29 September 2017

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee Secretariat

Re: Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 and the Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017

The Financial Services Council (FSC) welcomes the opportunity to provide a submission in relation to the collection of Bills that are designed to make the superannuation industry more transparent and accountable to consumers.

The FSC has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world.

FSC members provide services to all sectors of the industry, including industry, retail, corporate and public sector superannuation schemes.

FSC member companies are major participants in both the 'choice' and the 'MySuper' markets. The FSC supports higher standards of governance, transparency and accountability for both choice and MySuper products.

Please contact me with any questions in relation to this submission on (02) 9299 3022.

Yours sincerely,

Blake Briggs
Senior Policy Manager

Introduction

The FSC supports the overall policy objectives of the Bills and each of their component parts, including their respective application to trustees that offer both choice and MySuper products where applicable.

The FSC notes that the reforms are designed to operate as a cohesive package in favour of members, with the requirement to appoint independent directors and an independent chair, for example, reinforcing the need for sufficient expertise and skills and objective assessments of capability to drive outcomes for the best interests of the members. .

At a high level there are two main policy outcomes that the Committee should support that will result from the Bills:

1. Practical and equitable industry consolidation; and
2. Equal regulation of all types of funds in the superannuation industry.

These two, high level outcomes are outlined below.

Industry consolidation

Collectively these reforms will materially improve outcomes for superannuation consumers. The requirement for trustees to annually assess their MySuper offers (in conjunction with existing prudential obligations across the fund membership) is likely to facilitate the mergers of subscale and inefficient superannuation funds that the FSC has estimated are leaving some default consumers $170 000 worse off by retirement.

Reforms to drive industry consolidation are overdue. The Financial System Inquiry (FSI) concluded in 2014 that fees in the superannuation industry had not fallen by as much as would be expected given the substantial increase in size and scale of the system. The FSI demonstrated that between 2004 and 2013, average fees only fell by 20 basis points, whereas the size of the average fund increased more than twelvefold over the same period although increasing regulation imposts, service, and product improvements have a role to play in any fee shifts assessments.

From a governance, diversity and capability perspective, independent trustee directors will focus fiduciaries even more strongly on member outcomes and assist in managing and balancing potential conflicts (even if simply perceived).

In the same way as independent directors are required as a function of good governance for ASX listed companies, the FSC supports this for the growing and economically significant superannuation sector (at an estimated $2 trillion and 126% of GDP[1], it is larger than the estimated total market capitalisation of the ASX[2] and half the size of the Australian banking sector).

This submission shows how the package of reforms, including the requirement for independent directors, the potential for reduced conflicts of interest and more focused annual assessments of MySuper outcomes will drive industry consolidation in realistic ways with member outcomes at the forefront.

[1] Willis Towers Watson *Global Pensions Asset Study - 2017*

[2] ASX Corporate Overview http://www.asx.com.au/about/corporate-overview.htm (accessed September 2017)

Reforms apply evenly across the sector

Claims that the package of reforms targets union affiliated industry funds and default MySuper products, and ignores professional retail funds and choice products are incorrect. Most professional retail funds offer MySuper products and are as equally impacted by the changes related to annual MySuper outcomes assessments as their industry super counterparts.

APRA will also have enhanced powers to ensure there is a stronger safety net for consumers who do not choose their own superannuation fund (that is those who are defaulted and the group that is the least engaged are to be supported by more focused prudential standards under these changes). This safety net will apply evenly to all sectors of the industry, including:[3]

- 46 MySuper products offered by professional retail funds;
- 43 MySuper products offered by union affiliated industry funds;
- 15 MySuper products offered by corporate funds; and
- 11 MySuper products offered by public sector funds.

The FSC also notes that on 11 August this year, APRA wrote to all RSE licensees to advise that it will apply an outcomes test to all superannuation products. In doing so APRA will consider net investment returns, expenses and costs, insurance, and other benefits and services provided to choice members.

Annual Member Meetings

General meetings in the corporate sector are an important mechanism to promote transparency around how a business operates; however it is primarily a decision-making forum that allows company management and directors to be accountable to shareholders through resolutions and voting rights.

