Equal Representation: governing for members

ISA SUBMISSION: THE TRUSTEE ARRANGEMENTS BILL

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Industry Super Australia

ABOUT INDUSTRY SUPER AUSTRALIA

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GOVERNING FOR MEMBERS

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KEY POINTS

- In the two years since the Government last wasted Commonwealth resources attacking industry super funds by introducing its heavy-handed governance legislation, the six largest financial institutions in Australia (and their subsidiaries, related entities and aligned advisors) have paid approximately $480,000,000 in refunds and compensation to customers as a result of admitted or alleged misconduct. They are all overseen by boards with a majority of independent directors – the kind of directors that the Bill seeks to impose on not-for-profit superannuation funds.
- Rather than reform the governance of these institutions, the Bill would abolish the equal representation model of super fund governance. This model has, for over 30 years, ensured that not-for-profit funds deliver higher average net returns to members than retail funds. It has also ensured that not-for-profit funds have remained free of the numerous scandals that have plagued the banks and the superannuation funds they own.
- Since the bill was last before the parliament representative trustees have proved their worth delivering an *increase* in investment outperformance over all time periods relative to retail funds that embrace majority independent directors. Far from diminishing in value the empirical evidence shows representative trustees are integral to superior member outcomes.
- Industry super funds support boards that comprise directors who all share a strong commitment to protecting and advancing the interests of members above all else, and who take seriously their duty to members and the public to act ethically and honestly when managing the money of others.
- All directors of superannuation funds should (i) owe their first and only loyalty to members over shareholders and parent corporations, (ii) be entirely independent from fund management, (iii) be free of conflicts of interest that are likely to result in harm to members, and (iv) always apply independent critical judgement when deciding how members' money should be invested and spent.
- This is why industry super funds strongly support the equal representation model of fund governance.
- If implemented, the measures contained in the Bill will impose additional costs on members and substantially undermine a key pillar of the not-for-profit superannuation industry. At risk is the distinctive culture and ethos of service to others that defines not-for-profit superannuation and which has helped to deliver superior returns to members.
- The arguments in support of the Bill set out in the Explanatory Memorandum are embarrassingly weak assertions. The idea that a legislated quota of independent directors will improve governance – even though every scandal-plagued entity in the finance sector has a majority of independent directors – lacks credibility. The idea that international best practice of pension fund governance involves independent directors does not survive even a few minutes of research: the best pension systems in the world have funds that are not-for-profit and follow the equal representation model.
- The government has offered no evidence that the equal representation rules disadvantage members in any way. Nor has the government offered any evidence that its heavy-handed mandatory governance rules will improve member benefits. Where boards of not-for-profit funds believe that appointing independent directors will benefit members, they have already made such appointments. In short, there is no problem to be solved.
- There is no evidence that requiring independent directors on the boards of financial institutions benefits customers. The biggest financial corporations in Australia all have boards that comprise a majority of independent directors – and yet most have been engulfed in scandals as a result of admitted or alleged

breaches of law relating to activities such as fraud and deception, money laundering, anti-competitive conduct, and charging customers for services they did not want or receive.

- The evidence is that what matters in the governance of superannuation funds is not the number of independent directors but the commitment of directors to serving the interests of members. That commitment has been repeatedly proven to be lacking in retail funds. However, it is alive and well on boards where representative directors work for members – not shareholders.
- The Explanatory Memorandum claims the Bill would secure greater consistency with ASX standards. However, the ASX standards enjoy broad support because they are a flexible principles-based approach to governance that allows boards to tailor their membership according to circumstance, materiality and business needs. In contrast, the current Bill will insist that certain classes of individuals cannot serve as directors of superannuation funds. The Bill departs from the ASX's flexible and principles-based approach because this Bill is not about improving governance, but is instead about creating quotas and prescriptive regulation to help finance-sector insiders break into not-for-profit super funds.
- The Bill's rigid, prescriptive approach departs from the learned view of Justice Owen expressed in the HIH Royal Commission final report, which dealt extensively with governance:

  > 'Any attempt to impose governance systems or structures that are overly prescriptive or specific is fraught with danger. By its very nature, corporate governance is not something in which one size fits all.'

- The academic literature regarding board composition, and the incidence of independent directors, and company or fund performance actually show the Bill is bad policy. For example:
  - A study looking at the governance and performance of APRA-regulated funds found no evidence that board independence and chairman independence affect funds' performance.[1]
  - APRA papers demonstrate the outperformance of not-for-profit funds which are almost exclusively governed by representative trustees.[2]
  - The McKell Institute found a direct and strong relationship between the representative boards and the higher returns delivered by the not-for-profit sector.[3]
  - The Grattan Institute has found that these not-for-profit funds have lower fees and higher returns across a variety of investment options.[4]
- The review of not-for-profit super fund governance by Mr Bernie Fraser did not recommend mandatory independent director requirements.

The equal representation model of board composition is the superior model in the Australian superannuation industry. The proposed Bill places that model at risk and the changes it seeks are not justified by evidence.

ISA recommends that the Committee reject the Bill.

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[1] Liu, K., 2014, Governance and Performance of Private Pension Funds: Australian evidence, School of Risk and Actuarial Studies, University of New South Wales, Australia http://papers.ssrn.com.ezlibproxy.unisa.edu.au/sol3/papers.cfm?abstract_id=2484380

[2] See Coleman, A., Esho, N. and Wong, M., 'The investment performance of Australian superannuation funds', *APRA Working Paper*, APRA, 2003, Ellis, K., Tobin, A. and Tracey, B. 'Investment Performance, Asset Allocation, and Expenses of Large Superannuation Funds', *APRA Working Paper*, APRA, October 2008, Sy, W. & Liu, K., 'Investment performance ranking of superannuation' APRA Working Paper, APRA 2009 and Australian Prudential Regulatory Authority, *Response to Submissions - Fund level disclosure from the APRA superannuation statistics collection*, APRA, 2009.

[3] McKell Institute, The Success of Representative Governance on Superannuation Boards (2014)

[4] Grattan Institute, *Super Savings*, April 2015, p 20-22

1. Introduction

Industry super funds support strong and effective governance arrangements that promote a strong culture of ethical behaviour, accountability, risk management and transparency.

That is why industry super funds were vocal supporters of the enhanced governance requirements introduced through the Stronger Super reforms dealing with directors' fitness, skill and expertise, and enhancing policies around the management of conflicts of interest, transparency, risk management and board renewal.

Good governance is about much more than who sits at the board table.

However, boards matter.

Getting the right people around the board table - properly motivated and with the right mix of courage, curiosity, scepticism, skills, experience and values - is integral to good governance.

The representative trustee model of governance that is found in the not-for-profit superannuation sector has a strong track record of getting this right. Not-for-profit funds have a strong record of being governed by boards comprised of people from diverse backgrounds united by their strong belief that superannuation funds should be run only to benefit members and have a single focus on advancing members' best interest.

The proof is in the pudding, with industry funds outperforming bank owned retail funds by 2 per cent over the ten years to June 2016[5], while avoiding the scandals that have plagued the for-profit financial services sector.

The boards of industry funds and other not-for-profit funds resisted the siren-song of complex financial products that were catalysts of the Global Financial Crisis.

Using the power of Government to imposition a new model of governance on the not-for-profit sector that has consistently outperformed its peers lacks credibility. It is even more difficult to justify changes to industry super funds while leaving largely unchanged the model that has underperformed and has been ineffective at preventing widespread misconduct.

ISA does not oppose funds making good use of independent directors when they are needed.

Many independent directors (in both the non-representative and non-associated sense) make significant contributions to the boards on which they serve, and we support measures that ensure equal representation funds and their sponsors have the flexibility they need to respond to the different challenges they face, while retaining the integrity of the representative trustee model.

If the government insists on a uniform model of governance, it would be sensible to retain the strengths of the equal representation model and extend the requirement for member representatives to all boards.

Consistent with our member-only focus, we support efforts to ensure that directors are free from conflicts of interest when performing their fund role. We support the separation of the board from management, and we support efforts to encourage critical thinking in our superannuation fund boardrooms, including by drawing directors from outside the finance sector and from a diverse pool of candidates.

However, the approach adopted in this draft Bill will not strengthen the governance of superannuation funds. It is misdirected, imposes rigid and inflexible regulation, intrudes into the private affairs of a

[5] ISA analysis of APRA fund level net-return data, published February 2017.

corporation without a rational or compelling basis, and will undermine the representative trustee system. It will not achieve the policy outcomes it purports to desire.

ISA opposes the Bill on the following grounds:

- Not-for-profit funds, governed by boards that operate under the existing equal representation rules, on average deliver higher net returns to members than retail funds, many of whom have boards comprising a majority of directors who are independent.
- Not-for-profit funds are free from the scandals that have become closely associated with the big banks and the superannuation funds they own. Equal representation governance acts to ensure that not-for-profit funds act responsibly, ethically and solely in the interests of members. The proposed Bill places the superior model of equal representation governance at risk.
- There is no evidence that equal representation governance is disadvantaging members of not-for-profit funds and that mandating independent directors is required. In short, in the not-for-profit superannuation sector there is no problem to be solved.
- Where not-for-profit funds believe that appointing independent directors and chairs to boards will be beneficial to members, they have already done so.
- What matters in board governance is independence from fund management and 'independence of mind.' This already exists in not-for-profit funds were no directors are also members of fund management. Across the retail fund sector, however, many fund directors are also employed by the corporation that owns the fund, or are directors at affiliated entities in the same corporate group. The Bill does not require the same standard of independence in the retail sector that already operates in the not-for-profit sector.
- The governance of pension funds around the world varies. In many countries it is left to funds to decide how best to structure their boards. In the best pension systems in the world, such as those in Denmark and the Netherlands, nearly all funds have equal representation of employers and employees.

In short, the equal representation model of board composition is the superior model in the Australian superannuation industry. The proposed Bill places that model at risk and the changes it seeks are not justified by evidence.

ISA recommends that the Committee reject the Bill.

