File Name: 2015/27

14 October 2015

Ms Toni Matulick
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Ms Matulick

## Superannuation Legislation Amendment (Trustee Governance) Bill 2015

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission to the Senate Economics Legislation Committee in relation to *Superannuation Legislation Amendment (Trustee Governance) Bill 2015* (the Bill), which makes amendments to the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to require RSE licensees to have a minimum of one-third independent directors and an independent chair on their boards.

### 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 system. 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 14 million Australians with superannuation.

### General comments

ASFA supports the introduction of new section 86 of Part 9 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) which requires RSE licensees of all APRA regulated superannuation funds to have at least one-third independent directors, with one of these directors serving as an independent chair.

This support should not be seen as a criticism of current governance structures, but instead recognises changing community expectations, increased complexity and risk in running superannuation businesses, and significantly higher regulatory standards and liability.

It should also be recognised that there are many different structures and sizes across the sector and a 'one size fits all' approach may have unintended consequences particularly for small non-public offer funds. As such, it is important that the final legislation and the APRA prudential standards are

sufficiently principles-based and place the accountability for the best outcomes for fund members on the Trustee Boards.

ASFA has concerns about the proposed requirement for RSE licensees to disclose whether they have a majority of independent directors in their annual report. It is inconsistent with the proposed minimum one-third independence requirement, and could lead to community confusion and the sub optimum outcome of appointments for compliance rather than effective governance. We note that this is at odds with ASX corporate governance principles, but they are in place to drive the independence of the board from management which is not an issue for super trusts.

Our submission also discusses a number of issues regarding the definition of 'independent' and identifies this as an area where further work is required.

*  *  *  *  *

Thank you for providing us with the opportunity to make this submission and to participate in the ongoing consultation process. We look forward to working with the Government and APRA to get the details of these important reforms right.

If you have any queries or comments regarding the contents of our submission, please contact ASFA's Chief Policy Officer, Glen McCrea, on (02) 8079 0808 or by email gmccrea@superannuation.asn.au.

Yours sincerely

Pauline Vamos
Chief Executive Officer

# Submission

## ASFA's comments in relation to Superannuation Legislation Amendment (Trustee Governance) Bill 2015

14 October 2015

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# Table of Contents




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# Summary of ASFA's positions on key aspects of the governance legislation

A sound governance framework for superannuation funds is essential in order to ensure the performance of the trustee board in carrying out its trust and fiduciary duties is both optimal and transparent.

In a compulsory and concessionally taxed system, it is critical that those entrusted with looking after the retirement incomes of Australians are accountable to achieve and maintain high levels of effective governance. This is particularly important given that the size of Australia's superannuation pool continues to grow and the increasingly important role that trustee boards play in delivering retirement incomes, as well as investing in the economy and delivering the system in an efficient and cost-effective manner.

Below is a summary of ASFA's recommendations in relation to the proposed changes to the governance arrangements for APRA regulated superannuation funds outlined in the Bill:

| Key governance reforms | | Reference* | ASFA position |
|---|---|---|---|
| **1.** | Independence on trustee boards | Section 86(1) | ASFA **supports** the requirement that superannuation fund boards comprise at least one-third independent directors and for the Chair to be independent. |
| **2.** | Disclosure of majority independent directors | Regulation 4 | ASFA **does not support** the proposed requirement for RSE licensees to publicly disclose (on an 'if not, why not' basis) in the fund's annual report, whether they have a majority of independent directors, on the basis that it is inappropriate to create such an obligation when there is no legislative requirement to have such a majority. |
| **3.** | Definition of 'independent' (concept of materiality) | Section 87(1)(d) | ASFA **supports** the reintroduction of a concept of materiality into the definition of 'independent' in the SIS legislation.<br>Without a concept of materiality, the words "business relationship" in the definition of 'independent' will potentially capture relationships with providers of incidental services that are completely unrelated to the governance of the RSE.<br>ASFA supports the inclusion of examples in the Explanatory Memorandum which aim to provide:<br>• clarity around the circumstances in which an individual may or may not be considered independent; and<br>• guidance in relation to seeking a determination from APRA. |

