SUPERANNUATION REGULATORY PIVOT

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CONTENTS

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Three important superannuation bills have been introduced into Parliament and referred to the Senate Economics Legislation Committee that will report its findings by 23 October 2017. They are another key indicator that the regulatory environment for superannuation has pivoted towards a more interventionist approach.

Industry participants should be aware of these changes, especially APRA's extensive powers that can significantly impact the value of a superannuation business and be exercised even if the trustee is not in breach of its legal requirements.

1 What is the legislation?

There are three bills that were introduced into the Parliament on 14 September 2017, each has been referred to the Senate Economics Legislation Committee for reporting by 23 October 2017. These are set out in the table below along with the proposed commencement date for the various reforms:

BILL	PROPOSED AMENDMENT COMMENCEMENT
Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 (**No.1 Bill**)	• **Annual MySuper outcomes assessment**: Day after Royal Assent • **Authority to offer a MySuper product**: Day after Royal Assent • **Director penalties**: Day after Royal Assent • **Approval to own or control a RSE licensee**: 3 months after Royal Assent • **APRA directions power**: Day after Royal Assent • **Portfolio holdings disclosure**: 31 December 2018 • **Annual members' meetings**: Day after Royal Assent • **Reporting standard 'follow the money'**: Day after Royal Assent
Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 (**Choice Bill**)	• **Choice of fund for workplace determinations and enterprise agreements**: new workplace determinations and enterprise agreements on or after 1 July 2018 • **Salary sacrifice integrity**: 1 July 2018
Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 (**Independent Directors Bill**)	• **Independent directors**: Day after Royal Assent (with a 3 year transition period)

2 The context

The proposed reforms should be considered in the broader context of:

- the political and social environment that is focused on the culture within and the conduct of financial services organisations;
- APRA's increased funding and more interventionist regulatory stance;[1] and
- the broader legal landscape of the Banking Executive Accountability Regime, the proposed regulation of shadow banks and the Government's proposal to amend ASIC's administrative banning power in the financial services sector to include directors, officers and senior managers.[2]

3 The themes

The reforms can be divided into 5 main themes:

1 increased competition and consolidation;

2 enhanced governance;

3 increased transparency and accountability;

