Submission

Superannuation Legislation Amendment (Governance) Bill 2015: Governance arrangements for APRA regulated superannuation funds

Reforms to Superannuation Governance

The High Court of Australia has recognised that for many Australians their superannuation entitlement is the largest asset they will acquire during their working lifetimes, in many cases exceeding the equity in their own home.

Therefore the governance of Superannuation funds in a COMPULSORY superannuation system is no trivial matter.

Before addressing the matter of superannuation governance the first question to be addressed is: "**What is a Superannuation Fund?"**

Most superannuation funds are based on the legal concept of a "*trust*", with some funds established by legislation.

In a "*trust*" there is dual ownership of the assets "*held on trust*." The Trustee or Trustees have ***common law title*** to the assets, whilst the beneficiaries have ***equitable title***.

Courts established under **Chapter III** of the Australian Constitution have an inherent jurisdiction in the administration of all trusts including superannuation trusts (or funds).

Trustees have a duty to obey the terms of the trust and to seek advice and directions from a **Chapter III** Court if they have any doubt as to how to interpret the terms of the trust. This is especially important in Defined Benefits Superannuation Funds where benefits are directly determined by the terms of the trust.

Chapter II agencies such as ***APRA*** would be acting "***ultra vires***" if they were to breech the doctrine of **Separation of Powers** and give advice and directions to Trustees as to how to administer their superannuation trust.

This brings into the question the role that ***APRA*** can legitimately play in the supervision of superannuation funds.

Beneficiaries (ie members) have a legal right to compel the due administration of their superannuation trust.

To allow beneficiaries (fund members) to compel the due administration of the trust the general law provides a right of access to the original Trust Deed that established the trust and any instruments that purport to amend the terms of the original Trust Deed. Members and beneficiaries have the right of access to other "**trust documents**" such as the audited accounts and actuarial reports.

Since it is the members' money that is being held on trust they are the persons who have the most interest in the proper governance of the trust. Public servants have no such interest.

Trustees, as the archetype fiduciary, must also comply with the "***no conflict and no profit rule***".

There are currently around 30 million superannuation accounts held by around 12 million adult Australian. It is nonsense to claim that a small numbers public servants can properly supervise so many superannuation accounts.

The only persons who can properly safeguard their own money are the members themselves, with the assistance of the Courts.

The President of the Supreme Court of the United Kingdom is Lord Neuberger of Abbotsbury.

Neuberger J stated in ***Bestrustees v Stuart*** [2001] PLR 283, [2001] Pens LR 283, [2001] EWHC 549 (Ch), [2001] OPLR 341:

> ***"I bear in mind that a pension scheme is likely to continue for a substantial period of time and that those most affected by them and entitled to protection from the trustees, the employer and indeed the Court, will be people who are comparatively poor, who will not have easy access to expert legal advice, and who will not know what has been going on in relation to the management of the Scheme. In those circumstances, it seems to me that protection of the beneficiaries requires the Court to be very careful before it permits a departure from the plain wording and plain requirements of the trust deed."***

Governance Model

The most important question when considering any governance model is who holds the power to remove and appoint those in charge of the organisation?

In a public company it is the shareholders who hold this power.

Principle #1

The members of superannuation funds should at the very minimum hold the power to remove and appoint at least 50% of the natural person Trustees or Directors of a corporate Trustee.

This principle is currently only applied to corporate and industry funds which are **not-for-profit** funds.

Principle #2

Those whose money is at stake in public companies have the right to question the Directors at an Annual General Meeting as to how the company is being administered and the members of COMPULSORY superannuation funds should have this same right. Currently this right does not exist.

Principle #3

The Trustees or corporate Trustee has direct control of large amounts of "***other peoples' money***" and there should be adequate transparency as to how this money is being invested and spent.

The following documents as a minimum should be accessible on the website of the fund not just by members of the fund but by person who might become a member of the fund (ie by the general public).

- The audited accounts for the fund
- The "*independent*" auditor's Financial Report for the fund
- The "*Independent*" auditor's Compliance Report for the fund
- The audited accounts for the corporate Trustee
- The "*independent*" auditor's Financial Report for corporate Trustee
- The periodic actuarial report

Expenses incurred in the administration of the fund should be paid by way of "**exoneration**" from the fund and not by "***reimbursement***", with a large lump sum being paid to the corporate Trustee with no disclosure as to how this money has actually been spent.

Principle #4

In a COMPLUSORY superannuation system the Directors of a corporate Trustee should not be seeking to provide a profit for the parent organisation. Trustees are supposed to the archetype *fiduciary* who has to comply with the "***no conflict and no profit rule***", however this rules has been sidestepped by hiding profits as unnecessary "***fees and charges***".