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| Key governance reforms | | Reference* | ASFA position |
|---|---|---|---|
| **4.** | Definition of 'independent' (common independent directors on funds under the same financial conglomerate group) | Section 87(1)(c)(ii), EM paragraph 1.57 (Example 1.3), EM paragraph 1.71 (Example 1.8) | ASFA **recommends** that the definition of 'independent' in the legislation be amended to enable organisations to retain the ability to have common independent directors on the boards of RSEs under the same financial conglomerate group, rather than having to rely on APRA to make a determination on a case-by-case basis.<br>We believe that, on balance, this is an appropriate exclusion given that there are no limitations proposed in the revised draft legislation on an individual holding office as director on multiple unrelated RSE licensees.<br>In our view, allowing directors to sit on multiple unrelated RSE licensees where the RSEs are in competition with each other but not sit on multiple related RSE licensees within the same financial conglomerate group as an independent director would be a poor policy outcome. |
| **5.** | Definition of 'independent' (exclusion of former directors/executive officers of suppliers) | Section 87(1)(e)(i) | ASFA **recommends** that the definition of 'independent' in the legislation be amended so that recent executive officers and directors of firms that are suppliers to the RSE licensee, but who themselves have had no previous dealings with the RSE licensee, should be allowed to be appointed as an independent director.<br>For example, a former tax partner (within the last three years) of a firm that currently provides audit services to the fund, but who has never themself had any dealings with the fund, should not be precluded from being appointed as an independent director.<br>ASFA considers that such situations can be adequately addressed as part of the RSE licensee's conflicts management policy and procedures. |
| **6.** | Equal representation provisions and two-thirds voting rule | Regulations 7 – 10 | ASFA **recommends** equal representation provisions (for those funds to which these arrangements currently apply) be reinserted back into the legislation. This would maintain these provisions in relation to the remaining two-thirds of their board should be retained, together with the two-thirds voting rule.<br>ASFA members have expressed their strong concern regarding the repeal of the equal representation provisions and two-thirds voting rule from the SIS legislation. |
| **7.** | Board Audit Committee (BAC) and Board Remuneration Committee (BRC) | Clauses 43 and 53 of SPS 510<br><br>Clauses 42 and 52 of SPS 510 | ASFA **does not support** the requirements in the prudential standards that the BAC and BRC must have a minimum of one-third independent directors. In ASFA's view, while it is reasonable to require at least one independent director to be appointed to the BAC and BRC, beyond this, it should be up to each RSE licensee to decide how best to structure their committees.<br>Also, ASFA **does not support** the requirement that the chair of the BAC and BRC must be an independent director. In our view, these committees should be chaired by the director who is most suited to that role, regardless of whether or not they are an independent director. |

| Key governance reforms | | Reference* | ASFA position |
|---|---|---|---|
| **8.** | Transition period | Section 23 | ASFA **supports** the introduction of a three-year transition period for existing funds to comply with the new requirements.<br><br>However, this period should commence on 1 July 2016 and end on 30 June 2019, or three years after the legislation receives Royal Assent, whichever is later. |
| **9.** | Transitional provisions | Section 87(1)(d) | ASFA **recommends** that the legislation be amended to clarify that the mere fact of being a director on the trustee board does not result in the individual being deemed to have a material business relationship that precludes them from being considered 'independent'. |
| **10.** | Support for miscellaneous amendments | Section 87(1)(a),(b)<br>Section 87(2)<br>EM paragraph 1.56 | ASFA **supports** the following amendments that were made to the legislation as part of the consultation process:<br>• Confirmation that the 5 per cent shareholding interest limit for a person to be considered independent does not apply where the shareholding interest does not confer a right to profit from the interest, or give rise to an expectation that a person will profit from the interest, and the person is required to have the shareholding interest as a condition of holding office as a director of the RSE licensee; |
| | | Section 24(a)-(d)<br>EM paragraph 1.132 | • Clarification that neither the current equal representation rules nor the new minimum one-third independence requirements will apply during the transition period (although we note there is a potential risk for RSE licensees as a result of this exemption being contingent on an APRA compliant transition plan being in place); |
| | | Section 91(c)<br>EM paragraph 1.93 | • Extension of the period for filling a trustee vacancy from 90 days to 120 days; |
| | | EM paragraph 1.41 (Example 1.1) | • Clarification that the independent chair can be included in determining whether the requirement that at least one-third of directors must be independent has been complied with; and |
| | | Section 87(1) | • Confirmation of the policy intent that an individual is not precluded from being classified as an independent director purely as a result of being a member of the fund, where the person does not have any other material relationship with the RSE licensee. |

*References are to the new provisions being introduced by the *Superannuation Legislation Amendment (Trustee Governance) Bill 2015, Superannuation Legislation Amendment (Governance) Regulation 2015* or to APRA Prudential Standard SPS 510 Governance.

