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Dr Richard Grant
Acting Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Email: corporations.joint@aph.gov.au

Dear Dr Grant,

INQUIRY INTO THE SUPERANNUATION LEGISLATION AMENDMENT (TRUSTEE OBLIGATIONS AND PRUDENTIAL STANDARDS) BILL 2012

The Association of Superannuation Funds of Australia (ASFA) would like to provide this submission in relation to the Committee's Inquiry into the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* ("Bill").

We appreciate the opportunity to make a submission.

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

Comments on the Bill

ASFA supports the enhancement of trustee obligations, especially with respect to those trustees who offer a MySuper product, and APRA being able to make prudential standards. We have made some comments on two significant aspects of the Bill – determination of scale and directors' liability - in our covering letter, as well as addressing some other matters and drafting issues in an annexure.

1. Sub-sections 29VN(b), (c) & (d) - annual determination of scale

Proposed new sub-section 29VN(b) states as follows: -

> "*Each trustee of a regulated superannuation fund that includes a MySuper product must:*
> …
> *(b) determine on an **annual basis** whether the beneficiaries of the fund who hold the MySuper product are disadvantaged, in comparison to the beneficiaries of other funds who hold a MySuper product within those other funds, because the financial interests of the beneficiaries of the fund who hold the MySuper product are affected:*
> *(i) because the number of beneficiaries of the fund who hold the MySuper product is insufficient; or*
> *(ii) because the number of beneficiaries of the fund is insufficient; or*
> *(iii) where the **assets** of the fund that are attributed to the MySuper product are, or are to be, pooled with other assets of the fund or assets of another entity or other entities - because the **pool of assets is sufficient; or***
> *(iv) in a case to which subparagraph (iii) does not apply – because the assets of the fund that are attributed to the MySuper product are insufficient*" (emphasis added).

ASFA submits that - given that trustees are under a duty to act in the best interest of members - the test contained in paragraphs 29VN(b) is unnecessary. Further, it may drive trustees to make short-term decisions in how they operate and how they invest the fund which may not be in the best long-term interest of members.

By limiting the test to an annual comparison against other providers, the legislation will drive behaviour to meet that test only.

The concept of "financial interests of the beneficiaries" is unclear. Given that paragraph 29VN(a) refers to "the financial interests of the beneficiaries … in particular returns to those beneficiaries (after the deduction of fees, cost and taxes)" then presumably the concept of "financial interests" is broader than merely net returns.

Further, it is unclear what is meant by "disadvantaged, in comparison to the beneficiaries of other funds who hold a MySuper product within those other funds". It is unclear as to the basis upon which these comparisons are to occur.

Given the: -

- divergent nature of funds – from corporate funds though to industry funds and retail funds, including master trusts and wrap products;
- different types and levels of service offerings – such as insurance and advice; and
- variations in offerings – such as unit prices versus crediting rates

we foresee that trustees will have difficulties in performing what may otherwise be an "apples versus pumpkins" comparison rather than an "apples versus apples", or even an "apples versus oranges", one.

In particular, the concept of comparing net returns with other MySuper products is potentially misconceived: -

1. net returns are a function of the interplay of both investment returns and costs. While the latter, which is largely a function of operational issues, has some correlation with access to scale (noting of course that there can be diseconomies of scale), the former is significantly more a function of asset allocation and market returns, which generally are not a function of scale;

2. the use of metrics to compare with other MySuper products, such as quartile \ decile of net returns for a given period, is notoriously unreliable as an indicator over the longer term, as a last quartile performer for a quarter, or even for a year or two, can end up being a top quartile performer over the longer term;
3. utilising financial interests \ net returns as a measure ignores any measure of relative risk to which the beneficiaries may be exposed in earning those returns;
4. comparison of net returns as a measure may prove difficult when MySuper products adopt a lifecycle investment strategy or between MySuper products in funds which have differing underlying member demographics, say for example where a MySuper product with older members adopts a more conservative strategy than one with younger members; and
5. it should be noted that an outcome-reporting standard is yet to be put in place.

