13] Item 68 of the bill proposes to omit the words 'in relation to the investment' and substitute 'in relation to each act, or failure to act, that resulted in the loss or damage'. Accordingly, it is intended by the bill that subsection 55(5) will read as follows:

> It is a defence to an action for loss or damage suffered by a person as a result of the making of an investment by or on behalf of a trustee of a superannuation entity if the defendant establishes that the defendant has complied with all of the covenants referred to in sections 52 to 53 and prescribed under section 54A, and all of the obligations referred to in sections 29VN and 29VO, that apply to the defendant in relation to each act, or failure to act, that resulted in the loss or damage.

Operation of section 55 as amended

2.16 If the proposed amendments contained in the bill are passed, section 55 will operate as follows:

- Subsection 55(1) will continue to provide that a person must not contravene a covenant contained, or taken to be contained, in the governing rules of a superannuation entity.
- Subsection 55(3) will continue to allow a person who suffers loss or damage as a result of the conduct of a trustee or director that was involved in a contravention of subsection 55(1), then the person may recover the amount of the loss or damage from those involved in the contravention.

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11 Explanatory memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, paragraph 1.82.

12 Explanatory memorandum, paragraph 5.5.

13 Explanatory memorandum, paragraph 5.24.

- If the action relates to loss or damage suffered as a result of the making of an investment, the defence outlined in the revised subsection 55(5) will be available. If the action relates to loss or damage suffered as a result of the management of any reserves, the defence outlined in the revised subsection 55(6) will be available.[14]

Views of stakeholders

2.17 The evidence received by the committee on the amendments focused on two areas: how the established rationale underpinning the defences contained in subsections 55(5) and (6) may have been fundamentally changed by the Trustee Obligations Act and whether the revision to the defences contained in this bill addresses the earlier concern about the Trustee Obligations Act's amendments.

Theory behind subsections 55(5) and (6)

2.18 The Law Council argued that the changes to the legal defences available to trustees and directors have fundamentally altered the nature of the defences. It provided the following explanation of the original purpose of subsection 55(5) and how, in its view, this purpose is no longer achieved:

> Section 55(5) as it first appeared in the SIS Act in 1993 was a defence available to a trustee having regard to "modern portfolio theory"—ie, that if a trustee properly chose a diversified portfolio of investments it would be protected if, for example, one of those investments performed badly when, in the context of the whole portfolio, the trustee had properly formulated and implemented an investment strategy. Now, the revised version of section 55(5) turns the original purpose of the defence and protection for trustees on its head, and renders it effectively useless. Therefore, if a member alleges that one of the trustee's investments performed poorly and resulted in a negative interest adjustment to the member's account, the member could seek to take action against the trustee company and/or (with the leave of the court) the directors to claim the loss and the trustee/ directors would be put to the task of proving positive compliance with every covenant and obligation related to the making of the investment before it would have a statutory defence.[15]
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> … if you have to establish that you have met every relevant covenant in relation to each act, that could mean each investment. In that case, the purpose of the original defence has been lost.[16]

2.19 The Corporate Super Association shared the view that the nature of the defence has been changed by the Trustee Obligations Act. It argued that the former

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14 The defences available under subsections 55(5) and 55(6) are available whether the action is brought under subsection 55(3), section 29VP or otherwise.

15 Law Council of Australia, *Submission 2*, pp. 8–9.

16 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 16.

subsection 55(5) provided a defence for a trustee if it had followed the requirements of the former covenant 'to formulate establish and monitor an investment strategy that took account of certain specified requirements, including the requirement to ensure adequate diversification'. Under this defence, where the diversification was appropriate:

> … it was accepted that certain investments would do better than others at any particular time, and part of the strategy was that diversification by investment type, by geographical exposure and by sectoral exposure would limit losses by the overall portfolio at any particular time. The amended provisions do not appear to provide trustees and directors with the former protection but instead provide the trustee with a defence only if numerous requirements (compliance with which will be hard to establish) are met. In effect trustees are now deprived of the former protection in the event of loss of value of individual investments, where the investments were undertaken as part of a suitably diversified portfolio.[17]

Does the bill address the concerns yet still achieve the policy objective?

