SUPER SYSTEM REVIEW
FINAL REPORT

CHAPTER 2
Trustee governance

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CONTENTS

KEY THEMES

Issue

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.

Proposed solution

The Panel proposes measures, including:

- creation of a new office of 'trustee-director' with all statutory duties set out in the SIS Act;
- equal representation would not be mandatory and all boards would be required to have some 'non-associated' trustee-directors;
- a detailed, specifically-tailored conflicts policy would be required for all trustees; and
- development of a Code of Trustee Governance which would set out 'best practice' principles for trustees and trustee-directors.

Benefits for members

Members will benefit from better trustee governance as:

- it will help ensure that the appropriately qualified people are running the fund and that they are aware of their duties toward members;
- conflicts will be better managed so that members can be confident that all trustee-directors are acting solely for the benefit of members; and
- accountability to members will be improved.

1 INTRODUCTION

The Panel's Phase One — Preliminary Report 'Clearer Super Choices: Matching Governance Solutions' (14 December 2009) expressed concern that the current approach to superannuation fund governance under the SIS Act was no longer adequate. This was primarily due to the fact that the 'one size fits all' model was not sufficiently flexible to take into account industry developments since the SIS Act was enacted and because the current approach gave the 'illusion' that members' interests were protected and paramount. The Panel has further considered these significant governance issues. It sets out its final conclusions and recommendations on the subject of governance in this chapter and in chapter 3. This chapter addresses the governance of trustees of all APRA-regulated funds (including small APRA funds). Investment governance (which covers both MySuper and choice sector) is dealt with in chapter 3. This chapter does not address the trustee governance issues for SMSFs. All SMSF issues are addressed in chapter 8.

The Phase One Report also set out the Panel's preliminary conclusions concerning an enhanced architecture for superannuation which became the 'MySuper' proposals in the Panel's Second Phase One — Preliminary Report (20 April 2010). MySuper is specifically covered in chapter 1, so it is not addressed in a detailed way in this chapter.

Collectively, the purpose of trustees and trustee-directors is to deliver the public policy goal of enhancing the retirement incomes of members. It is sometimes overlooked that the superannuation industry is quite different from other businesses. It owes its existence to government policy and is underpinned by a social purpose that runs alongside many other economic and stakeholder considerations. Recognising this special purpose, the Panel believes that all those involved in the system need to have — and be seen to have — high standards of governance. In superannuation, just as in other areas of corporate activity, good governance plays a major role in promoting better decisions, greater accountability and in reducing unintended operational and investment risks.

The Panel believes that the governance standards that apply to major listed entities are a reasonable starting point for the requirements that should apply to trustees and their trustee-directors, given the profound impact the latter have on the retirement incomes of members. This is particularly so in light of the growing influence that super funds have in advocating corporate governance practices for entities forming part of their investment portfolios that are not necessarily matched in their own practices. Turning the governance spotlight on trustees' own operations is, in the Panel's view, critical to the long-term sustainability of the superannuation system.

2 A FRAMEWORK FOR ACCOUNTABLE TRUSTEE GOVERNANCE

Because all APRA-regulated funds must be trusts, the conduct and skills of trustees are crucial to a fund's efficient and successful operation.

While it is possible under the SIS Act for a trustee to be a natural person, the vast majority of trustees of APRA regulated funds are companies and it is the board of trustee-directors who are responsible for the trustee's decisions and actions. In this chapter of the report, when we refer to the 'trustee', in context it means the trustee company. When we say 'trustee-director', we mean the person who

serves as a director of a trustee company. There are so few large APRA funds where there are only natural person trustees (five in total) that we do not separately refer to them.

With the introduction of the SIS Act in 1993, the government chose to focus on the unique position of the trustee. This is because the SIS Act was specifically designed to regulate and influence the way in which trustees play their role. The SIS Act reinforces the common law's orientation of trustees towards the best interests of members and emphasises that the sole purpose of the superannuation system is generally to provide retirement benefits to members. Subsequent legislation (including licensing trustees) has reinforced the pivotal importance of trustees.

Although the term 'governance' can be used in different ways,[1] in this report, the Review uses the term 'trustee governance' in the same way that 'corporate governance' is used by the ASX:

> *"Corporate governance is 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations'. It encompasses the mechanisms by which companies, and those in control, are held to account. Corporate governance influences how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is optimised."*[2]

There is no evidence of systemic failure of trustee governance in the superannuation system. However, the Panel believes that there are shortcomings in the governance model that need to be addressed and improvements that can be made.

2.1 Current governance model

There are different models of governance evident across the industry. The differences are generally based on the fund's historical origins and whether the trustee operates a fund that is in the not-for-profit sector (industry, public sector and corporate funds) or the commercial sector (retail funds). However, the regulatory regime does not make significant distinctions between different models. This reflects the role of the SIS Act in articulating a minimum set of duties to be imposed on all super fund trustees, irrespective of business or operating model.[3]

That said, the Panel is concerned that the regulatory scheme shaping the governance of superannuation funds is unnecessarily complicated. It currently operates at two levels: one for trustees and a second for trustee-directors. To further complicate matters, some obligations on the trustee (company) flow through directly to the individuals acting as trustee-directors of the trustee.

In summary, then:

1. The trustee is subject to the duties imposed by section 52(2) of the SIS Act and a variety of registrable superannuation entity (**RSE**) licensing requirements.

2. The trustee-directors are subject to:

   (a) the 'fit and proper' requirements for an RSE licence;[4]

   (b) section 52(8) of the SIS Act, which imposes the covenants set out in section 52(2) on the trustee-directors as though they were trustees personally; and

   (c) those parts of the Corporations Act that apply to company directors.

Lack of coordination between the SIS Act, the Corporations Act and the regulatory regimes creates a range of governance problems.[5]

For example, the present system creates ambiguity and confusion for some trustee-directors as to whom their duty of loyalty is primarily owed: to the members of the fund or to the for-profit trustee company (and hence its owners and associated parties). Ordinarily, directors would owe their duties directly to the company, which would owe duties as a trustee to the members. Section 52(8) of the SIS Act attempts to address this by requiring the trustee-directors to:

> *"exercise a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out [its duties], and so operates as if the directors were [subject to the same duties]."*

However the list of duties in section 52(2) of the SIS Act contains some duties that appear more relevant to the trustee, and some that appear more relevant to the trustee-directors individually and collectively. The Panel believes that there ought to be unambiguous clarity about the duties owed by the trustee-directors, as well as the standard of competence that they should possess and exercise. These should be distinguished from those related to the trustee. Rules of a similar nature, such as those governing the standards of conduct and competency of trustee-directors, should be found in the one place wherever possible. Trustee-directors should not have to collate rules from multiple sources in order to understand their core duties.

