

Chapter 1

Introduction

1.1 On 14 September 2017, the Senate referred the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 (Measures No. 1 bill) and the Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 (STA bill) to the Senate Economics Legislation Committee (committee) for inquiry and report by 23 October 2017.

1.2 These bills form part of a broader package of government reforms designed to strengthen the Australian superannuation system by 'protecting members' money and members' interests'.¹ The Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017, which forms part of the package, was also separately referred to the committee for inquiry and report by 23 October 2017.²

1.3 In his second reading speech, the Assistant Minister to the Prime Minister, Senator the Hon James McGrath, explained that in implementing these reforms, the government will deliver a:

...strong and modern superannuation system with a stronger prudential regulator that is solely focused on delivering outcomes for all Australians who rely on these funds to secure their retirement.³

1.4 The Measures No. 1 bill contains eight schedules, which propose to amend the *Superannuation Industry (Supervision) Act 1993* (SIS Act), the *Corporations Act 2001* (Corporations Act) and the *Financial Sector (Collection of Data) Act 2001* (FSCODA) in order to 'modernise and increase confidence within the superannuation system'.⁴ The details of each schedule are set out below.

1.5 The STA bill seeks to introduce a definition of independence as it relates to directors and to legislate a requirement that all superannuation funds regulated by the Australian Prudential Regulation Authority (APRA) have a minimum of one-third independent directors; as well as an independent Chair.⁵ The details of the STA bill are set out below.

1 Senator the Hon. James McGrath, Assistant Minister to the Prime Minister, Second Reading Speech, *Senate Hansard*, 14 September 2017, p. 7311.

2 This bill would amend the *Superannuation Guarantee (Administration) Act 1992* to strengthen accountability of superannuation funds and improve outcomes for members. The measures contained in the bill are aimed at ensuring that choice of fund is provided to over one million more Australians; and salary sacrifice contributions are reflected in members' retirement savings.

3 Senator the Hon. James McGrath, Assistant Minister to the Prime Minister, Second Reading Speech, *Senate Hansard*, 14 September 2017, p. 7311.

4 Explanatory Memorandum, p. 9.

5 Explanatory Memorandum, p. 10.

Conduct of the inquiry

1.6 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting submissions by 29 September 2017. The committee received 37 submissions, which are listed at Appendix 1.

1.7 The committee held two public hearings in Canberra on 9 October 2017 and in Sydney on 10 October 2017. The witnesses who appeared at the hearings are listed at Appendix 2.

1.8 The committee thanks all individuals and organisations who assisted with the inquiry, especially those who took the time to make written submissions and appear at the hearings.

Background

1.9 Superannuation is an important part of Australia's retirement income system and will be an increasingly significant contributor to the retirement incomes of many Australians.⁶

1.10 This year marks 25 years since the introduction of compulsory superannuation in Australia. Over this time, the superannuation system has grown from \$136 billion to over \$2.3 trillion with APRA regulated funds managing approximately \$1.4 trillion of this total. The reforms in the two bills are designed to ensure that the superannuation system has a strong foundation into the future.

1.11 In recent years, two reviews have considered the governance arrangements of the Australian superannuation industry: the Super System Review and the Financial System Inquiry. The Measures No. 1 bill and STA bill put recommendations of these past reviews and the practices of high performing superannuation funds into effect.⁷

Super System Review

1.12 The Super System Review (the Cooper Review) was led by Mr Jeremy Cooper and was finalised in June 2010. It explored in detail, the governance, efficiency, structure and operation of Australia's superannuation system.⁸

1.13 A majority of the issues examined in the Cooper Review were linked back to issues of trustee governance. In particular, the review noted the need for changes to the structure of trustee boards, including their size, and recommended the creation of a new office of 'trustee–director', which would be subject to tenure⁹. The Cooper Review highlighted that:

6 The Hon. Kelly O'Dwyer MP (Minister for Revenue and Financial Services), Turnbull Government puts super members first, *Media Release*, 14 September 2017, <http://kmo.ministers.treasury.gov.au/media-release/093-2017/> (accessed 22 September 2017).

7 Senator the Hon. James McGrath, Assistant Minister to the Prime Minister, Second Reading Speech, *Senate Hansard*, 14 September 2017, p. 7311.

8 Super System Review: Final Report, p. v. <http://dpl/Books/2010/158928-1.pdf> (accessed 27 September 2017)

9 A trustee-director is: See also: Super System Review: Final Report, <http://dpl/Books/>

Contemporary best practice in corporate governance for listed companies includes the presence of independent directors on the board. The Panel believes that a minimum number of ‘non-associated’ trustee-directors (such that they can genuinely influence the decisions of those boards) should be required on all superannuation trustee boards.¹⁰

1.14 The Cooper Review also made several recommendations in relation to trustee governance including:

Recommendation 2.6: The SIS Act should be amended so that if a trustee board does not have equal representation, the trustee must have a majority of ‘non-associated’ trustee-directors.