It is also worth noting that, while scale is relevant, it is not the only indicator of likely success and there are cases where smaller, appropriately resourced and skilled funds are able to demonstrate that they are able to meet the trust law requirement to provide optimal benefits to members. Funds with relatively small assets and \ or members can achieve economies of scale though outsourcing operational and other functions to service providers and through combining with other trustees when acquiring services or in developing product or service offerings.

It should also be noted that there can also be diseconomies of scale and, as such, "sufficiency" of beneficiaries and assets may not be the only appropriate measure.

Accordingly, ASFA submits that - given that trustees are under a duty to act in the best interest of members - the test contained in paragraphs 29VN(b) is unnecessary.

2. Sub-section 29VN(c) - inclusion of determination as to scale in investment strategy

Proposed new sub-section 29VN(d) states as follows: -

> "*(c) include in the investment strategy for the MySuper product the details of the trustee's determination of the matters mentioned in paragraph (b)".*

ASFA submits that sub-section 29VN(d) should be deleted. With the current wording of paragraphs (b) trustees may be forced to give undue weight to "short term peer group" performance rather than longer-term investment decisions.

We also note that the covenants with respect to the formulation of an investment strategy do not refer to considerations of scale.

There is no doubt that assets under management, members account balances and investment time horizon are all relevant factors in asset allocation. These factors have been considered by Trustees as part of their fiduciary duty for a long time.

These factors, however, are part of many and by including sub paragraph (d), trustees may be forced to give undue weight to them in setting their strategy.

3. 29VP(3) - Contravention of section 29VN or 29VO

Proposed new sub-section 29VP(3) states as follows: -

> *"(3) A person who suffers loss or damage as a result of the conduct of another person that was engaged in in contravention of [section 29VN or 29VO] may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention".*

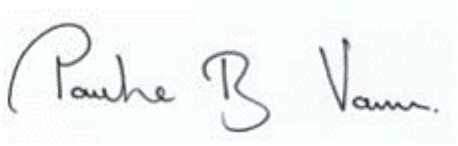
While it may be appropriate in extenuating circumstances for an action to be bought against a trustee director, as opposed to the superannuation fund itself, we submit that this should only be the case where the trustee has wilfully or deliberately engaged in a breach of section 29VN or 29VO.

* * * * * * * * *

We would be happy to discuss any aspect of our submission with you further, should time permit.

If you have any queries or comments regarding the contents of our submission, please contact me on (02) 8079 0805 or 0433 169 342 or by email pvamos@superannuation.asn.au.

Yours sincerely



Pauline Vamos
Chief Executive Officer

1. Paragraph 29U(2)(ca) - cancellation of MySuper Authorisation - need to notify employers

Proposed new paragraph 29U(2)(ca) gives APRA the power to cancel a MySuper authorisation: -

> "*(ca) where the RSE licensee is a body corporate—APRA is no longer satisfied that the directors of the RSE licensee are likely to comply with* the enhanced director obligations for MySuper products *(whether because of a previous failure to do so, or for any other reason)".*

The nature and design of the Superannuation Guarantee ("SG") system is such that employers must make "default" contributions to a MySuper product by the 28th day of the month following each quarter and face significant financial penalties if they fail to do so. Given this, it is essential that a fund whose MySuper authorisation is cancelled be under an obligation to advise this to contributing employers, along the lines of sub-section 63(9) of SIS, within a reasonable timeframe.

2. Sub-section 52(2)(b) - covenant with respect to care, skill and diligence

Proposed new paragraph sub-section 52(2)(b) states as follows: -

> "*(2) The covenants … include the following covenants by each trustee of the entity:*
>
> *…*
>
> *(b) to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments".*

This is essentially circular, as in effect it states that a **superannuation trustee** must exercise the same degree of care, skill and diligence as a **prudent superannuation trustee would exercise** in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes. .