Another example of a potential issue that arises from having dual statutes (each with authority on the same subject) can be illustrated by the different provisions that apply in determining when trustee-directors are entitled to be indemnified out of trust assets and when they are personally liable. This issue is created by the indemnity limitations under section 197 of the Corporations Act on the one hand and the indemnity requirements under section 56 of the SIS Act on the other. Section 5.2 of this chapter addresses this matter in more detail.

2.2 A new model for governance

The Panel believes that there is value in creating a distinct new office under statute, that of 'trustee-director'. The duties, powers and standards required of that office should be recorded clearly and cogently in one place, preferably the SIS Act. These duties, powers and standards would apply to the trustee-directors of all APRA-regulated funds, not just those offering MySuper products to members. Certain additional duties would be imposed in relation to MySuper products (these additional duties are explained more fully in chapter 1).

While establishing the trustee-director office would necessitate changes to current legislation that go beyond the insertion of a few new provisions and would require wide consultation with industry, the Panel is of the view that there would be significant benefits in equipping trustee-directors to understand completely their role and responsibilities.

The Panel is conscious of the consequences in terms of delay, cost and disruption, that legislative change such as this cause. However, it believes that these changes are important steps towards a more accountable and efficient trustee governance regime for the future.

2.2.1 Enhanced statutory duties for trustee-directors

Enhanced statutory duties would be articulated for trustee-directors to address these governance issues. The statutory duties would enhance, expand and clarify the duties in section 52(2) of the SIS Act. The Corporations Act would no longer have any relevance to trustee-director duties, but ASIC would continue its regulatory responsibilities for trustee-directors; those duties would simply be found in the SIS Act, rather than the Corporations Act. There is no intention that these statutory duties would codify common law principles.[6]

The Panel's intent is that these duties would focus trustees and trustee-directors on the issues that, as a matter of policy, the Panel believes are of utmost importance for superannuation fund governance.

Key among these is the trustee's duty of loyalty to the members of the fund. Despite the apparent simplicity of the reference in section 52(2)(c) of the SIS Act to the 'best interests' of members, there is considerable uncertainty in practice about what that provision actually means. A diversity of views has been expressed in the courts[7] and the AAT,[8] and in commentators' analysis of the provision.[9] IFSA, focusing on one dimension of the confusion, noted in its submission to Phase One:

> *"Codification has arguably resulted in the misunderstanding of the 'best interests' test ... misunderstanding of the test (together with the breadth of when it is applied) has lead to much of the confusion arising in the governance of superannuation funds."*[10]

The Law Council of Australia also directly alluded to the uncertainty. It noted:

> *"A recent challenge faced by the industry is the meaning of the best interests duty set out in section 52(2)(c) of the SIS Act ... Moreover at times the regulator's interpretation (with its apparent focus on 'outcomes') is arguably at odds with the historical and general law interpretation of various duties and general industry understanding of those duties."*[11]

The Panel believes that the SIS Act would benefit from a clearer articulation of what appears to be two important elements of that duty: the requirement that trustees place member interests ahead of the interests of all others, and the requirement that trustees should actively endeavour to achieve the best outcome for members and not to be content to accept merely an adequate, reasonable, or peer-comparable outcome. To that end, the Panel is recommending a more precise set of 'conflict' duties and also recommending that the standard applied to the requirement that trustees act with care, skill and diligence be raised from that of the 'prudent person' to that of the prudent 'person of business'. That heightened standard has the additional attraction of reflecting the increasing challenges now facing trustees as funds grow and become more complex. It is also the standard that currently applies in all Australian states for professional trustees of funds in other circumstances.[12]

The Panel believes that the SIS Act ought to articulate a consolidated list of duties to apply to *all* trustee-directors that addresses directly the quality of the decision-making process. Chapter 1 discusses additional duties specifically for trustees who offer MySuper products.

Recommendation 2.1

The SIS Act should be amended to create a distinct new office of 'trustee-director' with all statutory duties (including those which would otherwise be in the Corporations Act) to be fully set out in the SIS Act, along with re-focussed duties for trustees. The duties for trustee-directors should include:

(a) To act solely for the benefit of members, including and in particular:

- **i. to avoid putting themselves in a position where their interests conflict with members' interests;**
- **ii. to give priority to the duty to members when that duty conflicts with the trustee-director's duty to the trustee company, its shareholders or any other person;**
- **iii. to avoid putting themselves in a position where their duty to any other person (such as another super fund or a service provider) conflicts with their duty to members;**
- **iv. to avoid putting themselves in a position where their duty to any other person (other than members) conflicts with their duty to the trustee company;**
- **v. not to obtain any unauthorised benefit from the position of trustee or trustee-director; and**
- **vi. not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers.**

(b) To act honestly.

(c) To exercise independent judgment.

(d) To exercise the degree of care, skill and diligence as an ordinary prudent person of business would exercise in dealing with the property of another for whom the person felt morally bound to provide.

(e) To have specific regard to (among other matters) the likely long term consequences of any decision, including the impact of the decision on the community and the environment and on the entity's reputation for high standards of conduct.

The duties for trustees should include:

(a) To keep the money and other assets of the entity separate from any money and assets, respectively:

- **i. that are held by the trustee personally; or**
- **ii. that are money or assets, as the case may be, of a standard employer-sponsor or an associate of a standard employer-sponsor, of the entity.**

Recommendation 2.1 (continued)

(b) To formulate and give effect to an investment strategy in respect of the fund as a whole and each investment choice option, that has regard to the whole of the circumstances of the entity including, but not limited to, the following:

i. the risk involved in making, holding and realising, and the likely return from, the entity's investments having regard to its objectives and its expected cash flow requirements;

ii. the composition of the entity's investments as a whole, including the extent to which the investments are diverse or involve the entity in being exposed to risks from inadequate diversification;

iii. the liquidity of the entity's investments having regard to its expected cash flow requirements;

iv. the ability of the entity to discharge its existing and prospective liabilities;

v. the expected costs of the strategy, including those at different levels of any interposed legal structures and under a variety of market conditions; and

vi. the taxation consequences of the strategy, in light of the circumstances of the fund.

(c) To formulate and give effect to an insurance strategy which includes, but is not limited to, the types of insurance to be offered and the default minimum and permissible maximum levels of cover to be offered as well as the cost and value for money to members.

(d) If there are any reserves of the entity, to formulate and to give effect to a strategy for their prudential management, consistent with the entity's investment strategy and its capacity to discharge its liabilities (whether actual or contingent) as and when they fall due.

(e) To allow a beneficiary access to any prescribed information or any prescribed documents.

(f) To act fairly between all beneficiaries of the fund and to act impartially between beneficiaries of the same class.