2. The Bill attacks the best model of fund governance

If passed, the proposed Bill will place at risk the best performing model of fund governance in the superannuation industry: the equal representation model. This model is responsible for governing the most trusted part of the Australian financial services industry: not-for-profit superannuation.[6]

In this context the equal representation model plays a number of vital and distinctive roles:

- It places key decisions about how funds treat members in the hands of those who have no interest other than those of members: representatives of employees and employers.
- Representative directors are drawn from a diverse range of backgrounds, institutions and workplaces where they have experience of advocating for employees and fund members. When they are not

[6] Survey research by Essential Media for ISA earlier this year showed that only 31 per cent of respondents trusted the banks in relation to superannuation, compared to 69 per cent who trusted not-for-profit industry super funds.

attending board meetings many work as air traffic controllers, engineers, firefighters, and public servants. As such, they bring a distinctive set of skills and experiences to a financial industry that has become notorious for being led by like-minded career financiers who routinely place the interests of shareholders over those of ordinary workers and consumers.

- Unlike many directors of retail funds, representative directors do not owe a conflicting loyalty to the interests of shareholders and the corporations that own retail funds.
- Equal representation governance is a vital component of the not-for-profit business model. The not-for-profit model means that all profits go to members. It also means not-for-profit funds negotiate with external suppliers to get the best deal for members. This is in contrast to retail funds which exist to generate profits for the corporations (such as the banks) which own them. Retail funds generally pay more for external services – particularly where those services are provided by other entities within the same corporate group. Being governed by representative directors whose first and only loyalty is to fund members helps to ensure that funds remain not-for-profit.

We will expand on these points later in this submission.

The proposed Bill will substantially dilute the role and influence of representative directors. In place of carefully selecting directors who are appropriate to governing a not-for-profit fund, boards will be compelled to fulfil a quota – regardless of the quality of available candidates and their view of the not-for-profit model.

Recent research has confirmed that those who become career independent directors in Australia are drawn from a very narrow set of occupations:

> '…independent directors of major Australian companies are drawn predominantly from narrow occupational and industry backgrounds. Over 70 per cent of the sample are current or former CEOs or directors, and of these, over 60 per cent are drawn from just two industry groupings: banking, finance and financial services; and resources.
>
> The low proportions drawn from engineering and manufacturing should be of particular concern given the national imperative to promote innovation in order for Australian industry to remain globally competitive.'[7]

An examination of the independent directors of the trustees of bank-owned super funds shows even more clearly that "independent director" often means "finance sector insider". Indeed, of the 20 independent directors on these boards, 19 of them worked extensively in the finance sector prior to becoming a director.

If not-for-profit funds are required to appoint new independent directors under the proposed quota system, it is very likely they will have to recruit from this narrow group – reproducing the elite and unrepresentative nature of independent directors across corporate Australia within not-for-profit superannuation.

This will increasingly erode the distinctive and superior nature of not-for-profit funds and how they work for members. The risk is they will come to resemble the retail funds that they currently outperform; increasingly run by financial industry insiders who view superannuation as just another financial product that should become a source of profits for shareholders and bonuses for themselves – at the expense of benefits to members.

[7] http://www.regnan.com.au/research-report-independent-directors-and-board-diversity

2.1 The importance of member and employer voices in fund governance

Members and employers are represented on the boards of pension funds across OECD countries, and there is broad agreement that their input is integral to strong governance.

This is true in Australia as well. Research conducted by UMR has found that 67 per cent of Australians believe it is important that super funds are run by people who have a direct connection to the people in those funds, such as representatives of fund members and employers.[8]

A voice for employers is also important, particularly for default members where employers have assumed the rights of members to select the fund, and in the case of defined benefit funds where the employers take the investment risks on behalf of the members.

3. The case for change has not been made, and research contradicts the Government's position

A striking feature of the Explanatory Memorandum distributed by the Minister in support of the Bill is the lack of evidence that the equal representation model of governance is failing members of not-for-profit funds, and that imposing a minimum proportion of independent directors on these funds has therefore become essential.

There is no mention of the fact that not-for-profit funds with equal representation boards on average deliver higher net returns to their members than retail funds which have a majority of directors who are formally 'independent.'

There is no mention of the fact that when it comes to scandals and misbehaviour in the Australian financial industry, it is often companies that have a majority of directors who are independent that are implicated. For example:

- The majority of the directors of the Commonwealth Bank of Australia are independent. However earlier this year Austrac, the regulator responsible for policing anti-money laundering and counter-terrorism financing, filed a lawsuit claiming the CBA had breached anti-money laundering laws on 53,700 occasions since 2012.
- The majority of the directors of Westpac are independent. However in 2015, following surveillance by ASIC, Westpac offered to refund premiums to 10,600 insurance customers who paid for insurance cover they did not need. Customers were charged for loan protection insurance when they did not have a loan and did not intend to be covered.
- The majority of the directors of ANZ are independent. However, in 2016 the Federal Court imposed a penalty of $9 million on the bank after it admitted that it engaged in 10 instances of attempted cartel conduct in contravention of the Competition and Consumer Act 2010.
- The majority of the directors of NULIS Nominees (NAB's superannuation trustee) are independent. However, in February this year ASIC required NAB's superannuation trustee to repay approximately $34.7 million (excluding interest) after members were charged fees for financial advice they did not receive. At the same time, ASIC confirmed that NULIS has processed a number of members' insurance claims incorrectly, resulting in $1.6 million of claims being underpaid or declined.

[8] UMR survey for ISA (2015)

In addition to recounting these widely reported cases, ISA has undertaken a detailed analysis of the refunds and compensation payments made by Australia's largest banking and insurance institutions and their related entities in the past two years.

In just the past two years, these institutions (including their subsidiaries, related entities and aligned advisors) have paid approximately **$480,000,000** in refunds and compensation payments because of admitted or alleged misconduct.

All these large institutions (ANZ, CBA, NAB, Westpac, AMP and Macquarie) are governed by boards that comprise a majority of independent directors.

In terms of board membership, these are the institutions that the Government believes not-for-profit superannuation funds should more closely resemble.

In addition to the NULIS (i.e., NAB) case outlined above, further specific examples of scandals involving retail superannuation funds owned by banks are detailed below. All are very recent or current cases that demonstrate, yet again, why the mere presence of independent directors on boards has not resulted in good quality governance in the interests of members.

Table 1 – Examples of recent scandals involving bank-owned retail funds

Bank & Fund	Scandal
ANZ fund: OnePath Custodians Pty Limited	ANZ to pay a further $10.5 million to 160,000 superannuation customers for breaches within the OnePath group between 2013 and 2016 mainly in relation to incorrect processing of superannuation contributions and for failing to deal with lost inactive member balances correctly.[9]
ANZ fund: OnePath Custodians Pty Limited	ANZ engaged PriceWaterhouse Coopers to independently review ANZ's OnePath subsidiaries' compliance functions at the request of ASIC in 2016. ASIC sought the review after the ANZ Group reported a significant number of breaches to ASIC in relation to its life, general insurance, superannuation and funds management activities. For example: 1,422 superannuation fund members had $28.7 million in contributions allocated to the incorrect super account of the member for a period of up to 12 months. ANZ has returned these funds to the correct amounts and provided over $400,000 in compensation for lost earnings and/or incorrect fees.[10]

[9] ASIC, 17-266MR ANZ pays further $10.5 million to consumers for OnePath breach, 10 August 2017.

[10] ASIC, 16-069MR Independent compliance review of ANZ's OnePath following breaches resulting in compensation of approximately $4.5 million, 15 March 2016.

CBA fund: Colonial First State Investments Limited	CBA is in discussions with ASIC over the regulator's concerns that it may have given personal rather than general advice to customers during the sale of its Essential Super product.[11]
Westpac fund: BT Funds Management Limited & Westpac Securities Investment Limited	ASIC has taken action in the Federal Court of Australia against Westpac Securities Investment Limited (WSAL) and BT Funds Management Limited (BTFM) for their telephone sales campaigns to superannuation fund members, and a number of contraventions. According to ASIC, both WSAL and BTFM: • Provided personal financial product advice to customers, recommending them to "roll out of their other superannuation funds into Westpac-related superannuation accounts" • Were not permitted to provide personal financial product advice under their AFSLs. • Did not comply with the "best interest" duty under the FoFA rules • Did not undertake a proper comparison of superannuation funds as required by law.[12]

Source: ISA, sources cited in footnotes.

The Explanatory Memorandum does not reflect on this experience and discuss why having large numbers of independent directors has not prevented some of the largest financial institutions in Australia from routinely engaging in activity that has harmed consumers and undermined public trust.

The answer is that simply being 'independent' in a formal legal/regulatory sense does not necessarily mean anything for how directors conduct themselves and the extent to which they hold executives to account.

It is therefore not surprising that in the context of superannuation there is no evidence that independent directors result in better fund performance.

