ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

MODULE 5: SUPERANNUATION

POLICY SUBMISSIONS BY AUSTRALIANSUPER PTY LTD

A. Summary

1. These policy submissions are made by AustralianSuper Pty Ltd (**AustralianSuper**), as trustee and RSE licensee of the AustralianSuper superannuation fund (**Fund**), in relation to Module 5 of the Commission's hearings which concerned superannuation.

2. In these policy submissions, AustralianSuper responds to the questions raised in the following paragraphs of the section headed "Policy and General Questions" in the closing submissions of Counsel Assisting: [825.9], [825.10], [825.11], [825.12], [825.13], [825.14], [825.17], [825.18], [825.19], [825.20] and [825.24].

B. Engagement with Aboriginal and Torres Strait Islander people

[*825.9] Are the identification procedures used by superannuation funds appropriate for their Aboriginal and Torres Strait Islander members?*

(i) If those procedures are appropriate, are those identification procedures sufficiently understood and implemented by staff on the ground?

(ii) If those procedures are not appropriate, what should be changed?

3. In broad terms, the identification of Aboriginal and Torres Strait Islander people better facilitates the servicing of their superannuation needs. So far as AustralianSuper is aware, at present superannuation funds do not systematically identify Aboriginal and Torres Strait Islander people.

4. The superannuation needs of Aboriginal and Torres Strait Islander people viewed as a group warrant further careful investigation leading to reforms which cater to their particular needs as a group.

5. The reasons for identifying Aboriginal and Torres Strait Islander people fall into the following broad categories:

   a. to know where they live. AustralianSuper occasionally arranges visits to Aboriginal and Torres Strait Islander people in remote communities;

   b. to take steps to increase their financial literacy;

c. to be able to communicate with them more effectively. For example, AustralianSuper has call centre staff and insurance claims staff who are trained in engaging with Aboriginal and Torres Strait Islander members of the Fund; and

d. to facilitate the payment of benefits, particularly death, permanent incapacity and severe financial hardship benefits.

6. The Indigenous Superannuation Working Group convened by the Australian Institute of Superannuation Trustees has noted that Aboriginal and Torres Strait Islander people often emphasise a collective or relational character, in contrast to the non-Aboriginal and Torres Strait Islander emphasis on a stable individual identity and name. This is evident in the greater use of kinship names than individual names, and individuals having varying and multiple names throughout their life and in different circumstances. Names in many Aboriginal societies are also considered cultural property, often of particular groups, and restrictions on the sharing and use of these names are actively managed in everyday life. A common example is that after the death of a person, their name will not be spoken and those with the same or similar name will use an alternative name for some period. In addition to this, the unfamiliarity of Aboriginal languages to many other Australians, and occasional carelessness of others, means that Aboriginal names are often spelt incorrectly and not corroborated by the named person themselves.[1]

7. For many Aboriginal and Torres Strait Islander people, identification problems start at birth. Particularly with the older generation, births were not recorded in the official register resulting in no birth certificate being available. Many records are also inaccurate. The changing of names, and the incorrect recording of birth dates or spelling of names has also proved challenging for many Aboriginal and Torres Strait Islander people, leading to difficulties in proving their identity. Traditional marriages are also often not performed in accordance with Australia's marriage laws and are accordingly not registered. The same lack of registration can occur at the time of death where, if there is no funeral director, the actual step of registration can be missed.[2]

[1] Indigenous Superannuation Working Group, "Building better superannuation outcomes for Aboriginal and Torres Strait Islander people", February 2015, at http://www.aist.asn.au/media/14204/Indigenous%20Working%20Group%20-%20Discussion%20Paper.pdf.
[2] Ibid.

8. The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) recommends a flexible approach to the identification of Aboriginal and Torres Strait Islander people.[3]

9. AustralianSuper is currently developing a framework for identifying members of the Fund who are Aboriginal or Torres Strait Islander people that is consistent with the flexible approach recommended by AUSTRAC.

10. Any new legislative requirements will require definitions of "Aboriginal" and "Torres Strait Islander".[4]

[825.10] Should superannuation funds be required to record whether their members identify as Aboriginal or Torres Strait Islander people?

11. Yes, ideally for all members of a fund, but at least for new members joining the fund.

[825.11] Should those superannuation funds who do not currently permit the early release of superannuation on the basis of severe financial hardship do so?

12. Yes, severe financial hardship should be a mandated condition of release across all regulated superannuation funds other than self managed superannuation funds. At present, the trust deeds of some funds do not provide for the payment of a benefit when a member satisfies the severe financial hardship condition of release. As a consequence, some people move their superannuation from one fund to another just so that they can claim a severe financial hardship benefit.