2.2.2 Code of Trustee Governance

While legislation is necessary to express specifically the duties that trustee-directors will have to observe, the Panel believes that it should be supported by a Code of Trustee Governance for trustees and trustee-directors. The Panel has in mind a Code much like the one developed by the ASX Corporate Governance Council. The Code of Trustee Governance is discussed in more detail in section 7 of this chapter, along with the Panel's recommendation concerning the content of the Code.

3 STANDARD OF COMPETENCE FOR TRUSTEE-DIRECTORS

The competence of trustee-directors is fundamental to the governance of superannuation funds. The Panel is concerned that the lack of substantive requirements for serving as a trustee-director means that competence is not always assured in the current environment. Because boards act collectively, it is not possible to determine if all trustee-directors are contributing to the board's deliberations and, consequently, trustee-director shortcomings could remain undetected.

Further, under the enhanced trustee-director duties outlined above, trustee-directors would be expected to meet a legal high standard of care, skill and diligence. The industry generally, and members particularly, would benefit from ensuring that the trustee-directors who are in principle held to this high standard are both capable of achieving it and are actually delivering it in practice.

3.1 Fit and proper standard

The only regulatory measure specifically directed at the competence of trustees and trustee-directors is the requirement under sections 29D(1)(d) and 31(2)(ma) of the SIS Act that all trustees be 'fit and proper' in order to receive a licence. These requirements are more fully explained in APRA Superannuation Guidance Note 110.1 but, generally, 'propriety' goes to the person's integrity and character and 'fitness' addresses the knowledge and skills required to perform the role. The requirements are not especially prescriptive. There are, for instance, no particular educational or experience requirements and trustee-directors are not required to demonstrate any particular level of competence prior to appointment.

A number of submissions argued that the imposition of minimum educational requirements for trustee-directors would be undesirable.[13] There was a concern that people capable of contributing meaningfully to the board might be discouraged from seeking appointment.

The Panel is, however, concerned that as the challenges facing trustees become more sophisticated, the standards of competence currently required of trustee-directors under the 'fit and proper' test will be inadequate. The Panel believes that trustee-directors will require director skill-sets more akin to those required of the boards of listed entities of a similar scope and scale. That said, APRA data also show that the majority of trustee-directors do possess tertiary or vocational qualifications relevant to their roles.[14]

The Panel's attention was drawn to APRA's draft Prudential Practice Guide 520 on Fitness and Propriety (dated 14 August 2009) which is more prescriptive than the current standard as to the knowledge that trustee-directors are expected to have in order to be regarded as 'fit' for the role. For example, paragraph 28 of the draft Guide requires a director to understand the SIS Act section 52 covenants, to have a working knowledge of the SIS Act as well as basic knowledge of investments, the elements of an RSE licence and trust law. While this has not yet been formally issued by APRA, the Panel believes that the Guide is a step in the right direction.

3.1.1 A requirement to be 'expert'?

The Panel recognises that the governance and operation of a superannuation fund can involve decisions requiring highly specialised, technical knowledge. Failure on the part of trustee-directors to master that knowledge could result in poor processes and decisions, adversely affecting the

interests of members. (The Panel comments on this further in connection with investment governance in chapter 3.)

One factor mitigating against this risk is the availability of external advisers and service providers to help trustees on more technical matters. In this regard, the Panel does not want to encourage over-dependence by trustees on advisers and service providers. Without some minimum level of knowledge or expertise, trustees will find it difficult to question and monitor service providers to optimum effect. Neither, though, does the Panel want to suggest that only narrow technical skills are relevant to the governance of a large superannuation fund. It is largely for this reason that the reference above to the standard of care required of a trustee is that of a 'prudent person of business' rather than a 'prudent expert'.[15]

The Panel is also of the view that in many cases the internal management teams conducting the day-to-day business of superannuation funds will increase in number and size, so that there is less reliance on external service providers. In those cases, the trustee's ability to direct and monitor such teams (including very able chief executives), as well as form judgments on when, and to whom to outsource functions, will call for skills that are distinct from those that trustees in the past have required.

3.1.2 Individual vs collective competence

The Panel would like to see more emphasis on the board's collective fitness and a demonstration by each board that, collectively, it has the necessary blend of skills.[16] After all, the collective fitness of the board is the reason that each individual trustee-director is not required to have specific skills or knowledge. The Panel is concerned that a comprehensive analysis is not always performed by trustee boards so that gaps in knowledge are not identified and, consequently, neither individual trustee-directors nor the collective board are aware that important skills are not present at the board table.

The Code of Trustee Governance could provide guidance on these matters and the Panel also sees value in having an independent annual review of the board and its performance, which would specifically address the issue of the board's collective fitness.

3.2 Training

The regulatory scheme currently does not impose training requirements on trustee-directors, at least not directly. APRA's Superannuation Guidance Note 110.1 on 'Fit and Proper' also has no specific training requirements, but encourages trustees to develop an on-going training plan for all trustee-directors.[17]

The Panel recognises that many trustee boards already require training for trustee-directors. For example, according to the AIST, 92 per cent of their member trustee boards require their trustee-directors to undertake a minimum of 20 hours of professional development per annum.[18] Much of that training is directed towards understanding the legal dimensions of the trustee-director role, investment issues and aspects of the administration of trust affairs. ASFA likewise conducts trustee training courses on a wide range of practical issues relevant to super fund trusteeship.[19] The Panel believes this commitment to training is a very positive aspect of the superannuation system and commends those boards that have made this commitment.

Mandatory training is a feature of the regulatory schemes in some other countries.

Ireland's Pensions Board has launched an e-learning system that requires trustees to undertake professional training every two years. The e-learning system is free of charge and comprises nine major lessons. The training is designed both for new trustee-directors and for more experienced ones. New trustee-directors are required to complete the training courses within six months of their appointment. Some submissions have called for similar arrangements to the Irish Pension Board e-learning system be adopted for trustee-directors in Australia, although other means of training should also be encouraged.[20]

Similarly, in the UK, section 247 of the Pensions Act 2004 requires a trustee-director to have 'appropriate knowledge' of the relevant law relating to trusts as well as investment principles and, in the case of DB funds, funding principles. To help trustee-directors demonstrate that they have the requisite knowledge, the Pension Regulator has created a code of practice to guide them as to what is the relevant knowledge and understanding. As in Ireland, the regulator provides an e-learning programme free of charge.[21] Newly appointed trustee-directors have six months from the time of their appointment to complete the required learning.

Although a number of submissions recommended the imposition of minimum trustee on-going training requirements,[22] the Panel does not believe that training, per se, ought to be the subject of regulation. As noted above, Australia's regulatory scheme requires that boards and trustee-directors be competent to play the role expected of them,[23] and that they actually discharge that obligation. What is required to achieve and maintain that competence will vary dramatically by person and, potentially, by the type, activities and complexity of the fund. It is, however, an issue that the Panel believes should be addressed in the Code of Trustee Governance (see section 7 of this chapter).