Principle #5

Under the general law any adult of sound mind can be a trustee, however being a Director of a corporate Trustee has the legal responsibility of in many cases Billions of dollars of "***other peoples'***

money". Therefore the proper approach is to mandate that all Directors must complete a training course as to the laws of trusts and prudent investment practice soon after being appointed to office.

Directorships should not be limited to "***Mates of APRA***" where ***APR***A decides who can be a Director of a corporate Trustee and who cannot.

Principle #6

The fund auditor is supposed to be part of the governance model and is supposed to be "*independent*" and his or her services are paid by the members of the fund.

To ensure "***independence***" there should be mandatory audit partner rotation every three years and mandatory audit form rotation every six years.

This would assist in eliminating "*rubber stamping*" of financial and compliance reports by auditors who become too friendly with those who engage them but do not ultimately pay the auditor.

Principle #7

If the Government forces people to place 9.5% of their earnings into the hands of strangers who may seek to steal some or all of it or otherwise use questionable practices to transfer money from the fund to the shareholders of parent companies, then the Government has an obligation to educate members as to their legal rights and how they should ensure that trustees are safeguarding their money {Refer to **Appendix B** and a previous recommendation of the Parliament}.

Principle #8

Effective governance and regulation of a $1 trillion compulsory superannuation system is not possible where the public servants tasked by the Parliament to protect the interest of the public have themselves a **conflict of interests** where they seek to be promoted to the industry they regulate at much higher salaries.

Complaint Resolution

In a compulsory superannuation system there should be robust complaint resolution system where members of fund can obtain redress if they believe that have been the victims of theft, fraudulent or their Trustee is not complying with superannuation laws.

The Superannuation Complaints Tribunal is a "***complaint handling agency***", however due to the doctrine of the Separation of Powers the Tribunal can only deal with complaints where the Trustee has acted lawfully but has made a decision that might be impugned on the grounds that is it "*unfair or unreasonable*".

The Tribunal must refer any complaints that relate to the "***contravention of any law or governing rule***" to **APRA** (and in some cases to **ASIC**).

However ***APRA*** is not a "***complaint handling agency***" and is free to ignore any such referral (and so is ***ASIC***).

Both ***APRA*** and ***ASIC*** administer a "**complaint graveyard**".

This is clearly unacceptable in a COMPULSORY superannuation system.

Proposed Legislation

The ***Superannuation Legislation Amendment (Governance) Bill 2015: Governance arrangements for APRA regulated superannuation funds*** will be soon present to Parliament.

A longstanding feature of the superannuation governance framework is the requirement for **some** superannuation trustee boards to have equal representation (typically standard employer-sponsored funds). This reflects the position adopted with the commencement of occupational superannuation, that members should have a greater voice through representation on non - public offer funds (industry, corporate and public sector). Equal representation allowed both stakeholder groups (employers and employees) to have oversight and responsibility for funds' operations.

The "***equal representation rule***" was incorporated in the Superannuation Industry (Supervision) Act 1993 (SIS Act) after Robert Maxwell and his sons raided some £454 million from the pension funds of the employees of the Mirror Newspaper Group in the early 1990s.

The Super System Review (Cooper Review) found:

> *'Trustee governance structures have not kept up with developments in the industry. There have also been difficulties for trustees and their trustee-directors in understanding what is expected of them and, as the industry consolidates, conflicts of interest and conflicts of duty arise regularly.* ***Good trustee governance is fundamental to enhancing members' retirement incomes'***

However the logical response should have been to recommend that the "***equal representation rule***" should be mandated for all funds, including those administered by the four major banks and other large financial institutions.

Enacting this one recommendation would generally double the retirement benefits of around half of all working Australians, with any additional cost to:

- The members,
- Their employers
- The taxpayer.

Mandating Annual Meetings to be held by Trustees in a COMPULSORY superannuation system would supplement the "***equal representation rule***".

Members of the so called "***for-profit-funds***" would then be able to question the purported "*independent*" Directors as to why they are focused on the interests of their parent company and not focused the interest of the members of the fund and maximising the return to the members and not the return to shareholders of the parent company.

However the Cooper Review did not recommend such beneficial reforms. Instead the Cooper Review recommended that the SIS Act be amended so that it is no longer mandatory for standard employer-sponsored funds to maintain equal representation in selecting their directors.

So instead of promoting the "***equal representation rule***" to be apply to all funds, the conflict of interests of the "**independent**" directors of the "**for-profit-funds**" was simply overlooked.