The FSC supports the intent behind more active engagement of members through the concept of the proposed Annual Member Meetings (AMMs) to allow consumers to pose questions about the management and operation of their fund to executives and directors. There are some very important logistical matters to resolve in order to minimise costs and disruption while meeting the intent and FSC members look forward to the regulations in this regard.

The FSC notes that the effects of such engagement could drive more efficient products and services or even to highlight the need to consider merger or consolidation in order to provide the options and services members may be demanding.

The FSC also submits that the quality of engagement with consumers and the effectiveness of the reforms could be influenced by whether or not the trustee board has independent directors and an independent chair. Independent directors are more likely to bring different skills and insights and may be more responsive to consumers, particularly those that challenge 'standard operating models and practices' which can lead to fresh approaches and improved services.

Independent directors would also hold to account directors that may have conflicts of interest and may try to protect their sponsoring organisations from scrutiny.

[3] Sen McGrath, Second Reading Speech to the two Bills, 14 September 2017

Commencement

We welcome the more realistic timeframe for the requirement for the first AMMs to be held no earlier than 6 months after the end of the entity's income year following the financial income year in which the Act receives Royal Assent.

As noted in our submission on the exposure draft, the regulator should have the ability to extend the timeframe, or exempt the RSE, where it is in the overall best interest of members in certain circumstances (for example, revocation of license/wind up of the fund, potentially a merger/successor fund situation).

Trustee protection

The FSC recommends the Bill (or regulations) provides that trustees are afforded protection for any model that may be adopted to give effect to the core intent. No model will capture or suit all members.

The FSC's view is that members should have the capacity to pose questions to the responsible officers of the fund about its operations, management and overall condition, and that a trustee should have flexibility to choose the model that best suits its operations.

Online meetings, or in person

The Bill provides that a member meeting may be held electronically, but leaves this decision to the trustee. This raises issues for a trustee and its obligations to act in the best interests of members; if there are members who may be excluded by any given approach. This may be more so for MySuper members given requirements for equivalent rights and benefits. There will never be a universally inclusive approach for all members (of a large fund).

FSC member companies have analysed the potential for even small proportions of their members to seek to become involved in member meetings. We concluded that trustees would need to prepare for as many as 50 000 to 100 000 consumers seeking to participate. The FSC is concerned that there would not be the capacity to arrange meetings for tens to hundreds of thousands of consumers.

To accommodate this issue the FSC supports the trustee being able to adopt either:

- Webcast responses to pre-registered questions with capacity to submit further questions online on the day for response within the stipulated period; and/or
- Only online member meetings.

These approaches are likely to be the only viable models for very large entities and, subject to reasonable capacity, will reduce the cost of implementation and the administration of meetings that may involve several million consumers.

The FSC submits that the Bill or regulations should make it clear that member meetings are taken to satisfy the requirement to hold a meeting if they are held exclusively online or via a webcast in response to pre-registered questions (with ability to submit further questions following the webcast).

The Regulations may provide that trustees are protected where they have taken reasonable steps to provide access and notices to members (which may be with "Annual Reports", but also potentially via the website, emails or other communication modes).

Questions of directors and managers

The FSC acknowledges that the provisions provide for regulations where we anticipate more detail. We would reinforce the need for the Regulations to allow flexibility in the administration of questions, so that material questions only must be answered by the fund, duplicated questions need only be answered once, and vexatious questions screened out.

The FSC also proposes that consideration be given to requiring questions to be provided by the members prior to the meeting in order to construct the agenda, manage resources and reduce costs.

We note that some funds have upwards of 1.5 million members. Even if 10% (or 1%) were interested this would be more than 10,000 individuals. While we have not had the time to conduct sufficient research, at this juncture, we have not identified an interactive online provider with moderating capability with capability for this capacity (or potentially more).

Minutes

The Bill requires minutes to be kept for member meetings, but minutes traditionally record decisions, of which there will be none.

The FSC submits that instead of minutes, the regulations prescribe that funds be required to publish on their website, in a common and publicly accessible location:

1. The agenda for the general meeting;
2. The Annual Report;
3. A list of attendees from the fund who will be available to answer questions;
4. All the questions lodged with the fund (including those not answered); and
5. The answers that were provided to questions.