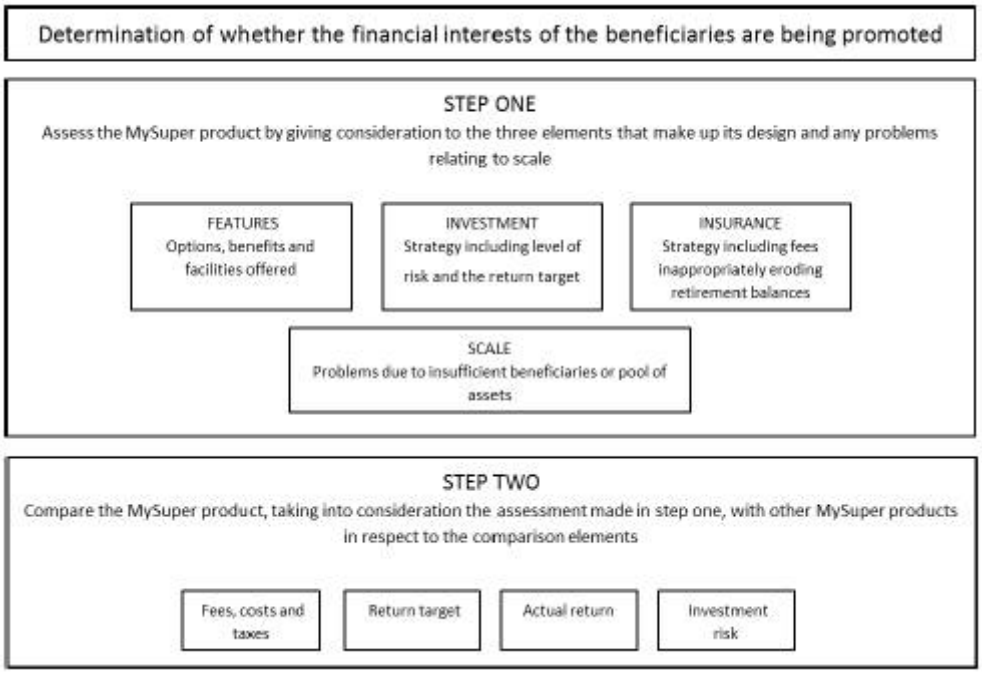
4 increased regulatory control; and

5 more severe sanctions for dishonest wrongdoing.

4 Reforms

4.1 Increased competition and consolidation: annual MySuper outcomes assessment

Annually, a RSE licensee will be required to determine (and publish on the superannuation fund's website) whether the financial interests of the MySuper members are being promoted. This will be undertaken following the process described in the diagram below:



APRA is expected to issue prudential guidance to RSE licensees about this process.

This requirement to perform an annual MySuper outcomes assessment has some problems that indude:

- it is duplicative, as the requirement to consider whether the insurance fees charged in relation to MySuper products inappropriately erode retirement incomes is already covered by section 52(7)(c) of the SIS Act;
- the requirement that trustees of a MySuper product must compare the taxes of competitor products to those in its own MySuper product is not achievable as information on the tax situation of superannuation products is not publicly disclosed; and
- there is no indication as to the relevant timeframe for the comparison of the returns for MySuper products. The inevitable variability of return over time in even the most conservative of investment portfolios means that the timeframe for such comparisons is very important.

However, of greater concern is the requirement for this assessment to be published on the superannuation fund's website within 28 days because, for example, if a scale issue is identified, the publication of this will only exacerbate the scale issue with the members who are quick to leave being rewarded at the expense of those members who are not as quick to react to that information.

4.2 Increased competition and consolidation: choice of fund

The proposed amendments made by the Choice Bill will limit the exemption to the choice of fund regime in Part 3A of the *Superannuation Guarantee (Administration) Act 1992* (Cth) for employer contributions made under, or in accordance with, a workplace determination or enterprise agreement[3], as is set out in the diagram below:

The legislation implements a 'soft' introduction of choice of fund for employees employed under workplace determinations and enterprise agreements that prescribe the superannuation fund that employer contributions will be made into. From 1 July 2018:

- a new workplace determination or enterprise agreement will not be able to require that an employer's superannuation contributions be made to a specific superannuation fund, as employees will have a choice of fund;
- a choice of fund form only needs to be provided to new employees employed under such a workplace determination or enterprise agreement; and
- a choice of fund form does not need to be provided to existing employees if the employer continues to make superannuation contributions to a superannuation fund that they were previously contributing to under, or in accordance with, the previous workplace determination or enterprise agreement.