3.1.1 What does the research show?

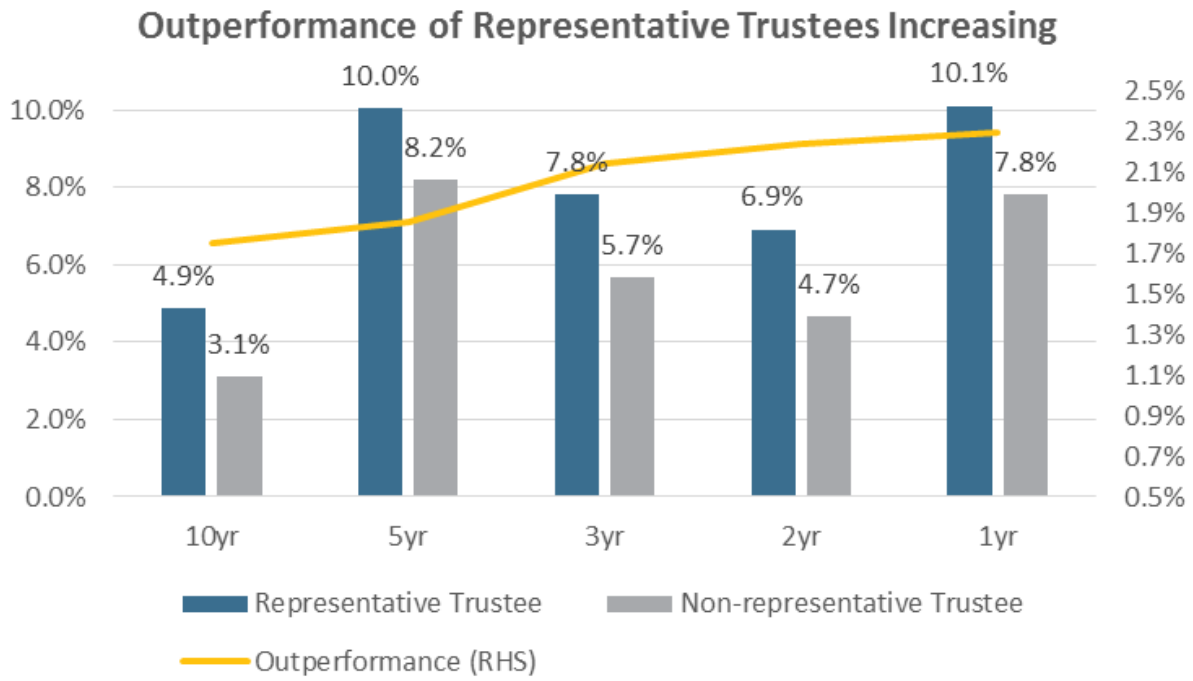
APRA statistics clearly show that super funds with representative trustee boards have materially higher average net performance compared to super funds with non-representative trustee boards over the short, medium and long term (Figure 1).

Notably the differences in performance between funds which utilise representative trustee boards and those which don't has been increasing – suggesting the importance and impact of the equal representation model to member outcomes is increasing rather than diminishing.

[11] Stephen Letts, Commonwealth Bank's ongoing systemic failures: But wait there's more, *ABC News*, 15 August 2017, http://mobile.abc.net.au/news/2017-08-15/cba-updates-settlements-with-clients-and-employees/8805872

[12] ASIC, 16-460MR ASIC takes action against Westpac entities in relation to the 'best interests duty' and superannuation customers, 22 December 2016, http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-460mr-asic-takes-action-against-westpac-entities-in-relation-to-the-best-interests-duty-and-superannuation-customers/.

Figure 1 - Rolling average returns by trustee structure (% p.a)



Source: ISA analysis of *APRA Quarterly Performance Statistics June 2017*. Weighted average returns over various periods are calculated for not for profit industry, public and corporate sectors that utilise representative trustees compared to retail sector that utilises non-representative trustees.

Since the governance bill was last before the Parliament in 2015 the difference in rolling three year net returns has increased from 1.9 percent per annum to 2.1 percent per annum. The widening gap may well explain the heightened lobbying efforts of the retail super sector to undermine the representative trustee model and impose quotas of 'independent directors' that have presided over poorer returns of their funds.

Turning to the academic literature regarding board composition, and the incidence of independent directors, and company or fund performance also indicates the Bill is bad policy.[13] In summary:

- A study looking at the governance and performance of APRA-regulated funds found no evidence that board independence and chairman independence affect funds' performance.[14]
- Empirical research on US public pension funds indicates that the proportion of "outside" trustees on the board has no significant relationship with funds' excess outperformance.[15]

[13] For example: Industry Super Australia, *In members' best interests: ISA submission to government discussion paper*, February 2014, http://www.industrysuperaustralia.com/assets/Submission/120214-ISA-Submission-Governance.pdf

[14] Liu, K., 2014, Governance and Performance of Private Pension Funds: Australian evidence, School of Risk and Actuarial Studies, University of New South Wales, Australia http://papers.ssrn.com.ezlibproxy.unisa.edu.au/sol3/papers.cfm?abstract_id=2484380

[15] Harper, J., 2008, Board of Trustee Composition and Investment Performance of US Public Pension Plans. International Centre for Pension Management

- Studies undertaken by international and Australian academics show that the introduction of majority independent arrangements on company boards either add limited or negative value to boards.[16]

However, there is evidence of a strong relationship between the representative trustee model and the outperformance of the not-for-profit sector over the for-profit sector. For example:

- APRA has published a series of working papers demonstrating the outperformance of not-for-profit funds which are almost exclusively governed by representative trustees.[17]
- The McKell Institute found a direct and strong relationship between the representative boards and the higher returns delivered by the not-for-profit sector.[18]
- The Grattan Institute has found that these not-for-profit funds have lower fees and higher returns across a variety of investment options.[19]

There is also significant evidence that points to structural governance issues in the retail sector where boards more closely resemble the governance model favoured by the draft Bill.

For example, an APRA research paper found that service providers to retail funds are much more likely to be owned by the same parent company as the fund, and they are more likely to be paid above market rates. In comparison, the not for profit funds were more likely to pay market rates to related parties for services.[20]

The Explanatory Memorandum does not engage with any of this evidence to make its case.

Instead it largely relies on two sets of arguments: (i) the Cooper Review of superannuation in 2010 and the Murray Inquiry into the Financial System in 2014 both supported mandating independent directors to the boards of not-for-profit funds, and (ii) there is an international consensus that requiring independent directors is an essential reform to corporate governance, and so not-for-profit funds in Australia are out-of-step.

In short, the Explanatory Memorandum claims, mandating independent directors is merely about implementing what past reviews have recommended and what everyone else in the corporate world is already doing.

Both arguments are deeply flawed.

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[16] See Lawrence, Jeffrey, and Stapledon, Geoff, 'Do Independent Directors Add Value?', Centre for Corporate Law and Securities Regulation Faculty of Law The University of Melbourne 1999; Tung, Frederick, 'The Puzzle of Independent Directors: New Learning', *Boston University Law Review*, Vol. 91, No. 3, pages 1175-1190, May 2011; Fischer Marc-Oliver and Swan Peter L, 'Does Board Independence Improve Firm Performance? Outcome of a Quasi-Natural Experiment', Australian School of Business, University of NSW 18 November 2013; Koerniadi, Hardjo and Tourani-Rad, Alireza, 'Does Board Independence Matter? Evidence from New Zealand', *Australasian Accounting, Business and Finance Journal*, 6(2), 2012, 3-18; Jeremy Leibler, 'Let's drop independence obsession', *The Australian* October 16, 2013.

[17] See Coleman, A., Esho, N. and Wong, M., 'The investment performance of Australian superannuation funds', *APRA Working Paper*, APRA, 2003, Ellis, K., Tobin, A. and Tracey, B. 'Investment Performance, Asset Allocation, and Expenses of Large Superannuation Funds', *APRA Working Paper*, APRA, October 2008, Sy, W. & Liu, K., 'Investment performance ranking of superannuation' APRA Working Paper, APRA 2009 and Australian Prudential Regulatory Authority, *Response to Submissions - Fund level disclosure from the APRA superannuation statistics collection*, APRA, 2009.

[18] McKell Institute, The Success of Representative Governance on Superannuation Boards (2014)

[19] Grattan Institute, *Super Savings*, April 2015, p 20-22

[20] Kevin Liu and Bruce R Arnold, 'Australian Superannuation Outsourcing – Fees, Related Parties and Concentrated Markets', *APRA Working Paper*, 12 July 2010

3.2 Cooper and Murray on independent directors

In 2010 the Cooper Review of the superannuation system recommended that the SIS Act be amended to the effect that no less than one-third of the total number of member representative trustee-directors, and no less than one-third of employer representative trustee-directors, should be 'non-associated' i.e. independent.

This recommendation flowed from the Cooper Review panel's assertion that such a requirement reflected 'contemporary best practice in corporate governance.'[21] However, the Cooper Review Final Report did not offer or discuss any evidence that equal representation governance was inconsistent with the best interests of members and therefore required change. Nor did the Report consider any of the evidence and debate generated by researchers in corporate governance which questions the extent the extent to which independent directors actually deliver better performance and governance in practice (some of which has been cited and discussed in this submission).

Furthermore, during consultations with the superannuation industry prior to the publication of its Final Report, the Cooper Review Panel did not state that it was considering recommending mandating directors to the boards of not-for-profit funds. So not only did the Panel not engage with the academic research on the role of independent directors in corporate governance, it did not even solicit views and evidence from the superannuation industry itself on this issue.

In the absence of academic or industry-generated evidence the Cooper Review opted for assertion based on what it chose to regard as 'best practice.' Given the lack of an evidence-base to support the Cooper Review's recommendation, it is not surprising that the then-government decided not to implement it.

A similar approach was taken by Financial System Inquiry led by David Murray. The Murray Inquiry's Final Report recommended the government should mandate that the majority of directors of public offer funds be independent.

However, when discussing the rationale for this recommendation the Final Report stated:

> '…there is little empirical evidence about the relationship between quality of governance in Australian superannuation funds and their performance…Some overseas research suggests that good governance adds one percentage point to pension fund returns.'[22]

There are two problems with this line of argument.

Firstly, as this submission has made clear, there is evidence that equal representation governance is strongly associated with superior performance. The Murray Inquiry chose to ignore it.

Secondly, it is correct that good governance can improve pension fund returns. But the research cited in the Murray Inquiry Final Report does not attribute higher returns to *independent directors*. Rather it highlights factors such as commitment to the purpose of the fund, high levels of trust, and good-quality strategic planning.[23]

The Productivity Commission has taken a very different approach to that adopted by Cooper and Murray.

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[21] Super System Review (2010) Final Report: Part One Overview and Recommendations, p. 12.

[22] Financial System Inquiry Final Report, p. 133

[23] The Final Report cites Ambachtsheer, K. P. (2007) *Pension Revolution: a solution to the pensions crisis*, John Wiley & Sons. A more detailed account of the research and statistical approach taken to assessing the quality of fund governance is in Ambachtsheer, K. et al (2006) *Pension Fund Governance Today: Strengths, Weaknesses and Opportunities for Improvement*, Working Paper, Rotman International Centre for Pension Management.