The FSC submits that this will provide a more meaningful outline and recount of the meeting that will be useful to consumers.

Independent Directors

A minimum standard of governance in the superannuation industry

The purpose of the reforms is to improve governance standards by introducing a proportion of directors who are genuinely independent and free of any conflicts of interest. This adds diversity to the trustee body in both composition and thought and could reduce the scope for potential conflicts (actual or perceived). The reforms are not intended to address particular failings in the industry but to ensure the industry as a whole is less prone to governance failings that may adversely affect consumers' retirement savings.

The FSC requires our members to appoint a majority of independent directors and an independent chair to their RSE boards. The FSC submits that this is the high water mark for corporate governance, as recognised by Labor's *Super System Review* (the Cooper Review) in 2010 and the FSI in 2014.

The appointment of independent directors on the boards of FSC fund members has resulted in the appointment of directors with a broad skill sets, and from a wide range of backgrounds, including:

1. Philanthropic causes, such as Australian Philanthropic Services, Autism Spectrum Australia, and local and regional arts centres;
2. Community groups, such as Bush Heritage Australia and Zoos Victoria;
3. Religious causes, such as a director from the Anglican Diocese and the Salvation Army; and

4. Unions and industry associations, such as AIST.

The FSC is proud of the diversity and representative nature of the boards of superannuation funds that are members of the FSC.

The *Superannuation Industry (Supervision) Act 1993* (SIS Act), however, does not currently require superannuation trustees to have any independent directors. As a result, the SIS Act does not effectively deal with a range of potential conflicts that arise in different types of superannuation funds, including retail, industry, corporate and public funds.

A requirement for a minimum of one-third independent directors is a long-overdue reform. It is critical that, in a mandatory superannuation system the judgement of at least one third of directors on superannuation boards are free of any potential conflicts of interest.

The minimum standard of governance provided for in the Bill will protect consumers in all superannuation funds – retail, industry, corporate and public - from circumstances where the judgement of non-independent directors may be influenced by the interests of a subset of the membership, a shareholder or a sponsoring organisation.

Arguments that the reforms are not necessary because funds with no independent directors have a track record of good investment performance misrepresent the purpose of the reforms. The focus of the reforms is governance and the behaviour of boards, and all superannuation funds, be they retail, industry, public or corporate funds, have the capacity to improve their governance process.

Recommendation: The Committee support these reforms as they create a minimum standard of governance to protect consumers from conflicts on all types of APRA-regulated super fund boards.

Super System Review

The Cooper Review of superannuation was conducted by the previous Labor Government in 2010 and argued in favour of requiring fund boards to have independent directors. The Cooper Review concluded "best practice in corporate governance includes the presence of independent directors on the board."[4]

The Cooper review concluded:

> The Panel believes that outsiders or 'non-associated' trustee-directors (that is, people who generally have no historic connection with the fund or the appointor) could help to provide an objective assessment of issues that would assist the employer and member representatives.

And

> The Panel believes that those trustee-directors have brought great value to the boards that they serve, a proposition borne out in several submissions."[5]

The Cooper review recommended that superannuation legislation be amended to require one third of equal representation boards should be independent directors.[6] This recommendation was not implemented by the then Government.

[4] Super System Review Final Report, Recommendation 2.8 at 55
[5] Ibit at 55 Super System Review Final Report, Recommendation 2.8 at 55
[6] Ibid, Recommendation 2.7 at 56

Financial System Inquiry

The FSI recommended in 2014 that all trustee boards, including both industry funds and retail funds, should be required to have a majority independent directors and an independent chair.

The FSI drew on overseas research that suggests "good governance adds one percentage point to pension fund returns." [7] The FSI concluded that:

> Including independent directors on boards is consistent with international best practice on corporate governance. Independent directors improve decision making by bringing an objective perspective to issues the board considers. They also hold other directors accountable for their conduct, particularly in relation to conflicts of interest.