The whole point of trust law case law with respect to this was to set an objective standard of care, skill and diligence for a **trustee** by reference to the standard expected of another party. This was generally that which an **ordinary prudent person would exercise in dealing with property of another for whom that ordinary prudent person felt morally bound to provide**.

There is little to be gained by stating that the standard of care, skill and diligence expected of a (superannuation) trustee is that which a prudent (superannuation) trustee would exercise. If the policy intent were to raise the standard then we submit that it would be preferable to refer to a "prudent person of business". This was the recommendation of the Cooper Review and was supported by the Peak Consultative Group in its report to Government.

Further, use of the term "superannuation trustee", which is defined in sub-section 52(3) in similar terms to the definition of superannuation entity director in sub-section 29VO(3), sets that degree of care, skill and diligence to the standard expected of a professional trustee, even if the trustee is not a professional. While this may be appropriate with respect to funds which offer a MySuper product, we query whether this is the case with respect to all superannuation entities.

3. Paragraph 52(2)(d) - conflicts – priority to beneficiaries

Proposed new paragraph 52(2)(d) states as follows:

> *"(d) where there is a conflict between the duties of the trustee to the beneficiaries or the interests of the beneficiaries and the duties of the trustee to any other person*
>
> *(i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;*
>
> *(ii) to ensure that the duties to the beneficiaries are met despite the conflict;*
>
> *(i) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and*
>
> *(ii) to comply with the prudential standards in relation to conflicts".*

Consideration may need to be given to expressly ensuring that trustee continue to be able to charge fees. Similar considerations apply to proposed new sub - section 52A(3).

4. Paragraph 52(6)(a) - investment covenants

Proposed new paragraph 52(6)(a) states as follows: -

> *"(6) The covenants … include the following covenants by each trustee of the entity:*
>
> *(a) to formulate, review regularly and give effect to an **investment strategy** for the **whole of the entity**, **and** for each **investment option** offered by the trustee in the entity, having regard to …"* (emphasis added).

Firstly, it is unclear why, in the context of member investment choice, this provision continues to refer to an investment strategy for the whole of the entity, **and** for each investment option offered by the trustee in the entity. If a fund offers member investment choice then the concept of an investment strategy for the whole of the entity does not make sense – the trustee formulates a strategy for each of the options offered but the composition of the entity's investments ultimately is determined by the relative amounts invested in each option by the members.

Further, while sub-section 6(a) refers to "an investment strategy for the whole of the entity, and for each investment option offered by the trustee in the entity", the subsequent paragraphs only refer to "the entity" and not to "each investment option".

In addition, while the Explanatory Memorandum ("EM") states that this is intended to include individual investments, it is not readily apparent how the concept of an investment strategy can have application to a single asset investment, such as where the member is able to invest in a specific share or a specific term deposit. It is unclear as to how the requirement to formulate an investment strategy would apply to such an option.

Of course, this is not to say that the trustee is not under a duty, encapsulated in paragraph 52(6)(b), to ensure that the single assets offered are appropriate, having regard to such matters such as risk \ return \ diversification \ liquidity \ valuation \ tax \ costs etc. This is different, however, to the concept of formulating an investment strategy with respect to a single asset.

By way of contrast, where the trustee offers a "multi-asset" option, for example a balanced, growth or conservative option, it is necessary for the trustee to have an investment strategy with respect to the composition of the assets which comprise that option from time to time.

5. Section 52B - self managed superannuation funds – direction by beneficiaries

Proposed new sub-section 52B(4), with respect to SMSFs, states as follows: -

> *"(4) An investment strategy is taken to be in accordance with paragraph (2)(f) even if it provides for a specified beneficiary or a specified class of beneficiaries to give directions to the trustee, where:*
>
> *(a) the directions relate to the strategy to be followed by the trustee in relation to the investment of a particular asset or assets of the fund; and*
>
> *(b) the directions are given in circumstances prescribed by regulations made for the purposes of this paragraph".*

We query why there is no equivalent provision in section 52 (or for that matter section 52A).