As part of the Commission's inquiry into the selection of default funds to be listed in modern awards, it considered the issue of fund governance and the composition of boards. However, rather than engage in the kind of evidence-free assertion that characterised Cooper and Murray on this issue, the Commission reached a more sober and balanced conclusion:

> '…there is a lack of compelling evidence to suggest that any one model of board structure should be viewed as clearly preferable in all cases. Therefore, the Commission does not consider it appropriate at this time for a particular structure to be mandated. Further, the Commission would not want to see restrictions placed on board structures without such restrictions having a sufficient evidentiary basis'[24]

Since the Commission reached this conclusion no body of evidence has emerged to support mandating independent directors on not-for-profit funds.

3.3 International practice

The Explanatory Memorandum further attempts to advocate for the Bill by suggesting that there is a global consensus in favour of mandating independent directors in corporate governance. In this context, the Australian superannuation industry is pictured as having 'fallen behind.' The current Bill is therefore simply about making sure that the governance of superannuation funds in Australia is at least as good as everywhere else.[25]

This is simply wrong. As shown below, the most highly-regarded pension systems have funds with equal representation governance, just like the best funds in Australia.

To the extent that some public regulators and institutions assumed that imposing a majority of independent directors on companies (not pension funds) would safeguard shareholders and the public from poor corporate behaviour, such assumptions were shattered by the Global Financial Crisis in 2007/08. Nearly all the financial institutions responsible for excessive risk-taking, deceiving regulators and miss-selling to customers were governed by boards that comprised a majority of independent directors.

Dr Wolf-Georg Ringe, Professor of International Commercial Law at Oxford University, has reflected on the impact of the financial crisis on what he calls 'the system' of corporate governance that had assumed the superiority of requiring independent directors:

> 'The 2007-08 global financial crisis has highlighted serious shortcomings in the system. Independent directors have in no way prevented firms' excessive risk taking; further, they have sometimes shown serious deficits in understanding the business they were supposed to control, and have remained very passive in addressing structural problems – in short, it is clear now that there were severe shortcomings and that boards can have 'too much' independence.
>
> A closer look reveals that under the surface of seemingly unanimous consensus about independence in Western jurisdictions, a surprising disharmony prevails about the justification, extent and purpose of independence requirements.'[26]

In fact, despite pre-2007 enthusiam among some for mandating independent directors, the rules that applied to pension funds in different countries varied widely. They continue to vary widely today.

Table 2 illustrates some of the enduring diversity in fund governance.

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[24] Productivity Commission, *Default Superannuation Funds in Modern Awards Inquiry Report*, No. 60, 5 October 2012, p 102

[25] See, for example, the Explanatory Memorandum, para 1.8.

[26] Ringe, W-G (2013) 'Independent Directors: After the Crisis', *European Business Organisation Law Review*, Vol. 14.

Table 2 shows that different countries take different approaches to how pension funds should be governed at board level. Some countries require no employee representation at all. Others require equal representation.

In short, and despite the strong impression given in parts of the Explanatory Memorandum, the governance of pension funds around the world has not seen a prevailing trend toward requiring independent directors.

It should be noted that two of the countries that require equal representation, Denmark and the Netherlands, are widely regarded as having the best retirement income systems in the world. The Melbourne-Mercer Global Pensions Index has repeatedly ranked the Danish and Dutch systems as the top two, describing each as a 'first class and robust retirement income system that delivers good benefits, is sustainable and has a high level of integrity.'[27]

Table 2 – Rules for pension fund board membership in selected OECD countries

Country	Rules for pension fund board membership
Belgium	The board of directors of a pension fund must have equal representation of employers and employees
Denmark	The board of directors of a pension fund must have equal representation of employers and employees
Germany	On fund supervisory boards employee representation depends on the number of employees in the pension fund, with a maximum of equal representation.
Ireland	No requirement for employee representation
Japan	The Board of Representatives of Employee Pension Funds must have equal representation of employers and employees
Mexico	No requirement for employee representation
Netherlands	The board of the pension fund must have equal representation of employers and employees
Sweden	The board of the pension foundation must have equal representation of employers and employees
Switzerland	The supreme council of a pension fund must have equal representation of employers and employees
United States	No requirements for single-employer funds. Multi-employer (Taft-Hartley) funds must have equal representation of employers and employees

Source: OECD; ISA.

In Denmark and the Netherlands nearly all pension funds are operated on a not-for-profit basis and are governed jointly by the representatives of the industrial parties. Their success derives from their shared

[27] The 2016 Melbourne-Mercer report is at: https://www.globalpensionindex.com/wp-content/uploads/MMGPI2016-Report.pdf

culture and values rooted in the belief that pension funds should be soley committed to helping deliver the best retirement incomes possible – not have those incomes drained by paying dividends to shareholders.

Central to fulfilling this commitment is the not-for-profit model, one which is policied and reinforced by having funds governed – not by career independent directors drawn from for-profit banking and finance – but by directors whose only concern is to benefit and protect fund members.

In terms of board membership Australia should be seeking to emulate the best funds in the world, not dillute a model that has been proven to work best for fund members.

4. Government prescription is not appropriate for governance

Board performance involves a complex set of relationships that do not lend themselves to prescriptive regulation. Yet the regulatory approach adopted in the Bill would hard-code board composition through a quota, and a definition of independence into law.

This approach was strongly rejected by the Royal Commission into the collapse of HIH Insurance when Mr Justice Owen concluded:

> 'Any attempt to impose governance systems or structures that are overly prescriptive or specific is fraught with danger. By its very nature, corporate governance is not something in which one size fits all.'

Until now, the avoidance of prescriptive approaches has been maintained, even in the face of true scandals.

The original impetus for independent directors arose after the Enron, Worldcom and other scandals in listed companies in the early part of this century.

These scandals were characterised by boards dominated by chief executives and management. That is, indeed, a problem.

However, long before Enron became a household name, industry super fund boards of directors did not -- and never have -- had members of management on the board.

In the wake of HIH, Enron, Worldcom and the other scandals in listed companies in the early 2000s, the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations followed the guidance of Justice Owen in the HIH Royal Commission, and took the position that there is little value in a checklist approach to corporate governance that does not focus on the particular needs, strengths and weaknesses of the company.[28]

The Australian Institute of Company Directors has previously submitted to the Senate Committee on Finance and Administration:

> 'As a general proposition we are of the view that mandated standards of corporate governance result in a "one size fits all" approach which should be avoided wherever possible. Appointments to boards need to be made on the business needs of an organisation, including the skills and abilities that needs to be represented on its board.'[29]

[28] http://www.asx.com.au/regulation/corporate-governance-council.htm

[29] AICD, 2015 Submission to Senate Finance and Administration Committee inquiry into the Australian Government Boards (Gender Balanced Representation) Bill 2015

Moreover, in the wake of the GFC, where entities with a majority of independent and (apparently) highly qualified directors behaved irresponsibly and devastated economies, and in the face of weak evidence about the relevance of independent directors to listed company performance (and evidence that pension funds with equal representation outperform), the push for independent directors has weakened further.

Yet, the Government's proposed measures depart from settled approaches to governance regulation. ASX corporate governance standards have been accepted because they are flexible and recognise that one-size doesn't fit every entity. In short, prescription is not appropriate.

The non-prescriptive approach that characterises the ASX model enjoys broad support. The present Bill's radical departure from this approach is a clear indication that it is designed primarily to attack and weaken equal representation rather than merely 'to align governance more closely with the corporate governance principles applicable to ASX listed companies' as the Explanatory Memorandum claims.[30]

The ASX principles do not include a definition of relationships that give rise to a loss of independence, but rather provide examples of interests, positions, associations and relationships that may raise doubts about independence and therefore require consideration.

This approach recognises that a relationship that could create a conflict of interest in one context might not in another (or could even be beneficial in a different context). For example, a relationship with a substantial shareholder of the RSE licensee raises very different considerations where that shareholder demands profit, compared to where the trustee is not expected to and does not provide a profit to the shareholder.

And, importantly, under the 'if not, why not' approach, the ASX principles provide that if an entity considers a recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it tempered by the requirement of public disclosure of the rationale for this choice, so that its shareholders, academics and others can evaluate it.

This recognises that the company and its stakeholders – not the Government – are best placed to understand the context within which board composition decisions are made, including the skills, experience, character and other qualifications being sought, as well as the available candidates.

In stark contrast, the Bill provides no opportunity for trustees to consider whether meeting each of the obligations in the Act is consistent with the best interests of members.

The proposed Bill is inconsistent with the principles-based approach which is the hallmark of modern regulatory practice and which is particularly suited to the regulation of trustees whose primary obligations are determined by the fiduciary relationship and the SIS covenants.

5. The proposed measures will be ineffective

Independence is not an end in itself. The Explanatory Memorandum claims that mandating independence will help to secure certain outcomes that will be of benefit to all superannuation fund members. It is claimed that the Bill will:

- Secure more diverse boards
- Curtail the influence of conflicted directors
- Secure greater consistency with ASX standards

However, the Bill will not achieve any of these objectives.

[30] Explanatory Memorandum, para 3.9.

5.1 The Bill will not enhance diversity

There is nothing in the Bill that requires boards to broaden the skills or experience of directors. While the provisions of the Bill rule certain classes of person ineligible to serve as an independent director, they do not prohibit people with similar background, experience or training from serving as independent directors.

This is particularly relevant to the retail fund sector, where directors are frequently recruited from established networks of people with very similar occupational backgrounds and worldviews.

In contrast, the boards of not-for-profit funds already comprise directors from genuinely diverse backgrounds as employers and employees – construction workers and accountants, teachers and engineers, and many more – all of whom have direct connections with members of the funds they govern.

By compelling funds to remove some of these people from boards, in favour of directors who are very likely to share similar backgrounds to those of fund executives, the Bill will make boards less diverse and less independent from fund management.

5.2 The Bill will not curtail the influence of conflicted directors

It is widely agreed that directors should be free from any interest and any business or other relationship which could, or could reasonably be perceived to, materially interfere with their ability to act in the best interests of the fund.

However, this Bill will not ensure that directors are free from material conflicts.