Each of ASFA's positions outlined above are discussed in greater detail in the subsequent sections of this submission.

# 1 Requirement to have at least one-third independent directors

The Bill provides that all boards of RSE licensees acting as trustees of APRA regulated superannuation funds, including standard employer-sponsored superannuation funds, are required to have a minimum of one-third independent directors. Where the RSE licensee consists of a group of individual trustees, one-third of these individuals must be independent.

There are strong views in relation to the merits or otherwise of having independent directors on trustee boards and mandating a minimum number/proportion of independent directors. Some have argued that having independent directors has the potential to add significant value to the decision making process and improve the overall performance of the trustee board. However, others have argued that forcing boards to have a certain number or proportion of independent directors could, if anything, result in less discursive boards and, ultimately, potentially inferior decision-making.[1]

On balance though, and in recognition of changing consumer attitudes, ASFA supports increasing the number of independent directors on the boards of superannuation funds and recognises that over the past few years many trustee boards have already taken the opportunity to supplement their skills and have appointed independent directors.

While there is no conclusive research on the appropriate proportion, ASFA supports the position that at least one-third of the directors on superannuation boards should be independent.

In ASFA's view, the right independent directors are able to offer diversity of thought and the benefit of experience outside traditional superannuation and financial services. Such directors may be useful in filling any gaps that may exist or arise in the overall skills and experience of the board.

| **ASFA position #1** |
| --- |
| ASFA supports the requirement that superannuation fund boards comprise at least one-third independent directors. |

[1] Professor Sally Wheeler, Professor in the Faculty of Law, Queen's University Belfast – presentation to ASFA Sydney and Melbourne luncheon series, August 2013.

## 2 Requirement to appoint an independent chair

The Bill provides that all boards of RSE licensees acting as trustees of APRA regulated superannuation funds, including standard employer-sponsored superannuation funds, are required to have an independent chair.

The Explanatory Memorandum to the Bill makes it clear that the independent chair may be counted towards the minimum one-third independent director requirement (that is, funds do not have to have at least one-third independent directors PLUS an additional independent chair).

ASFA supports the requirement for trustee boards to appoint an independent chair. This recommendation is consistent with contemporary governance standards and with requirements of other prudentially regulated entities, including banks and insurance companies under *Prudential Standard CPS 510 – Governance*.

The importance of the role played by the chair in ensuring the effectiveness of a trustee board cannot be overstated. This role includes guiding the board and CEO to focus on the right strategic priorities, make difficult decisions and ensure all fiduciary duties are met. The trustee board should therefore consider the characteristics it seeks in a chair and devise suitable procedures for the chair's appointment.

In addition, from a good governance perspective, the roles of the chair and chief executive officer should not be held by the same individual. However, such a prohibition, if introduced, should be addressed in the APRA Prudential Standards rather than through legislated requirements.

| **ASFA position #2** |
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| ASFA supports the requirement that RSE licensees acting as trustees of APRA regulated superannuation funds must appoint an independent chair. |

## 3 Requirement to disclose majority of independent directors

The Regulation proposes to require RSE licensees acting as trustees of all APRA-regulated superannuation funds to publicly disclose (on an 'if not, why not' basis) in the annual report whether they have a majority of independent directors commencing 1 July 2019. This requirement will be implemented through changes to the *Corporations Regulations 2001*.

ASFA considers that it is inappropriate to create an obligation to report on an 'if not, why not' basis if funds do not have a majority of independent directors – when there is no legislative requirement to have such a majority.

Having to report an absence of a majority of independent directors implies that having less than a majority of independents is somehow less than fully compliant, which clearly is not the case given the new SIS Act requirements only mandate a minimum of one-third independent directors. This may, in our view, cause confusion to members, increase regulatory burden and impose unnecessary costs on RSE licensees. More importantly it may lead to appointments to meet compliance

obligations rather than appointments based on merit. We also do not regard the ASX corporate governance principle requirement as a valid precedent as they are driven by the need for greater independence of the Board from management, which is not such an issue in the superannuation system.

Paragraph 1.33 of the Explanatory Memorandum states that "[t]his reporting obligation provides RSE trustees with the opportunity to provide a clear indication of the rationale underlying their composition. In particular, it allows the board to explain how it believes that its chosen composition will best serve the interests of fund members".

ASFA argues that RSE licensees can provide such an explanation to members without having to justify why it does not have a majority of independent directors, which it is not required by law to have and which could ultimately be confusing for members.