6. Section 52C - directors of SMSF corporate trustees – missing covenants

Proposed new section 52C inserts a number of covenants with respect to directors of corporate trustees of SMSFs. As such it should be loosely equivalent to proposed new section 52A with respect to directors of corporate trustees of RSEs, allowing for any material differences between RSEs and SMSFs, yet there are no equivalent to most of the covenants contained in proposed new sub-sections 52A(2) or 52A(4).

7. Sub-section 55(5) – defence if comply with all of the covenants

Proposed new sub-section 55(5) states as follows: -

> *"(5) 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****" (emphasis added).*

Proposed new sub-section 55(6) is in similar terms with respect to the management of reserves.

It is not clear the extent to which the phrase "in relation to the investment", or "in relation to the management of the reserve", which appear at the end of the respective sub-sections, qualifies the phrase "all of the covenants": -

- to the extent that the trustee has to comply with all of the covenants in relation to the making of the investment or management of the reserves then this meet public policy objectives;
- if, however, this is intended to apply such that the trustee must have complied with all of the covenants, irrespective of whether or not they relate to the making of the investment or the management of the reserves, then this is too broad. If this were the case then this does not recognise causality – it is possible that the covenant which the trustee did not comply with was in no way related to, and did not contribute to, the loss incurred.

In the context of an action for loss or damage because of the making of an investment by a trustee or the managing of reserves, if the behaviour \ conduct was not in relation to the making of the investment or the managing of reserves, and the trustee complied with all of the investment or reserve related covenants, we submit that this defence should be available.

Schedule 2—Prudential standards

ASFA supports APRA having the power to make prudential standards.

To the extent that prudential standards extend to matters which fall under the jurisdiction of other regulators, such as consumer protection \ disclosure which is the province of ASIC, there will be overlap and the potential for inconsistent and even conflicting regulation. As such, it is critical that APRA co-ordinates and agrees the requirements of its standards with affected regulators, in particular ASIC.

8. Sub-paragraph 34C(4)(c)(i) - definition of "prudential matters" – sound financial position

Proposed new sub-paragraph 34C(4)(c)(i) provides as follows: -

> *"(4) A prudential matter is a matter relating to:*
> *…..*
> *(c) the conduct by **an RSE licensee** of a registrable superannuation entity of the affairs of the licensee in such a way as:*
> *(i) to keep **itself** in a sound financial position"* (emphasis added).

We query why the obligation is not to keep the RSE itself (i.e. the superannuation fund) in a sound financial position, as opposed to the RSE licensee (i.e the trustee company). Trustee companies are often "two dollar" proprietary limited companies.

9. Paragraph 52(7)(c) - insurance covenants

Proposed new paragraph 52(7)(c) states as follows: -

> "*(7) The covenants … include the following covenants by each trustee of the entity:*
> *…*
> *(c) to only offer or acquire insurance of a particular kind, or at a particular level, if the cost of the insurance does not **inappropriately erode the retirement income of beneficiaries**"* (emphasis added).

Further guidance from APRA will be required as to the basis upon which the trustee is to determine whether the cost of the insurance does not inappropriately erode the retirement income of beneficiaries.

10. Paragraph 52(7)(d) – pursuit of insurance claims

Proposed new paragraph 52(7)(d) states as follows: -

> *"(d) to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success".*

Given the existence of the Superannuation Complaints Tribunal and the Financial Ombudsman Service as economical, informal and quick dispute resolution services, while it may be reasonable for a trustee to negotiate with an insurer it may not be reasonable to expect it to commence litigation, which can prove costly and time-consuming. Accordingly this is a matter upon which further guidance from APRA would prove useful.

11. Sub-section 29VN(d) - target returns and risk – lifecycle options

Proposed new sub-section 29VN(d) states as follows: -

> *"(d) include in the investment strategy for the MySuper product, and update each year:*
> *(i) the investment return target over a period of 10 years for the assets of the fund that are attributed to the MySuper product; and*
> *(ii) the level of risk appropriate to the investment of those assets".*

We note that, as life-cycle investment options will be permitted under MySuper, there may be multiple different investment return targets and levels of risk with respect to different cohorts of members.