If the Bill is passed, up to two-thirds of an RSE board can still be comprised of people with a material conflict of interest sitting as non-independent directors.

By sanctioning the establishment of boards dominated by individuals who owe a material competing duty, the Bill sends a signal that these arrangements are consistent with high standards of governance, and flies in the face of the expectations established by APRA in respect to the management of conflicts.

It is not currently uncommon in retail settings for individuals to sit as independent directors across multiple entities, and be classified as independent directors.

This may occur where the executive of an entity with the same corporate parent as the RSE (a sibling of the RSE Licensee), even if where a substantial portion of the person's remuneration is linked to the success of the corporate parent, giving rise to an incentive to prioritise the success of the parent over the interest of the members.

It may also occur where a director holds multiple directorships on the boards of sibling entities within a conglomerate, including serving as an independent director on the RSE Licensee. It is also not uncommon in these circumstances for the director's fees to be paid by the corporate parent – in effect their livelihood is wholly drawn from a single corporate parent.

5.3 The Bill will not secure consistency with the ASX standards

A key objective of the Bill, according to the Explanatory Memorandum, is to secure greater consistency with ASX corporate governance arrangements.

However, the Bill does not do this.

There are three significant distinguishing features between the ASX Principles and the current proposal.

First, unlike the current Bill, the ASX guidelines do not rule certain classes of persons as independent or not independent. Instead, the guidelines list interests, positions, associations and relationships that a board

should consider in assessing whether a person could act in the best interest of the corporation. It is left to the board to make the final decision as to a person's eligibility to serve as an independent director, having regard to all the facts.

Second, unlike the current Bill, in each case the materiality of the interest, position, association or relationship needs to be considered. The Bill rules out certain classes of persons from being independent, regardless of materiality.

Finally, ASX listed companies have the flexibility to depart from the guidelines where that is determined to be in the best interests of the corporation, provided that they explain their reasons for doing so.

These are significant differences. And they are not accidental. This is because the actual aim of the Bill is not to improve super fund governance in line with ASX rules, but to dismantle the equal representation model of governance.

6. The proposed measures are unnecessary

APRA's Prudential Standards constitute a robust regulatory regime to address concerns about board composition, board performance and managing conflicts of interests. The Prudential Standards include requirements that each RSE licensee:

- Has a risk management framework that covers governance risk.
- Undertakes regular external assessments of board performance and of the performance of individual directors.
- Has a formal board renewal policy.
- Ensures that directors, collectively, have the necessary skills, knowledge and experience.
- Has a robust conflicts management policies and processes.

In respect to the skills required of directors, RSE licensees must, amongst other things:

- Clearly define the competencies required of the director role.
- Consider competence, character, diligence, experience, honesty, integrity, judgment, education or technical qualifications, knowledge and skills.
- Consider whether the person has a conflict in performing director duties, or, if they do have a conflict, whether it would be prudent to conclude that this conflict will not create a material risk that the person will fail to perform their director duties properly.
- Conduct annual fit and proper assessments in relation to each director, including the making of reasonable enquiries to obtain relevant information.
- Take reasonable steps to assist APRA to conduct its own fit and proper assessment of directors.

Each RSE licensee must have a robust conflicts management framework. This must be reviewed annually by the trustee and then comprehensively every three years by an independent expert.

APRA can apply to the Federal Court to disqualify a person from being a director of a trustee of a superannuation entity where the Court is satisfied the person has engaged in serious contraventions, or is satisfied a person is not otherwise fit and proper.

These Standards provide APRA with a numerous points to engage with RSE Licensees where the regulator identifies concerns about the composition of boards.

6.1 The Fraser Review

In 2015 AIST and ISA asked Bernie Fraser, former Reserve Bank Governor and Treasury Secretary, to review the governance of not-for-profit superannuation funds for the purpose of proposing a new best practice Governance Code for the not-for-profit sector.

Earlier this year Mr Fraser delivered his report. He found that there was not a good case for imposing a mandatory quota of independent directors on not-for-profit funds. The most important sources of good governance lay not in rigid definitions of 'independence', but in directors' values, skills and expertise.

In short, commitment to the values of not-for-profit superannuation, and commitment to the interests of members above all else, were most important in determining the behaviour of directors and boards.

Following extensive consultation with regulators, international governance experts and consumer groups, Mr Fraser concluded that the sector would benefit from a new mandatory code of conduct that would take funds beyond current regulatory requirements to reflect best practice governance for representative trustee boards.

The Review made the following key recommendations:

- Develop the AIST Fund Governance Framework for Not-For-Profit Superannuation Funds into mandatory code effective from July 1 2017.
- Formalise director appointment standards to ensure new appointments have the appropriate culture and values and skills for strong oversight.
- Improve professional, educational, cultural and gender board diversity.
- Continue to operate under a majority representative trustee structure and clarify that all directors are independent of management; and the chair is the best candidate as determined by the board.
- Improve accountability to members on governance issues through regular two way communication via annual general meetings or fund briefings.

The recommendations made by Mr Fraser are now being discussed across the not-for-profit sector with a view to finalising a new mandatory principles-based governance code to commence in 2018.

The Fraser Review initiative further underlines the unnecessary nature of the measures proposed in the present Bill.

7. The proposed measures are costly

Good law making not only requires an evidence base, it requires that the benefits of any reform justify the costs. The Government proposal fails this test.

7.1 The benefits are not quantified

First, the government has made no attempt to quantify the purported benefits of its reforms. Instead the Government asserts that independence in superannuation funds is 'key to improving governance in the

superannuation system, this improving member outcomes.'[31] However, it cannot support this claim, and admits that 'the full benefit…will only be identified over the longer term.'[32]

7.2 Indirect costs are not quantified

Second, the Regulatory Impact Statement (RIS) focuses solely upon the direct costs of the reforms, and fails to take into account indirect costs. These costs are difficult to quantify with precision, but are the consequence of a loss of cultural alignment within not-for-profit funds.

Mandating changes to the composition of superannuation trustee boards creates a number of risks, which over time may have a significant impact on the retirement outcomes of superannuation members. It would be a reckless assumption that the strong outperformance of the representative trustee system will be preserved under a new governance model.

Research on US public pension plans indicates that board composition has an effect on asset allocation and funding levels of US pension plans. Specifically the research suggests independent directors possess different investment beliefs and risk appetites than representative directors. Significantly the research found a higher proportion of representative directors (and by implication a lower proportion of outside independent directors) had 'a positive effect on funding levels of the pension plans and are more focused on a stable, sustainable plan to provide future benefits.'[33]

The clear alignment between member interest and the objectives of the employer associations and unions that nominate representative directors has underpinned the high ethical standards and culture of accountability that prevail in the representative trustee sector. There is a risk that finance sector norms will be imported into the not-for-profit sector, undermining the member-first culture of the boards, leading to 'group think' and homogeneity rather than diversity around the board table.

7.3 The Government's estimate is too low

Third, the Government's assessment of direct costs is unrealistic and understates these costs. The estimate is flawed because it (i) ignores the inevitable upward pressure on director fees that will occur with the appointment of a large number of directors (ii) does not consider the costs that retail funds will bear in implementing the charges; and (iii) makes no provision for knock-on costs arising from the need to restructure the boards of subsidiaries of funds.

The Government estimates the cost of compliance is $70 million in the first five years. Further, after this five year period, costs of $12.3 million per year will continue to apply on an ongoing basis.

This is the same estimate made by the Government in relation to the 2015 Trustee Governance Bill. In relation to the first draft of the 2015 Bill we estimated that the direct costs of the reforms was likely to be between $89 million and $168 million.

A copy of our estimates from that time is included with this submission as an Attachment.

Our estimates are higher than the Government's because we made provision for the upward pressure on director remuneration that will inevitably occur with the appointment of large numbers of new

[31] Explanatory Memorandum, para 3.26

[32] Explanatory Memorandum, para 3.74

[33] Harper, J., 2008, Board of Trustee Composition and Investment Performance of US Public Pension Plans. International Centre for Pension Management

independent directors, and we have taken into account the costs that retail funds will bear in developing transition plans. The Government has made no provision for these costs.

These costs will be borne by members – a further drain on members' retirement incomes that is being imposed only because the Government is fixated with dismantling equal representation boards.

8. Additional problems with the Bill

Our primary reasons for opposing the Bill have been discussed above. Here we wish to comment on several further important problems with the Bill.

8.1 The best person should be Chair

The Bill would require that the Chair of the boards of all RSE Licensees meet the definition of an independent director, apparently reflecting the pivotal role of the chair.

ISA does not underestimate the important role that Chairs play in leading an effective organisation. The fund Chair drives strategy, ensures high ethical standards and a culture of accountability, leads the board in evaluation and renewal, liaises regularly with management, and builds relationships with key external entities and persons.

However, boards should be at liberty to select the best person for this role.

There is no reason or evidence to justify the belief that directors who do not meet the proposed definition of an independent director are less qualified to perform the role of Chair than a director who does meet the definition.

There are a number of highly regarded independent Chairs of large industry funds will not meet the new definition of independent, and will no longer qualify for their role.

8.2 The rights of shareholders should be respected

The Bill would require that the appointment and removal of independent directors comply with any relevant prudential standards. We agree that APRA should be satisfied that a trustee is a competent trustee, and that shareholders or other bodies with nominating rights must appoint directors capable of diligently performing their role. However, prescribing a structural definition of independence that certain directors must meet impinges on the rights of shareholders to nominate the board of the companies that they own. It will also impinge on contractual relationships between directors and shareholders. In the absence of evidence of failure, lawmakers should not seek to encroach on traditional rights.

8.3 Related bodies corporate in a not-for-profit environment

In not-for-profit funds it is common for directors to serve on the boards of wholly or partly owned entities, to ensure that those entities act in the interests of the fund. The Bill would require funds to identify and nominate replacement directors on these subsidiary boards, or to substantially reorganise their operating model.

