AUSTRALIAN INSTITUTE of SUPERANNUATION TRUSTEES

Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017

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AIST Submission to Senate Economics Legislation Committee

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Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017

AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the $700 billion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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Executive summary

AIST rejects each of the measures outlined in the *Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017* (the "Bill") and our arguments can be summarised as follows:

Mandated governance model: It is inappropriate to mandate a governance model to apply to all superannuation funds because no evidence has been presented that the current system is failing or that mandating independence would be beneficial. The measure also ignores the reality that there are already three separate layers of independence within the profit-to-member sector (independence from management, structural independence, and independence safeguards derived from the broader regulatory framework). The measures should not be implemented because there is no evidence based need to make fundamental changes to the governance structures of private entities and the unintended consequences and potential risks have not been examined. Furthermore, mandatory changes to board composition will mean changes to the culture of large financial institutions and a potential disruption to fund activities. This is unjustifiable without any evidence for the need for such reform or an articulated benefit to the members being presented.

Preservation of equal representation essential: The equal representation model is the cornerstone of member representation and accountability within the superannuation industry and its preservation is essential. Equal representation contributes towards outperformance in the delivery of net returns, it provides members with a clear accountability mechanism and it ensures members' best interests are advanced at all times. Any modification of the model could have a materially detrimental impact on members' retirement outcomes.

Independence is intrinsic within profit-to-member funds: The profit-to-member model – in combination with general trust law, statutory law, APRA prudential standards and the AIST Governance Code – provides a robust framework that both protects members' interests and has consistently delivered out performance. In the model directors are independent from the fund's management and free from ties with commercial parent shareholders. This means that directors are free to act solely in members' best interests and in this context, independence is an intrinsic characteristic of profit-to-member funds.

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Introduction

The Australian Institute of Superannuation Trustees (AIST) welcomes the opportunity to comment on the *Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017.* Although this inquiry also includes the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.1) Bill 2017,* we will provide comments in relation to that Bill in a separate submission.

We support high standards of governance in the superannuation industry, as well as measures to improve governance, however we do not support any of the proposed changes contained in this Bill. Our ongoing commitment to advancing good governance within the industry is highlighted by the development of AIST's Governance Code, which was released in April 2017.

The code applies to all Australian AIST member funds from 1 July 2018 and contains provisions that ensure the continual improvement of governance in the profit-to-member sector and also works to entrench the profit-to-member culture within funds.

Prescribing a governance model is unjustified

The prescription of a mandatory governance model in legislation to apply to superannuation fund boards is unjustified because:

- No evidence has been presented that the current system is failing.
- The case has not been made that mandating independents would improve superannuation governance.
- Prescribing independent directors does not take into account the fact that layers of independence are entrenched within the profit-to-member model, these layers are: independence from management, structural independence, and independence safeguards derived from the broader regulatory framework.
- It incorrectly assumes that organisations do not see the value of independent directors.
- A common argument used to justify prescribing independence to the boards of profit to member funds is to add skills to the board. There is no evidence that equal representation precludes a board from being adequately skilled. Moreover, independence *per se* has nothing to do with skills.
- Good governance is about more than who sits around the board table. AIST recognises this and our Governance Code is therefore directed at the factors underlying good governance practices.

No evidence has been presented that the current system is failing

Prior to development of any public policy it is important to first consider the evidence base and to identify the existing failures, and the rate at which they have occurred. The lengthy explanatory memorandum to the Bill does not outline the failures of the current system and simply notes that:

> *In the 25 years since the introduction of the SIS Act, there has been substantial change to both the nature of employment in Australia and the structure of the superannuation industry. This means that there is less justification for the arrangements that exist today to remain unchanged.*[1]

The simple fact that the system has matured does not constitute, in of itself, a justification for the removal of the well-functioning equal representation model.

Furthermore, it is incorrect to imply that superannuation governance arrangements have not changed in the last 25 years. The AIST Governance Code, released in 2017, contains over 20 requirements that ensure the continual improvement of governance processes and procedures in

[1] Explanatory Memorandum (EM), page 14 para 2.23.

the profit-to-member sector. The Governance Code serves to improve existing governance arrangements, which are already strong, and contains a number of principles and requirements, including requirements that:

- A profit-to-member superannuation fund must determine the respective roles and necessary skill profile of the Board and management and set these out in writing. They must also determine how the respective performance of the Board and management will be measured and evaluated.
- A profit-to-member superannuation fund must have a diverse Board composed of highly competent and committed directors. Representation of member and employer interests must be ensured, and the Board should be of an appropriate size, composition and have the skills to be able to discharge their duties effectively.
- A profit-to-member superannuation fund must act ethically and responsibly.
- A profit-to-member superannuation fund must have appropriate and rigorous processes for financial governance.
- A profit-to-member superannuation fund must respect the rights of stakeholders. These scheme participants must be provided with open and transparent disclosure as well as opportunities to participate in dialogue with the fund's Board and management.
- In accordance with SPS 220, a profit-to-member superannuation fund must establish a robust risk management framework, monitor and regularly review the effectiveness and continuing appropriateness of that framework. The risk management framework must consider the maintenance and prioritisation of a member-first culture
- A profit-to-member superannuation fund must establish a remuneration policy for its trustee directors and staff in alignment with the best interests of the members of the fund that complies with SPS 510 and SPG 511.
- A profit-to-member superannuation fund must establish an investment framework to deliver appropriate retirement outcomes for its members and continually monitor and review the effectiveness and continuing appropriateness of that framework.

No evidence has been presented that mandating a governance model would improve superannuation governance or that the presence of independent directors prevents fund failures

The lack of evidence to support the proposed governance changes highlights a significant flaw in this reform process. Regulated superannuation funds are a major contributor to the Australian economy, with the profit-to-member superannuation sector representing more than $700 billion in funds under management. While good governance practices should be encouraged and pursued at all times, AIST submits that mandatory changes to board composition will mean changes to the culture of these large financial institutions and a potential disruption to fund

activities. This is unjustifiable without any evidence for the need for such reform or an articulated benefit to the members being presented.

While we do not dispute the value that independent directors can bring to a board, we believe that mandating independent directors does not in and of itself mean that superannuation fund governance will be improved.