Recommendation 2.2

Trustee-directors should not be required to have specific pre-appointment skills or training. However, APRA should consider further strengthening it's administration of the 'fitness' test under the SIS Act including requiring potential trustee-directors to be fully briefed before accepting the position (or deciding to seek nomination, where applicable) as to their responsibilities and potential liabilities. The Code of Trustee Governance should address the on-going training requirements that trustees and trustee-directors must meet on an annual basis.

Recommendation 2.3

The board of the trustee must demonstrate on an annual basis that it has the collective skill set to govern the APRA regulated fund or funds for which it is responsible and this should be one of the subjects covered in the independent annual review of the board.

4 THE STRUCTURE OF THE BOARD

The SIS Act has some basic rules regarding board structure. The Corporations Act, however, has no special rules for the governance of companies that act as trustees of superannuation funds.

4.1 Board size and director tenure

Information provided to the Panel indicates that board size is a problem for some funds in that the boards seem to increase (or there is pressure on them to increase) whenever a successor fund transfer or merger occurs. In some cases, the transferring trustee makes 'seats on the board' a condition of the transfer occurring, even though the transfer is in the best financial interests of members. In the Panel's view, this is inappropriate and shows that trustee-directors can sometimes forget that members' interests are always to be preferred.

The Panel can, however, understand that, in the context of a fund merger, there might be a need for the board to settle on its optimum size over time (having regard to the Code of Trustee Governance) after an appropriate transition period. In these limited circumstances, the board might for a time need to be increased beyond what is regarded as an optimum size and that increase should be permitted so long as the board has a plan as to how and when the number of trustee-directors will be reduced to the optimum size.

Research in corporate governance generally shows that boards should be of an appropriate size and that boards that are too large can become ineffective and inefficient.[24] Further, the Panel has been made aware that some trustee-directors seem to be appointed for an unlimited term and that turnover on the board rarely happens, or only happens for some trustee-directors and not others. Again, research shows that succession planning and regular turnover on the board is important for good governance and new ideas.

The Panel resisted making a recommendation on board size and tenure and, instead, has recommended that both issues be dealt with as important matters in the Code of Trustee Governance discussed in section 7.

4.2 The equal representation model

Equal representation was an important aspect of the governance structure established by the SIS Act in 1993. As the government noted at that time:

> *"One of the most important ways in which members are able to participate in the management and protection of their retirement savings is through representation on the board of trustees."*[25]

The Review received submissions both endorsing[26] and challenging[27] the effectiveness and appropriateness of the equal representation regime, as implemented. However, the Panel has come to the view that changes in the industry over time and certain implementation practices mean that equal representation no longer seems to achieve its original stated objective.

1. The superannuation system has moved substantially away from single-employer defined benefit funds that were dominant in 1993. In that environment, an employer and its employees might both be regarded as having a legitimate interest in the operation of the fund.

The introduction of fund choice, together with the prevalence of defined contribution funds today, materially changes (and in many cases severs) the close relationship that previously existed between the employer and the super fund.

2. The employer and employee representatives on many trustee boards are not, in fact, elected by employers or members, but rather are nominated by third party organisations, such as employer associations and trade unions. Current employment and industrial relations practices mean that these organisations do not necessarily represent all employers or all employees. Thus, the democracy that the equal representation policy appears to embed in the governance of superannuation funds is not always present in reality. The equal representation model also could result in a perception that individual trustee-directors are required to answer to the organisation that appointed them in respect of trustee decisions or that they are dictated to by that organisation.

3. The large number of employers, employer organisations and employee organisations related to a fund can sometimes result in trustee boards being far larger than makes sense for efficient governance of that fund.

4. 'Policy committees' have been an adjunct to the equal representation model as the SIS Act requires a public offer trustee, which does not have equal representation on its board, to establish 'policy committees' in respect of each employer with a group of 50 or more employees who are members. The SIS Act requires policy committees to meet even though they have no responsibility. Consequently, many public offer fund trustees have been reluctant to move away from equal representation due to the additional work that policy committees require. The Panel is of the view that maintaining equal representation merely because of the administrative burden of policy committees is not in keeping with the spirit of what the SIS Act and equal representation intended to achieve.

5. Equal representation leaves significant groups 'unrepresented.' Key among these are members who are pensioners (and potentially other post-retirement members in the future) and members who have joined the fund because they exercised fund choice. These groups of members, already sizeable in some funds, can be expected to grow in the future.

There was a strong consensus in submissions that for the most part trustee-directors understand and respect the principle that they are required to safeguard the interests of members as a whole, and not simply to represent one class of member, an appointing organisation or some other stakeholder. However, this result does not appear to arise from the equal representation model, but from the overarching SIS Act and general law requirements that all trustees (and their trustee-directors) have regard for the interests of members as a whole. The equal representation model appears to impose rigidity into fund governance practices and reduce accountability, without contributing materially to the representation objective on which it was predicated.

Recommendation 2.4

The SIS Act should be amended so that it is no longer mandatory for trustee boards to maintain equal representation in selecting its trustee-directors. The Panel expects that trustees would review and amend corporate constitutions to ensure consistency with this recommendation.

Recommendation 2.5

The SIS Act should be amended so that policy committees are no longer mandatory where the trustee board does not have equal representation.

4.3 'Non-associated' trustee-directors

Best practice in corporate governance includes the presence of independent directors on the board.[28] The Panel believes that the same broad principle is relevant to superannuation fund boards. However, given the different types of superannuation funds, the reasons why independence is valuable differs. For example, for retail funds, independence from management would be an important objective; on the other hand, for many not-for-profit funds obtaining an 'outside perspective' is vital. The Panel believes that outsiders or 'non-associated' trustee-directors (that is, people who generally have no historic connection with the fund or the appointor) could help to provide an objective assessment of issues that would assist the employer and member representatives. Of course, the boards of many superannuation funds already include independent trustee-directors. The Panel believes that those trustee-directors have brought great value to the boards that they serve, a proposition borne out in several submissions.[29]

The Panel believes that a minimum number of non-associated trustee-directors should be required on all boards. Also, the Panel believes it is important that such trustee-directors have a 'critical mass' so that they can genuinely influence the decisions of those boards.

For this purpose, the term 'non-associated' would have a different meaning from the term 'independent' in the SIS Act. For example, the Panel believes that a member of the fund could be a 'non-associated' trustee-director. Non-associated trustee-directors would still need to be free of connections to, or associations with, employer sponsors, the appointor (other than by reason of the appointment itself), entities related to the trustee, employer groups, unions, service providers and should not be current or former executives of the fund or a related entity. Of course, if a non-associated trustee-director is paid for their duties as a trustee-director, the fee should be paid only from fund assets and not by any third party.