These subsidiaries operate solely for the benefit of trustee, and ultimately the fund beneficiaries. They provide both material services, such as administration services[34] or investment management services [35] and non-material services [36] such as financial planning services to fund members. [37] Some of the subsidiaries are established to hold assets on behalf of the fund in a separate structure for risk-management, tax, insurance or other reasons.[38]

For efficiency and governance reasons, some or all of the directors of the trustee also serve as directors of the subsidiary.

These entities generally serve no other clients than the RSE Licensee, and ISA understands that any operating profit is reflected in the value carried by the RSE parent and, ultimately, in fund members' accounts. The interests of the subsidiary and of the parent are completely aligned, and it is hard to see how any conflict of interest arises in these instances, as all duties are ultimately owed to the same beneficiaries.

There is no obvious policy rationale to preclude a director serving concurrently on the board of the RSE and of the subsidiary and retaining his or her standing as an independent director.

Indeed, there are strong governance grounds to permit such dual appointments. It is common for fund directors to be appointed to the board of these subsidiaries to ensure board oversight of the subsidiary entity, and provide a check on management powers. To implement this provision unamended would be to diminish rather than enhance the governance arrangements within the RSE.

8.4 Joint ventures and collective vehicles

Industry super funds have collectively established entities to provide services to the funds, leveraging scale, skill and cash to efficiently provide services to fund members. The constitutions of some of these collectively owned entities confer a right on the funds to appoint directors to the board of the collective entities, and this role is traditionally performed by one of the directors of the fund.

There are clearly material differences between the governance issues that arise in respect of related bodies corporate in the not-for-profit and for-profit context.

Where a not-for-profit fund establishes a related entity to provide services to it - either alone or as a joint venture – the service provider is akin to a business unit within the fund whose sole purpose is to support the objectives of the fund (or funds). Multiple directorships in this case do not generate conflicts, as the only purpose of the entity is to deliver value to the funds and their members.

The difference between this and the appointment of a director or executive officer of a related body corporate that is established to make a profit could not be clearer. In that case, their duty to promote the commercial success of the service provider is in conflict with the interests of the beneficiaries.

Directors appointed to the boards of these entities in the not-for-profit sector provide a crucial link between the funds and the collectively-owned service providers, ensuring control by the trustees over the quality and pricing of the services provided to it by the service provider. These alliances operate as joint ventures serving the collectively agreed needs of their joint owners rather than any external shareholders.

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[34] For example UniSuper Management Pty Ltd is a wholly owned subsidiary of UniSuper Limited

[35] For example Cbus Property Pty Ltd is wholly owned by Cbus

[36] Energy Super has appointed its wholly owned subsidiary ESI Financial Services Pty Ltd (ESIFS) to provide Energy Super's contact centre operations, financial advisory services and member education services,

[37] First State Super Financial Services Pty Ltd is a wholly owned subsidiary providing financial planning services to First State Super members

[38] For example, HOST-Plus Property Pty Ltd and Host-Plus Investments Pty Ltd

This is not to argue that these arrangements do not give rise to conflicts, but rather that the conflicts are manageable and that application of a blanket rule would reduce the efficiency of these entities, to the detriment of members. Indeed, APRA research has found that, on average, not-for-profit funds relying on these related party service providers pay market rates for the services provided. This suggests that not-for-profit boards have managed the conflict effectively, ensuring fund members'' interests are paramount.

This is in contrast to the for-profit sector, where APRA has found retail trustees pay significantly higher fees to related party service providers.[39]

8.5 APRA's powers to determine 'independent judgement'

The Bill would confer upon APRA the power to determine that an individual is or is not independent for the purpose of compliance with the Act.

The test that APRA applies is not whether the person meets the statutory definition, but whether the person is capable of exercising independent judgement.

The Explanatory Memorandum suggests APRA will be afforded these powers to cater for 'situations where a person's circumstances and their capacity to exercise independent judgement is clear but for reasons such as timing, restructures and mergers and acquisitions.'[40]

It goes on to claim these powers would be used 'where a person's circumstances mean they do not meet the independence requirements, but that they are considered to be capable of exercising independent judgement.'[41]

That is, it allows APRA to consider all of the circumstances, and ignore the statutory test where it makes sense to do so. The existence of these provisions highlights the inherent problem with the rigid statutory definition of independence proposed by the Bill. They provide a 'workaround' to a problem that could be readily avoided through non-prescriptive, principles based regulation.

These powers are far in excess of the powers that APRA enjoys in respect to banks and insurers, where boards self-assess whether directors meet the test of independence, and APRA's capacity to determine independence is activated only where the board is in doubt and refers the matter to APRA.[42]

No reason is offered for this differential treatment.

It is hard to understand the grounds on which APRA – who is unlikely to be in possession of all of the facts – could override the trustee's judgement about an individual's capacity to perform their role with independence. We note that the legislation does not provide for the trustee to be notified that APRA intends to make a determination, nor provide for a right to be heard.

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[39] APRA, Working Paper - *Australian superannuation outsourcing – fees, related parties and concentrated markets*, Kevin Liu and Bruce R Arnold, 2010 & APRA, Working Paper - *Superannuation and insurance: Related parties and member cost*, Kevin Liu and Bruce R Arnold, 2012

[40] Explanatory Memorandum, para 2.65

[41] Explanatory Memorandum, para 2.67

[42] APRA, Prudential Standard CPS 510 (paragraph 25 & 26)

ATTACHMENT – REGULATORY IMPACT ANALYSIS

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1. Executive Summary

The proposed *Superannuation Legislation Amendment (Governance) Bill 2015* requires a number of changes to fund governance. In meeting these changes funds will incur a number of costs that for not-for-profit funds, will be ultimately born by their members.

These costs relate to higher director fees for both replacement and additional directors who meet the proposed definition of independence, additional recruitment and training costs, and administrative and legal costs.

The total implementation cost over the first five years of reform is estimated to be between $89 and $168 million.

The reform will impact an estimated 101 not-for-profit funds (corporate, industry and public sector funds), with secondary costs impacting 147 retail funds.

The most significant and costly change is an estimated increase in the number of non-chair independent directors of 57 per cent, and an estimated increase in number of independent chairs of 35 per cent across all superannuation sectors, including retail.

This estimate of implementation cost does not include the very likely consequence that the proposed changes will result in lower net returns given that the funds impacted most significantly (corporate, industry and public sector funds) have achieved consistently higher net returns for their members over the last 17 years, as compared to the funds less impacted by the proposed changes.

Against this estimate of direct compliance costs associated with these proposed changes, absolutely no evidence has been presented in the explanatory material released so far to demonstrate that the proposed changes will result in benefits to members.

2. Introduction

Australia's superannuation system manages the retirement savings of over 13 million people. The pool of savings is currently just over $2 trillion in total assets.

The majority of these savings, $1.2 trillion, are in funds regulated by the Australian Prudential Regulatory Authority (APRA). The majority of these assets, $715 million, are in turn managed by funds that are governed by representative trustees.

Representative trustee funds are defined by their governance structure in which employer and employee representatives are equally represented on the trustee board. These funds include corporate funds, industry funds and public sector funds.[43] In legislation they are referred to as standard employer-sponsored superannuation funds.

Over the last 10 years, funds governed by representative trustees have outperformed funds governed under the alternative governance structure (retail funds) by on average two per cent per annum.[44] Retail funds are governed by trustees that reflect the governance models of the major banks (often their parent companies) and other publicly listed companies.

Under current legislation funds operating under the representative model are able to appoint one director who is neither an employer or employee representative, i.e. an "independent director" under current

[43] Some public sector superannuation schemes are not regulated by APRA but rather under their own specific legislation.

[44] APRA, *Superannuation Fund-level Profiles and Financial Performance*, 2014 and ISA analysis

definitions.[45] In reality, however, funds may appoint independent directors through an application to APRA or if such an appointment is permitted under the individual fund's governing rules and requested by the employer or employee representatives on the board. Boards of Registrable Superannuation Entity (RSE) licensees acting as trustees of APRA regulated superannuation must regularly review their governance arrangements. This has been a requirement since the introduction of APRA licensing regime s in 2006, with further enhancements to prudential oversight and governance standards introduced in 2013 as part of the Stronger Super reforms.

Representative trustee boards have evolved over the past twenty years. This evolution has included an increased use of independent directors and independent chairs where the trustee has formed the view that this would improve the skills matrix of the board and or improve board dynamics whilst maintaining the positives flowing from the representative character of the board.

In 2014, approximately half of all representative trustees had at least one independent director.[46] Just over one third of representative trustees had an independent chair.

3. Proposed Change

3.1 The *Superannuation Legislation Amendment (Governance) Bill*

The proposed *Superannuation Legislation Amendment (Governance) Bill* provides that all boards of RSE licensees acting as trustees of APRA regulated superannuation funds, including standard employer-sponsored superannuation funds, are required to have a minimum of one-third independent directors and an independent chair. Where the licensee is a group of individual trustees, one-third of these individuals must be independent. The definition of "independence" is the proposed Bill is far broader than the both the current definition in the SIS Act (independent of stakeholders i.e. employer and employee associations), and the definition used in the FSC Code for the retail sector (independent of management, parent companies and material service providers).

The definition of "independence" in the proposed *Bill* excludes anyone is employed by an entity with a material relationship with the fund. These entities would include management, service providers and a number of others including sponsoring organisations. The determination of "material" is made by ARPA in prudential standards. It is proposed that APRA will also have the power to make a determination regarding whether an individual trustee satisfies APRA that they can exercise independent judgement, at their own motion. Due to the breadth and discretionary element in the proposed definition/process, it is impossible to determine for every case whether a trustee director currently classified as independent (under SIS or the retail definition) would be classified as independent under the proposed definition.

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[45] As noted by the Explanatory Guide of the proposed Bill 'the current definition of "independent director" under the SIS Act is designed to achieve independence from stakeholders (i.e. employers and members and their representative organisations) rather than independence from management, service providers and advisers.' In the retail sector, which has not stakeholder representation, "independence" currently means independent of management, service providers and advisers

[46] This is based upon the sample of 45 funds used in this analysis. APRA has previously reported that at June 2013, 34 per cent (35 out of 103) of RSE licensees with an equal representation board had an independent director. See APRA, *Annual Superannuation Bulletin June 2013* (revised 5 February 2014). Note that the definition of independent trustee used in this calculation is narrower than the definition contained in the exposure draft Superannuation Legislation Amendment (Governance) Bill 2015 and associated material.