Professor Donald C Clarke notes that:[2]

> *Despite the surprisingly shaky support in empirical research for the value of independent directors, their desirability seems to be taken for granted in policy-making circles. … Independent directors have long been viewed as a solution to many corporate governance problems. Well before the Enron and WorldCom scandals, the New York Stock Exchange already required the presence of independent directors on audit committees, and in the United States, insider-dominated boards have been rare for years. … Some studies have even found a negative correlation between board independence and corporate performance.*

Queens University Belfast academic, Sally Wheeler, in discussing the corporate governance failures of HIH, Enron and Northern Rock said:

> *History tells us that independence neither guarantees good financial performance nor freedom from scandal … Structural rules around independence fails on all counts … The injection of new blood is forced. … Policies that assume that structural independence is a panacea capable of addressing failures in group decision making are simply a recipe for disappointment.*[3]

The positions offered by academics above highlights that there is doubt that the mere presence of independent directors around the board would automatically improve fund governance. There are also a number of examples of corporate scandals and failures that have taken place and independent directors being unable to prevent them. The demise of OneTel for example, which resulted from poor corporate governance practices, in particular a situation where the independent directors failed to exercise adequate monitoring and oversight of management, as a result of the strong executive representation on the OneTel board.[4]

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[2] Clarke, D. (2007). *Three Concepts of the Independent Director*. [online] George Washington University Law School. Available at: http://tinyurl.com/y8temxcq [Accessed 29 September 2017].
[3] Wheeler, S. (2013). *Do we really need 'independent' directors on super boards?*. [online] UNSW. Available at: http://tinyurl.com/y8z82hm4 [Accessed 29 September 2017].
[4] Clarke, D. (2007). *Three Concepts of the Independent Director*. [online] George Washington University Law School. Available at: http://tinyurl.com/y8temxcq [Accessed 29 September 2017].

More recently, there have been high-profile banking scandals that have occurred under the watch of independent directors. The most recent example is the Commonwealth Bank of Australia's alleged breaches of the anti-money laundering and terrorism financing laws in 2017. While we understand that, at the time of writing, the investigation into the breaches is ongoing, other banking scandals have also led to legal and regulatory intervention and a reduction in consumer trust. The recent Commonwealth Bank scandal took place under a board that had an overwhelming majority of independent, non-executive directors.

The academic literature and practical examples highlight that having independent directors on boards does not in-and-of-itself ensure that poor practices are avoided.

We believe that good governance is for the most part affected by the culture of the board and the ethics of individual directors, regardless of any 'independent' classification. The importance of good culture is highlighted by AIST's Governance Code. The Code includes a requirement for the risk management framework within a fund to consider the maintenance, and prioritisation of a member-first culture.[5] It is this member's first culture that contributes towards good governance among profit-to-member superannuation funds.

Prescribing independent directors does not take into account existing layers of independence across profit-to-member boards

We refer to our arguments extracted below outlining how the profit-to-member governance structure gives rise to independence from management, structural independence, and other independence safeguards. In light of these layers it is inappropriate to mandate independent directors.

We understand that in a listed company context, independent directors are there to protect minority shareholders and to ensure independence from management. In the profit-to-member superannuation sector these protections are neither relevant nor necessary. Minority shareholders do not exist and superannuation funds are required by law to act in the best interests of all beneficiaries. A trustee is not a listed company in function or in form, and these changes also fail to recognise that fundamental difference.

It assumes that organisations do not see the value of independent directors

AIST does not dispute that independent directors can add value to a board, however the significance of their contribution depends on the individual needs of that board and an alignment with the skills and competencies of the independent director. A structural reorganisation of

[5] AIST Governance Code, principle 6.

boards by the legislature to require a number of independent directors on equal representation boards, without the context of individual board needs, will not bring about the desired results. On a retail for-profit fund board, independence from management and the profit-driven parent company are vital. These considerations, however, are not present in profit-to-member super fund structures.

AIST submits that in an equal representation context it is not the perceived higher state of independence of a director that adds value, but rather how their skills and values' alignment adds to the collective competency of the board.

Independent directors can contribute skills to the board however equal representation does not preclude a board from being skilled

The explanatory memorandum states that:

> *A requirement for a minimum number of independent directors will also broaden the talent pool from which directors are drawn, allowing boards to access greater diversity of skills and experience.*[6]

We acknowledge that independent directors can contribute valuable skills to the board of superannuation funds, however it is the collective skills, knowledge and expertise of the trustee directors that make a highly functioning and effective board. Diversity of skills, knowledge and expertise, as well as background and life experience are therefore important in challenging the development of 'group think' and provides for better decision-making and outcomes.

It is an APRA requirement that trustee directors have knowledge of the industry they are operating in. Any new independent trustee directors will therefore require appropriate training in superannuation, as expertise in one area (e.g. investments) will not provide the director with sufficient understanding of the superannuation industry as a whole.

Furthermore, AIST's Governance Code includes a number of requirements that specifically address the fundamental requirement for skills on the board table, for example:

> *A profit-to-member superannuation board must conduct all appropriate enquiries to ensure that nominees have the appropriate skills and experience before appointing a person as a trustee director…*[7]

Furthermore, principle 1 of the Code reads:

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[6] EM, page 12, para 2.11.
[7] AIST Governance Code, req 1.1.

> *A profit-to-member superannuation fund must determine the respective roles and necessary skill profile of the board and management and set these out in writing. They must also determine how the respective performance of the board and management will be measures and evaluated.*[8]

Appropriate skill and knowledge requirements already exist in APRA's Fit and Proper Standard (SPS 520). Appropriate education or technical knowledge, and the knowledge and skills relevant to the duties and responsibilities of an RSE licensee are required. The regulator can use the powers it currently has to address any concern with current trustee director skill levels, and the management of director skills and ongoing professional development is a key focus of all super funds. The need for complementary skills on the board is sufficiently addressed within the current regulatory framework and the introduction of more independent directors does not in-and-of-itself strengthen existing requirements.

We also reiterate our argument above that the current equal representation model allows for directors to be drawn from a board pool of directors.

[8] AIST Governance Code, principle 1.

Maintenance of equal representation is essential

The equal representation model of governance has been the cornerstone of member representation and accountability in the superannuation industry for decades. We have long defended this model of governance and continue to do so because it continues to serve the best interests of members well. The maintenance and retention of the equal representation model is essential because:

- The model contributes towards outperformance and delivering net returns.
- It provides accountability to members as a result of the direct alignment of interests of member and employer representation on the board.
- Equal representation ensures that members' best interests are advanced at all times.
- Equal representation is a common feature of some of the top performing international pension fund systems which is an acknowledgement of the value it brings.
- Equal representation enables a better understanding of the fund's membership base.
- Promotes continuous improvement of members best interests.
- Equal representation model contributes to diversity and experience.
- Equal representation recognises the importance of member and employer roles in a mandatory savings system based on participation in the workforce.

Outperformance

The profit-to-member superannuation sector, with its equal representation governance model, has performed consistently well for members, and consistently outperformed the retail superannuation sector. This remains the case even after the introduction of My Super, and the Financial Services Council's requirement for a majority of independent directors on retail fund boards. We repeat our earlier argument that there is no objective reason for board composition requirements to be imposed on profit-to-member superannuation funds.

SuperRatings', a non-aligned research provider, data at 31 July 2017 regarding the top returns for balanced options within funds revealed that over a 5 year period the funds that ranked the highest on returns to members were all profit-to-member funds.[9] Each of these funds has a representative governance model.