13. "Severe financial hardship" is defined in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**).[5] AustralianSuper submits that the definition does not need to be changed.

14. The severe financial hardship condition of release is subject to the cashing restrictions specified in the SIS Regulations.[6] In the case of a person who has not reached their preservation age plus 39 weeks, the benefit is capped at $10,000 for each 12 month period. Based on its experience and its view that the preservation age for Aboriginal or Torres Strait Islander people should be lowered (see answer to the question at [825.12]), AustralianSuper submits that the present cap

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[3] At http://www.austrac.gov.au/aboriginal-andor-torres-strait-islander-people. AUSTRAC provides an example of the identification of a superannuation death benefit beneficiary of Aboriginal and/or Torres Strait Islander heritage.

[4] Perhaps the definitions of "Aboriginal person" and "Torres Strait Islander" in s 4(1) of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) could be incorporated by reference.

[5] SIS Regulations, reg 6.01(5).

[6] SIS Regulations, schedule 1, part 1, column 3 of the table (regulated superannuation funds); and part 2, column 3 of the table (approved deposit funds).

on severe financial hardship benefits is appropriate and does not need to be changed. (AustralianSuper does not oppose this matter being the subject of further investigation.) If the preservation age for Aboriginal and Torres Strait Islander people is lowered, this will somewhat ease the need for severe financial hardship benefits.

[825.12] Should the lower life expectancy of Aboriginal and Torres Strait Islander people be taken into account in the decision-making processes of superannuation funds when considering how to administer or release the funds of Aboriginal and Torres Strait Islander people? If so, how?

15. Given the shorter life expectancy and shorter working life expectancy of Aboriginal and Torres Strait Islander people as a group, the preservation ages for Aboriginal and Torres Strait Islander people should be lowered. This matter warrants further investigation. It is important that any reform have inbuilt flexibility, so that the preservation ages for Aboriginal and Torres Strait Islander people can again be raised in the event that life expectancy and working life expectancy increases. AustralianSuper suggests that APRA be charged with determining the appropriate preservation ages for Aboriginal and Torres Strait Islander people.

16. "Preservation age" is defined in the SIS Regulations.[7] AustralianSuper suggests that the definition be amended so that:

    a. in the case of an Aboriginal or Torres Strait Islander person who is a member of a "registrable superannuation entity"[8] – their preservation age is as determined by APRA; and

    b. in any other case – their preservation age is the same as in the current definition of "preservation age".

[825.13] Should the categories of person permitted by legislation to be the subject of a binding nomination be changed to reflect Aboriginal and Torres Strait Islander kinship structures? If so, how should the categories be broadened?

17. No changes to superannuation legislation are necessary.

18. The SIS Regulations limit the categories of persons to whom a superannuation death benefit can be paid. In the first instance, the benefit can only be paid to either or both of:

    a. the deceased member's legal personal representative; and

    b. one or more of the deceased member's "dependants" within the meaning of that term in the SIS Act.[9]

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[7] SIS Regulations, reg 6.01(2).
[8] "Registrable superannuation entity" is defined in s 10(1) of the SIS Act.
[9] SIS Regulations, reg 6.22(2).

19. The SIS Act defines "dependant" in the following terms:

> ***dependant***, in relation to a person, includes the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship.[10]

20. The use of the word "includes" rather than "means" indicates that the scope of the definition is not limited to the concepts of "spouse",[11] "child"[12] and a person who has an "interdependency relationship".[13] It is well established that "dependant" includes a financial dependant.[14]

21. It is also established that a person who is not a spouse, a child, an interdependant or a financial dependant may be a "dependant" (**dependency in the broader sense**). In *Edwards v Postsuper Pty Ltd*[15] the deceased member's parents claimed that they were dependants of the member.[16] It was accepted that they were dependants without being financially dependent on the member, although as it turned out they were given a nil share.[17]

22. Dependency in the broader sense is consistent with Aboriginal and Torres Strait Islander kinship structures. AustralianSuper recognises dependency in the broader sense. In distributing death benefits, AustralianSuper takes Aboriginal and Torres Strait Islander kinship structures into account.

23. AustralianSuper suggests that APRA issue a Superannuation Prudential Practice Guide explaining dependency in the broader sense and providing examples of how the concept can apply with respect to Aboriginal and Torres Strait Islander kinship structures. This would help promote a more consistent approach across the industry.