3.2 Impact analysis and the *Australian Government Guide to Regulation*

Regulatory impact analysis is a crucial element in policy development, as it tests the evidence base for reform and ensures a degree of rigour in the reform process. Regulatory impact analyses are the key feature of the 2014 *Australian Government Guide to Regulation* and are required of all reform proposals by government regulatory agencies.

The 2013 discussion paper *Better regulation and governance, enhanced transparency and improved competition in superannuation* which informs the current Bill specifically requested estimates of the costs incurred in complying with reform proposals for superannuation governance. Moreover, it committed the Government to "ensuring all regulatory measures undergo a Regulatory Impact Assessment, to establish the precise impact of regulation".[47]

However, the draft legislation, draft regulation and explanatory guide do not include any assessment of associated costs and benefits of the proposed reforms. This analysis provides a regulatory impact assessment for the proposed reforms.

4. Methodology

4.1 Categories of costs

In implementing the proposed governance reforms, affected funds will incur two kinds of costs: (i) transitional costs, particularly the costs to search for, recruit, and train a greater number of new chairs and trustee directors than would otherwise be the case, and (ii) ongoing costs, particularly assumed higher average salary costs of independent chairs and trustee directors.

There also are potential costs that relate to the substance of the proposal. Representative trustees are associated with superior long-term net performance relative to funds with non-representative governance models, including those with a majority of independent directors. Long term performance data provides an unequivocal basis for this fact. We have not included the costs of reduced performance in this analysis but have focused solely on the costs associated with the need to recruit additional trustee directors, pay their salaries and meet the requirements of the reform in respect to legal and administrative processes.

4.2 Population of Affected Funds

This regulatory impact assessment considers the processes which funds must undertake to comply with the proposed law within the transition period. For each of the processes, the costs incurred by the superannuation funds, and ultimately their members in the case of not-for-profit funds are estimated. As many of the processes do occur within funds in a business as usual scenario, the cost estimates are for costs in excess of a business as usual scenario.

The explanatory statement accompanying the Bill indicates the intended target of the reforms is the representative trustee sectors. While some retail funds will incur costs associated with these reforms, this analysis takes a conservative scope in only considering the intended target of not-for-profit representative funds. Hence, the for-profit retail sector funds are not included in the affected population in this analysis,

[47] *Better regulation and governance, enhanced transparency and improved competition in superannuation*, Discussion Paper, 28 November 2013, Treasury, p 7

although changes in the demand for independent directors may impact fees they charge across all sectors of the superannuation industry, including retail. This factor is included as a sensitivity analysis.

The population of affected funds is anticipated to be 101 funds in the following sectors:

- 44 industry funds
- 38 corporate funds
- 19 public sector funds

A survey of 45 funds, representative of the three different APRA regulated sectors (corporate, industry and public sector) which use equal representation trustees was used to inform the estimates under the reform scenarios. The sample includes 26 industry funds, 13 corporate funds and 6 public sector funds. The parameters determined by the survey are included in Table 1 below.

Under the draft Bill, APRA is given power to determine which relationships will fall within and outside the definition of independent. Hence, there is a level of uncertainty regarding whether trustee directors who are currently considered independent under the SIS Act and the constitutions of particular RSEs will meet the new definition of independence, or whether current directors not currently considered independent will meet the definition following reform. However, the current analysis assumes no change in the number of directors who are currently classed as independent/not independent under the reform scenario.

Table 1 – Summary statistics of fund and trustee parameters

Summary Stats	Industry	Corporate	Public Sector	Overall
Population of affected funds	44	38	19	101
Number of funds in sample	26	13	6	45
Average trustee size - current	9.62	7.00	8.17	8.36
Number of funds with at least one independent trustees	17	3	3	51%
Average number of independent directors per trustee	0.96	0.54	0.83	
Average proportion of independent trustees	9.68%	6.22%	10.19%	
Proportion of funds with an independent chair	42.31%	23.08%	50.00%	37%
Average number of independent trustees (excl chair)	0.54	0.31	0.33	
Average proportion of independent trustees (excl chair)	5.10%	2.37%	4.17%	
Average trustee size - reform scenario	10.27	9.62	9.00	

Source: APRA, RSE Disclosures and ISA analysis

4.3 Reform Scenario

Affected funds may meet the requirement to have a minimum of one-third independent directors and an independent chair on their boards in two ways:

1. They may maintain their existing trustee size and substitute existing trustee directors and/or chair for new directors who meet the new definition of independent trustee directors
2. They may increase the size of their trustee board through adding additional trustee directors.

In practice, the implementation across the population of affected funds will likely involve a combination of these approaches. Trustees of relatively small size may increase in size, whereas larger trustees may exclusively substitute.[48]

The reform scenario used in this analysis takes into account the combined response of substitution and addition of trustee directors. Funds with fewer than nine trustee directors will comply by both adding trustee directors up to a trustee size of nine, and substituting trustee directors. Funds with nine or more trustee directors will exclusively substitute trustee directors.

The reform scenario will result in:

- The appointment of 64 replacement independent chairs
- The appointment of 247 replacement independent trustee directors, and 48 new additional trustees.

Table 2 shows these appointments broken down by sector.

Table 2 – Number of new appointments under reform scenario

Reform Scenario	Industry	Corporate	Public Sector	Overall
Number of Replacement Chairs	25	29	10	64
Number of Replacement Independent non-chair Trustees	119	82	46	247
Additional New Independent non-chair Trustees	10	33	5	48

Source: APRA, RSE Disclosures and ISA analysis

The increase in the number of both independent chairs and independent non-chair trustee directors is significant. It is estimated that that there is currently 520 trustee directors serving as independent directors under current definitions: 79 on the trustees of the affected funds population specified above and 441 on the trustees of retail funds. For trustees serving as independent chairs, under current definitions, there is estimated to be 184: 37 on affected funds and 147 on retail funds.[49] Hence, the increase in non-chair independent directors under the reform scenario is estimated to be 57 per cent, while for independent chairs the increase is estimated to be 35 per cent.

4.4 Implementation Costs

The full parameters and assumptions underlying cost estimates are provided in Table 5.

4.4.1 Recruitment

The additional cost of recruiting new independent trustees would be equal to the difference between the recruitment costs under normal trustee director renewal processes and the recruitment costs incurred appointing the required independent trustees within the transition period.

[48] APRA are also likely to weight against large increases in trustee size or the emergence of very trustees in response to this reform.

[49] The estimates for the retail sector are based upon APRA statistics at June 2014 and an assumption of one independent chair per fund and three independent non-chair trustee director per fund (this equates for four independent directors per fund in the retail sector where the average trustee size is estimated to be 7 based upon the survey of 11 major retail funds.

Typical board renewal policies state a maximum tenure of between 9 and 12 years.[50] For a trustee with between 8 and 9 trustee directors, an average constant appointment rate for directors is between 0.75 and 0.90 per year. Due to the significant and rapid increase in demand for independent directors, prudent funds are anticipated to recruit (and train) new independent directors within the first two years of the three year transition period. Therefore, under a business as usual scenario, between 1.5 and 1.8 trustee directors would be appointed during the transition period. To take this into account, the number of new independent directors required has been reduced by 1.75 for each fund for estimating recruitment and training costs.

The current industry benchmark for recruitment is a one-time cost of between $20,000 and $30,000.[51] This cost is the same regardless of whether the recruitment is done in-house or using a recruitment agency.

4.4.2 Training

The additional cost of training the required independent directors is estimated in the same way as recruitment costs.

The current industry benchmark for training is between $10,000 and $15,000.[52]

4.4.3 Termination Costs

Under the assumptions detailed in section 4.4.1 Recruitment, 48 independent trustees must be appointed in addition to those that replace existing positions under business as usual. These 48 appointments may require a corresponding 48 terminations. Termination fees have not been a feature of the governance practices of industry super funds, however in other sectors terminations may incur costs depending on the contractual arrangements.

ISA has been unable to source cost estimates for terminations and therefore have not included these in the analysis.

4.4.4 Trustee Director Fees

The reform is predicted to lead an increase in director fees. This is due to differences in fee rates between representative chairs and independent chairs and non-chair representative directors and non-chair independent directors.

The following fee rates (Table 3) have been determined by a survey of 45 funds, representative of the population of funds governed by representative trustees, and 11 trustees of major retail funds.

Table 3 – Average Current Chair and Independent Director Fees

Trustee Position	Corporate	Industry	Public Sector
Average Chair annual fee (representative sectors)	$14,911	$87,940	$85,572
Average non-Chair annual fee (representative sectors)	$14,053	$50,959	$51,662
Average Independent Chair annual fee (excluding corporate)		$120,029	

[50] Typical renewal polices are nine years (three three-year terms), 10 years (two five-year terms), or 12 years (three four-year terms) after which the board can continue to extend tenure under specified circumstances.

[51] Industry Super Australia has surveyed funds and industry consultants to determine this range.

[52] Industry Super Australia has surveyed funds and industry consultants to determine this range.

Trustee Position	Corporate	Industry	Public Sector
Average Independent non-Chair annual fee (excluding corporate)		$79,440	

Source: RSE Disclosures and ISA analysis

Note: Corporate Funds have been excluded from the Independent Chair and Independent non-chair fee averages because the sample size is small and disclosed fees are atypical compared to the two other representative sectors (industry and public sector) and the retail sector within which independent chairs are more common. These fee estimates do not take into account additional fees for committees of the board which are likely to increase under APRA's proposed changes to SPS 510 to require that a majority (including the chair) of both the Board Audit Committee and Board Remuneration Committee be independent directors. All figures are in 2013/14 dollars.

The average independent chair fee and independent non-chair fee are used for the reform scenario. The cost for each sector will be the difference in the current fee and the fee under the reform scenario, multiplied by the number of new independent chairs and new independent directors under the reform scenario.

