



23 July 2015

Manager
Insurance and Superannuation Unit
Financial System and Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

CPA Australia Ltd
ABN 64 008 392 452
Level 20, 28 Freshwater Place
Southbank VIC 3006
Australia
GPO Box 2820
Melbourne VIC 3001
Australia
Phone 1300 737 373
Outside Aust +613 9606 9677
Website cpaustralia.com.au

By email: superannuationgovernance@treasury.gov.au

Dear Sir/Madam

Exposure draft: improving superannuation governance

CPA Australia represents the diverse interests of more than 150,000 members in 120 countries. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders.

Against this background, we provide this submission in response to the Exposure Draft Legislation 'Superannuation Legislation Amendment (Governance) Bill 2015: Governance arrangements for APRA regulated superannuation funds' and the accompanying explanatory guide and draft regulation.

General comments

Trustees of APRA-regulated superannuation funds are entrusted with safeguarding and maximising the superannuation savings of millions of Australians. CPA Australia strongly supports the need for good governance in superannuation funds.

As discussed in our response to the *Discussion Paper: better regulation and governance, enhanced transparency and improved competition in superannuation* dated 12 February 2014, trustee director independence, alongside diversity, skills and experience, may contribute to good governance.

CPA Australia supports the intention of the Government to more closely align the governance structures in the superannuation system with corporate governance principles. However, the unique characteristics of superannuation funds which distinguish them from commercial ventures undertaken through limited liability companies should be recognised. In particular:

- The overarching structure of superannuation is drawn from trust law, whereas corporate law and governance are predominantly based on contract law and tort of negligence.
- Superannuation funds give a clear and direct recognition to the benefit and beneficial interests (rights) of members (beneficiaries). In contrast, the rights of shareholders are determined primarily by the corporate constitution which is construed as a contract. What primacy there is for shareholders is achieved through the medium of the corporation.
- The director of a limited liability corporation has a fiduciary responsibility towards the company (a fiduciary relationship between director and shareholder is recognised in only very limited and specific circumstances: typically of reliance and dependence).

Given the unique characteristics of the superannuation industry and its participants we believe an overarching principles-based governance framework is required specifically for superannuation funds from which threshold principles of good governance would then be articulated.

An overarching governance framework would adopt a principal focus on duties, from which other elements of a framework would stem. These other elements would then span issues such as disclosure and board structure. Such a framework would:

- Distinguish between common law duties (in the specific context here, predominately one of fiduciary relationship) and statutory duties, identifying their sources and where there is overlap or interaction. This would assist a director to navigate through a complexity of rules and moreover, understand the purpose of the rules
- Provide a concise categorisation and discussion of the fiduciary rules – conflict, profit, and misappropriation
- Define the boundaries between fiduciary based duties and other duties, such as care and diligence
- Describe the division of powers, addressing where powers of management reside and what are the limits on such powers
- Discuss who it is that owes the duties, considering ancillary issues of delegation and reliance
- Describe to whom the duties are owed – again reinforcing the objective and fundamental nature of superannuation structures themselves. This would also enable some description of member rights and how they are pursued
- Identify who it is that enforces duties – thus addressing some elements of the enforcement framework, including some discussion of consequences of breach of duty

The proposal for enhancing independence requirements for superannuation trustees will likely have cost implications. These costs may include one-off transition costs, trust deed amendments, recruiting costs, ongoing director fees, which may be higher for independent directors, and ongoing monitoring of the requirements. The possibility of a shortage of sufficiently qualified and interested independent directors, even with the three-year transition period, should also be given consideration.

Comments on exposure draft

In relation to the exposure draft of the proposed amendments to the SIS Act, we have the following specific comments in respect of the meaning of 'independent' in proposed section 87:

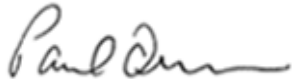
1. In sub-section (1), the person should be independent from the RSE licensee, the RSE and the agents of the RSE licensee/RSE
2. The definition should cover both direct and indirect associations/relationships
3. The person should be independent in terms of both mind and appearance
4. Sub-section (1)(a) focuses on 'substantial holding'. A clear definition is needed of what this means.
5. Sub-section (1)(b) focuses on "material relationship" and employment relationships. Clear definitions are needed. For example, does "employed" cover an extended definition of employment (i.e. including contractors). Any relationship where the individual and an entity that is associated with the individual (and not necessarily as entity that the individual controls) should be covered by the definition of independent.

6. The relationship in sub-section (1)(c) should not be limited to body corporates and should include relationships with any of the directors in paragraph (i) just the same as with any of the trustees in paragraph (ii) of this sub-section.
7. The definition should also exclude former auditors, senior audit staff, service providers and senior staff of service providers.

Further, in order to protect themselves, it is likely superannuation trustee boards would seek approval from APRA under sub-section 88(2) on the independence of any director prior to appointment. It is proposed that APRA be given a 60 day period to approve appointments (or removals) and this can be extended for another 60 days. This may result in considerable periods where a trustee board would not be satisfying the independence requirements or their legal responsibilities under the fund's trust deed.

If you have any questions regarding this submission, please do not hesitate to contact Michael Davison, Senior Policy Adviser - Superannuation on (02) 6267 8552 or michael.davison@cpaaustralia.com.au.

Yours faithfully



Paul Drum FCPA
Head of Policy

Phone: +61 3 9606 9701

Email: paul.drum@cpaaustralia.com.au