The excuse for this failure to recommend real reform was that the "***Cooper Review noted that the presence of independent directors on boards is best practice in corporate governance***."

Now the Directors who sit on the Boards of Public Companies can be classified as:

- Executive Directors who are also involved in the day-to-day administration of the company;
- Non-executive Directors who are not involved in the day-to-day administration of the company.

Non-executive Directors are also referred to as" *independent*" Directors however this is somewhat of a misnomer. Both Executive Directors and Non-executive directors will often hold share in the company and if the Directors have "**some skin in the game**" they are more likely to be focussed on the performance of the company than a Director who has no shareholding and who just picks up Directors fees whilst sitting on the Boards of several companies.

In any case the shareholders retain the power to remove and appoint the Directors whatever name might be applied to them.

Now it is claimed that the Directors on the Boards of "***for-profit- funds***" are "***independent***", since the "***equal representation rule***" has not been mandated for these funds.

However theses Directors are appointed by the parent financial institution and can hardly be classified as "*independent*".

If these so called "*independent*" Directors fail to do the bidding of the parent financial institution, they will simply be replaced. The members of these funds have ZERO control over who is appointed as a Director of their fund.

It is claimed:

."In addition, independent directors allow for an increased accountability of decisions made by other directors who may have conflicting interests. (FSI Report, p.134)"

However the funds where conflicts of interest are most problematic and impose the most burden on members are those where all the Directors are supposedly "*independent*".

A Power Grab by APRA

A proper governance model would ensure that the members of the fund have the maximum say as to how their money is being administered and invested.

Under the proposed legislation:

> "APRA also has powers to determine that a person is, or is not, independent."

What we have is a "***Mates of APRA***" club in formation with those who curry favour with **APRA** will be "certified" as suitable to get their grubby hands on other peoples' money and those whose money it is will be powerless to have these carpetbaggers removed from office.

New subsection 87(1) sets out the definition of ***independent*** applied in the Bill. It says that a person is independent if they do not have a substantial holding in the licensee or a related entity; are not directly associated with a person who has such a substantial holding; do not have a material relationship with the licensee, including through their employer; and have not in the last 3 years been an executive officer or director of a body that has a material relationship with the licensee.

Now the key words are "***substantial***" and "***material***" and of course **APRA** wants the power to determine what is "***substantial***" and what is "**material**".

However no mention is made as to who will have the power to remove and appoint these wonderful "*independent*" directors who will miraculously improve the governance of superannuation fund solely on the basis that they are "***mates of APRA***".

The so called "***independent***" Directors will in reality not be "*independent*" at but merely proxies for those who do have the power to remove and appoint them and in the case of "*for-profit-funds*", this is the parent financial institution.

Big Brother

New section 88 allows ***APRA*** to make a determination that a person is independent if it is reasonably satisfied that the person is likely to be able to exercise independent judgment in their role as a director. ***APRA*** is able to do so on application by the RSE licensee or on its own initiative (subsection 88(2)).

Now how is ***APRA*** going to make such a determination when the Directors of "***for-profit-funds***" fail this test on any objective measure where the members of their funds generally lose half their potential retirement benefit due to unnecessary fees and charges that are imposed because there Directors have a conflict of interest and are completely unable to exercise any independent judgement?

But of course these Directors will pass the "***Mates of APRA***" test and at the need of the day that is all that will count.

Here the Parliament will be giving the power to Public Servants to veto a Director who might be elected my members to protect their interest on the basis that this Director might actually do his job and instead a flunky of APRA will be installed in his place.

Welcome to ***Big Brother***.

No Credibility

Last year the Senate held an inquiry into the conduct of ***ASIC*** and why ***ASIC*** had failed to investigate the conduct of the **Commonwealth Bank**

The finding of the Senate Inquiry established that both ***ASIC*** and the **Commonwealth Bank** cannot be trusted to secure the financial well being of Australian citizens.

[redacted]

APRA produces a report on the performance of Superannuation funds and the largest "**NOT-FOR-PROFIT**" super fund AustralianSuper returned an average of **7.2%** over a 10 year period with $65 Billion under management.

The largest Fund administered by the **Commonwealth Bank** - Colonial First Sate returned only **4.8%** over the same 10 year period with $51 Billion under management.

So in a **COMPULSORY** superannuation system a member of AustralianSuper, a not-for-profit Fund, will receive around DOUBLE what a member of a fund administered by the **Commonwealth Bank** will receive at retirement, based on the same contributions.