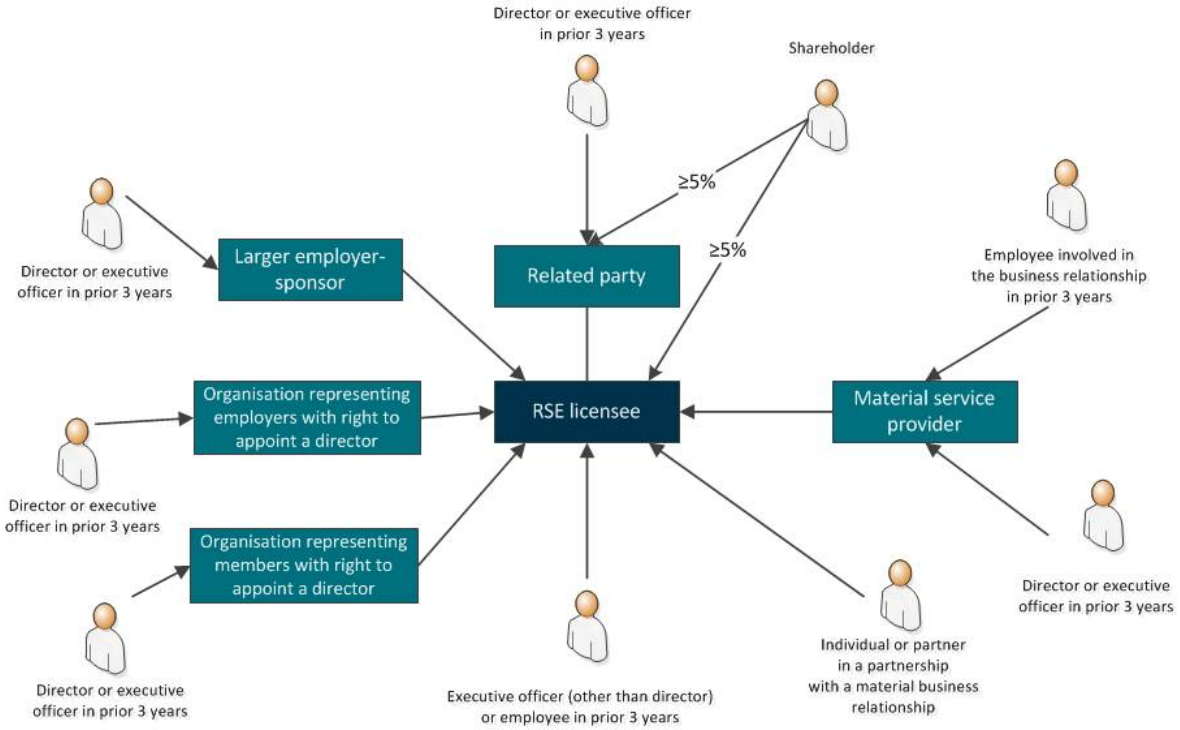
4.3 Enhanced governance: independent directors

The Independent Directors Bill will, over a three year transition period commencing from the day after the Bill receives Royal Assent, require RSE licensees to have an independent chair and at least one third of the directors (including the chair) must be independent directors. There is a statutory override of any contrary provisions in the trust deed, constitution of the RSE licensee, and 'any other document' that imposes requirements in relation to the appointment of directors of the RSE licensee.

The object of this reform is to 'bring different skills and expertise and [independent directors] can hold other directors accountable for their conduct, particularly in conflicts of interest'. We consider that it is questionable whether the 'structural' independence test that is currently contained in the Independent Directors Bill will result in different skills and expertise being brought to the Board, as this will depend on the totality of the circumstances of nomination, selection, tenure and remuneration of independent directors.[4] That is not to say that independent directors cannot enhance governance processes in an institution like a superannuation fund. In our experience, independent directors are valuable when a Board is faced with significant decisions (eg decisions about the termination or successor fund transfer of members benefits in the fund), particularly when those decisions involve related parties. In addition, as has been previously noted:

> "independence can make a positive contribution not just in potentially enhancing decision processes (as hard as that may be to measure) but also in enhancing stakeholders' perceptions of the legitimacy of a system in which they are forced to participate but in which they may feel under-prepared or disempowered"[5]

We are also concerned that the test for independence is not well designed and may not achieve genuine 'cognitive' independence. The criteria for independence is as shown in the diagram below with the 'people' shown not satisfying the definition of an 'independent director'.



There are several issues with this structural independence test. In our opinion, the most important of these are:

- A requirement not to hold 5% or more of the shares makes sense in the context of listed companies but:
  - does not translate well into the context of superannuation funds where the shares are generally not held by individuals or, if they are, they are held on trust by the individual for the members of the superannuation fund; and
  - can be circumvented through the use of a trust arrangement.
- In the previous 3 years, the person cannot have been:
  - an executive officer (other than director) or employee of the trustee; or
  - a director or executive officer of a related body corporate.