The FSI examined the rationale for allowing different types of funds to have different board composition from other corporate entities and argued that there was not a strong case for ongoing special treatment of superannuation funds if the result was weaker standards of governance in the context of a mandatory $2 trillion superannuation system.

The FSI concluded that as fund members exercise choice, directors appointed by employer and employee groups are less likely to represent the membership of public offer funds. Given the diversity of membership, it is more important for directors to be independent, skilled and accountable than 'representative'.[8]

The FSI recommended "a majority of independent directors, with an independent chair, would strengthen the governance of superannuation funds."[9]

Independent directors will drive industry consolidation

A requirement for all superannuation funds to appoint independent directors and an independent chair to their boards will support merger activity and consolidation of the sector.

The current law does not ensure that conflicted directors, who may put the interests of their sponsoring organisation ahead of the interests of members, will more likely be held to account by genuinely independent directors. The case studies below demonstrate the absence of independent directors is a proven barrier to the merger of subscale and poorly performing superannuation funds.

Failed merger due to conflicts of interest

Energy Super and EquipSuper

Energy Super and EquipSuper were in discussions in 2016 to merge to create a $13 billion industry fund. Mergers reduce costs for consumers and improve net returns by achieving scale efficiencies.

The Energy Super board has ten directors, five of whom are union appointed directors. Energy Super has only one independent director, no independent chair, and the remaining directors are employer appointed directors.

[7] Financial System Inquiry Final Report, Chapter Two; Governance of Superannuation Funds
[8] Ibid
[9] Ibid

The Queensland branch of the Electrical Trades Union (ETU) has the right to appoint a director to the board of Energy Super. State Secretary of the ETU, Peter Simpson[10], is the ETU's nominated director to Energy Super.[11]

Leaked emails have shown that the ETU lobbied Queensland Energy Minister, the Hon Mark Bailey MP, who himself is a former member of the ETU. Mr Simpson argued the Queensland Government should prevent the merger from going ahead so as to protect the ETU's board position. In the emails, Mr Simpson raised concerns that unions might not have a guaranteed position on the board of the merged fund.[12]

Mr Simpson also chose to email Mr Bailey's private email address, rather than his official work email. Mr Bailey subsequently deleted the private email account, including all the emails from Mr Simpson, after his office became aware that media outlets had lodged FOI requests in relation to the email address.[13]

The merger was abandoned in January 2017; however Mr Bailey's actions were referred to the Queensland Crime and Corruption Commission that determined there was a "reasonable suspicion of corrupt conduct," however Mr Bailey has not been prosecuted.[14]

Energy Super and EquipSuper are not isolated examples

- The example of the failed merger between Energy Super and EquipSuper is, unfortunately, not an isolated example. Similar governance issues arose in relation to the failed mergers between EquipSuper and Vision Super. Sponsoring unions on the board of Vision Super were unable to agree on the number of board seats each union would receive in the merged entity, causing the merger to collapse.[15]
- Current CEO and former Chairperson of Industry Funds Services, Cath Bowtell, has similarly confirmed that some directors put their own interest ahead of the interests of fund members. "The self-interest of board members and executives wanting to keep their jobs was a common obstacle to funds merging, [Ms Bowtell] said." [16]

Successful EquipSuper Merger

EquipSuper recently completed a successful merger with corporate fund Rio Tinto Staff Superannuation Fund, creating a $14 billion fund. Chair or EquipSuper, Andrew Fairley recently supported independent directors on boards and argued that[17]:

> The superannuation sector is not operating in an environment that is completely transformed from the early 1990s. That was an era that predated the internet, mobile technologies and algorithm trading.
>
> Equipsuper undertook a skills analysis of its directors and concluded that under the model of having equal numbers of employer and employee representatives, the fund could not be assured of securing

[10] https://etu.org.au/your-union/etu-officers-and-staff/
[11] https://www.energysuper.com.au/why-join-us/about-our-fund/our-people/our-board
[12] *Minister under pressure over private emails*, The Australia, 18 January 2017
[13] *Palaszczuk stands by Bailey as LNP pushes 'pub test' rule*, The Australian, 4 March 2017
[14] *Mark Bailey stood down over email scandal after CCC finds 'reasonable suspicion of corrupt conduct'*, ABC, 19 July 2017
[15] *Vested interests to blame in merger collapse*, Sydney Morning Herald 28 May 2012
[16] *Default fund choice aired*, Australian Financial Review, 4 June 2015
[17] *Labor at risk of being seen as ideological*, Australian Financial Review, 25 September 2017

the necessary capabilities, skills, competencies and experience to enable better fund governance and thus the best possible outcomes for members.