[redacted]

Previous Legislation

Now before Members of Parliament and Senators consider voting for this new legislation it is worthwhile considering who ***APRA*** has enforced existing superannuation fund governance legislation.

In response to the Robert Maxwell pension funds fraud the "***equal representation rule***" was included in the ***Superannuation Industry (Supervision) Act 1993***.

Robert Maxwell and his sons stole £454 million from the pension funds of the Mirror Newspaper Group and associated companies.

Given the historical reason why the "***equal representation rule***" was added to the legislation by the Parliament one might expect that enforcement of the provisions of the "***equal representation rule***" would be a high priority of ***APRA***.

But no – ***APRA*** does not care whether corporate Trustees of employer sponsored superannuation funds comply with this important governance rule or not.

Laws are not worth the paper they are written on if there is no will to enforce these laws.

APRA's failure to enforce the "***equal representation rule***" is reason enough not to provide move governance powers to ***APRA***.

APRA's failure to enforce the "***equal representation rule***" will become much better known now a **class action** is underway where the member-elected Directors were never replaced and ***APRA*** ignored repeated complaints concerning the loss of governance by members of the fund.

Regulatory Capture

Regulatory capture is a form of political corruption that occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or special concerns of interest groups that dominate the industry or sector it is charged with regulating. Regulatory capture is a form of government failure; it creates an opening for firms to behave in ways injurious to the public (e.g., producing negative externalities). The agencies are called "***captured agencies***".

Both ***APRA*** and ***ASIC*** are examples of "***captured agencies***".

A captured regulatory agency is often worse than no regulation, because it wields the authority of government.

Whistleblower Comments

CBA Whislteblower Jeff Morris has noted:.

""Governance" issues with industry funds were being addressed (by the Coalition Government) with moves to appoint "independent" directors. No mention is made of governance issues with institutions like CBA deceiving their customers for years and defrauding them of compensation - and there is no plan to deal with this either"

Recommendations

Recommendation #1

Members of Parliament and Senators should not vote for this sham legislation that will soon be before the Parliament that is ideological driven and will cost members of superannuation funds dearly.

Recommendation #2

The "***equal representation rule***" should be made mandatory for all regulated superannuation funds so that around half of all working Australians can double their retirement benefits at no cost to:

- The Members,
- Their Employers, or
- The Taxpayer.

Recommendation #3

It should be mandatory for Trustees to hold annual General Meetings so that the members of the fund can voice any concerns as to how the fund is being administered and what investments are being made by the trustees. This is especially important to ensure "*related party transactions*" are properly disclosed and explained to members.

Recommendation #4

A public register should be established where certified copies all original Trust Deeds and amending instruments can be lodged and be available for public inspection in a similar manner as to how title certificates and records of Title Deeds are available for public inspection

Recommendation #5

The following documents as a minimum should be accessible on the website of the fund not just by members of the fund but by person who might become a member of the fund (ie by the general public).

- The audited accounts for the fund
- The "*independent*" auditor's Financial Report for the fund

- The "*Independent*" auditor's Compliance Report for the fund
- The audited accounts for the corporate Trustee
- The "*independent*" auditor's Financial Report for corporate Trustee
- The periodic actuarial reports

Recommendation #6

Expenses incurred in the administration of the fund should be paid by way of "**exoneration**" from the fund and not by "***reimbursement***", with a large lump sum being paid to the corporate Trustee with no disclosure as to how this money has actually been spent.

Minimum standards of disclosure should be mandated especially in relation to related party transactions.

Recommendation #7

Audit Partner rotation should be mandated for every three years and audit firm rotation every six years.

Recommendation #8

Public servants should not have the power to veto who members of a superannuation fund might wish to elect to represent their interest and appoint their "***mates***" instead. Instead all Directors of large superannuation funds should be required to attend a certified training course so that have an adequate understanding of the laws of trusts, their legal obligations to members and prudent investment principles .

Recommendation #9

The decision of ***APRA*** or ***ASIC*** not to investigate complaints where Trustees have failed to comply with Commonwealth Statutory Laws related to superannuation should be appealable to the **Administrative Appeals Tribunal**. This will prevent the continuance of "**The Art of the Deal**" replacing "**The Rule of Law**".

Recommendation #10

The "***secrecy provisions***" under the ***APRA Act*** should be abolished as they relate to superannuation funds in a COMPULSORY superannuation systems since such provisions have all the hallmarks of the desire of **APRA** to run a "***protection racket***" for its clients in the superannuation industry.