  This would prevent an independent director of a related body corporate being an independent director of a RSE licensee. This will also be problematic if there are multiple RSE licensees in the same corporate group. In these circumstances, the RSE licensee will have to apply for and be granted a determination by APRA that the relevant person is independent. We note that this regulatory setting is different from that which applies in the analogous situation of life insurance companies.[6]
- An independent director cannot in the previous three years have been:
  - a director or executive officer of an entity that had a material business relationship with the RSE licensee in the previous three years; or
  - an employee of an entity that had a material business relationship with the RSE licensee in the previous three years and was involved in that business relationship.

  As there is no materiality threshold on the involvement of an employee of an entity in the material business relationship between a RSE licensee and the entity, an employee could have had a minor role in a material business relationship but nonetheless be excluded from being an independent director.
- An independent director cannot in the previous 3 years have been a director or executive officer of:
  - a large employer sponsor; or

  - an organisation representing the interests of an employer-sponsor or members of the fund that has the right to appoint a director of the RSE licensee.

  The issue with this requirement is that many nominees of an organisation representing the interests of an employer-sponsor or members of the fund do not hold formal positions within the nominating organisation. Accordingly, members of such organisations will be considered independent (if they satisfy the other criteria for independence).

- Consideration will have to be given to whether in the previous 3 years the person had a business relationship with the RSE licensee that was 'material' to the person or the RSE licensee. This will be difficult to apply in the context of partnerships, such as law and accounting practices, where a partnership has provided services to the RSE licensee. A particular partner may have had a significant involvement in the services provided by the partnership to the RSE licensee, whereas other partners may not have had any involvement. The Explanatory Memorandum indicates that APRA will issue a Prudential Standard in relation to the requirement that the business relationship not be 'material' to the individual, and we hope that the issues concerning partnerships is addressed.

RSE licensees will have 120 days to fill a vacancy of an independent director. If this is not done, APRA may direct the RSE licensee not to accept employer contributions.[7]

The good news for RSE licensees is that policy committees, many of which appear to have had little practical utility, will no longer be required. RSE licensees may therefore be able to assess, in light of their unique circumstances, the ongoing need to maintain such structures and processes.

4.4 Increased transparency and accountability: portfolio holdings disclosure

Four important changes have been made to the portfolio holdings regime by the No.1 Bill:

'Look through' to the first non-associated entity: The portfolio holdings regime has been circumscribed to reflect the reach of APRA's 'look through' powers under the *Financial Sector (Collection of Data) Act 2001* (Cth) (**FSCOD Act**) to the first level of investment outside of a group structure. This is achieved through the requirement to identify each 'investment item' that is:

- held by the RSE licensee or an associated entity; and
- 'is not an investment in an associated entity of the [RSE licensee]'.

This second requirement is curious and it is not clear what it is intended to cover. For example, if a RSE licensee invested in a wholly owned subsidiary that in turn invested in other assets, the second requirement appears to exclude the shares in the associated entity of the RSE licensee.

What has to be disclosed: The RSE licensee will have to disclose the value and the weighting or exposure of each investment item that must be disclosed, as well as the total value and weighting. However, regulations may prescribe that for a particular kind of investment item, only the name of that kind of investment item needs to be disclosed, as well as the total value and weighting or exposure of all investment items of that kind.

Additional exclusions: Amendments have been made to provide for exclusions to address concerns about disclosure related to private equity investment, unlisted assets and other commercially sensitive arrangements. These exemptions are:

- trustees of pooled superannuation trusts, single member funds, and small APRA funds do not need to comply with the portfolio holdings disclosure requirements;
- investments of an investment option:
  - if the investment option has been closed to new members for at least 5 years (ie there has been a 'soft' or 'hard' close for at least 5 years);
  - that are 'not material' (which will be determined under regulations);
  - that solely supports defined benefits;

- that is a risk life policy, an investment account contract or a life policy where the contributions and accumulated earnings cannot be reduced by negative investment returns or a reduction in the value of the assets; and
- that the trustee chooses provided that the value of those assets does not exceed 5% of the assets (excluding derivatives) of the investment option, they are commercially sensitive and disclosure would be detrimental to the interests of the members (eg private equity or venture capital investments).