As of July 1 this year, one-third of the fund's trustees are independent. The interests of members are too important to be compromised by limiting the pool of potential board members to selection from a narrow cohort of nominating bodies or the relative unpredictability of appointment by director elections.

Rice Warner Analysis

The FSC commissioned Rice Warner to model the benefits to consumers of fund mergers. Rice Warner concluded that consolidation of the industry would generate material cost reductions and reduce fees for consumers.[18]

Rice Warner's analysis shows that competition in the superannuation industry could result in average fees falling by 15 basis points, from 110 basis points to 95 basis points, should the proposed reforms drive scale so that all funds were over $5 billion.

Industry consolidation that drives the minimum fund size to $20 billion would result in average industry fees experiencing a 25 basis point reduction to 85 basis points.

Rice Warner shows that the more considerable the scale derived from competition, the greater the fee reductions for consumers.

Table 1. Expected reduction in fees as a result of the scale in the superannuation industry

Minimum Size ($b)	Number of APRA regulated funds 30 June 2014	Estimated Reduction in costs (bps)
1	97	9
2	78	11
5	48	15
10	28	20
20	14	25

Rice Warner also estimates that the reduction in fees would be significantly greater amongst small, subscale superannuation funds.

Members of small, inefficient superannuation funds managing under $1 billion currently pay, on average, 141 basis points per annum in fees; 31 basis points above the entire industry average. Consolidation of these inefficient superannuation funds would result in members paying fees of only 94 basis points; a substantial 47 basis point reduction.

[18] Rice Warner, *Superannuation Fees Report 2014*, page 15-21

Chant West Analysis

Similar analysis has been conducted by independent and ratings agency Chant West. Their research demonstrates that significant efficiencies and lower fees for consumers can be achieved in the default MySuper market through consolidation of subscale superannuation funds.

Chant West, for example, has publicly presented the following data:

MySuper fees – by size

Weighted average MySuper fees (% pa) on a $50k balance

Product Size	No. of Products	Admin. Fee (bps)	Invest. Fee (bps)	Total Fee (bps)	75% Within Range (bps)
> $10 b	16	26	60	86	72 – 110
> $5 b - < $10 b	13	46	57	103	84 – 121
< $5 b	87	46	59	105	81 – 123
Total	116	33	59	92	80 – 130

Chant West's analysis shows that consumers that are members of funds managing less than $5 billion under management are paying fees that are 19 basis points higher than members in funds managing over $10 billion.

Chant West also concluded that members of larger funds are receiving a higher quality of service for the lower fee, as well as greater exposure to more sophisticated and higher returning asset classes, such as direct infrastructure and private equity.

Chant West concluded that there were 87 funds under $5 billion in the superannuation industry and those consumers may be paying higher fees for a lower quality service.

FSC Analysis

FSC analysis of APRA data has reached similar conclusions regarding the importance of fund mergers to improve outcomes for consumers, particularly in the default MySuper market.

In our recent submission to the Productivity Commission, we demonstrated that an important issue facing consumers is the significant market presence of subscale and underperforming funds that are under no competitive pressure to consider merging:[19]

- There are 33 subscale funds listed in modern awards[20];

[19] FSC analysis of FWC modern award data and APRA superannuation performance data.

[20] Subscale funds are defined for this analysis as those that manage less than $10 billion, the level that industry researcher Chant West has used to demonstrate that, on average, smaller not-for-profit funds charge higher fees and produce lower returns than larger not-for-profit funds. It also excludes funds that are not members of Industry Super Australia (ISA) to demonstrate the significant underperformance of subscale funds that are hidden by the use of industry average figures.