Recommendation #11

A **National Integrity Commissioner** should be established to investigate complaints of corruption by officer of ***APRA*** and ***ASIC.***

Recommendation #12

There should be mandatory provisions that prevent ***APRA*** officers (and ***ASIC*** officers) from resigning from the Australian Public Service and taking jobs at double or triple their public service salaries with the financial institutions and superannuation funds they once "*regulated*".

This is just another form of corruption where higher salaries are paid and not brown envelopes stuffed with $100 bills.

Recommendation #13

There should be a robust complaint resolution system not just limited to cases where Trustees have acted honestly and lawfully. There should be easier access to **Chapter III** Courts so that members can have the Courts determine a "***true construction***" of the terms of their superannuation trust if the Trustee or Trustees of their fund refuses to seek the advice and directions of the court where necessary as recommended by the High Court of Australia.

Recommendation #14

When new Directors are appointed to the Board of a corporate Trustee, it should be mandated that they complete an approved course covering trust and superannuation laws and prudent investment practices.

Recommendation #15

Members of superannuation funds should be provided with a booklet summarising their legal rights under the laws of trusts and under statutory legislation, including their right to be provided iwth a copy of the Trust Deed that established their superannuation trust and copies of all instruments that purport to amend the terms of their superannuation trust.

Appendix A

Superannuation Funds are based on the legal concept of a trust and trust are supposed to be administered on an **open book** basis where the members should have access to most documents related to the administration of the trust with few exceptions.

This same principle should apply to any Regulator such as ***APRA*** who has been given role by the Parliament to ensure the integrity of the COMPULSORY superannuation system.

Proper governance reform requires the removal of "***secrecy provisions***" in the ***APRA*** Act as they currently apply to superannuation funds.

"**Secrecy provisions**" have the hallmark of a "**protection racket**" where ***APRA*** simply hides evidence or complaints concerning fraud and other misconduct in the COMPULSORY superannuation system.

Appendix B

Superannuation was made **compulsory** by the Keating Government.

The **Senate Select Committee on Superannuation** in 1993 made the following recommendation:

> ***"The Committee in carrying out a close study of the Queensland Professional Officers Association Superannuation Fund observed the consequences when the principles of trust law are neglected and abused. It remarked on the important role government had in educating both trustees and members as to their respective rights and responsibilities as a means of preventing a Queensland Professional Officers Association Superannuation Fund situation."***

This recommendation was accepted.

The comments included:

> ***"The legislation is designed to support honest and diligent trustees and give members a greater say in the management of funds "***

These comments in the Senate Hansard have been echoed two decades later by the Western Australia Court of Appeal.

The Western Australia Court of Appeal in ***Schreuder v Murray [No. 2]*** 41 WAR 169; 260 ALR 139 ; [2009] WASCA 145 stated:

> ***"A trustee is the trustee of property for the benefit of the beneficiaries of the trust. The trustee and beneficiaries have a correlative duty and interest in the proper administration of the trust. The duty of the trustee includes a duty to properly perform the trust by adhering to and carrying out the terms of the trust.*** **The beneficiaries have an interest and, indeed, a right to compel proper administration of the trust."**

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There has been a total failure of Governments, both Labor and Coalition, to educate members of superannuation funds as to how to ensure their fund is being properly and lawfully administered for their benefit.

Extract from the Senate Hansard 25 November 1993 page 3696

GOVERNMENT RESPONSE TO THE EIGHTH REPORT OF THE SENATE SELECT COMMITTEE ON SUPERANNUATION

General Points

The Government accepts the Report and the recommendation of the Committee which is related to the Government's retirement income policy.

The Government is conscious of the need for the early implementation of legislation to increase the prudential control and supervision of superannuation funds.

The Superannuation Industry Supervisory Bills which the Government introduced into the Parliament on 27 May 1993 give effect to increasing the prudential and consumer protection arrangements for superannuation.

Recommendations	Response	Comments
The Committee in carrying out a close study of the Queensland Professional Officers Association Superannuation Fund observed the consequences when the principles of trust law are neglected and abused. It remarked on the important role government had in educating both trustees and members as to their respective rights and responsibilities as a means of preventing a Queensland Professional Officers Association Superannuation Fund situation. The Committee recommends the early implementation of legislation to increase the prudential control and supervision of superannuation funds.	Accepted	The Government welcomes the Committee's Recommendation that the Superannuation Industry Supervisory legislation be put into effect quickly. That package of legislation gives effect to the prudential and consumer protection arrangements for superannuation announced by the Government on 21 October 1992. The legislative framework includes a comprehensive system of prudential supervision. The legislation is designed to support honest and diligent trustees and give members a greater say in the management of funds. The Insurance and Superannuation Commission (ISC) will be monitoring and auditing compliance.