2.20 The AIST indicated its support for the amendment, noting that its suggestions made to Treasury during the consultation on the exposure draft have been adopted.[18] Other stakeholders, however, questioned the effectiveness of the approach taken by the bill. They suggested that the proposed revision to subsections 55(5) and 55(6) does not address their key concern that the earlier tranches have made any defence to action taken for loss or damage contingent on the director or trustee demonstrating compliance with every covenant and the additional obligations contained in sections 29VN and 29VO. For example, in its submission the Industry Super Network stated that it supported the intent of the amendment as expressed in the explanatory memorandum—that is, creating the necessary nexus between the act or omission and the claimed loss—however, it suggests that the amendment 'fails to achieve this end':

> It remains that case that before a trustee or director could rely upon this defence they would be required to establish that they have complied with all covenants that were potentially relevant to the loss.[19]

2.21 A representative of the Law Council suggested that developing an appropriate investment strategy and making investments in accordance with that strategy—the requirement expressed in the previous version of the defence—provides appropriate cover as compliance with the other covenants would still be required:

> I believe, though, that as a matter of law every investment strategy … still has to comply with the covenants. I accept that, for members who are passive in relation to their superannuation, yes, a more paternalistic approach—to use a shorthand expression—may well be warranted, but

17 Corporate Super Association, *Submission 1*, p. 3.

18 Australian Institute of Superannuation Trustees, *Submission 8*, p. 6.

19 Industry Super Network, *Submission 5*, p. 3.

> I believe that those investment covenants and all of the covenants apply to every investment strategy that is formulated, not merely the default strategy, I guess, to put it that way.[20]

2.22 However, the Law Council argued that actually demonstrating compliance with those other covenants is a key problem, as the 'evidence involved in establishing positive compliance with so many obligations would be extremely onerous',[21] particularly because of the 'broadly-stated nature of many of the covenants and obligations, and … the positive obligation to establish "compliance"'. Of seemingly greater significance, however, the Law Council also concluded that the defence 'is not a defence at all' because to rely on it the trustee or director would have to show that they met every relevant covenant.[22] As an action brought under subsection 55(3) for the recovery of an amount of loss or damage suffered must be linked to a covenant having been contravened (subsection 55(1)), if the trustee or director were able to demonstrate compliance with every covenant and obligation that was relevant to each act, or failure to act, that resulted in the loss or damage, the legal action taken would 'necessarily fail', and the defence would not be needed. As the further change to the subsection proposed by the bill retains the requirement that the defendant must establish compliance with every potentially relevant covenant, the Law Council suggested that the further change to the subsection proposed by the bill is of 'no practical use':

> In other words, the effect of the revised drafting is to provide a defence only where the trustee or director can show that they had done nothing wrong in the first place.[23]

2.23 Regarding the new covenants that are introduced by the Trustee Obligations Act, and the requirement that use of the defences relating to the making of investments or the management of the reserves depends on compliance with every covenant being demonstrated, the Financial Services Council expressed its view that legal action should be linked to a breach of a particular, relevant, covenant:

> … if someone breaches a covenant they should be held to account through the covenant that they have breached. If it has resulted in a loss to a member there needs to be a causal link between the breach in the covenant and any loss that is suffered by the member.[24]

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20 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 17.

21 Law Council of Australia, *Submission 2*, p. 8.

22 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 15.

23 Law Council of Australia, *Submission 2*, p. 8.

24 Mr Andrew Bragg, Senior Policy Manager, Financial Services Council, *Proof Committee Hansard*, 22 January 2013, p. 4.

2.24 The Financial Services Council was asked to elaborate on how the other covenants could interact with investment covenant. It noted that action could still be taken for breaches of other covenants if necessary:

> Senator THISTLETHWAITE: Are there any circumstances that you could envisage where a director may have followed the investment strategy of the super fund but not some of the other covenants and there was not a loss to a particular beneficiary?
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> Mr Bragg: Potentially; for example, if all the directors follow the investment covenant related to the strategy but there is a breach of, say, a covenant relating to the risk management of fund, there could be a loss to the fund that had something to do with hedging which a member could then bring an action against. Even if the trustees have failed to meet the covenant in relation to the risk management of the fund, that would be the covenant which we would expect an action would be brought against, not against breaching another covenant related to, say, the reserves of the fund.[25]