Repeal of the reporting obligations 'down' and 'up' a chain of investments: The statutory reporting obligations 'down' and 'up' a chain of investments[8] will be repealed on the basis that:

> "It is assumed that RSEs will be able to obtain sufficient information from associated entities in order to comply with their PHD requirements, and that no obligation in the law is required"[9]

The portfolio holdings disclosure requirements will commence on 31 December 2018 and therefore will require disclosure within 90 days of that date.

4.5 Increased transparency and accountability: annual members' meeting

Much focus in relation to the proposed superannuation reforms has been on the annual members' meeting (**AMM**). Some of the key requirements are:

- **Timing**: The AMM must be held within 3 months of notice of the AMM being given.
- **Notice**: A RSE licensee must provide notice to members of an AMM within six months of the end of the superannuation fund's financial year and hold the AMM at least 21 days after the notice is given.
- **Form**: An AMM can be held electronically.
- **Attendance**: A quorum of directors must attend along with each other responsible officer (ie secretary and executive officers), auditor and actuary.
- **Questions**: Members must be given a reasonable opportunity to ask questions.
- **Answers**: If a responsible officer, auditor or actuary is asked a question at the AMM they must answer the question at the AMM unless it is not reasonably practicable to do so, in which case the question must be answered within 1 month. There are some limited exceptions (eg the question is not relevant to the acts or omissions of the RSE licensee in relation to the fund or a member, it would breach the law to answer the question or would cause detriment to members as a whole).
- **Minutes**: The minutes of the AMM (including the answers to questions that are raised) must be posted on the superannuation fund's website.

Some of the issues associated with the AMM relate to the following:

- The requirement for all 'Responsible Officers' to attend an AMM will require any individual who is 'concerned in the management of the body' to attend the AMM. This will require some individuals to attend and be available to answer member's questions that normally do not directly interact with members.
- The lack of clarity concerning its function and how it relates to the existing requirements of superannuation fund trustees to answer questions and provide information to members.[10]
- There is a problem with an individual responsible officer having to answer a question asked at the AMM when it may be more appropriate for the answer to be provided by the RSE licensee. This may undermine boardroom solidarity and be inconsistent with the RSE licensee having regulatory accountability for the superannuation fund. In addition, if a question is outside an individual responsible officer's area of responsibility, it seems inappropriate for that individual to be required to answer the question.
- There is a possibility for competitors who may contribute a nominal amount to become a member, or hackers who pose as a member, to undermine the AMM process by asking numerous questions.

- Although meetings can be held electronically, if a number of members have chosen to receive hard-copy information, would the RSE licensee have to hold a physical meeting when considering the best interests of the members and the manner in which it will hold its AMM?
- There is the potential for answers provided at an AMM to a member in a particular employer plan in a master fund to be misleading to a member who is in a different employer plan of the master fund.
- There is potential for members who have had claims denied to use this as a forum to raise their personal circumstances. How can the trustee address these claims at the AMM without breaching their privacy obligations (especially considering that all answers to questions must be included in the minutes that must be posted on the fund's website)?

4.6 Increased transparency and accountability: reporting standard to 'follow the money'

The No.1 Bill will amend the FSCOD Act to expand the reporting requirements to include information about expenses incurred in managing or operating the superannuation fund. More specifically, APRA will have the power to collect information in relation to a transaction between a RSE licensee and another entity where the money, consideration or other benefit originated from the assets of the superannuation fund or the RSE licensee.

The information that APRA can obtain are:

- the details of the other entity (A);
- the purpose of the transaction;
- the way the other entity (A) used the money, consideration or benefit received; and
- any entity (B) that the other entity (A) deals with.

This will be facilitated by the legislation deeming a clause into a contract or arrangement that a RSE licensee enters into with another entity (A) that where the RSE licensee gives money out of the assets of the superannuation fund to another entity (A):

- the RSE licensee must notify the other entity (A) that the consideration is paid out of superannuation fund assets; and
- the other entity (A) must, as soon as reasonably practicable, after being notified by the RSE licensee, provide the RSE licensee with the required information of which it is aware.