In addition to the direct costs of increasing the number of independent directors on equal representation trustees, on a broader scale this rapid demand for independent superannuation trustee directors is likely to bid up independent director remuneration and flow through to all independent directors. This is due to two factors.

First, the required increase in independent directors is significant. Across the affected funds and retail funds, the estimated increase in the number of non-chair independent directors industry wide under the reform scenario is estimated to be 57 per cent, while for independent chairs the increase is estimated to be 35 per cent.

Second, the supplier response to wages is highly inelastic for specialised services, such as being a superannuation trustee director. That is, general speaking, there are relatively few people with the appropriate skill level and background, and therefore larger movements in fees are required to attract greater work effort. This is a standard result in labour economics.[53] The supply of appropriate candidates will ultimately depend on the definition of excluded persons.

There appears to be few directly relevant Australian studies that address the link between independent directors, work effort and remuneration. Linck et al 2008 uses United States public company data on 8000 firms to find that regulatory reforms imposing greater independence significantly drive up the cost of corporate boards.[54]

In the absence of a precise estimate of the regulatory impacts on Australian super fund boards, we have assumed that independent director fees increase from current average fees to the 80th percentile fees of retail fund non-chair independent directors. Chair fees increase to $125,000.[55] The immediate fee impact is assumed to take immediate effect.

4.4.5 Legal and Administrative Costs

RSE licensees acting as trustees of APRA regulated superannuation funds will need to amend trust deeds and articles of association under the reform scenario. In addition, they must update publications including

[53] Richardson, S, 2007, *What is a skill shortage?,* National Centre for Vocational Education Research (NCVER), 2007

[54] Linck, J, Netter, J & Yang, T, *The Effects and Unintended Consequences of the Sarbanes-Oxley Act on the Supply and Demand of Directors, Oxford University Press on behalf of The Society for Financial Studies, 2008, p 3298*

[55] There is insufficient data from which to calculate a meaningful estimate for the chair uplift, either using the 80th percentile for independent chairs or premium rates for chairs across all sectors. Such metrics produce figures between $150,000 and $200,000.

Product Disclosure Statements and websites. The additional cost of implementing these changes is assumed to be $14,000 per fund based upon stakeholder feedback.

4.4.6 Transition plan

The proposed Bill requires funds to comply with transition requirements to be prescribed by APRA under SPS 512. These requirements will include submitting a Transition Plan by July 1 2016. The Transition Plan must include assessment of the status of each current director, what changes are needed to meet new requirements, steps that the board will take by the end of the transition period to ensure compliance. The additional cost of meeting the requirements under SPS 512 are assumed to be $20,000 per fund based upon stakeholder feedback.

5. Estimates

Table 4 shows the cost estimates, expressed as a range, for each item under the reform scenario.

The five year cost for the reform is estimated to be between $89 million and $168 million.

Table 4 – Aggregate Cost Estimates

Item	Minimum Cost	Maximum Cost
Transition Costs		
Recruitment	$7,183,985	$10,775,978
Training	$3,591,993	$5,387,989
Legal and Admin Cost	$3,472,000	$3,472,000
Transition Plan	$4,960,000	$4,960,000
Ongoing Costs		
Chair Fees	$4,214,570	$4,533,285
Director Fees (non-chair)	$13,858,107	$23,061,884
Fee Response (retail funds)	$0	$8,835,226
Total Costs		
Total - Transitional Years	$45,620,532	$84,570,590
Total - Subsequent Years	$14,259,920	$31,120,633
Five Year Cost	**$89,390,401**	**$168,050,904**

Source: ISA analysis

Note: All estimates are in 2013/14 dollars.

The minimum and maximum cost of Director Fees (non-chair) is determined using the reform fee rate as the average independent director fee for the minimum and the 80th percentile fee for retail funds for the maximum.

For the total cost in the reform scenario, the anticipated remuneration response to the spike in demand for independent superannuation trustee directors (discussed in section 4.4.4) is only included in the maximum cost estimate. It is judged this outcome is more likely than no change in independent director remuneration assumed in the minimum cost estimate.

The five year cost is determined as the sum of the transition costs (which are one-off) and an appropriate weighting of the ongoing costs over the three year transition period. The chair fee increase is weighted at

1.5 on the assumption that the new chair is appointed half way through the transition period. The director fee are weighted at two, assuming all new independent directors are appointed after the first two years (a weighting of half for the first two years and one for the third year). The fee response is weighted at two, assuming the price impact is swift and comes into full effect within the first year.

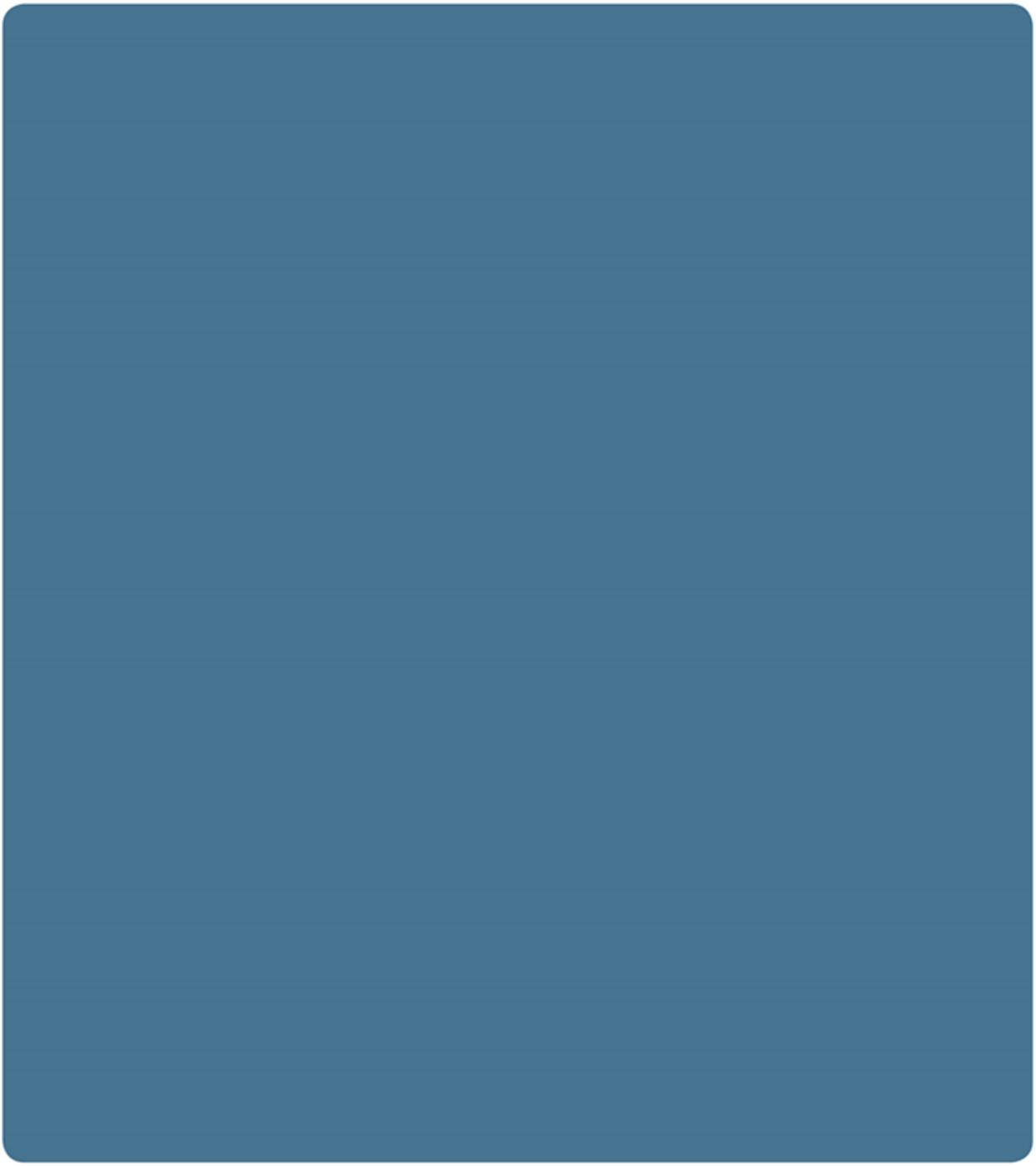
6. Parameters and Assumptions

Table 5 – Parameters and Assumptions

Item	Corporate	Industry	Public Sector	Retail
Cost Estimates by Sector				
Increase in chair fees Min is current average / Max is $125,000	$3,072,671 to $3,217,976	$814,559 to $940,745	$327,340 to $374,564	-
Increase in non-chair independent. directors fees Min is current average / Max is current 80th percentile	$5,385,951 to $7,955,127	$3,402,289 to $7,128,304	$1,257,110 to $2,668,691	-
Fees for additional non-chair independent Min is current average / Max is current 80th percentile	$2,631,689 to $3,664,970	$761,805 to $1,060,912	$419,264 to $583,880	-
Recruitment cost per director	$2,894,595 to $4,341,893	$3,088,695 to $4,633,042	$1,200,694 to $1,801,041	-
Training cost per director	$1,447,297 to $2,170,946	$1,544,347 to $2,316,521	$600,347 to $900,520	-
Legal and admin cost per fund	$532,000	$616,000	$266,000	$2,058,000
Transition plan	$760,000	$880,000	$380,000	$2,940,000
Assumptions / Inputs				
	Corporate	Industry	Public Sector	
Current chair fee	$14,911	$87,940	$85,572	-
Current non-chair fee	$14,053	$50,959	$51,662	-
New independent chair fee	$120,029 to $125,000			-
New independent non-chair fee (average)	$79,440 to $110,630			-
Recruitment cost per director	$20,000 to $30,000			-
Training cost per director	$10,000 to $15,000			-
Legal and Admin Cost per Fund	$14,000			
Transition plan	$20,000			

Source: RSE Disclosures and ISA analysis – new fees adjusted for wage inflation since relevant reporting periods.

Note: All estimates are in 2013/14 dollars.



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