At a minimum, if the reporting obligation is to be retained, it should be amended along the lines of RSE licensees being required to provide a brief explanation in their annual report as to why they believe their chosen board composition is appropriate for their fund and serves the best interest of their members.

| **ASFA position #3** |
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| ASFA does not support the proposed requirement for RSE licensees to publicly disclose (on an 'if not, why not' basis) in the annual report whether they have a majority of independent directors. We recommend that this requirement be removed from the Bill. |

# 4 Definition of 'independent'

The Bill provides a definition of 'independent'. It includes, among others, persons who are not substantial shareholders of the RSE licensee or do not have or have not had within the last three years a 'business relationship' with the RSE licensee that is deemed to be material.

Below we discuss issues with respect to this definition.

## 4.1 Concept of materiality

ASFA supports the reintroduction of a concept of materiality into the proposed definition of 'independent' in the SIS legislation.

Without a concept of materiality, the words "business relationship" in the definition of 'independent' will potentially capture relationships with providers of incidental services that are completely unrelated to the governance of the RSE.

ASFA supports the inclusion of examples in the Explanatory Memorandum which aims to provide:

- clarity around the circumstances in which an individual may or may not be considered independent; and
- guidance in relation to seeking a determination from APRA.

| ASFA position #4 |
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| ASFA supports the reintroduction of a concept of materiality into the proposed definition of 'independent' in the SIS legislation. |

## 4.2 Common independent directors on boards of related entities

One area of concern is the fact that the definition of 'independent' in the Bill precludes individuals from serving as an independent director on boards of multiple closely related body corporates under the same financial conglomerate group, even where the funds are arguably not in competition with each other.

The Bill introduced into Parliament on 16 September 2015 (and subsequently referred to the Senate Economics Legislation Committee) does not allow a director to sit on the board of multiple related RSEs under the same financial conglomerate group as an independent director. Instead, the RSE licensees can apply to APRA for a determination that the director is capable of exercising independent judgement in such circumstances (on the grounds that the RSEs are not in competition with each other).

This is an issue for a number of our members who currently have shared independent directors sitting on the boards of their various funds.

ASFA believes that the definition of 'independent' should be amended to enable organisations to retain the current arrangements for shared independent directors on the boards of related RSEs, rather than having to rely on APRA to make a determination on a case-by-case basis. In that regard, APRA has indicated that they will be using the power rarely and this scenario is unlikely to result in a person being classed as independent.

Accordingly we believe that, on balance, this is an appropriate exclusion given that there are no limitations proposed in the revised draft legislation on an individual holding office as director on multiple unrelated RSE licensees.

In our view, allowing directors to sit on multiple unrelated RSE licensees where the RSEs are in competition with each other but not sit on multiple related RSE licensees within the same financial conglomerate group as an independent director would be a poor policy outcome.

| ASFA position #5 |
| --- |
| The definition of 'independent' should be amended to enable a director to sit on the board of multiple related RSEs under the same financial conglomerate group as an independent director, rather than RSE licensees having to rely on the real uncertainty of an APRA determination. |

## 4.3 Exclusion of former directors/executive officers of suppliers

Section 87(1)(e)(i) of the Bill precludes an individual from being considered independent if he/she is, or has been during the preceding three years, a director or executive officer of an entity that has had a material business relationship with the RSE licensee.

APRA has previously advised that it considers "material professional advisors, consultants or suppliers" as examples of entities having a material business relationship with the RSE licensee.

ASFA acknowledges that in some circumstances, the appointment of a former director or executive officer of a supplier might raise a perceived or actual conflict of interest. However, we consider that this can be adequately addressed by the RSE licensee applying its conflicts management framework.

ASFA considers that the proposed exclusion of a person who has been an executive officer or director of a supplier in the last three years is too wide in scope and may reduce the pool of potential candidates for independent director appointments. The size and scale of many superannuation providers is such that they use multiple professional firms for a variety of reasons.

For example, all former partners of an accounting firm which provides (or has, within the last three years, provided) audit services in respect of a fund would be precluded from being appointed to the fund's trustee board as an independent director. This is the case even where an individual former partner was not personally involved in the provision of those services. If a fund uses all major accounting firms for different reasons a significant number of potential directors will be excluded.

For some funds, recently retired employees and executive level officers of suppliers are likely to be one of their best sources of skilled independent directors – particularly in the areas of investments, accounting and IT services.

ASFA believes this section of the Bill should be re-considered so as not to exacerbate difficulties that some funds might face in identifying and appointing a sufficient number of candidates who are appropriately skilled and qualified to act as independent directors.