[9] SuperRatings (2017), Top 10 Returns, [online] http://tinyurl.com/ybvcd67v [Accessed 29 September 2017]

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Chant West data published in January 2017 reveals that profit-to-member funds outperformed retail funds over a 10 year rolling period.[10]

SuperRatings provides numerous awards to superannuation funds on an annual basis in a number of different categories. Profit-to-member superannuation funds feature heavily in the history of each award which further demonstrates their superior performance and offering over that of retail funds. For example:[11]

- For the last 7 years, the winner of the 'Fund of the Year' award has been a profit-to-member superannuation fund.
- For the last 2 years, the winner of the 'MySuper of the Year' award has been a profit-to-member superannuation fund.
- For the last 7 years, the winner of the 'Pension of the Year' award has been a profit-to-member superannuation fund.

The dominance of profit-to-member superannuation funds, each of which use a representative trustee model, further highlights how these funds, and their governance models, continue to produce outcomes for members.

The perception for an 'independent director' requirement has arisen because the vertically-integrated model of the retail sector leads to some directors being drawn from the management within the corporate group. Such directors have far more actual conflicts of interests than directors in the profit-to-member super sector. Many directors of retail funds have historically been managers of the profit-making entity, such as the bank or insurer, and they have a conflict of duty between their responsibilities to the shareholders of the bank, and the members of the super fund entity. Since the new professional standard requiring a majority of independent directors in retail funds was introduced in 2013 there has been no demonstrable improvement in their financial performance for super fund members.

[10] Chant West (2017), Late Surge Powers Super Funds to Another Positive Year, [online] http://tinyurl.com/y6u67zsg [Accessed 29 September 2017]
[11] SuperRatings (2017), Award Winners [online] http://tinyurl.com/yaf2yp4m [Accessed 29 September 2017]

The abolition of equal representation is inconsistent with the Government's stated intention

On 19 September 2017 the government introduced four separate bills into parliament that were immediately referred to the Senate Economics Legislation Committee. These bills, if passed, will introduce a number of major changes to Australia's retirement savings system and in order to fully understand and assess the impact of the measures in the bills it is vital that they should not be viewed in isolation.

The rationale for a number of the changes outlined in the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.1) Bill 2017* (the "Accountability and Member Outcomes Bill") appear to be at odds with some of the measures contained in this Bill, for example:

- This Bill will abolish the equal representation system. The equal representation system ensures that the interests of superannuation fund members are represented at the board table and therefore the removal of the equal representation system will dilute the members-first ethos and could lead to a reduction of confidence within the superannuation system – which is at odds with the measures in the Accountability and Member Outcomes Bill which seek to '*increase confidence within the superannuation system.*[12]'
- The Accountability and Member Outcomes Bill seeks to empower members by *'strengthening fund accountability and boosting confidence in the superannuation system'.*[13] We believe that one way in which funds are held to account is through member representation on the board. Member representation on the board ensures that the views of fund members are not lost in discussions and serves as a constant reminder that funds act in the best interests of members. If the goal is to strengthen accountability, then maintaining the equal representation system should be paramount.
- In the Accountability and Member Outcomes Bill the government states that '*having a modern, vibrant superannuation system, which is solely focused on delivering outcomes for members, culminating in the efficient delivery of income in retirement, is critical*.'[14] We agree with this observation and reiterate that profit-to-member funds have continued to

[12] *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill*, explanatory memorandum, page 9, paragraph 1.1.
[13] *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill*, explanatory memorandum, page 10, paragraph 1.12.
[14] *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill*, explanatory memorandum, page 10, paragraph 1.8.

outperform the retail sector and any removal of the successful equal representation governance system may adversely affect fund members.

Equal representation ensures members' best interests are front and centre

The equal representation model serves a role in ensuring that members' best interests are actively considered by the board of the RSE licensee in all decisions. There have been a number of examples where retail fund boards have appeared to make decisions that were not in members' best interests.

Following the introduction of the MySuper in 2013 funds were given four years to transfer their existing default members into new MySuper products. The new products required APRA authorisation and had increased disclosure and transparency obligations attached. Research performed in 2016 revealed that:

> *Differential MySuper transition ratios imply that retail fund members are being held back in older style default workplace funds longer than necessary. Since MySuper fees in the retail sector are significantly lower than the fees that are payable on traditional default super products the implication is that members are paying more fees than they need.*
>
> *…The cost of this transition delay amounts to $800 million in extra fees being paid by retail MySuper members over the four years up until 2017.*[15]

The slow transition of the retail sector can be compared with that of the profit-to-member sector, which swiftly transitioned their members over to the new MySuper regime. While there may be a number of reasons for the delay on behalf of retail trustees, it is at least arguable that the representative governance model and the strong members' first ethos in the profit-to-member sector, contributed towards the swift transition by profit-to-member funds and the resultant benefits that flowed to members attached to the MySuper products. Profit-to-member funds, in moving quickly, saved their members these significant costs and therein protected their retirement savings.

The second example relates to APRA's 2010 report[16] into related-party transactions in the superannuation industry. The report highlights the fact that retail funds have significant financial conflicts at play in their related party transactions, and that these conflicts have resulted in significant additional costs to the super fund members. In the case of administration fees, for

[15] Rainmaker, Research Note 2016, http://tinyurl.com/yaxydzt8 [Accessed 29 September 2017]
[16] Liu, K. and Arnold, B. R. (2010) 'Australian superannuation outsourcing: fees, related parties and concentrated markets', Australian Prudential Regulation Authority Working Paper.

example, APRA revealed that the fees paid by members of some retail funds were more than twice that of profit-to-member funds.

More recently, an investigative report by Fairfax journalist Michael West revealed how super customers of bank-owned super funds were being "short-changed" because the trustees were settling for lower returns by investing only with parent banks, "rather than seeking the best returns in the market".[10]

It is these conflicts in the retail sector that the introduction of independent directors seeks to address. It is these considerations that should be central to what is meant by 'independence' – overcoming the impact of relationships and associations that due to the potential personal benefit to the director, could influence their decision-making in a way that does not prioritise the best interests of members.

Equal representation is a common feature of international pension fund systems

Far from a governance system peculiar to Australian super funds, the representative trustee system is prevalent in many overseas occupational pension funds, providing an important accountability mechanism to members. OECD data in 2008[17] found that at least half of the funds examined appoint directors using the representative trustee system.

Some of the top performing pension funds in the world (including those in Australia's APRA-regulated superannuation industry) have an equal representation model, or at a minimum, have a degree of member representation on the board. This is evident from the strong correlation between the Mercer Melbourne Global Pension Index 2016 'integrity' scores for individual countries and pension governance structures in which equal - or member - representation is prevalent.

The international shift away from defined benefit funds towards defined contribution systems has added weight to the view that member representation at board level is vital, since it is the member who ultimately bears the risk of poor investment performance.