This will apply to new and existing contracts (but excludes past transactions) from Royal Assent.

This requirement is problematic as:

- there is no requirement to provide information about the quantum of the payment which would appear to be an important consideration;
- it can be easily circumvented by a RSE licensee making payments out of its own assets that are not subject to the terms of the superannuation fund trust (as this requirement only applies to consideration paid out of the superannuation fund assets);
- it ignores the fact that money is fungible and when received by the other entity (A) will be added to the accounts of that organisation for the operation of that other entity (A) and therefore cannot be directly 'traced' to being used in a particular way.

4.7 Increased regulatory control: authority to offer a MySuper product

This is a troubling reform because although the Government intends to give APRA greater power to refuse or cancel a RSE licensee's authority to offer a MySuper product, in our view, it has lowered the 'bar' to an inappropriately low level before APRA can intervene to refuse or cancel a MySuper authorisation.

Following the proposed amendments, the threshold in section 29T of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) for APRA to refuse or cancel authority to offer a MySuper product will change after this amendment:

- from APRA being 'satisfied' that the RSE licensee is 'likely to comply' or is 'not likely to contravene'; and
- to APRA having 'no reason to believe' that the RSE licensee 'may fail to comply' or 'may contravene'.

This is a significant tightening of the rule in two respects:

- being 'satisfied' is a higher threshold of belief than 'having no reason to believe'; and
- being 'likely' not to comply is a higher level of probability than 'may' fail to comply.

Although the Government intends to give APRA greater power to intervene we believe it is more appropriate that the regulator be required to demonstrate that they 'reasonably believed' that the RSE licensee will fail to comply. This combination of a subjective test (of did APRA actually believe?) and an objective test (of was that belief one that an ordinary, reasonable person could hold?) is an appropriate calibration of regulatory intensity.

The Explanatory Memorandum suggests that the prospect of a single contravention of the relevant law is sufficient to justify APRA refusing or cancelling authority to offer a MySuper product. This seems a potentially disproportionate response when such a cancellation of a MySuper authority will have a significant impact on the members of the relevant superannuation fund and potentially the commercial value of the relevant superannuation business and the members of the relevant superannuation fund.

4.8 Increased regulatory control: approval to own or control a RSE licensee

APRA's prior approval is required for a change in a controlling stake (that will be a holding of greater than 15% of the voting power) of a RSE licensee. A 'controlling stake' will include the shareholdings of associates and will extend to indirect control (through parent companies). APRA will have 90 days (from application or provision of further information) to consider the application and that timeframe can be extended by 30 days.

This requirement for APRA approval is aligned with the *Financial Sector Shareholding Act 1998* (Cth) requirements that apply to banks and insurers but the test for approval is different for RSE licensees.

For banks and insurers, it is a national interest test (which the legislature has deliberately left broad). However, for RSE licensees, it is APRA having 'no reason to believe' that because of the person's controlling stake or the way that the controlling stake is 'likely to be used', the RSE licensee 'may' be unable to satisfy one or more covenants in sections 52 to 53 or 54A, 29VN or 29VO of the SIS Act. Again, we consider that the combination of a subjective test (of did APRA actually believe?) and an objective test (of was that belief one that an ordinary, reasonable person could hold?) is an inappropriate calibration of regulatory intensity. It is not clear to us why a different test for approval is required in the superannuation industry to the banking or insurance industries.