Section 89 of the SIS Act currently requires (where there is equal representation) an independent trustee-director to be appointed 'at the request' of employer representative or member representative trustee-directors. The Panel thinks that a non-associated trustee-director should be able to be appointed in the same way and must be non-associated with the entity that requests the trustee-director's appointment (other than by reason of the appointment itself).

Recommendation 2.6

The SIS Act should be amended so that if a trustee board does not have equal representation, the trustee must have a majority of 'non-associated' trustee-directors (as described in this chapter).

Recommendation 2.7

For those boards that have equal representation because their company constitutions or other binding arrangements so require, the SIS Act should be amended so that no less than one-third of the total number of member representative trustee-directors must be non-associated and no less than one-third of employer representative trustee-directors must be non-associated.

It has been brought to the Panel's attention that not all independent trustee-directors are presently afforded the right to vote on trustee company business under the terms of the company constitution. While the Panel questions the validity of such a provision, it believes that it is important that all trustee-directors be eligible to vote on all company business (subject to any conflicts) and, consequently, any trustee company constitution provision to the contrary should be ineffective.

Recommendation 2.8

The Corporations Act should be amended so that any provision of a trustee company constitution that prohibits any trustee-director from voting on any trustee company business (other than in the event of conflict of duty or interest) is ineffective.

5 ACCOUNTABILITY TO MEMBERS

Given that the interests of members are paramount, the Panel believes that any trustee governance model must guarantee that trustees and trustee-directors are accountable to members. The special public purpose which superannuation plays also requires that trustees and trustee-directors be accountable as a matter of public policy.

The Panel has observed that trustees and trustee-directors often seem removed from members and do not always understand, or seek to understand, members' positions or concerns. 'Accountability' is more than just compliance with the relevant law. The Panel sees accountability as a way for trustees to obtain members' confidence that the trustees and trustee-directors are acting in a way that benefits members. It is important for them to demonstrate that they know what they are doing and that they are willing to be open and transparent in their decision-making and regarding the outcomes they achieve for members.

5.1 Transparency

One of the weaknesses of trust law is that, traditionally, trust beneficiaries often cannot acquire information from trustees about decisions that affect beneficiaries' interests.[30]

This aspect of trust law, when applied to the superannuation context, has attracted adverse comment by the courts on a number of occasions. The courts have been persuaded by the fact that participation in a superannuation fund is mandatory for almost everyone in the workforce, that preservation rules mean members cannot easily withdraw their money until retirement and that superannuation contributions are properly regarded as part of the member's remuneration.[31]

The Panel shares these concerns and believes that the current constraints on members gaining access to the trustee's reasons for decisions should not be thwarted by the trust structure.

Recommendation 2.9

SIS Act section 101 should be amended to require a trustee to provide a member with reasons for its decision in relation to the member's formal complaint.

5.2 Indemnities

Section 197 of the Corporations Act generally makes a director of a trustee company liable if the company has not (and cannot) discharge that liability; and the company is not entitled to be fully indemnified out of the trust assets because of:

- a breach of trust by the company;
- the company acting outside the scope of its powers as a trustee; or
- a term of the trust denies or limits the company's right of indemnification.

Section 56 of the SIS Act, on the other hand, provides a right of indemnification to the trustee from the assets of the superannuation fund (and section 57 has a corresponding right in respect of trustee-directors). The only restrictions on the SIS Act indemnity is if the trustee has failed to act honestly, has intentionally or recklessly failed to observe the requisite standard of care or is subject to a monetary penalty under a civil penalty order.

There is a clear conflict between the two statutes as to what the trustee's right of indemnity encompasses. The Panel believes that it should be made clear what the rights are for a trustee and trustee-director in these circumstances.[32]

The Panel believes that section 197 of the Corporations Act should have no application to a company to the extent that it is acting as trustee of an RSE.

Recommendation 2.10

Section 197 of the Corporations Act should have no application to a director of a company to the extent that the company is acting as a trustee of an RSE and the Corporations Act should be amended accordingly.

5.3 Member democracy

In some large APRA funds, members elect the member representative trustee-directors who are to serve on the trustee board (it is more unusual for them to vote on employer representative trustee-directors). Some would argue that this act of participatory democracy makes trustee-directors more accountable. However, accountability only occurs if there exists in the member a corresponding right to remove a trustee-director should a majority of members be unhappy with the trustee-director's performance.

In its first Issues Paper on Governance, the Panel canvassed the idea of trustees holding an annual general meeting (**AGM**) for members of large APRA funds so that members would have a forum to exercise powers in the same way that shareholders can exercise powers with respect to directors at an AGM. While the Panel was initially somewhat attracted to this concept, it has been convinced by the overwhelming weight of submissions[33] that the structural and logistical issues inherent in the superannuation industry make it impractical and undesirable at this time to require superannuation funds to hold AGMs.

However, the Panel would expect trustee-directors, who are charged with acting in members' interests, to have satisfied themselves that they know what those interests are and to seek to make themselves accountable even if the law does not explicitly require an AGM. Submissions to the Review revealed that several funds already hold consultative meetings with members (for example, in small groups, via webcasts) and the Panel would like to encourage all trustees to consider ways of ensuring that member feedback is obtained and that member views are known.

5.4 Enforcement

Clearly, it is a basic principle that trustees should always endeavour to comply with the relevant law and members would expect nothing less. If trustees do not comply and that leads to damage or loss to members, trustees should be accountable to members who are affected.

In the Panel's view, however, it is dangerous to rely too heavily on the threat of regulatory sanction to deter transgressions because not all transgressions are detected in a timely manner and formal remediation is typically cumbersome and often cannot fully compensate those affected. Such an environment can lead to excessive caution and lack of action and this is not in members' interests either. The Panel believes that its various recommendations for more transparency in superannuation will do more for members than heavier enforcement penalties for wrongdoing.

There is also the problem that trustees are not required as a matter of law to have indemnity insurance so that there is a risk that a successful claim against the trustee might not be able to be paid if the trustee is not capitalised. Even if there is a right of indemnity under the SIS Act, that may mean that other members are indirectly paying the claim. The Panel believes that, as a matter of member accountability and protection, all trustees should be required to have appropriate indemnity insurance and that it should be an RSE licence condition to provide a certificate of currency annually to APRA.

Further, the SIS Act and the Corporations Act currently provide a range of actions that APRA and ASIC can take against a trustee or trustee-director who fails to comply with the law. This ranges from criminal sanctions to enforceable undertakings to civil penalty orders. In chapter 10 the Panel recommends extending the flexibility of the enforcement regime.