We reiterate our argument that the equal representation governance model should be retained, with flexibility for up to one-third independent directors in a principles-based framework of good governance. AIST opposes the abolition of the equal representation system outlined in the Bill. We recognise there are limitations in the *Superannuation Industry (Supervision) Act 1993* which

[17] Stewart, F. and Yermo, Y. (2008). Working Paper on Pension Fund Governance, Challenges and Potential Solutions, Organisation for Economic Co-operation and Development. Available at: http://www.oecd.org/finance/private-pensions/41013956.pdf

allows equal representation fund boards to only appoint one independent director to their board in addition to the representative directors. Recognising the autonomy of superannuation fund entities, and their right to make decisions in the best interests of their members, AIST has recommended changes to the SIS Act to allow equal representation boards to appoint up to one-third independent directors to their boards, thereby allowing them to retain equal representation across the remaining two-thirds.

Better understanding of the membership base

The proposed changes abolish the legislative basis for equal representation on superannuation fund boards and disrupt the governance structures of the sector that has consistently outperformed, providing the highest returns for members. Representation of members and employers on super fund boards ensures a balance in decision-making, and a true understanding of the membership base. This continued focus on understanding and knowing the membership base has meant that profit-to-member superannuation funds have been at the forefront of implementing MySuper, delivering better performing, lower fee outcomes for members while for-profit funds have only slowly transitioned to MySuper, and continue to overall underperform the profit-to-member sector.

Both a member and an employer voice in a mandatory savings system are vital and this arrangement should be preserved in all sectors of the APRA-regulated superannuation industry. The representative model ensures a deep knowledge of the membership, representation of their respective interests in a mandatory retirement savings system, and a balancing of considerations in the pursuit of the best possible outcomes for members.

Continuous improvement of members' best interests

Profit-to-member super funds have a unique culture where the direct alignment of member and employer representative directors ensures a continuous commitment to the best interests of members.

The proposed changes do nothing to address the real and demonstrated conflicts associated with board structures and the vertically integrated commercial model in the retail superannuation sector. It will still be possible for the staff of a bank to form the majority of the bank superannuation fund board, where those directors responsible for maximising profits for the bank's shareholders are required to also act in the best interests of super fund members. This is an almost impossible conflict and is not in the best interests of fund members.

AIST supports a framework that preserves accountability to members, a voice for both members and employers and a board of trustee directors drawn from a wide pool of appropriately skilled individuals with no material conflicts of interest or duty.

AIST submits that the current equal representation governance model, together with existing regulatory requirements and the AIST Governance Code satisfies good governance practices. AIST opposes the proposed abolition of the equal representation system of governance outlined in the Bill.

Equal representation model contributes to diversity and experience

Equal representation boards are drawn from a broad pool of talent. Through the nominating bodies, and in some cases elections, equal representation boards recruit directors from multiple stakeholder sources, naturally broadening the pool of candidates. The diversity this creates on boards has been central to the success of the profit-to-member superannuation sector.

Unlike many of the directors in corporate Australia, profit-to-member directors are not cut from the same cloth. AIST's membership data reveals that of a pool of nearly 600 trustee directors, nearly 100 employee, union and employer groups are involved in nominating or electing directors. In addition, to the many different unions that nominate directors, employer-nominated directors come from a variety of sponsoring organisations including State and Federal Governments and religious institutions. While nominating bodies do in fact nominate individuals for Board positions, those individuals are not necessarily officers or employees of those bodies, and come from a variety of different walks of life.

In considering governance in financial institutions post-Global Financial Crisis, the European Commission in 2010 said: "Empirical evidence highlights the benefits of diversity for corporate governance both in terms of efficiency and better monitoring. Diversity, not just of gender but also of race and social background, and the presence of employee representatives, broadens the debate within boards and helps, as some say to avoid the danger of narrow group think."[18]

AIST supports diversity on boards and believes that the representative trustee system delivers a broad range of backgrounds and skills to the board table. A system that necessarily reduces the diversity of the talent pool diminishes the quality of board discussion and ultimately decision-making, and should be resisted.

[18] European Commission, (2010). *Commission Staff Working Document, Corporate Governance in Financial Institutions: Lessons to be drawn from the current financial crisis, best practices*. Accompanying document to the GREEN PAPER Corporate governance in financial institutions and remuneration policies. [online] Brussels: European Commission. Available at: http://tinyurl.com/awmq2xn

Profit-to-member model provides layers of independence

There is little doubt that limiting conflicts on superannuation fund boards is of paramount importance and AIST submits the profit-to-member model – in combination with general trust law, statutory law and APRA prudential standards – provides a robust independent framework that both protects members' interests and has consistently delivered out performance. Director independence is an intrinsic characteristic of profit-to-member funds.

Non-executive independence

All directors on AIST member fund boards are non-executive. There is no clear settled definition of 'independent director' however a common understanding is that they are typically non-executive directors who are not involved in the day to day management of the organisation and are free of any interest that may, in a material respect, affect the ability of the director to bring independent judgment to the board table. In profit-to-member superannuation funds all directors are non-executive directors who are independent from the RSE licensee.

Structural independence

An additional layer of independence is provided through the unique ownership structure of profit-to-member funds. Profit-to-member directors and the fund itself do not have a material commercial relationship with the shareholders of the RSE licensee.

In the profit-to-member sector, shareholders are less likely to try and influence the decision-making of a director appointed by them because the shareholder is unable to derive any commercial interest from their shareholding. A common structural arrangement for profit-to-member funds is for the appointing organisations – typically unions and employer bodies – to be provided with a number of shares, at a nominal value such as $1. The shares usually give them the right to appoint a director but prevents them from deriving a material commercial interest from their shareholdings, such as dividends.

This can be highlighted by way of example. The following is extracted from the constitution of an unidentified profit-to-member superannuation fund:

> *The capital of the company shall be divided into…shares of $1.00 each.*
>
> *…the shares of the company shall carry no right to a dividend.*
>
> *Each…body shall be entitled to appoint one director for each…class share that it holds.*

Provisions such as these prevent shareholders from deriving a commercial interest in the fund, thus eliminating the likelihood of them influencing directors.

The same cannot be said for directors in the retail sector. The following is an extract from the constitution of an unidentified retail fund:

> *The parent company may by notice to the company appoint a person as a director.*
>
> *… Directors may, with the prior consent of the parent company, declare a dividend.*

The starkly different structural arrangements that exist between the profit-to-member super funds and for-profit funds illustrate how directors of retail funds are more likely to have difficulty in exercising independent judgment at all times. Retail super funds have parent shareholder companies which derive a profit from the super funds they own. Retail fund directors effectively serve two interests: members and shareholders.

The directors of profit-to-member super funds are not required to produce a profit for shareholders and cannot procure the sale of the fund to make a profit for themselves or someone else. There is no economic advantage to be had that creates the kind of conflict that could materially influence decision-making contrary to the best interests of members. Director fees are paid to directors on most super fund boards; however the amount of this remuneration is immaterial and does not create a conflict warranting the need for independent directors.