- On average these funds manage $3.3 billion, although 10 manage a very small amount, less than $650 million each; and
- The subscale funds make up 153 modern award superannuation listings, which equate to 30.2% of all the award listings.

Collectively subscale funds manage $94 billion within 1.7 million consumer accounts. Subscale funds have a significant market presence, and present a major risk for superannuation consumers.

FSC analysis also shows the negative impact that subscale fund underperformance has on consumers. The average performance of the default 33 subscale funds is 4.50% per annum over ten years.[21]

The poor performance of subscale funds is clear when compared to other funds in the sector:

- Their performance is 0.64% lower than the average performance advertised by ISA funds;[22]
- Their performance is 0.80% lower than average 5.30% performance of all 'Growth' options in the market, including both industry and retail funds;[23] and
- Their performance is 1.4% per annum lower than the performance of the best performing MySuper products.[24]

The scope of underperformance is magnified when analysis focuses on the worst performing funds.

The weakest performing fund returned only 2.7% per annum over ten years, and whilst it manages less than $1 billion, it is listed in two modern awards.

Whilst it is sometimes unhelpful to use comparisons of default performance, given the relative recent implementation of the MySuper framework, this analysis demonstrates the scale of the underperformance issue concerning default products in the industrial system.

The performance gap between subscale funds and the best performing funds shows that a consumer could be over $170 000 worse off by retirement as a result of the current industrial system.[25]

Recommendation: The Committee support the requirement for independent directors and an independent chair to facilitate fund mergers and consolidation of the superannuation industry.

MySuper Outcomes Test and related APRA Powers

The FSC supports concept behind the new MySuper Outcomes Test as an important mechanism to ensure trustees act even more diligently in respect of members who may have defaulted their decisions to the trustee and, where beneficial, to drive consolidation of the superannuation industry.

This submission articulates the well understood issue of underperforming, sub-scale superannuation funds. The FSC supports APRA having the capacity to take action in relation to trustees that are unwilling, or unable, to act in the best interest of their members.

[21] APRA's ten year, whole of fund, performance data.
[22] Industry Super Australia published performance data, July 2017.
[23] Chant West 'Growth' category, ten year returns.
[24] The FSC used the average performance of the best three MySuper products.
[25] Analysis of the projected returns of a 31 year old with an income of $80 000, net of fees, using ASIC's Money Smart Superannuation Calculator.

MySuper products are designed for disengaged consumers so they should have strong consumer protections built in, at least equal to those engaged consumers who make informed decisions based on sound advice. The FSC therefore supports enhanced consumer protections and transparency around MySuper products.

The FSC notes, however, that the multiple references to the regulations in the Bill in relation to the Outcomes Test suggest that there is a significant level of detail to still be provided to Trustees. It should also be noted that a number of Trustees are likely to be completing their annual Scale Test at the same time the Bill may be passed and receive Royal Assent. An appropriate transition period should therefore be provided for Trustees to interpret the detail in the regulations before the commencement of the broader Outcomes Test takes effect. Therefore, the commencement for the Outcomes Test should be from 1 July 2018, rather than from Royal Assent.

The FSC also supports APRA's proposed extension of this regime to Choice products. APRA wrote to all RSE licensees on 11 August and provided[26]:

> "Beneficiaries of all products provided by an RSE licensee, not just MySuper products, are entitled to have confidence that the RSE licensee is continuing to deliver quality, value for money outcomes in their best interests…
>
> "To this end, APRA intends to consult on a proposal to require all RSE licensees to regularly assess whether the RSE licensee has provided, and is likely to continue to provide, quality, value for money outcomes for beneficiaries in all of its RSEs and products. The proposed assessment would include consideration of net investment returns, expenses and costs, insurance, and other benefits and services provided."

The FSC supports APRA's announcement, but notes that implementation across Choice products will be complex. We request that APRA takes a measured and consultative approach to application of the test to choice products to ensure that trustees and consumers are not subject to excess cost.

APRA Directions Powers

The FSC agrees that APRA should have broad powers to manage the superannuation industry through periods of genuine crisis. The proposed powers, which mirror APRA's oversight of ADIs and life insurance companies, do not recognise there are important distinctions between those types of companies and superannuation funds.