As for members enforcing their rights, the Superannuation Complaints Tribunal is available, but has limited jurisdiction (this is addressed more fully in chapter 10). Of course, when damage or loss is incurred, members also have recourse to the courts, but this is expensive and time-consuming and not an attractive option. While class actions provide a vehicle for members to share the costs of bringing an action, that has not occurred to date.

Section 298 of the SIS Act allows the regulator to initiate an action in the name of a person who has suffered damage. The limitation is that the information on which the action is predicated must arise from an investigation conducted under the Act.

Recommendation 2.11

All trustees should be required, as a condition of their RSE licence, to have an appropriate level of indemnity insurance cover and to provide an annual certificate of currency to APRA.

Recommendation 2.12

The enforcement provisions of the SIS Act and the Corporations Act should be reviewed and an appropriate proportionate penalty regime should be designed to take into account the new duties imposed on trustees and trustee-directors.

6 MANAGEMENT OF CONFLICTS

While many trustees and trustee-directors are alert to actual and potential conflicts of interest and conflicts of duty when performing their roles, the Panel is of the view that more needs to be done in this regard and that APRA should provide strong prudential guidance. Disclosure of the conflict and non-involvement in decision-making do not constitute an adequate solution in a great number of cases.

In the Panel's view, the SIS Act does not address conflicts of interest and conflicts of duty clearly enough in the superannuation context. The enhanced trustee-director duties recommended above in section 2.2 go some way to remedying this shortfall. However while trustees are required by the SIS Act and the general law to act in the interests of fund members and no one else, as the industry has become more complex and consolidates, it is often difficult for them to identify conflicts of interest and conflicts of duty and to know what their responsibilities are in each instance. Direct prudential guidance may be required for specific types of issues that arise commonly in the superannuation context.

6.1 Multiple trustee-directorships

As a basic principle to address possible conflicts of duty, the Panel suggests that it should be exceptional for a person to serve as a trustee-director on more than one public offer fund trustee board. There might be related party group situations where it might be acceptable, but not otherwise.

Multiple directorships in corporate life very rarely occur in an identical line of business (for example,, a person serving on the boards of two of the big four banks or on the board of more than one airline) and the Panel believes that the trustee boards of superannuation funds should be concerned about this occurring, especially as the industry consolidates. Nonetheless, the Panel is recommending a flexible approach on this issue.

Recommendation 2.13

In order for a trustee-director to act as a trustee-director on the board of more than one APRA-regulated fund, the person and both boards need to attest to APRA that at the time of appointment there is no reasonably foreseeable conflict between the person's duty to the members of each fund and to the person's duty to each trustee company. There would be a transitional period for existing trustee-directors with multiple board positions. APRA would need the appropriate regulatory tools to administer this requirement.

6.2 Embedded provisions and service provider contracts

Several submissions expressed concern about the presence of provisions in the trust deeds of some superannuation funds that 'embed' specific service providers into the administration of the trust (generally related parties). Other submissions pointed to the benefits that vertical integration can have in delivering tailored, cost-effective services to a trustee. The Panel sees some merit in both these arguments.

However, the Panel believes that from a governance perspective it is important that the benefits of vertical integration (say by appointing a service provider like an administration company or an insurer from within the same group of companies) be tested regularly against external alternatives by the trustee. This could be addressed in the Code of Trustee Governance discussed in section 7 of this chapter.

Generally, when selecting a service provider, the trustee would carry out appropriate due diligence and negotiate terms before making an appointment. However, if the trust deed contains a provision mandating a certain product provider, then the trustee has no discretion to exercise in the matter and is prevented from making another selection.

The Panel's research suggests that this practice is not common in modern deeds, but is still present in some older deeds.

Recommendation 2.14

The SIS Act should be amended so as to override any provision in the governing rules of an APRA-regulated fund that requires the trustee to use a specified service provider in relation to any services in respect of the fund.

The Panel notes that if this recommendation were adopted, a trustee with such a provision in its trust deed would still be able to appoint the named service providers if it thought it were in the best interests of members, but that it would not be bound to do so.

6.3 Gifts and other emoluments provided by third parties

As trustees and trustee-directors have a duty to avoid conflicts of interest, the Panel believes that disclosure of any gifts, emoluments and benefits provided to trustees and trustee-directors is a logical extension of this principle. Members should be able to have confidence that persons are fulfilling the role of trustee-director for the right reasons and that members' interests are

transparently paramount. The Panel does not think that it is necessary to prohibit these gifts and emoluments as it believes that boards can decide what is appropriate in this context and develop and implement a policy addressing this issue.

The Panel is of the view that trustee companies should keep registers of all gifts, emoluments and benefits provided to the trustee, trustee-directors and management and disclose that information on an annual basis to APRA, in the annual report to fund members and on the fund's website.

Recommendation 2.15

A record of all gifts, emoluments and benefits (subject to an appropriate materiality threshold) provided to trustees, trustee-directors and management should be kept in a register maintained by the trustee and disclosed to APRA annually as well as in the annual fund report to members and on the fund's website.

Recommendation 2.16

APRA should develop a prudential standard that sets out particular examples of conflicts of interest and conflicts of duty to illustrate behaviour that would not be allowed in relation to all APRA-regulated funds so as to ensure that trustee-directors and trustees observe their duty of loyalty to members.

6.4 Conflicts matrix

The Panel believes that it is of primary importance for trustees and trustee-directors to understand and manage conflicts of interest and conflicts of duty appropriately. Good governance demands that there be no improper motivation for trustee and trustee-director decisions.

Trustees that have an Australian financial services licence (**AFSL**) are required to have a conflicts policy for the purposes of their Corporations Act obligations. Given the Panel's recommendation that the Corporations Act obligations for trustee-directors now be in the SIS Act, it follows that trustees must formulate, as part of their management plans, a conflicts policy that addresses not only the conflicts issues which would be required under the Corporations Act, but also those conflicts issues that are relevant for their SIS Act duties, including those identified in this section 6. The policy should be available to fund members on the fund website and should be up-to date at all times.

While the contents of the conflicts policy can be developed after industry consultation and while the current AFSL conflicts policy requirements are a good place to start, the Panel is of the view that, in the interests of superior trustee governance, the contents of the policy should significantly exceed what is currently required. For example, the Panel believes that the policy should contain a section which puts in context the trustee's relationship with those who are involved in the operation of the fund, whether or not they are a related party of the trustee's. These persons would include, not only the fund administrator and insurer, but also, for example, related party investment managers, life offices, any financial planning/distribution arrangements or proxy voting consultants. The Panel sees this exercise as providing a useful matrix for the trustee as assembling this type of information would require the trustee to turn its mind very specifically and deliberately to any conflicts that might arise from each of those business relationships. Further, the information will also be helpful in assisting stakeholders, including members, to understand who provides what services to the fund. The Panel

also sees value in the policy setting out other details such as the industry organisations to which the trustee pays dues. Ideally, the matrix would be disclosed via the fund's website.