12. Section 29VO - additional obligations of director of MySuper corporate trustee

Proposed new sub-sections 29VO(1) and (2) state as follows: -

> *"(1) Each director of a corporate trustee of a regulated superannuation fund that includes a MySuper product must exercise a* ***reasonable*** *degree of care and diligence for the purposes of ensuring that the corporate trustee carries out the obligations referred to in section 29VN.*
>
> *(2) The reference in subsection (1) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a superannuation entity director* ***would exercise in the corporate trustee's circumstances****".*

It is unclear as to why "reasonable" is being defined, unless the use of the newly defined term "superannuation entity director" is attempting to apply a higher standard pertaining to directors who are remunerated ("professional trustees"). While this may be appropriate for directors of corporate trustees of funds offering a MySuper product, it may not be appropriate for all funds.

Given that the care, skill and diligence is being exercised by a director of a corporate trustee we submit that the standard should also reflect the circumstances of the director as well as of the corporation.

13. Section 29VO - new definition of "superannuation entity director"

Proposed new sub-section 29VO(3) creates a new definition of "superannuation entity director" as follows: -

> *"(3) A superannuation entity director is a person whose profession, business or employment is or includes acting as director of a corporate trustee of a superannuation entity and investing money on behalf of beneficiaries of the superannuation entity".*

It is unclear as to whether this intended to create a distinction between directors who are remunerated ("professional trustees") and those who are not.

Furthermore, it is unclear why it was considered necessary to include the words "*and investing money on behalf of beneficiaries of the superannuation entity"* as this is one of the, but not the only, duties of a corporate trustee of a superannuation entity and accordingly, on the principle of collective responsibility, of all of the directors of a corporate trustee of a superannuation fund.

14. Sub-section 29VP(3)

Proposed new sub-section 29VP(3) contains a typographical error at line 5 – a repeat of the word "in" as opposed to the word "a".

15. Sub-section 52A(5) - covenant relating to directors and degree of care and diligence

Proposed new sub-section 52A(5) states as follows: -

> *"(5) The reference in paragraph (2)(f) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a superannuation entity director would exercise in the circumstances of the corporate trustee".*

It is unclear as to why "reasonable" is being defined, unless the use of the newly defined term "superannuation entity director" is attempting to apply a higher standard pertaining to directors who are remunerated ("professional trustees"). While this may be appropriate for directors of corporate trustees of funds offering a MySuper product, it may not be appropriate for all funds.

Given that the care, skill and diligence is being exercised by a director of a corporate trustee we submit that the standard should also reflect the circumstances of the director as well as of the corporation.

16. Section 52C - covenant relating to directors of SMSF corporate trustee – care & diligence

Proposed new sub-section section 52C(3) states as follows: -

> "*(3) The reference in subsection (2) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a reasonable person in the position of director of the corporate trustee would exercise in the corporate trustee's circumstances".*

This is circular – in effect it is saying that "a reasonable degree of care and diligence is … the degree of care and diligence that a reasonable person in the position of director of the corporate trustee would exercise in the corporate trustee's circumstances*".* This adds nothing and we would suggest that it appears to be redundant.

17. Paragraph 34C(4)(f) - definition of "prudential matters" – conduct of licensees

Proposed new paragraph 34C(4)(f) provides as follows: -

> *"(4) A prudential matter is a matter relating to:*
>
> *…..*
>
> *(f) the conduct by an RSE licensee of a registrable superannuation entity, or a connected entity of the RSE licensee, of any of its affairs that are relevant to the registrable superannuation entity with integrity, prudence and professional skill".*

This does not read well. We submit that the phrase "with integrity, prudence and professional skill" be deleted as these refer not to what it constitutes a prudential matter (conduct) but instead to the *standard* of the conduct.