ADIs and life insurers manage shareholder capital, and can become insolvent, putting at risk creditors and the financial system more broadly. Superannuation funds, however, could sustain investment losses, but generally the risk to creditors and members is very low. The powers APRA is afforded should reflect these differences and be tailored to the problem that the regulator may be called upon to solve.

The FSC submits that administrative merits review of the use of its directions powers is not an adequate check on the substantial power APRA will be granted under these reforms. Further, we note that judicial review of an APRA decision under the new regime will be available, however, the powers given to APRA are extremely broad as are the circumstances in which they can be exercised. We feel that further steps should be introduced into the process so unnecessary litigation can be avoided and an objective measure or test applied.

[26] APRA letter to trustees: http://www.apra.gov.au/Super/Publications/Documents/110817Letter-RSELs-Op-Governance-proposals.pdf

The FSC recommends that a proportionality requirement be introduced to APRA's directions powers in relation to superannuation funds. In effect, APRA should be required to show how the direction it is issuing is proportionate to the risk to the fund and its consumers that APRA has identified in the crisis scenario.

In practice, if APRA is not able to readily justify how its action is proportionate there would be a strong argument that APRA has not conducted a sufficiently thorough assessment of the issue and its response.

The FSC also submits that if APRA is deciding to implement direction that would have a material impact on the fund and its consumers, APRA should be required to get Ministerial approval for such a direction. Given the very significant consequences of the issue by APRA of a direction, it is appropriate that such a step occur only with Ministerial approval.

RSE protections

The FSC submits that the protection from liability be amended to expressly apply to the RSE Licensee itself (a corporate RSE Licensee is not currently included in proposed section 131FC(1)(c)).

Given the consequence of not complying with a direction, and the current limitation to administrative merits review, we suggest that it is inappropriate to limit the protection to compliance with the direction being 'reasonable' (section 131FC(1)(b)) and recommend that the limitation on the protection be removed.

Portfolio Holdings Disclosure

The FSC supports a requirement on superannuation funds to disclose their portfolio holdings by allowing a consumer to 'click through' the fund website to the disclosure of underlying holdings by a fund manager. The FSC understands that the draft Bill broadly achieves this objective, however due to its complexity the implementation will require further consultation on Regulations.

In particular, the FSC supports early development of the regulations of 1017BB(1A) particularly as in some circumstances 1017BB(1)(c) could have the effect of either or both compromising intellectual property or price signalling affecting market values.

The 5% threshold and materiality provision

We support the inclusion of the 5% threshold as this should be sufficient for now to protect those assets where disclosure of the fund name or holdings is not permitted as a result of confidentiality undertakings (e.g. private equity assets). However, it would be useful to include some more definitive language around this provision.

This 5% may be at times exceeded in the future, as more alternative and commercially sensitive asset investments are entered into. This threshold should be monitored over time be amended when necessary in response to changes in industry practice.

The FSC recommends that RSE licensees could seek exemption from ASIC to provide relief (either Class Order or specific relief) in situations where the 5% threshold has been exceeded and, for example, the Private Equity or unlisted asset manager refuses to allow the fund details to be disclosed. Corresponding ASIC guidance on the circumstances that fall within such an exemption would also be useful. We note that ASIC has an exemption and modification power under section 10120F in Part 7.9 of the Corporations Act.

The Bill also provides that the details published must include the value and the weighting or exposure of each disclosable item. It is not clear whether this means whether a percentage or dollar amount disclosure is required. The FSC submits that disclosures should be at percentage level only as this would simplify implementation.

A dollar figure would also be less meaningful to consumers as it would force them to determine a funds' FUM to understand what proportion of their retirement savings is going towards a particular asset.

Materiality

We support the regulation-making power to prescribe a materiality threshold. An optional threshold (that is, RSEs may choose not to apply it) is important to assist RSEs in managing costs and reducing the potential for overwhelming disclosure particularly for small exposures.

Technical clarification

Clarification of the disclosure required for investments made through an associated entity or assets held by a downstream associated entity under a non-associated entity would be welcome.