The policy would, of course, go beyond merely identifying conflicts of interest and conflicts of duty and set out the ways in which the trustee proposed to deal with each of the actual conflicts it has identified and any potential conflicts which could arise. The policy would also have to address conflicts of interest and duty with respect to management of the company as well as those affecting trustee-directors.

The Panel suggests that the policy would only be effective if all those covered by the policy understand what it means and its practical implications with respect to their individual actions and the fund's operations. Consequently, the Panel believes that all trustee-directors and senior management must have specific training to ensure that they understand the policy's principles and are aware of the policy's application to the fund's operations.

The Panel believes that the policy matrix concept has substantial value to add to members in all sectors of the industry.

Recommendation 2.17

Trustees of APRA-regulated funds should, as a condition of their RSE licence, be required to articulate and follow a conflicts policy specifically tailored to their business structure that addresses all relevant issues regarding their role under the SIS Act and as a fiduciary to the members of the fund.

7 A CODE OF TRUSTEE GOVERNANCE

7.1 Introduction

The Panel believes that the combined effect of a compulsory system outsourced by government to the private sector and preservation demand a higher level of governance than that appropriate for members of major listed entities. Members of those entities have chosen to invest and are free to sell their holdings at any time.

The Panel strongly supports the establishment of a Code of Trustee Governance for trustees that would reflect the unique context of a superannuation fund. Several industry associations have already compiled similar guidance for their trustee-director members and the Panel believes these could be used as a starting point for developing such a Code.[34]

The Panel sees the ASX Corporate Governance Principles and Recommendations as a benchmark for what can be accomplished with appropriate 'buy in' from industry. The ASX Principles and Recommendations are the work of the ASX Corporate Governance Council, which is charged with ensuring that the principles-based framework is a practical guide for listed entities and that stakeholder confidence in the corporate governance practices of listed entities is maintained. The Panel is of the view that a similar council would be of value to the superannuation industry and the council would be asked to assemble, to prepare, and to review and monitor a Code of Trustee Governance. APRA could coordinate membership of the council and provide secretariat support. If

the industry cannot work together to establish such a council then, in the alternative, the Panel suggests that APRA creates the Code. The Panel would not regard it as satisfactory if there were more than one code.

The Panel believes that the superannuation industry has reached the point where broad equitable principles are not sufficiently targeted to meet the needs of a multi-trillion dollar statutory system intended to serve a very distinct public policy objective. The rules should be much clearer and should only default to 19th century principles of equity where absolutely necessary. The 'best interests of members' has become a relatively ineffective mantra in such a complex and sophisticated industry.

A Code of Trustee Governance would be more flexible than legislation and could keep pace more easily with changes in the industry.

The Code would not be the law in the formal sense and would be voluntary, but the Panel believes that non-compliance with the Code should be assessed on a stricter basis than the 'if not, why not' basis used by the ASX. This is principally because superannuation funds are not normal commercial enterprises, but specialised vehicles charged with fulfilling a very narrow and specific public policy purpose: optimising the retirement incomes of members.

The Panel is of the view that the trustee's performance should be audited against the Code's requirements annually and that the auditor's assessment and comments in this regard should be made available on the fund's website. The Panel believes that this is information that members and the industry generally would want to have.

While the auditor's report could provide a reason for APRA to open dialogue with the relevant trustee or trustee-director, or both, any failure to comply with the Code would not result in an APRA enforcement action. Further, the Code's existence would be taken into account by courts and other decision-making bodies to the extent that the Code was relevant to what was at issue and, in that way, would serve to make the trustee more accountable to members. It is also possible that compliance with the Code could become relevant for employers in selecting MySuper products in tenders and in the process for nominating them for the purposes of industrial awards.

The April 2010 report by the Corporation and Markets Advisory Committee (**CAMAC**) recommended that there not be a new code developed for the purposes of guiding company directors on how to perform their job. CAMAC found that there were already many sources of guidance for directors, including the ASX Principles and Recommendations. CAMAC was also careful to say that a code should not be introduced or developed by a regulator because there were dangers 'in moving to a more prescriptive approach'.[35] Of course, company directors are not themselves subject to licensing in the same way that trustee companies are. Consequently, it seems to the Panel that trustee-directors of a licensed trustee company may require more guidance on how they perform their director role in that context.

In any event, the Panel considers that the approach to the Code of Trustee Governance which it recommends is in accord with that preferred by CAMAC. The Code of Trustee Governance would not be the work of a regulator and is intended to be broadly similar to the ASX Principles and Recommendations in both its normative and regulatory effect.

7.2 Gender equality

As superannuation fulfils many social policy objectives and as superannuation covers almost all Australian workers, the Panel believes that it is important that the Code of Trustee Governance include a principle so as to ensure that gender equality is pursued on trustee boards with reasonable haste. A number of submissions indicated support for the notion that the gender balance on trustee boards, though further advanced than other areas of corporate life, could be improved.[36] While the Code would not necessarily mandate a specific quota, the Panel notes that a goal of at least 40 per cent of directors being women would be in keeping with emerging international best practice.[37]

Recommendation 2.18

An industry council (coordinated by APRA) should develop, in consultation with all stakeholders, a Code of Trustee Governance for trustees of superannuation funds and their trustee-directors to assist with identifying best practice in the industry. The Code could cover, but not be restricted to:

(a) **the imposition of a higher standard of competence and a greater commitment of time from those appointed to chair a super fund board than is required of other trustee-directors;**

(b) **board size, including whether a maximum is appropriate and any transition period for successor fund transfers and mergers;**

(c) **length of time in office and retirement by rotation;**

(d) **development of an enhanced conflicts-handling policy, including maintenance of an affected-decisions register and regular reporting to APRA;**

(e) **skill set for each director to demonstrate within the first 12 months of appointment;**

(f) **a skill matrix for the trustee board and analysis of how the current composition of the board provides the skills required under the matrix;**

(g) **a procedure for a rigorous and independent annual review of the performance of each trustee-director and the overall collective competence and performance of the board;**

(h) **gender and other diversity requirements;**

(i) **tendering for and benchmarking service providers; and**

(j) **minimum ongoing training requirements.**

Recommendation 2.19

If industry cannot work together to establish such an industry council, or cannot finalise a Code of Trustee Governance within two years, then APRA should create the Code.

Recommendation 2.20

There should be an annual audit of the trustee's performance against the requirements of the Code of Trustee Governance and the results of that audit should be made available on the fund's website.