2.25 Finally, despite the requirement contained in the bill that leave of the court is needed before action against a director can be taken, concern was expressed that opportunistic claims would be undertaken in an attempt to force a settlement:

> We can expect that there will be people looking very closely to see whether there is an opportunity there to make a claim with a view to settling. Given that these are expensive matters to go to trial, in many instances, on balance, I think it would be tempting for many funds simply to settle. That is the main concern we have.[26]
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> … we were also concerned that perhaps frivolous actions might be brought against individual directors in order to gain settlements through their indemnity insurers.[27]

2.26 However, it was acknowledged that more frivolous forms of these actions may have consequences, as the applicant could have costs awarded against them.[28]

Treasury's response

2.27 Given the concerns raised by a number of stakeholders, the committee was particularly interested to pursue this matter with Treasury. Treasury provided an explanation as to why it was viewed that the previous defence, which enabled for a defendant to rely solely on an investment strategy, is no longer appropriate:

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25 Mr Andrew Bragg, Senior Policy Manager, Financial Services Council, *Proof Committee Hansard*, 22 January 2013, pp. 4–5.

26 Mr Richard Watts, External Relations Manager and Legal Counsel, Industry Super Network, *Proof Committee Hansard*, 22 January 2013, p. 22.

27 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 15.

28 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 17.

> The concern was that the trustee may well have followed the investment strategy but otherwise may have not appropriately managed a conflict of interest or there may have been dishonest behaviour or some non-adherence to other obligations that are expected of trustees or directors. The sense was that that defence, while perhaps well intentioned, had gone too far in that it should not be sufficient to just wave an investment strategy and say that we followed it, if there had been other untoward behaviour. So the defence was adjusted to make sure that the trustee had complied with all relevant covenants before accessing the defence.
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> There have been some refinements to that to try and tighten the nexus between the loss or damage and the relevant covenants, and that point has been raised today. The words in this bill pick up words that were suggested, I think, by ASFA and AIST in the consultation phase. I understand they are comfortable with those words. ISN have suggested some further refinements. But it is clear that the intent is to create that nexus so that you do not have to demonstrate you have complied with covenants that actually have no relationship or relevance to the particular loss or damage. Perhaps it is something that could be further iterated in an EM or somewhere along the line, but that is the clear intention. That is more to the objective with that defence.[29]

Committee view

2.28 The committee supports the intent, as expressed by Treasury, behind the defences to actions arising from an investment or the management of a reserve available to trustees and directors being revised as part of the Stronger Super reforms. It would be troubling for a trustee to access a defence based only on compliance with an investment strategy if non-compliance with other covenants, such as acting dishonestly, has occurred and was relevant to the loss or damage suffered but could be ignored. The committee supports the intent that a greater nexus be created between the alleged breach and the claimed loss or damage.

2.29 Although some stakeholders suggested that the wording used for the revised defences be further amended, the committee notes that key industry groups are broadly supportive of the revised defences as they are currently drafted. While the committee draws the government's attention to the issues raised in evidence, it is not recommending further amendments to the defences at this time.

29 Mr Jonathan Rollings, Principal Adviser, Financial System Division, Treasury, *Proof Committee Hansard*, 22 January 2013, pp. 36–37.

Increased time limit for lodging complaints with the Superannuation Complaints Tribunal

2.30 The Superannuation Complaints Tribunal (SCT) is an independent dispute resolution body that provides mechanisms for the 'fair, economical, informal and quick' conciliation or review of disputes about superannuation'.[30] However, the Cooper Review found that the current time limit for members to lodge a complaint with the SCT regarding total and permanent disability (TPD) claims 'can unfairly exclude claimants who had reasonably delayed a claim'. The Review recommended that the time limit be extended.[31]

2.31 The bill proposes amendments to the *Superannuation (Resolution of Complaints) Act 1993* to increase the time limit for members to lodge a complaint with the SCT regarding TPD claims. The time limit will be increased from two years from the time of the decision to six years from the time of the decision. However in cases where a person has permanently ceased employment as a result of the physical or mental condition linked to the claim:

> … the time period will only be increased to four years, because in that case, the person has already had two years from ceasing employment to lodge their claim. The four year time period in paragraph 14(6A)(a) reflects the two-year time limit in subsection 14(6B).[32]

Views of stakeholders

2.32 The AIST and the Industry Super Network expressed their support for these amendments,[33] as did the SCT. The SCT stated that the extended time limit 'more closely aligns access to the free Tribunal dispute resolution service with the time limits which apply to proceedings commenced in the courts', adding that the SCT has 'specialist skill and knowledge in the area of superannuation and related insurance disputes'.[34]

Committee view

2.33 The committee supports the increased time limits for lodging complaints with the SCT.

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30 *Superannuation (Resolution of Complaints) Act 1993*, s. 11.