On retail fund boards, with super funds being a related entity of a parent bank or insurance company that has profit-seeking shareholders, pecuniary conflicts are more apparent. Meeting the obligations to serve the best interests of members is sometimes incompatible with the obligation to maximise profits for shareholders in the parent company. In a paper commissioned by AIST in 2009 on superannuation fund governance, Dr Mike Rafferty and others[19] noted that no person can serve two masters. In terms of the fiduciary duty concept, an agent should not have more than one principal.

Legal framework

Each director, and class of directors (representative and non-representative), on the board has the same fiduciary responsibilities, and the same obligations to act in the best interests of members above any other interest or duty they may have. While directors may be appointed by particular nominating bodies and referred to in Part 9 as 'employer representatives' and 'member representatives', all are required to set aside the interests of their nominating bodies when serving on the board. The 'conflicts covenants' in sections 52 and 52A of the SIS Act reinforce that position.

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[19] Dick Bryan, Gillian Considine, Roger Ham and Mike Rafferty, (2009). *Agents with Too Many Principles? An analysis of Occupational Super Fund Governance in Australia*. Workplace Centre, University of Sydney

Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017

The existing regulatory framework is extensive and ensures conflicts of interest are managed by superannuation funds. In situations where conflicts of interests arise these are suitably managed by the RSE licensee through measures such as APRA's *Prudential Standard SPS 521 – Conflicts of Interest* that requires boards of an RSE licensee to have a conflicts management framework in place. Provisions in the *Corporations Act 2001* and general law principles also require directors to avoid conflicts of interest. Furthermore, APRA prudentially regulates the majority of superannuation funds in Australia and a summary of APRA's extensive regulatory toolkit that can be relied upon to address governance failures, can be found in Appendix B.

In addition to the regulatory framework AIST's Governance Code, released in April 2017 seeks to:

- Continuously improve governance in the profit-to-member superannuation sector.
- Ensure the profit-to-members concept is fully supported by fund governance structures.
- Improve accountability and transparency.

The Code will be mandatory for Australian AIST member funds from 1 July 2018 and contains eight principles and 21 separate reporting requirements that operate alongside the current regulatory framework. These additional obligations expand existing legal requirements applying to funds and contribute towards the ongoing improvement of the strong profit-to-member governance framework. A number of the code requirements extend to managing conflicts, for example requirement 4.2 reads:

> *A profit-to-member superannuation fund must ensure due process in all transactions, and ensure that any related party transactions are conducted under market conditions with full transparency and disclosure.*[20]

The fact that profit-to-member directors are independent from the fund's management and free from ties with commercial parent shareholders ensures they are free to act solely in members' best interests. In this context, independence is an intrinsic characteristic of profit-to-member funds.

[20] AIST Governance Code, req 4.2

Response to key measures in the Bill

Despite our opposition to the changes for the key reasons outlined above, we respond to the proposals set out in the Bill below.

Requirement for RSE licensees to have an independent chair

In addition to our general concerns articulated in the previous part, we strongly believe that the case has not been made for mandating a governance model that requires RSE licensees to have an independent chair.

The chair plays a fundamental role in leading and steering board discussion and setting the culture for the board, and ultimately for the organisation as a whole. This key role should be undertaken by the best person for the job, regardless of whether they are classified as 'independent' or not. The role of the chair in the leadership of the board and setting its cultural is vital, and should be at the discretion of the trustee. This is reflected in the AIST Governance Code that reads:

> *The Chair of a profit-to-member superannuation fund board must be appointed by the board and must satisfy all the requirements of skill and experience identified in the fund's skills matrix for the role of Chair.*[21]

We submit that the choice of chair should be a decision for the superannuation fund board and should not be subject to legislative intervention.

Requirement for RSE licensees to have at least one-third independent directors

This measure prescribes a governance model on all RSE licensees and we restate our concerns outlined above. In addition to these concerns we believe it is imperative for boards to be given the flexibility to appoint the right people for the job.

Flexibility, not quotas

The idea of imposing a quota of independent directors on superannuation funds has developed in recent years and we have been an active contributor to the debate. We recognise there are limitations in the *Superannuation Industry (Supervision) Act 1993* which allows equal representation fund boards to only appoint one independent director to their board in addition to the representative directors. Recognising the autonomy of superannuation fund entities, and their right to make decisions in the best interests of their members, AIST has recommended

[21] AIST Governance Code, req 2.5.

changes to the SIS Act to allow equal representation boards to appoint up to one-third independent directors to their boards.

This measure is beneficial because it allows funds to retain equal representation across the remaining two-thirds, which plays a pivotal role in good governance and it leaves the organisation flexibility to determine their own governance model.

APRA's powers to address governance concerns

As detailed above, APRA has an expansive regulatory toolkit (see Appendix B) to address issues related to the governance of superannuation funds thus removing the 'need' to mandate independent directors.

Superannuation funds are highly regulated and the prudential regulator, APRA, has a significant suite of powers currently at its disposal (See Appendix B). Governance matters in the regulated superannuation industry can be dealt with under existing legislation and prudential standards, including the power to remove a trustee. The legal obligations imposed on individual trustee directors were heightened in the Stronger Super reforms, and all-in-all this has seen the Australian superannuation system's governance star rise even further at a global level.[22]

Current prudential standards provide a robust framework for the regulator to supervise, monitor and require funds to adopt the necessary systems and behaviours that meet the best practice governance obligations set out by APRA. The fit and proper standard (SPS 520), together with the conflicts of interest standard (SPS 521), and the requirement for adequate resources clearly set out what is expected of industry. Importantly, it also gives the regulator the ability to deal with any concerns it may have, even allowing it to make adjustments or exclusions under the standards that are particular to an individual RSE licensee.

The prudential standards regime for superannuation has been in place for four years and has broad reach. Accordingly, AIST believes that a robust principles-based framework for high governance standards is already in place. Moreover, there is no evidence to suggest that the existing framework could not be utilised by the regulator to address any of the issues outlined in a new Part 9 of the *Superannuation Industry (Supervision) Act 1993* (the "SIS Act") or that the regulator itself needs additional powers, as proposed, to deal with such issues.

AIST does not support further government intervention in board composition of equal representation boards when a strong regulatory framework already exists, and the regulators have sufficient powers to ensure the fitness and propriety of directors, as well as how the management

[22] Australian Centre for Financial Studies and Mercer, (2016) *Melbourne Mercer Global Pension Index*, Melbourne. Available at: https://www.globalpensionindex.com/wp-content/uploads/MMGPI2016-Report.pdf

of conflicts is handled. The governance models of Australia's superannuation industry should be left up to individual entities to decide to ensure appropriate agility and capacity for innovation, within a strong regulatory framework.

The proposed requirement for one-third independent directors is not proposed in the context of any demonstrable benefit to members. AIST maintains that the true conflicts reside only in the retail superannuation fund sector, and therefore reform in the equal representation model is not warranted.

AIST therefore rejects the proposal to mandate independent directors on boards.