ENDNOTES

1 For a brief discussion, see Robert P Austin, Harold AJ Ford and Ian M Ramsay, *Company Directors. Principles of Law and Corporate Governance*, (LexisNexis Butterworths, Sydney 2005), pp 5-14.
2 ASX *Corporate Governance Principles and Recommendations*, 2nd edition, p 3.
3 Hon. John Dawkins, MP, *Strengthening Super Security* (October 1992) at 6.
4 SIS Act sections 29D(1)(d) and 31(2)(ma) and discussed in APRA Superannuation Guidance Note 110.1.
5 For a discussion of some of the technical legal complexities that can arise, see Pamela Hanrahan, 2008, '*Directors' liability in superannuation trustee companies*', Journal of Equity 2(3), pp 204-224.
6 In strict legal terms, 'codification' is a complete restatement of the law and excludes all common law and equitable principles from affecting the 'code'.
7 See for instance *Invensys v Austrac Investments* (2006) 198 FLR 302; *Manglicmot v Commonwealth Bank Officers* Superannuation *Corporation* [2010] NSWSC 363.
8 *Re VBN* [2006] AATA 710.
9 See for instance Michael Vrisakis, '*The best test of (or the 'bestest') interests of members*' (2006) 17 Australian Superannuation Law Bulletin 138 – 141; Justice Margaret Stone, *'The Superannuation Trustee: Are Fiduciary Obligation and Standards Appropriate?*', (2007) 1 Journal of Equity 167; Geraint Thomas, *'The duty of trustees to act in the "best interests" of their beneficiaries*' (2008) 2 Journal of Equity 177; Scott Donald, *'"Best" interests*' (2008) 2 Journal of Equity 245.
10 IFSA, Submission no. 72, pp 30-31.
11 LCA, Submission no. 73, p 7.
12 J D Heydon and M J Lemming, 2006, *Jacobs Law of Trusts in Australia*, at [2921].
13 For example, ISN, Submission no. 41, p 16; QSuper, Submission no. 86, p 10; Watson Wyatt, Submission no. 31, p 10.
14 APRA, 2008, *Superannuation fund governance: Trustee policies and practices,* APRA INSIGHT, 2008(1). Also, Shey Newitt, *'What drives superannuation trustee board performance?*', AIST Fund Governance Conference (Melbourne, May 2009) <www.aist.asn.au/Pages/Events/SubPage_SFGC/Program.aspx>.
15 In this respect the recommendation varies slightly from the OECD's preference; see OECD Insurance and Private Pensions Committee and Working Party on Private Pensions, 2006, *OECD Guidelines on Pension Fund Asset Management*, 2.1; <www.oecd.org/dataoecd/59/53/36316399.pdf>.
16 For example, Ernst & Young, Submission no. 38, page 4; ICAA, Submission no. 43, p 6; Law Council of Australia, Submission no. 73, p 13; PwC, Submission no. 85, p 12.
17 APRA Superannuation Guidance note 110.1 (July 2008), paragraph 31, p 10.
18 AIST, Submission no. 62, p 11.
19 ASFA, Submission no. 32, Confidential part (permission granted to cite).
20 See for example AIST, Submission no. 62, page 12; Mercer, Submission no. 296, p 39.
21 Pensions Regulator (UK), <www.thepensionsregulator.gov.uk>.
22 For example, AIST, Submission no. 62, page 11; AMP, Submission no. 59, page 14; ASFA, Submission no. 32, Confidential part (permission granted to cite); AXA, Submission no. 34, p 10; Ernst & Young, Submission no. 38, p 5; Mercer, Submission no. 75, p 36; Rice Warner, no. 233, p 15; Tower, Submission no. 54, p 4.
23 APRA Superannuation Guidance note 110.1 (July 2008), paragraph 14, p 6.
24 See for instance research cited in Grant Fleming, 2003, '*Corporate Governance in Australia'*, Agenda, Volume 10, Number 3, 2003, p 195-212.
25 Hon. John Dawkins, MP, *Strengthening Super Security* (October 1992) at 12.
26 For example, AIST, Submission no. 150, page 23; ASFA, Submission no. 32, Confidential part (permission granted to cite); Corporate Super Specialist Alliance, Submission no. 394, page 12; ING, Submission no. 412, p 20; Unions NSW, Submission no. 370, p 12.

27 For example, EquipSuper, Submission no. 328, page 11; ICAA, Submission no. 137, p 11; Mercer, Submission no. 75, p 28; Noel Davis, Submission no. 67, p 1.

28 For a brief summary see IOSCO Corporate Governance Task Force, 2006, *Consultation Report: Board Independence of Listed Companies*, p 32. < www.iosco.org/library/pubdocs/pdf/IOSCOPD228.pdf>.

29 For example, Cbus, Submission no. 35, p 1; EquipSuper, Submission no. 328, p 11; UniSuper, Submission no. 56, pp 5-6; PwC, Submission no. 85, p 6.

30 *Crowe v SERF* [2003] VSC 316; *Avanes v Marshall* [2007] NSWSC1068. For a discussion generally see Dimity Kingsford-Smith, "*Who Knows Best? Review of Discretionary Powers in Superannuation Funds*" (2000) 28 Australian Business Law Review 428 – 442; J C Campbell, 2009, '*Access by trust beneficiaries to trustees' documents, information and reasons*.' 3 Journal of Equity 97.

31 See for instance *ASEA Brown Boveri Superannuation Fund v ASEA Brown Boveri* [1999] 1 VR 144; *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* [2002] VSC 576; *Sayseng v Kellogg Superannuation* [2003] NSWSC 945.

32 Cooper, J, "*Piercing the veil of obscurity*" – the decision in *Hanell v O'Neill*, (2004) 22 C&SLJ 313.

33 For example, ABA, Submission no. 102, page 17; AIST, Submission no. 62, p 23; ASFA, Submission no. 32, pp 19-20; CPA, Submission no. 37, p 10; CSA, Submission no. 66, p 8; Ernst & Young, Submission 38, p 5; IFSA Submission no. 72, p 15; LCA Submission no. 73, p 25; Mercer Submission no. 75, p 7; REST Submission no. 99, p 8.

34 For example, ASFA Best Practice Paper No 7, 'Superannuation Fund Governance', June 2008; IFSA Blue Book, Guidance Note no 2 'Corporate Governance: A Guide for Fund Managers and Corporations, June 2009.

35 CAMAC report, p 80.

36 For example, AIST, Submission no. 62, page 36; ASFA, Submission no. 32, Confidential part (permission granted to cite).

37 Public Listed Companies Act (Norway); www.gender.no; http://www.businessweek.com/news/2010-06-09/bearded-women-challenge-french-boys-club-boards-in-paris.html.