31 Super System Review, *Final report*, part 2: recommendation packages, 2010, p. 147 [recommendation 5.7].

32 Explanatory memorandum, paragraph 3.18.

33 Australian Institute of Superannuation Trustees, *Submission 8*, p. 5; Industry Super Network, *Submission 5*, p. 1.

34 Superannuation Complaints Tribunal, *Submission 4*, p. 2.

Reasons for decisions made on a complaint

2.34 The Cooper Review observed that, under trust law, beneficiaries often cannot acquire information decisions that affect their interests.[35] At present, while trustees must ensure that they take reasonable steps to ensure an affected beneficiary has the right to make a complaint and for the complaint to be properly considered, trustees are not required to provide a reason for their decision in relation to an eligible person's complaint.[36] The Cooper Review recommended that the SIS Act should require trustees to provide reasons for a decision made on a complaint.[37]

2.35 The bill proposes amendments to implement this recommendation.[38] Separate arrangements are proposed for death benefit complaints compared to other complaints:

- For death benefits, trustees will be required to automatically provide written reasons when notice of the decision is given to the eligible person who made the complaint (such as the beneficiary or executor of the estate of a former beneficiary). Complainants will also be able to request reasons for a non-decision if a decision on a death benefit compliant has not been made within 90 days.
- For other complaints, trustees will be required to provide written reasons for their decision within 28 days of an eligible person requesting them.

2.36 The Australian Securities and Investments Commission (ASIC) will be able to grant an extension to the 28 day period during which decisions must be given.[39]

Views of stakeholders

2.37 In its submission, the Industry Super Network stated its support for the proposed amendments.[40] The SCT also outlined some of the additional benefits that the amendments could have:

> The requirement for a trustee to provide reasons, either with a decision or upon request, in the Tribunal's view, improves the general societal level of

35 The Cooper Review noted that, in the superannuation context, this aspect of trust law had 'attracted adverse comment by the courts on a number of occasions … The courts have been persuaded by the fact that participation in a superannuation fund is mandatory for almost everyone in the workforce, that preservation rules mean members cannot easily withdraw their money until retirement and that superannuation contributions are properly regarded as part of the member's remuneration'. See Super System Review, *Final report*, part 2: recommendation packages, 2010, p. 56.

36 Explanatory memorandum, p. 16.

37 Super System Review, *Final report*, part 2: recommendation packages, 2010, p. 57 [recommendation 2.9].

38 Schedule 1, item 74.

39 Schedule 1, item 74, proposed paragraph 101(1)(e).

40 Industry Super Network, *Submission 5*, p. 1.

> awareness and understanding of the superannuation system. It may have the effect of reducing the number of complaints resulting from trustee decisions.[41]

2.38 Views were also expressed about the obligation to respond within 28 days, with the Industry Super Network stating its view that, 'to the extent that there are problems' with this timeframe:

> … systems should be changed and problems addressed with a view to resolving the interests of the beneficiaries rather than the interests of the administrators or the funds themselves. These are matters that can be, we believe, overcome.[42]

2.39 However, the Law Council and the Corporate Super Association recommended that a time limit be imposed for the making of the request for reasons. The Law Council provided the following argument:

> … a trustee could potentially have to stand ready indefinitely so as to respond (in a short time frame) to a request for reasons. The trustee's ability to properly respond to a request for reasons will naturally decline as the months and years elapse … The decision by an applicant to request reasons should not be something which requires detailed consideration or legal advice, and their interest in pursuing reasons should be most heightened shortly after receiving information about the trustee's decision on the complaint.[43]

2.40 The Law Council initially suggested a limit of 90 days from the day the decision has been communicated by the trustee be imposed. The Corporate Super Association supports the Law Council's proposal.[44] At the hearing, however, the Law Council representative revised the 90 day limit and instead suggested a 12 month timeframe:

> We note that tranche 4 introduces an ability for complainants to request reasons for why their complaint may have been denied—and we support that. But we think there should be some time limit, some reasonable time frame, in which a complainant must request those reasons. Primarily, we are concerned about retrospective requests where records may not have been kept. So we think there should be some reasonable period, perhaps 12 months after receiving the notice of the decision, in which the request for reasons must be made.[45]

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41 Superannuation Complaints Tribunal, *Submission 4*, p. 2.