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[10] Definition of "dependant" in section 10(1) of the SIS Act. The Explanatory Memorandum to the *Superannuation Industry (Supervision) Bill 1993* (Cth) does not throw any light in the meaning of "dependant".
[11] "Spouse" is defined in section 10(1) of the SIS Act and section 2CA of the *Acts Interpretation Act 1901* (Cth).
[12] "Child" is defined in section 10(1) of the SIS Act. The meaning of "child is expanded by the definition of "spouse" in section 2CA of the *Acts Interpretation Act.*
[13] "Interdependency relationship" is defined in section 10A of the SIS Act and regulation 1.04AAAA of the SIS Regulations.
[14] See, for example, *Noel v Cook* [2004] FCA 479.
[15] Superannuation Complaints Tribunal determination D05-06\121 [2006] SCTA 7 (17 January 2006); on appeal *Edwards v Postsuper Pty Ltd* [2006] FCA 1380; on further appeal *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83.
[16] Leaving aside their assertions that were not accepted (ie that the member had provided them with regular financial support by contributing $50 per week towards their rent and paying their electricity and telephone bills), the parents established that: they and the member had been very close, and the member had provided them with emotional support; the member had spent a great deal of time with them (they said that the member had seen them daily); and the member had bought household items for them, and had given them the money for a car.
[17] The trustee's decision to pay 75% of the benefit to the member's de facto spouse and 25% of the benefit to the member's minor daughter was affirmed by the Superannuation Complaints Tribunal, the Federal Court and the Full Federal Court.

C. Discretion to appoint and remove directors

[825.14] Is it appropriate for shareholders of RSE Licensees to retain a broad discretion to appoint and remove directors? Or should there be an obligation imposed on shareholders to exercise such powers in the best interests of the members?

24. In relation to the first part of the question, in the superannuation industry there are two basic models for the appointment of directors.

25. Under the first and more prevalent model, the shareholders appoint the directors but the appointment only takes effect if the new director passes the board's vetting process and the board ratifies the appointment. (Alternatively, the shareholders nominate the directors who are appointed by the board if they pass the board's vetting process.) AustralianSuper follows this first model.[18]

26. Under the second and less prevalent model, the shareholders appoint the directors and the board either has no vetting rights or has limited vetting rights. NULIS Nominees (Australia) Limited is an example of an RSE licensee which follows this second model.[19]

27. AustralianSuper submits that the first model is to be preferred.

28. In relation to the first part of the question, a director of a corporate RSE licensee is already subject to an extensive range of duties. These duties include:

    a. the duties of directors under the general law. These duties include (among other duties) fiduciary duties[20] and a duty of care, skill and diligence;[21]

    b. duties imposed by ss 180 to 184 of the *Corporations Act 2001* (Cth); and

    c. duties imposed by ss 52A and 29VO of the SIS Act.

29. The *Corporations Act* requires a director:

    a. to "exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise" if they were a director of a corporation in the corporation's circumstances and occupied the same office and had the same responsibilities;[22]

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[18] Constitution of AustralianSuper Pty Ltd, 22 June 2018, rules 8.2 and 8.3, ASU.0013.0001.0013-0014.
[19] Constitution of NULIS Nominees (Australia) Limited, articles 9.3-9.5, at http://www.plum.com.au/content/dam/plum/pdf/forms%20and%20publications/NULIS_Consitution.pdf
[20] *Furs Ltd v Tomkies* (1936) 54 CLR 583,592 per Latham CJ.
[21] *Daniels (formerly practising as Deloitte Haskin & Sells) v Anderson* (1995) 37 NSWLR 438.
[22] *Corporations Act*, s 180(1).

b. to "exercise their powers and discharge their duties … in good faith in the best interests of the corporation" and "for a proper purpose";[23]

c. to "not improperly use their position to … gain an advantage for themselves or someone else" or to "cause detriment to the corporation";[24] and

d. to not improperly use information obtained as a director to "gain an advantage for themselves or someone else" or to "cause detriment to the corporation".[25]

30. Turning to the key duties imposed by the SIS Act, s 52A(2)(b) requires a director of a corporate RSE licensee to exercise, in relation to all matters affecting the superannuation entity, "the same degree of care, skill and diligence as a prudent superannuation entity director would exercise in relation to an entity where he or she is a director of the trustee of the entity and that trustee makes investments on behalf of the entity's beneficiaries".

31. Section 52A(2)(c) of the SIS Act requires a director of a corporate RSE licensee to "to perform the director's duties and exercise the director's powers as director of the corporate trustee in the best interests of the beneficiaries". The concept of acting in the best interests of the beneficiaries imports the fiduciary duty of undivided loyalty to the trust,[26] ie the superannuation fund. As a fiduciary must not act in a way that is inconsistent with the beneficiary's interests, except with the beneficiary's informed consent, [27] so a director of a corporate RSE licensee must not act in a way that is inconsistent with the interests of the beneficiaries of the fund, except with their informed consent.