For example, a former tax partner (within the last three years) of a firm that currently provides audit services to the fund, but has never themselves had any dealings with the fund, should not be precluded from being appointed as an independent director.

**ASFA position #6**

ASFA believes that recent executive officers and directors of firms that are suppliers to the RSE licensee, but who themselves have had no previous dealings with the RSE licensee, should be allowed to be appointed as an independent director.

ASFA considers that such situations can be adequately addressed as part of the RSE licensee's conflicts management policy and procedures.

# 5 Equal representation provisions and two-thirds voting rule

Since the initial release of the draft legislation we have been identifying key areas of concern and unintended consequences. One of these relates to equal representation.

One of the proposed governance changes is the removal of the equal representation provisions from the SIS legislation and, as a consequence, the current two-thirds voting rule (where equal representation applies) is also proposed to be repealed.

Currently, under SIS Regulation 4.08, where equal representation applies, a decision is only valid where at least two-thirds of the total number of directors voted for it. Where equal representation does not apply, funds have flexibility on their voting rules and simple majority voting rules may apply.

SIS Regulation 4.08 is one of the regulations being repealed by the new governance legislation. The intention is that, going forward, it will be up to each trustee board to decide how to structure their own voting rules.

Many ASFA members have expressed their strong concern regarding this aspect of the proposed changes.

The failure to allow for an equal number of employer and employee representatives to sit on a board as trustees could have unintended consequences. For example, a superannuation fund board could, in theory, comprise one-third independent directors and two-thirds employer representatives (meaning members would have no direct representation on the trustee board) or two-thirds member representatives (meaning employer groups would have no direct representation).

ASFA considers that the equal representation arrangements (for those funds to which these arrangements currently apply) in relation to the remaining two-thirds of their board, should be retained, together with the two-thirds voting rule.

ASFA has historically advocated for a principles-based approach in relation to any changes that impact the structure and operation of trustee boards. However, given the importance of this issue and the need to ensure that there is a consistent approach across the industry that is not reliant on case-by-case decisions of the regulator, we believe that legislative certainty is warranted.

**ASFA position #7**

The equal representation arrangements (for those funds to which these arrangements currently apply) in relation to the remaining two-thirds of their board, should be retained, together with the two-thirds voting rule.

# 6 Independence on board committees

As discussed in section 1 above, ASFA supports the position that at least one-third of the directors on superannuation boards should be independent.

However, ASFA considers that the mandated minimum number/proportion of independent directors should be restricted to the board level. We note that draft Prudential Standard SPS 510 requires both the Board Audit Committee (BAC) and the Board Remuneration Committee (BRC) to consist of a minimum of one-third independent directors, and for the chair of the BAC and BRC to be independent.

In ASFA's view, while it is reasonable to require at least one independent director to be appointed to the BAC and BRC, beyond this, it should be up to each RSE licensee to decide how best to structure their committees.

By mandating a minimum number of independent directors on the BAC and BRC, trustee boards could be forced to remove non-independent committee members with audit and remuneration experience from these two committees and replace them with directors who, while independent, have little or no experience in these areas.

**ASFA position #8**

ASFA does not support the proposed requirement that the Board Audit Committee (BAC) and the Board Remuneration Committee (BRC) must consist of a minimum of one-third independent directors.

In ASFA's view, while it is reasonable to require at least one independent director to be appointed to the BAC and BRC, beyond this, it should be up to each RSE licensee to decide how best to structure their committees.

Also, ASFA does not support the requirement that the chair of the BAC and BRC must be an independent director. In our view, these committees should be chaired by the director who is most suited to that role, regardless of whether or not they are an independent director.

# 7 Transition arrangements

## 7.1 Three-year transition period

The Bill provides that the new governance regime will apply from the date the legislation receives Royal Assent. Where an APRA regulated superannuation fund is established after this date, the RSE licensee of that fund will need to adhere to the new governance arrangements from the time it is established.

However, existing APRA regulated funds and RSE licensees will have three years from the date of Royal Assent to transition to the new arrangements.

ASFA supports a three-year transition period for RSE licensees to move to the new governance regime. In previous submissions, including our response to the Treasury discussion paper: "*Better regulation and governance, enhanced transparency and improved competition in superannuation*" (February 2014) and our response to the Financial System Inquiry (FSI) Final Report (March 2015), ASFA has recommended that a minimum transition timeframe of three years is necessary to implement such significant changes, including any new requirements regarding the minimum number/proportion of independent directors and the appointment of an independent chair.