Similarly, APRA can require the divestment of control (being shares or practical control over of a RSE licensee) if, because of that control or the way that the control is likely to be exercised, the RSE licensee has been (or is likely to be) unable to satisfy one or more covenants in sections 52 to 53 or 54A, 29VN or 29VO of the SIS Act. Again, this seems an inappropriately low bar for APRA to intervene to require divesture of control over a RSE licensee, as a breach of a covenant may not have been and may not occur even though the test of 'likely to be' breached may be satisfied. A person will have 90 days after being given a copy of the direction to relinquish their control over the RSE licensee. It appears to us that it may not be an appropriate outcome of a person's shareholding being devalued in circumstances when the RSE licensee has not breached its obligations. In addition, a more appropriate regulatory response may be for APRA to use its directions power (see section 4.9 below) to effectively prevent the conduct that it is concerned is 'likely' to occur.

At the commencement of these requirements (3 months after Royal Assent), all people with a controlling stake will be deemed to have approval from APRA. However, APRA may direct such people to relinquish such control.

4.9 Increased regulatory control: APRA directions power

The No.1 Bill, if passed, will give APRA expanded and extensive directions powers in relation to RSE licensees and their 'connected entities'. Both:

- the circumstances in which directions can be given; and
- the directions that can be given,

are wide and seem to be inappropriately intrusive into the operation of a superannuation fund. They also expose APRA to considerable political risk. APRA having such powers to, in essence, intervene in any aspect of a superannuation business may cause questions to be asked of APRA about why they did not exercise such powers if and when issues materialise in respect of any superannuation fund. This in turn will inspire APRA to conceive of its own institutional risk different, with consequences for regulatory style and culture that are hard to forecast at this point with any certainty.[11]

APRA will be able to give a direction to a RSE licensee or a connected entity if APRA **'has reason to believe'**:

- the RSE licensee/connected entity has contravened the SIS Act, a Prudential Standard or FSCOD Act;
- the RSE licensee/connected entity **is likely to** contravene the SIS Act, a Prudential Standard or FSCOD Act but for a RSE licensee the direction must be reasonably necessary to deal with a 'prudential matter';
- the RSE licensee has contravened a condition or direction under the SIS Act or FSCOD Act;
- the direction is necessary to protect **the interest of beneficiaries** or to prevent the interests of beneficiaries from being materially prejudiced;
- the RSE licensee/connected entity is (or is about to become) unable to meet its liabilities;
- there is (**or might be**) a material risk to the security of the assets of a RSE licensee;
- there has been (**or might be**) a material deterioration in the financial condition of the RSE licensee/connected entity or a superannuation fund;
- the RSE licensee/connected entity is conducting its affairs or the affairs of a superannuation fund in an improper or financially unsound way;
- a failure to issue a direction would materially prejudice **the interests or reasonable expectations of beneficiaries**;
- the RSE licensee/connected entity is conducting its affairs or the affairs of a superannuation fund in a manner that may cause or promote instability in the Australian financial system; or
- for a connected entity, **it is conducting its affairs in a way that may cause it to be unable to continue to supply products or services to the RSE licensee or superannuation fund**.

We recognise that for this power to be effective, it is important to give APRA the power to act to forestall a problem. However, we believe it would be preferable to employ a criterion more common in other contexts, such as requiring APRA to 'reasonably believe' the threat exists rather than APRA having a 'reason to believe' that the treat is 'likely' or that there 'may be' a threat.

APRA may give a direction to:

- comply with the SIS Act, a Prudential Standard or the FSCOD Act;
- for an RSE licensee, comply with the whole or part of a condition or direction under the SIS Act or the FSCOD Act;
- **remove a 'Responsible Officer'**;
- **ensure that a 'Responsible Officer' does not take part in the management or conduct of the business of the RSE licensee/connected entity or a superannuation fund**;
- **appoint a 'Responsible Officer'**;

- audit (by an APRA selected auditor) of the RSE licensee/connected entity or a superannuation fund at the RSE licensee's/connected entity's expense;
- remove an auditor and appoint another auditor;
- require an actuarial investigation (by an APRA selected actuary) of the superannuation fund;
- remove an actuary and appoint another actuary;
- for a RSE licensee, not to accept (or cease to accept) contributions;
- not borrow;
- **not pay or transfer any amount or asset to any person or create an obligation**;
- **not undertake any financial obligation**;
- **not discharge a liability** of the RSE licensee/connected entity or a superannuation fund;
- make changes to the RSE licensee's/connected entity's **systems, business practices or operations**; or
- **do or refrain from doing anything else in relation to the affairs of the RSE licensee/connected entity or a superannuation fund**.