32. The RSE licensee director's duty of loyalty to the beneficiaries of the fund must take priority over any duty or feeling of loyalty to the organisation which appointed or nominated the person as a director. In this sense, the terms "employer representative" and "member representative" in the SIS Act are misnomers and anomalous. The director's duty of loyalty to the beneficiaries of the fund is widely understood.

33. Section 52A(2)(d) of the SIS Act reinforces and extends this duty of loyalty to the beneficiaries of the fund. Section 52A(2)(d) requires a director of a corporate RSE licensee, in a conflict situation, "to give priority to the duties to and interests of the beneficiaries over the duties to

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[23] *Corporations Act*, s 181(1).
[24] *Corporations Act*, s 182(1).
[25] *Corporations Act*, s 183(1).
[26] *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* [2006] VSC 112; (2006) 15 VR 87 [107].
[27] *Bray v Ford* [1896] AC 44 at 51 per Lord Herschell.

and interests of other persons". This overrides any conflicting duties the director owes to any corporation under Part D of the *Corporations Act*: s 52A(3).

34. Taken together, ss 52A(2)(f) and 52(2)(c) of the SIS Act require a director of a corporate RSE licensee "to exercise a reasonable degree of care and diligence for the purposes of ensuring that the corporate trustee" exercises, in relation to all matters affecting the superannuation entity, "the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity".[28]

35. The SIS Act imposes additional obligations on a director of a corporate RSE licensee where the fund includes a MySuper product. Section 29VO(1) requires the director to "exercise a reasonable degree of care and diligence for the purposes of ensuring that the corporate trustee carries out the [additional] obligations referred to in section 29VN". The reference to "a reasonable degree of care and diligence" is a reference to "the degree of care and diligence that a superannuation entity director would exercise in the corporate trustee's circumstances", where a superannuation entity director is "a person whose profession, business or employment is or includes acting as director of a corporate trustee of a superannuation entity and investing money on behalf of beneficiaries of the superannuation entity".[29]

36. The corporate trustee's additional MySuper obligations specified in s 29VN include an obligation to "promote the financial interests of the beneficiaries of the fund who hold the MySuper product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes)".[30]

37. The duties of a director of a corporate RSE licensee as referred above are widely, although not universally, understood.

38. AustralianSuper submits that what is required in this area is not more legislation, but more enforcement of the existing law (and any changes to the law).

D. Managing conflicts

[825.17] Are there structures that raise inherent problems for a superannuation trustee being able to comply with its fiduciary duties. For example, where a trustee is a dual-regulated entity, that would seem to raise an inherent conflict of interest, or the potential of a conflict of interest. Are there other

[28] Section 52(3) imposes a professional standard on the superannuation trustee, by providing that in this context "a superannuation trustee is a person whose profession, business or employment is or includes acting as a trustee of a superannuation entity and investing money on behalf of beneficiaries of the superannuation entity".
[29] SIS Act, s 29VO(2) and (3).
[30] SIS Act, s 29VN(a).

structures such as investment of funds in insurance policies issued by related party insurers or the integration of a superannuation trustee into an advice business that also raise inherent problems? Is it possible to say that these conflicts are ever manageable?

39. The investment of superannuation moneys into, or through, related entities of the trustee is always problematic in circumstances where either:

    a. the operation of the fund is expected to produce a return for the shareholders of the trustee; or

    b. the related entity is chosen otherwise than as the result of a competitive process.

[825.18] If certain structures do raise inherent problems, is structural change of entities, mandated by legislation or otherwise, something that is desirable?

40. AustralianSuper submits that in the case of a for-profit organisation which operates a superannuation entity, neither the organisation itself nor a related entity should be permitted to be the trustee of the superannuation entity.

41. Apart from this proposed reform, there is already enough law in this area.

42. An RSE licensee is already subject to an extensive range of duties. These duties include:

    a. trustee duties under the general law. These duties include (among other duties) fiduciary duties[31] and a duty of care, skill and diligence to the standard of a professional trustee;[32]

    b. the trustee covenants in s 52 of the SIS Act. These include covenants:

        i. to exercise care, skill and diligence to the standard of a professional superannuation trustee;[33]

        ii. to act in the best interests of beneficiaries;[34]

        iii. to giving priority to the duties to, and the interests of, beneficiaries;[35] and

    c. the additional MySuper duties in s 29VN of the SIS Act. These include a duty to promote the financial interests of the MySuper members of the fund.[36]

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[31] *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223.
[32] *Bartlett v Barclays Trust Co Ltd (No 1)* [1980] Ch 515.
[33] SIS Act, s 52(2)(b) and (3).
[34] SIS Act, s 52(2)(c).
[35] SIS Act, s 52(2)(d).
[36] SIS Act, s 29VN(a).