The international experience

According to Mercer, the Netherlands has a first class and robust retirement income system that delivers good benefits, is sustainable and has a high level of integrity and is among the best in the world.[23] A closer examination of the Dutch pension system suggests that the government acknowledged that there is no one-size fits all governance model, highlighted by the fact that pension funds operating in the Netherlands are permitted to select from a number of different governance models, one of which is equal representation, depending on their needs.[24]

Abolition of the equal representative model

The Bill proposes to repeal Part 9 of the SIS Act and substitute it with a number of proposed measures, each of which we reject. The repeal of part 9 will remove the legislative recognition of the equal representation governance model.

We reiterate our arguments outlined in the previous part and respond to the proposed abolition in greater detail below.

We oppose the removal of equal representation from the legislation and consequently the guaranteed voice of the members through their representation on the board, or alternatively on a policy committee. Similarly, the removal of equal representation eliminates the guaranteed voice to employers. This is especially significant in the case of defined benefit funds where the employers take the investment risks on behalf of the members.

There are three distinct sectors in the superannuation industry and AIST supports maintaining equal representation as a valid and successful governance model in the industry. Inside the APRA-regulated superannuation fund industry both retail and profit-to-member funds thrive despite

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[23] Melbourne Mercer Global Pension Index 2016 [Online], http://tinyurl.com/ycd36pf5 [Accessed 29 September 2017].
[24] IPE, *Pension Fund Governance – Netherlands: New Models,* [Online] http://tinyurl.com/ybm896h6 [Accessed 29 September 2017].

their different governance and ownership structures. A third sector, being the self-managed sector is also allowed to thrive, yet it sits outside of prudential regulation requirements, and avoids scrutiny on board composition and director competency.

The repeal of Part 9 of the SIS Act seeks to allow for new governance rules to be applied across the regulated superannuation industry. It seeks to bring into alignment the board composition requirements for profit-to-member superannuation funds that are currently operating under an equal representation governance model, and retail superannuation funds, that generally utilise an independent trustee. In doing so, however, it has removed the guaranteed voice of the members and of the employers – in removing equal representation for profit-to-member funds, and policy committees for non-equal representation funds.

AIST submits that both a member and an employer voice in a mandatory savings system are vital and that it should be preserved in all sectors of the APRA-regulated superannuation industry. The representative model ensures a deep knowledge of the membership, representation of their respective interests in a mandatory system, and proper consideration of all relevant issues in the pursuit of the best possible outcomes for members.

The definition of independent

The definition of independent director in a superannuation context has proved challenging for the Government and industry alike. The existing SIS Act definition relates only to equal representation governance models and has little relevance in the retail sector. Similarly, the ASX Corporate Governance Guidelines definition has little relevance in the superannuation industry due to the different ownership structures that exist, and superannuation's foundation in trust law. The Bill proposes a definition that seeks to be appropriate to both the profit-to-member and retail superannuation sectors, despite their vastly different ownership structures and interests of key stakeholders. Such a broad-brush approach raises the likelihood of serious unintended consequences and perverse outcomes, particularly given the diversity of ownership structures and director backgrounds that already exist across the profit-to-member superannuation sector.

The definition proposes to deal with ownership-related issues and relationship-related issues that potential directors may have. The definition proposes to exclude certain directors or potential directors with those ownership or relationship issues from eligibility for independent director status.

Section 87(1)(c)(ii)

With regard to the ownership provisions, AIST is particularly concerned with proposed section 87(1)(c)(ii) where the effect is not only to capture upstream entities of the RSE licensee, but also those downstream, such as subsidiaries or investee entities . Directors or executive officers of

related bodies corporate to the RSE licensee, during a preceding three-year period, are not considered to be independent.

This requirement should not extend to internal companies of the RSE licensee that are established for investment purposes i.e. an investment vehicle interposed between the fund and the holding of the investment for good reason (normally to restrict recourse to the rest of the funds' assets in the event of some failure) which may be wholly or partially held by the fund. RSE licensees in the profit-to-member superannuation industry establish such companies for three main reasons:

1. Tax benefit purposes.
2. To manage joint ventures in a more administratively efficient way.
3. To allow for borrowing in an entity.

These stated purposes are for the benefit of members, and directors of the RSE licensee are often selected to be directors on these companies. The directors on these investment-purpose companies have no rights to profit from those directorship interests. This practice should not result in trustee directors of the RSE licensee being deemed not independent.

We have attached (Appendix A) - an extract from AustralianSuper's Register of Relevant Interests and Duties - that demonstrates the existence of such holding companies for investment purposes.

Other examples of internal subsidiary companies owned by super funds include:

- A wholly-owned administration company (often self-administered funds set up a company to provide member administration services to the fund).
- A wholly-owned financial planning service company (since under SIS funds cannot provide non-super advice most funds who wish to provide a financial planning service to members do so via a separate corporate structure).

AIST submits that clause 87(1)(c)(ii) not extend to internal companies established to manage fund investments or companies established to facilitate services to members, that meet the best interests test.

Sections 87(1)(d)–(e)

With regard to the relationship provisions, these are concerned principally with material business relationships, employer sponsors' associations or employee representative bodies.

A 'business relationship' for the purposes of proposed sections 87(1)(d)-(e) can be interpreted differently, depending on the perspective. The words read together emphasise the legal relationship. Read the words severally and the interpretation becomes much broader, e.g. does

the person have a relationship, if so, is it in a business context? AIST suggests that the latter interpretation could produce wider outcomes than the legislature intended.

The word 'material' also poses potential ambiguity. It appears to have two different meanings depending on whether it relates to the person in consideration for 'independent' status or to the RSE licensee. If it relates to the RSE licensee then it relates to APRA's Prudential Standard and Guidance SPS 231/SPG 231 –Outsourcing and captures the business activities of the RSE licensee. In relation to a person, it has a different test, i.e. the Explanatory Memorandum states:

> *The RSE licensee would be expected to consider the effect on the other person if the business relationship was to cease for example, they would lose a significant portion of their revenue.*[25]

This extends the definition of 'materiality' into new territory away from RSE licensee's existing practices with outsourced providers and would capture consultants. In many cases we believe this would go too far.

There is also ambiguity around the meaning and relevance of the 'preceding three years' time frame in proposed sections 87(1)(d)-(e). A one-off business relationship that lasted a short time within that three-year period would potentially be covered. The Explanatory Memorandum adds to the ambiguity:

> *Whether a business relationship is material or not will depend on the circumstances of each case.*[26]

The inclusion of 'employees' involved in the 'business relationship' at proposed section 87(e)(ii) reaches too deep into the relationship. The provision should only apply to employees with the potential to influence outcomes in those material business relationships.

The combination of the different potential interpretations of 'business relationship', 'material' and the operation of the time frame are not sufficiently clear for boards to be able to make certain decisions.

AIST submits that the provision be further tested for unintended consequences and not exclude potential independent directors by virtue of other positions they hold that are immaterial for the purpose of their independence on the super fund.