We have also recommended that the transition period for any significant changes of this nature should not commence until the relevant requirements are finalised (in this case, until the legislation receives Royal Assent and the prudential standards are finalised). For this reason, ASFA considers that the transition provision in the Bill should be amended so that the transition period commences on 1 July 2016 and ends on 30 June 2019 or three years after the legislation receives Royal Assent, whichever is later.

It would make sense to allow directors to serve out their existing terms (which could be up to three or four years). A three-year transition period would give funds time to amend their internal processes and procedures to comply with the new requirements, which is of particular importance given the number of funds and the time it can take to find suitable candidates.

**ASFA position #9**

ASFA supports the introduction of a three-year transition period for RSE licensees to move to the new governance requirements. However, this transition period should commence on 1 July 2016 and end on 30 June 2019 or three years after the legislation receives Royal Assent, whichever is later.

## 7.2 Transitional provisions

The mere fact of being a director on the trustee board would appear to be a material business relationship for the purposes of section 87(1)(d), and therefore preclude all current directors from being deemed 'independent'.

In recent discussions with APRA, the regulator has indicated that the policy intent is that current directors should not be precluded from being 'independent' purely as a result of sub-section (d), and

that it is feasible for some current directors to be re-designated as 'independent', subject to any other relationships they have with appointing/nominating bodies.

ASFA considers that the provisions in the Bill are inconsistent with the stated policy intent regarding current directors being able to be reclassified as 'independent' and should be amended accordingly.

| ASFA position #10 |
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| ASFA recommends that the legislation be amended to clarify that the mere fact of being a director on the trustee board does not result in the individual being deemed to have a material business relationship and therefore precluded from being 'independent'. |

## 8 Support for miscellaneous amendments

ASFA supports the following amendments that were made to the legislation as part of the consultation process:

- Confirmation that the 5 per cent shareholding interest limit for a person to be considered independent does not apply where the shareholding interest does not confer a right to profit from the interest, or give rise to an expectation that a person will profit from the interest, and the person is required to have the shareholding interest as a condition of holding office as a director of the RSE licensee;
- Clarification that neither the current equal representation rules nor the new minimum one-third independence requirements will apply during the transition period (although we note there is a potential risk for RSE licensees as a result of this exemption being contingent on an APRA compliant transition plan being in place);
- Extension of the period for filling a trustee vacancy from 90 days to 120 days;
- Clarification that the independent chair can be included in determining whether the requirement that at least one-third of directors must be independent has been complied with; and
- Confirmation of the policy intent that an individual is not precluded from being classified as an independent director purely as a result of being a member of the fund, where the person does not have any other material relationship with the RSE licensee.

# 9 Exemption for non-public offer employer-sponsored funds

An area of concern that has been raised with us by a number of our members is the view that small non-public offer employer-sponsored funds should be excluded from the proposed independence requirements and be allowed to continue to operate under the equal representation system, on the basis that they are in a unique position as the employer sponsor. It is also argued that the new independence requirements place an undue burden, particularly for smaller single-employer corporate funds.

The distinction between public offer funds and those funds sponsored by one or a restricted group of employers was recognised in the FSI Final Report, wherein the recommendation regarding the appointment of independent directors referred only to public offer funds.

Employee and employer representative directors of such funds are typically not remunerated for their efforts, other than as part of their general employment arrangements. The move to a significant number of independent directors, not only on the trustee board but on board committees, will result in significant additional costs.

One long-established corporate fund with $670 million in assets and 3600 members, estimates the additional costs at around $150,000 per annum, an increase of 10% on its administration fees. These costs cover only an independent chair and one additional independent director. The actual costs are likely to be greater, given APRA's approach to independence on board committees.

There is also an argument that the introduction of paid board and committee members could create disparity in terms of remuneration. The disparity may result in a push for remuneration of all directors on the grounds of equity, resulting in significant further cost increases for non-public offer employer-sponsored funds.

There is an additional issue around the loss of existing control by the sponsoring employer. Companies that have their own (non-public offer) corporate fund generally take a paternalistic approach to providing retirement benefits for their employees. In many cases, they pay their members' administration fees and/or insurance premiums and often provide additional benefits for fund members, all of whom are their employees (or ex-employees). As such, there is an argument that the employers and members together (i.e. through the current equal representation model) are best placed to continue overseeing the provision of fund members' retirement benefits and should retain control of how the fund is operated.