43. AustralianSuper submits that what is required in this area is more enforcement of the existing law (and any changes to the law).

[825.19] Would it be preferable to extend the obligation to act in the best interests of members of a superannuation fund so that:

(i) contravention of the obligation attracts a civil penalty; and

(ii) the obligation (and the civil penalty for breach) extends to shareholders of trustees and any related bodies corporate (within the meaning of the Corporations Act) of the trustee in respect of any conduct that will affect the interests of the members of the superannuation fund?

44. AustralianSuper submits that a contravention by an RSE licensee of the covenant in s 52(2)(c) of the SIS Act to act in the best interests of the beneficiaries of the superannuation entity should attract a civil penalty in cases where the contravention involves intentional serious misconduct. Being knowingly concerned in a contravention should also attract a civil penalty. It should be made clear that this can catch directors and shareholders of a corporate RSE licensee and also related bodies corporate (within the meaning of the *Corporations Act*). AustralianSuper does not oppose the imposition of criminal penalties in cases where the contravention is reckless or intentionally dishonest.[37]

[825.20] Are there unforeseen consequences of such a legislative intervention that would make it undesirable to strengthen the SIS Act in this way?

45. Increasing the potential exposure to liability of directors of a corporate RSE licensee may make potential directors more circumspect about taking on the role. Directors of RSE licensees should be paid commensurately with their responsibilities and potential exposure to liability.

E. System changes

[825.24] Are there other system changes that might be appropriately tailored responses to misconduct or conduct falling below community standards and expectations of superannuation trustees? If so, what are the general parameters for such a system change?

46. AustralianSuper submits that:

a. consistently underperforming superannuation entities should be compelled to merge into other superannuation entities;

[37] This proposed test draws on s 184(1) of the *Corporations Act*.

b. RSE licensees who engage in serious misconduct should have their RSE licence cancelled;[38] and

c. in the case of a for-profit organisation which operates a superannuation entity, neither the organisation itself nor a related entity should be permitted to be the trustee of the superannuation entity.

The SIS Act should be amended to the extent necessary to facilitate these measures.

47. In relation to points (a) and (b), forced mergers of superannuation entities should happen where members' interests are not being adequately served, such as where a fund is consistently underperforming or in cases of serious misconduct by an RSE licensee. An effective and efficient method of transferring the members of the affected fund to the fiduciary care of a different trustee is needed.

48. APRA should be given additional powers to facilitate the merger of superannuation entities, including powers to:

a. direct an RSE licensee to cooperate in a process for the tender and transfer of a superannuation entity of which the RSE licensee is trustee, to another RSE licensee.

b. invite other RSE licensees to tender for the acquisition of the superannuation entity from the first RSE licensee; and

c. approve the transfer of the superannuation entity from the first RSE licensee to another RSE licensee. APRA could be given voluntary and compulsory transfer powers similar in some respects to the transfer powers it presently has under the *Financial Sector (Transfer and Restructure) Act 1999* (Cth) in respect of banking business, life insurance business and (general) insurance business.

49. AustralianSuper envisages that APRA would exercise these transfer powers when:

a. APRA is satisfied that the transfer is appropriate, having regard to the interests of the beneficiaries of the *transferor* entity when viewed as a group; *and*

b. APRA is satisfied that the transfer is appropriate, having regard to the interests of the beneficiaries of the *transferee* entity when viewed as a group.[39]

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[38] APRA can cancel an RSE licence under s 29G of the SIS Act. In the case of an RSE licensee that is also an Australian financial services licensee, the effect of s 29GA(1) is that APRA must consult with ASIC before cancelling the RSE licence.

[39] This broadly follows the approach in the *Financial Sector (Transfer and Restructure) Act.* A more stringent test based on the best interests of beneficiaries would not be appropriate.

50. The introduction of the annual "no disadvantage" test[40] as part of the 2012-13 Stronger Super reforms was intended to promote the merger of superannuation funds. That objective has not been achieved to the desired extent. It is now time for APRA, as the relevant regulator, to be given compulsory transfer powers which can be used where members' interests are not being adequately served, such as where a fund is consistently underperforming or in cases of serious misconduct by an RSE licensee.

DATED: 21 September 2018

[40] SIS Act, s 29VN(b).