These directions powers appear too extensive, especially as there is no requirement that the direction by APRA is apposite or proportionate to the problem or the threat apprehended. Both relevance and proportionality are important qualities of any regulatory scheme.

If a direction is given by APRA, under statute, this will override anything in the RSE licensee's or connected entities constitution or any contract or arrangement with a third party. In addition, there will be a broad general protection for a person for 'anything done, or omitted to be done, in good faith and without negligence in the exercise or performance, or the purported exercise or performance, of powers, functions or duties under this Act'.[12] In addition, there is a statutory protection from liability for officers, employees, agents, service providers and advisers for acts and omissions done in good faith for the purpose of complying with a direction given by APRA, provided that the act or omission was reasonable to comply with a direction. It is surprising that the causal link between the act or omission that benefits from the statutory protection that applies to officers, employees, agents, service providers and advisers is not present in the broad general protection that is discussed above.

We note that a RSE licensee or a connected entity is not required to comply with a direction that would result in an acquisition of property in breach of paragraph 51(xxxi) of the Constitution. This is an unsatisfactory position of legislation being passed to provide APRA with powers when there is uncertainty as to whether those powers, when exercised, will breach the Constitution. This uncertainty is likely to result in lengthy and expensive litigation when APRA exercises its powers.

4.10 More severe sanctions for dishonest wrongdoing: Director penalties

The directors of a RSE licensee are currently accountable directly to members who, with the leave of the court, can seek compensation for breaches by a director of the covenants listed in section 52A of the SIS Act. The No.1 Bill will mean that directors may also be subject to a civil penalty order if they breach such a covenant.

The proposed legislation does not currently identify how proceedings brought by APRA in relation to civil penalty proceedings will relate to proceedings brought by members before, during or after the civil penalty proceedings. This issue is magnified by the extensive information-seeking powers available to APRA as part of their supervisory and enforcement processes, powers that enable wide-ranging enquiries that would ordinarily lie beyond the discovery process available to private litigants.

5 Conclusion

The Bills (if enacted) will result in extensive changes to the superannuation industry and provide APRA with powers to intrude into the ownership and operation of superannuation businesses when a RSE licensee or connected entity is not in breach of the law. Each RSE licensee should consider these changes and how they may impact their business.

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1 For a description, see Sarah Yu 'APRA's 'Guiding' Hand'.

2 See 'Budget 2017 - APRA's new powers, and hot spots for banks' and 'The BEAR - ASIC Enters the Fray ...'.

3 Section 32C(6) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

4 M Scott Donald and Suzanne Le Mire 'Independence in Practice: Superannuation Fund Governance through the Eyes of Fund Directors', 4 April 2016, CLMR Research Paper Series, Working Paper No.16-3.

5 M Scott Donald and Suzanne Le Mire 'Independence and the Governance of Superannuation Funds', 10 March 2016, CLMR Research Paper Series, Working Paper No.16-1.

6 See paragraphs 39 and 40 of APRA's Prudential Standard CPS 510 'Governance'.

7 Section 63 of the SIS Act.

8 Sections 1017BC, 1017BD and 1017BE of the *Corporations Act 2001* (Cth) (**Corporations Act**).

9 Paragraph 7.12 of the Explanatory Memorandum for the No.1 Bill.

10 See, for example, section 101 of the SIS Act and section 1017C of the Corporations Act.

11 See, in relation to APRA's current approach, Julia Black, 'Managing Regulatory Risks and Defining the Parameters of Blame: A Focus on the Australian Prudential Regulation Authority' (2006) 28 *Law and Policy* 1.

12 See the proposed section 131FB(1) of the SIS Act.

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