



Governance working group

Issues paper on a code of trustee governance

March 2011

PROPOSED REFORM

The Super System Review recommended the development, by an industry council, of a code of trustee governance for trustees of superannuation funds and the directors of corporate trustees (recommendation 2.18).

The Government supports best practice in the area of trustee governance. The Government has stated its support for matters in this area being addressed, to the extent possible, through a voluntary code of governance and, where appropriate, by prudential standards. It indicated it would consult with relevant stakeholders on design and implementation issues.

RATIONALE

Superannuation generally involves contributions made to private trust arrangements (funds), and subsequently preserved for eventual payment to beneficiaries. A significant amount of these contributions are compulsory, with the majority of employees on whose behalf the contributions are made having left it to their employer to choose a default option within a fund.

The review suggested that the nature of these arrangements demands a higher level of governance than may be appropriate for shareholders of major listed entities.

The review recommended the development of a code of trustee governance that includes:

- the imposition of a higher standard of competence and greater commitment of time from those appointed to chair a superannuation fund board than is required of other directors (recommendation 2.18(a));
- board size, including whether a maximum is appropriate and any transition period for successor fund transfers and mergers (recommendation 2.18(b));
- length of time in office and retirement by rotation (recommendation 2.18(c));
- gender and other diversity requirements (recommendation 2.18(h));

Stronger Super

- the skill set for each director to demonstrate within the first 12 months of appointment, and minimum ongoing training requirements (recommendations 2.18(e) and (j));
- a skill matrix for the trustee board (setting out the necessary skills for the board), and a requirement for the board to analyse how the composition of the board fulfils the necessary skills (recommendation 2.18(f)); and
- a procedure for a rigorous and independent annual review of the performance of each director and the overall collective competence and performance of the board (recommendation 2.18(g)).

The review also recommended an annual audit of the trustee's performance against the requirements of the code of trustee governance, with the results of that audit to be made available on the fund's website (recommendation 2.20).

ISSUES

Issue 1 – Development of a code

A precursor to the development of an industry code of trustee governance is the establishment of an industry overseeing body with representatives drawn from all sectors of the industry. This body would have agreed upon terms of reference and working procedures, including ratification and signoff mechanisms.

The body would need to be given authority and resources through the key industry associations (for example, the Association of Superannuation Funds of Australia, the Australian Institute of Superannuation Trustees and the Financial Services Council).

Question 1.1 How should a code of trustee governance be developed?

Question 1.2 What support is required from the regulators to assist industry in this process?

Issue 2 – Enforcement of a code

The review identified the ASX Corporate Governance Principles and Recommendations as a benchmark for what can be achieved by industry. The ASX principles achieve the purpose of setting minimum benchmarks for listed companies through a disclosure requirement to report in a company's annual report on an 'if not [adhered with], why not basis'. The market and investors can then make decisions about the value of the company through their investment choices. The ASX Principles form part of the governance frameworks for banking and insurance.

However, the review suggested non-compliance with a code of trustee governance be assessed on a stricter basis than the 'if not, why not' approach. The review suggested that the trustee's performance should be audited against the code's requirements annually and the assessment, and associated comments, be made available on the fund's website.

The review noted that the audit report could provide a reason for APRA to initiate discussions with trustees, and could potentially be taken into account by courts or other decision-making bodies in their consideration of matters to which the code may be relevant.

Question 2.1 To what extent would assessment of compliance with a voluntary code on a 'stricter' basis deter funds from participation?

Question 2.2 Are there practical issues in relying on an annual audit to enforce the code?

Question 2.3 Should the code require an audit of compliance with it?

Issue 3 – Coverage of a code

The review proposed a non exhaustive list of matters to be covered by a code of trustee governance.

Conflicts of interest

In relation to conflicts of interest and conflicts policy issues the review proposed, and the Government supported in principle, that:

- trustees be required, as a condition of their RSE licence to follow a conflicts policy specifically tailored to their business structure (recommendation 2.17);
- APRA develop a prudential standard setting out particular examples of conflicts of interest and conflicts of duty (recommendation 2.16);
- trustees maintain, and disclose to APRA, a register of all gifts provided to trustees (recommendation 2.15); and
- the code of trustee governance provide for the development of an enhanced conflicts-handling policy, including maintenance of an affected-decisions register (recommendation 2.18(d)).

Further, the review proposed addressing conflicts issues relating to the use of tied service providers through amendments to the *Superannuation Industry (Supervision) Act 1993* (recommendation 2.14), and the code (recommendation 2.18(i)).

APRA prudential standards and guidance material that may be developed further to the Government response to recommendations 2.16 and 2.17 could address these issues.

Trustee skills

Australia's regulatory framework requires trustee boards and trustees to be competent to play the role expected of them, but does not impose training requirements on them. APRA's *Prudential Practice Guide SPG 520 Fitness and Proper Propriety* encourages trustees to develop an ongoing training plan for all directors of a corporate trustee, but does not have any specific training requirements.

The review concluded that directors of corporate trustees should not be required to have specific pre-appointment skills or training. However, it suggested APRA consider strengthening its administration of the 'fitness' test under the SIS Act to require trustees to be fully aware, before accepting the position, as to their responsibilities and potential liabilities (recommendation 2.2).

The Government supported the need to strengthen trustee requirements in principle, and referred the recommendation to APRA for consideration in consultation with industry.

The review further recommended that the proposed code of trustee governance include requirements for trustee boards to establish the skill set for each director to demonstrate within the first 12 months of appointment, with minimum ongoing training requirements. It recommended the board of a trustee would have to demonstrate annually that it has the collective skill set to govern the fund or funds for which it is responsible (recommendation 2.3). It also recommended this would be one of the subjects covered by the independent annual review of the board in the proposed code (recommendation 2.18(g)).

The skill set of trustee boards could be considered by the industry oversighting body responsible for the development of the code. Alternatively, individual trustee skills, and the skill sets of trustee boards, might be an area more appropriately covered by an APRA prudential standard.

Question 3.1 Are there particular aspects proposed to be covered by the code which would be more appropriately dealt with through prudential standards?

Question 3.2 Are there additional matters that should be considered for inclusion in the code?