42 Mr Richard Watts, External Relations Manager and Legal Counsel, Industry Super Network, *Proof Committee Hansard*, 22 January 2013, p. 25.

43 Law Council of Australia, *Submission 2*, p. 7.

44 Corporate Super Association, *Submission 1*, p. 2.

45 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 16.

2.41 In response to a question on notice, the AIST outlined a range of record keeping requirements that apply to the superannuation sector. The AIST advised that:

> Subsection 22(3)(a) of the *Superannuation (Resolution of Complaints) Act 1993* states that the Superannuation Complaints Tribunal may treat a complaint as withdrawn if more than 12 months elapses between the decision or conduct that is being complained about, and the date that the complaint is made to the Superannuation Complaints Tribunal.
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> Primarily, complaints are made to the Tribunal about decisions that relate to complaints received by trustees. An exemption applies which relates to the decision of a trustee relating to the payment of a disability benefit because of TPD, where the time limit specified in the Bill will apply.
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> By implication, a trustee should maintain records of complaints (other than in relation to TPD matters) for at least 12 months from the date of the trustee's decision or conduct that is being complained about.[46]

2.42 The AIST also suggested that there be a requirement for trustees to inform beneficiaries about their entitlement to request reasons for decisions. The AIST noted that superannuation funds are already required to advise their members about their dispute resolution procedures and to provide information about the SCT. It recommended that these requirements be extended to include advising members about their ability to request reasons for decisions, observing that '[k]nowledge of a right is crucial to people being able to access it'.[47] The explanatory memorandum advises that the government will consider including in the regulations a requirement for trustees to inform members that they can request written reasons for decisions.[48]

Committee view

2.43 Making available to a member the trustee's reasons for a decision on a matter that affects that member is a relatively straightforward change that will increase the transparency of the dispute resolution process and the accountability of trustees. Accordingly, the committee supports the intent of these amendments.

2.44 After examining the proposed amendments and taking evidence from stakeholders, however, the committee considers that it would be ideal for an amount of time to be stipulated during which notices requesting reasons for a decision on a non-death benefit complaint can be given for subsection 101(1) to apply. Such a time limit should not be specified for instances of non-decision.

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46 Australian Institute of Superannuation Trustees, answer to question on notice, 22 January 2013 (received 24 January 2013), p. 4.

47 Australian Institute of Superannuation Trustees, *Submission 8*, p. 5.

48 Explanatory memorandum, paragraph 3.13. Section 1017DA of the Corporations Act allows the regulations to specify additional information that trustees of superannuation entities are required to provide. As noted by the AIST, the Corporations Regulations 2001 (subdivision 5.11) already specifies additional information that trustees are required to provide, such as information about the SCT.

2.45 The committee suggests that the timeframe should correspond with the limits that apply to the timeframes in which the SCT may consider a complaint. For complaints regarding total and permanent disability claims the time limit should be six years from the time of the decision, which is the new time limit imposed by the bill. For other complaints, the request for reasons should be required within one year of the trustee's decision.

2.46 The committee also considers that to ensure the amendments are effective, there is a need to ensure that affected persons are advised that they may request from a trustee reasons for a decision. The committee notes the advice contained in the explanatory memorandum that regulations to address this are being considered and encourages the government to make these regulations.

Recommendation 1

2.47 That schedule 1, item 74 be amended to require that for a notice in writing from an eligible person to a trustee given in accordance with proposed paragraph 101(1)(d) to be valid:

- **for complaints regarding total and permanent disability claims, it must be given within six years from the time of the decision; and**
- **for other complaints, it must be given within 12 months of the trustee's decision.**

Recommendation 2

2.48 That the government amends the Corporations Regulations 2001 to require that when a decision is made in relation to a non-death benefit complaint, the trustee must give the eligible person information about how they can request reasons for the decision.