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[25] EM page 19, para 2.56.
[26] EM, page 20, para 2.58.

Section 87(1)(f)(i)

Proposed section 87(1)(f) attempts to address independence considerations that particularly impact on equal representation funds. Section 87(1)(f)(i) excludes large employer sponsors with 500 or more contributing members from meeting the independence criteria.

Not all super funds are of the same size, with the same employer and member demographics.

For example, in 2015 HESTA provided us with the following analysis of large employer-sponsors. Employers with 500 contributing members would qualify as representing only 0.06% of HESTA's total membership, and 0.08% of the active membership. We suggest that this is an immaterial representation, and that in the case of HESTA, such employer-sponsors should not fail to meet the independence criteria, as their influence is insignificant on the basis of those numbers.

AIST submits that the provision should be redrafted to take into consideration the different sizes and compositions of superannuation funds, their members and their contributing employers. The exclusion from independence should extend only to employer-sponsors representing a material percentage of the fund.

Sections 87(1)(f)(ii) and (iii)

Under existing equal representation rules, an equivalent number of representative directors from employer-sponsors of the fund, and trade union sponsors of the fund are typically appointed to the super fund board. (This excludes funds where elections for board positions take place)

Section 87(1)(f)(ii) is drafted to capture 'representative organisations' of employer sponsors of a fund, such as the Retail Council in the case of REST Industry Super. However, it is drafted so widely that it might also potentially capture anyone who has a 'representative' relationship with employer sponsors of a fund such as lawyers or accountants, for example. This is no doubt an unintended consequence of the drafting but it should be rectified or risk further limiting the field of potential candidates for independent director roles.

AIST submits that clause 87(1)(f)(ii)-(iii) be reviewed for unintended consequences.

Sections 87(1)(g) and 87(3)

Proposed sections 87(1)(g) and 87(3) create a new regulation-making power to add additional circumstances relevant to the definition of 'independent'. The Explanatory Memorandum reads:

> *This provision has been included to address possible structures and relationships that may emerge in the superannuation industry and may mean a person could be considered independent even though they might otherwise be captured by new section s87(1).*[27]

As APRA will also have powers to make determinations on a person's independence (though it has indicated that it would use these powers rarely,) and the definition in the legislation is expected to provide the industry with 'sufficient certainty'[28] and there is now an identified need for further regulation-making powers, it is clear that sufficient certainty has not been delivered in the proposed changes. We query how these provisions will operate together in practice, and how they will provide RSE licensees with the requisite certainty.

APRA powers

The Bill provides APRA with the power to make prudential standards relating to appointment and removal of independent directors and the power to determine if a person is or is not independent.

We reject the continued expansion of APRA's powers without an in depth assessment being performed that analyses the adverse efficiency impact that is associated with expanding APRA's already expansive powers. Furthermore, we are concerned that the Bill allows for the prudential regulator to determine whether a person is or isn't independent.

AIST remains opposed to the broad determination powers granted to APRA in these provisions with regard to a person's independence, or non-independence. Section 88 and 90 require subsection (2) require that APRA 'must have regard to' the elements of the definition of independent in proposed section 87. Also, APRA's determination rests on their assessment, having regard to those elements, of the likelihood of the person being able to exercise independent judgement. Again, this is not a sufficiently objective test for making such a determination, and the consequences are significant.

CPS 510's definition of independent director also refers to a director's ability to exercise independent judgment, but only in the context of any of the person's associations or shareholdings materially interfering with that capacity. Entities regulated under *CPS 510– Governance* are able to seek guidance from APRA on the question of independence and there are no determination powers such as proposed in this Bill.

In any event, the requirement that all directors exercise independent judgement in their director role is a long established part of corporate governance law.

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[27] EM, page 21, para 2.62.
[28] EM, page 25, para 2.82.

AIST submits that there should be no power for APRA to make determinations; only the capacity to provide guidance such as exists in CPS 510.

AIST also has concerns about the inter-relationship of section 89(6) with the requirement to give reasons for decision in section 88(3)(b)(ii). If APRA fails to make a decision within the requisite timeframe, and that is deemed as a refusal, the trustee is left in a difficult position, and with no reasons for a decision.

APRA has a broad regulatory toolkit and we dispute the need for change in light of the existing prudential framework and the powers available to the regulators to rectify or address any issues that arise. In advice received from Hall & Wilcox Lawyers in 2015, AIST was advised that:

> *It is difficult to identify existing gaps or areas where APRA does not already have significant powers to step in if it identifies an issue of concern.*

This includes APRA having the power to address any concerns it may have with current trustee director skill levels including the power to remove directors. An outline of APRA's extensive powers can be found in Appendix B.

Transitional arrangements

We strongly oppose each of the measures outlined in the Bill. Notwithstanding this we submit the transition period for implementing the proposed changes is inadequate and inherently dangerous to the stability of the financial sector and the operation of each super fund.

A transition period to the new governance arrangements of three years is proposed in the Bill. This period appears to have been chosen to align with director terms under board renewal policies. AIST has found however that a significant number of its member funds have four-year terms (in some cases five-year terms), and the proposed transition period may therefore not allow them sufficient opportunity to rotate existing directors in a manner that protects the best interests of members or that complies with existing contractual arrangements.

Also, as the proposed changes potentially require turnover of one-third of the board, including the chair (in 2015 AIST estimated that two-thirds of its membership may need to appoint a new chair), we caution against the haste of transitioning in light of the potential risks. Board renewal policies were introduced from 1 July 2013 and for some funds this means that new directors have been recently appointed to their boards. Requiring turnover of a further one-third will result in the loss of corporate memory and knowledge, and a shift in culture. The quality of decision-making may be impacted and AIST submits that this risk is contrary to the members' best interests.

Furthermore, AIST questions the prudence of requiring a minimum of one-third of the board, including the Chair, to change within a proposed three-year time frame. Such a significant change

to board composition poses risks to the corporate memory of the board, its knowledge and the culture. These are not insignificant concerns and, without a demonstrable benefit to members, these changes should not be pursued with such haste.

AIST is concerned at the level of board disruption that is proposed within a short timeframe and cautions against such significant changes being implemented in haste. The impact on decision-making and boardroom culture poses a risk to the best interest of members. Coupled with the proposed removal of the two-thirds voting rule, AIST believes that good governance practices will be diminished as a result, with members bearing the cost.

We believe the proposed changes will impose significant costs (both through implementation and ongoing higher director fees) and introduce risks to the industry for no good reason. The changes also take Australia in the opposite direction to the rest of the world by removing guaranteed member representation from boards of occupational-based retirement savings funds.

We submit the transition period for implementing the proposed changes is inadequate and that a five year transition period is more appropriate in the circumstances. There will be unintended consequences to these proposals, as well as a range of unreasonable risks that will naturally flow.

Appendix A – AustralianSuper Pty Ltd register of relevant interests and duties

Relevant interests and relevant duties register to 30/06/2017:

TRUSTEE - AUSTRALIANSUPER PTY LTD SUBSIDIARY COMPANIES	PERCENTAGE OWNERSHIP
AS Anson LLC	100% fully owned subsidiary
AS Baseline LLC	100% fully owned subsidiary
AS Finance Company Pty Ltd	100% fully owned subsidiary
AS Infrastructure No. 1 (Holding) Pty Ltd	100% fully owned subsidiary
AS Infrastructure No. 1 (Operating) Pty Ltd	100% fully owned subsidiary
AS Infrastructure No. 2 (Holding) Pty Ltd	100% fully owned subsidiary
AS Infrastructure No. 2 (Operating) Pty Ltd	100% fully owned subsidiary
AS Infrastructure No. 3 (Holding) Pty Ltd	100% fully owned subsidiary
AS Infrastructure No. 3 (Operating) Pty Ltd	100% fully owned subsidiary
AS Property Nixon REIT LLC	100% fully owned subsidiary
AS Property No. 2 LLC	100% fully owned subsidiary
AS Property No. 2 Pty Ltd	100% fully owned subsidiary
AS Residential Property Pty Ltd	100% fully owned subsidiary
AS Residential Property No. 1 Pty Ltd	100% fully owned subsidiary
AS Residential Property No. 2 Pty Ltd	100% fully owned subsidiary
AustralianSuper Icon Parking No. 1 Pty Ltd	100% fully owned subsidiary
AustralianSuper Icon Parking No. 2 Pty Ltd	100% fully owned subsidiary
AustralianSuper Investments Pty Ltd	100% fully owned subsidiary
AustralianSuper Property No. 1 LLC	100% fully owned subsidiary
AustralianSuper Property No. 3 LLC	100% fully owned subsidiary
AustralianSuper Property Pty Ltd	100% fully owned subsidiary
AustralianSuper Research Pty Ltd	100% fully owned subsidiary
AustralianSuper (UK) Ltd	100% fully owned subsidiary
Western Australian Mindarie Investment Company Pty Ltd	100% fully owned subsidiary

Appendix B – APRA's regulatory toolkit

This table outlines the powers that are provided to APRA through legislative instruments. It excludes powers that are contained in the suite of superannuation prudential standards.

APRA power	Detail of power
Power to seek injunction	APRA has the power to seek an injunction to restrain persons from engaging in, or proposing to engage in, specified conduct outlined in the SIS Act.[29]
Suspend or remove a trustee	APRA has the power to suspend or remove a trustee of a superannuation entity in circumstances, such as:[30] • It appearing to APRA that conduct has been, is being, or proposed to be engaged by the RSE licensee may result in the financial position of the entity or of any other superannuation entity becoming unsatisfactory. • The RSE licensee breaching a RSE licence condition.
Disqualification	APRA has power to disqualify individuals that are, or were, responsible officers of trustees.[31]
Appointing acting trustee	APRA can appoint an acting trustee on suspension or removal of a superannuation entity.[32]
Infringement notices	APRA can issue infringement notices if they reasonably believe that a SIS Act provision has been contravened and the provision is subject to the infringement notice regime.[33]
Ongoing reviews of management and operation of entities	APRA regularly reviews the management and operations of superannuation entities through reviewing various reports received by those entities under the law.

[29] *Superannuation Industry (Supervision) Act 1993* (SIS Act) s 315. All references in this section are to the SIS Act.
[30] SIS Act s 133.
[31] SIS Act s 126A (1) – (3).
[32] SIS Act s 314.
[33] SIS Act s 223A.

Investigate	APRA can investigate an RSE licensee if they believe the financial position of the superannuation entity may be unsatisfactory.[34] APRA can also require the trustee to appoint an individual to investigate the whole or specified part of the financial position of the entity and make a report on this investigation.[35]
Directions power	APRA has the power to issue a direction to an RSE licensee if APRA has reasonable grounds to believe that the RSE has breached a condition of their licence.[36] Licence conditions include a requirement for the RSE licensee to comply with RSE licensee law, which includes the SIS Act, regulations, prudential standards and other legislation.[37] APRA can also issue directions about acquiring or disposing of assets, or a freezing of assets if the entity's conduct is likely to adversely affect the interests of beneficiaries.[38]
Directions power – prudential standards	APRA can issue a direction to a RSE licensee if it has reasonable grounds to believe that the RSE licensee has not complied with prudential standards.[39] APRA has power, enshrined in legislation, to make prudential standards relating to prudential matters. Prudential matters are widely defined.[40] These powers effectively mean that APRA has a high degree of flexibility, and ability, to develop and enforce various requirements on RSE licensees.
Obligations on auditors and actuaries	There is a positive obligation on auditors and actuaries to inform the regulator in writing if any contraventions of the SIS legislation or the *Financial Sector (Collection of Data) Act 2001* (FSCDA) may have

[34] SIS Act s 263 (1)(b).
[35] SIS Act s 257 (1)(a)–(b).
[36] SIS Act s 29EB (a)–(b)
[37] SIS Act s 29E(1)(a); s 10(1).
[38] SIS Act s 264 (1) – (5).
[39] SIS Act s 29E(1)(a); s 10(1).
[40] SIS Act s 34C.

	occurred.[41] This notification requirement ensures the regulator can act as soon as practicable if necessary.
Power to approve a RSE licence	APRA has the power to grant a RSE licence, provided specified criteria are met.[42]
Power to impose additional conditions on an RSE licensee	APRA has the power to impose additional conditions on RSE licensees, above minimum legislative conditions.[43]
Powers related to licensing of trustees	Part 2A of the SIS Act sets out APRA's broad powers and responsibilities regarding the licensing of trustees and includes: • Power to grant or refuse a RSE license.[44] • Power to impose additional conditions on RSE licensees at any time.[45] • Power to vary or revoke licence conditions.[46] • Power to cancel a RSE license.[47]
Powers related to RSEs	Part 2B of the SIS Act sets out APRA's powers regarding the management of RSEs and includes the power to: • Register or refuse to register an RSE.[48] • Cancel the registration of an RSE.[49]
Powers related to MySuper	Part 2C of the SIS Act sets out APRA's powers related to MySuper products and includes the power to:

[41] SIS Act s 129(3).
[42] SIS Act s 29D.
[43] SIS Act s 29EA.
[44] SIS Act s 29D; s 29DE.
[45] SIS Act s 29EA.
[46] SIS Act s 29FD.
[47] SIS Act s 29G.
[48] SIS Act s 29M.
[49] SIS Act s 29N.

	• Authorise or refuse authorisation for an RSE licensee to offer a MySuper product.[50] • Cancel a MySuper product authorisation.[51]
Power to declare superannuation funds as public offer funds	APRA has the power to declare superannuation funds as public offer funds.[52]

[50] SIS Act s 29T; s 29TE.
[51] SIS Act s 29U.
[52] SIS Act s 18(6).