Recommendation 2.7: For those boards that have equal representation because their company constitutions or other binding arrangements so require, the SIS Act should be amended so that no less than one-third of the total number of member representative trustee-directors must be non-associated and no less than one-third of employer representative trustee-directors must be non-associated.¹¹

1.15 These recommendations are reflected in the schedules of the STA Bill.

Financial System Inquiry

1.16 The Financial System Inquiry (FSI) was led by Mr David Murray AO and finalised in November 2014. The FSI examined how the financial system could be positioned to best meet Australia's evolving needs and support its economic growth. The FSI noted that:

...superannuation is now the second largest asset for many Australians. Its growing importance underlines the need for a regulatory approach that puts individual members at the very centre of the system — benefiting both individual Australians and the economy as a whole.¹²

1.17 The FSI raised concerns in relation to directors who fail to execute their responsibility to act in the best interests of members, or who use their position to further their or others' interests to the detriment of members. The FSI suggested that the government introduce civil and criminal penalties for directors who do not fulfil their responsibilities.¹³ This suggestion has been captured in schedule 3 of the Measures No. 1 Bill.

10 Super System Review: Final Report, p. 12. <http://dpl/Books/2010/158928-1.pdf> (accessed 27 September 2017)

11 Super System Review: Final Report, p. 31. <http://dpl/Books/2010/158928-1.pdf> (accessed 27 September 2017)

12 The Financial System Inquiry 2014 (Murray), Final Report, p. 24. http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf (accessed 27 September 2017)

13 The Financial System Inquiry 2014 (Murray), Final Report, p. 133. http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf (accessed 27 September 2017)

1.18 Recommendation 13 of the FSI report, recommended changes to governance of superannuation funds, which in effect, summarises the principal objective of the STA Bill:

Mandate a majority of independent directors on the board of corporate trustees of public offer superannuation funds, including an independent chair; align the director penalty regime with managed investment schemes; and strengthen the conflict of interest requirements.¹⁴

Superannuation Legislation Amendment (Trustee Governance) Bill 2015

1.19 The committee notes that it has previously inquired into the Superannuation Legislation Amendment (Trustee Governance) Bill 2015. That bill contained measures which would have had the same effect as those set out in the STA Bill.

1.20 The committee reported on the provisions of that bill in November 2015 and recommended that the bill be passed. However, the bill lapsed when the Parliament was prorogued in April 2016.

Overview of the Bills

Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017

1.21 As noted above, the Measures No. 1 Bill contains eight measures, which propose to amend the SIS Act, the Corporations Act and the FSCODA in order to 'modernise and increase confidence within the superannuation system'.¹⁵ The eight schedules that make up the bill are set out below.

Schedule 1: Annual MySuper outcomes assessment

1.22 Schedule 1 amends the SIS Act to strengthen the obligation on superannuation trustees to consider the appropriateness of their MySuper product offering annually including how that product continues to deliver appropriate outcomes to MySuper members.

Schedule 2: Authority to offer a MySuper product

1.23 Schedule 2 amends the SIS Act to give APRA an enhanced capacity to refuse a registerable superannuation entity (RSE) licensee a new authority to offer a MySuper product or to cancel an existing authority.

Schedule 3: Director penalties

1.24 Schedule 3 amends the SIS Act to impose civil and criminal penalties on directors of RSE licensees who fail to execute their responsibilities to act in the best interests of members, or who use their position to further their own interests to the detriment of members.

14 The Financial System Inquiry 2014 (Murray), Final Report, p. 133.
http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf
(accessed 27 September 2017)

15 Explanatory Memorandum, p. 9.

Schedule 4: Approval to own or control an RSE licensee

1.25 Schedule 4 amends the SIS Act to strengthen APRA's supervision and enforcement powers when a change of ownership or control of an RSE licensee takes place.

Schedule 5: APRA directions power

1.26 Schedule 5 amends the SIS Act to strengthen APRA's supervision and enforcement powers to include the power to issue a direction to an RSE licensee where APRA has prudential concerns.

Schedule 6: Portfolio holdings disclosure

1.27 Schedule 6 amends the Corporations Act to refine the requirements for RSE licensees to make publically available their portfolio holdings.

Schedule 7: Annual members' meetings

1.28 Schedule 7 amends the SIS Act to require RSE licensees to hold annual members' meetings (AMMs). The meetings are to discuss the key aspects of the fund and provide members with a forum to ask questions about all areas of the fund's performance and operations.

Schedule 8: Reporting standards

1.29 Schedule 8 amends the FSCODA to provide APRA with the ability to obtain information on expenses incurred by RSE and RSE licensees in managing or operating the RSE.

Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017

1.30 The STA bill seeks to introduce a 'strong and consistent definition of independence' and a legal requirement that APRA regulated funds must have an independent Chair and a minimum of one-third independent directors on their boards.

Schedule 1: RSE licensees

1.31 Schedule 1 amends the SIS Act to introduce new trustee arrangements RSEs to have at least one third independent directors and for the Chair of the Board of directors to be one of these independent directors.

Schedule 2: Board of CSC

1.32 Schedule 2 amends the *Governance of Australian Government Superannuation Schemes Act 2011* (Governance Act), to enable the trustee board of the Commonwealth Superannuation Corporation to comply with the independence requirements set out in schedule 1.

Financial impact and regulatory impact statement

1.33 The explanatory memorandums to the Measures No. 1 bill and the STA bill state that the bills do not have any financial impact. However, the regulation impact statement for schedule 7, which introduces a requirement to hold AMMs, indicates that the amendments have a start-up cost of \$8.5 million and ongoing costs of \$13.7

million, which will result in an estimated compliance cost impact, averaged over 10 years of \$14.6 million.¹⁶

Legislative scrutiny

1.34 The explanatory memorandums to the Measures No. 1 bill and the STA bill state that the bills do not engage any of the applicable rights or freedoms under the *Human Rights (Parliamentary Scrutiny) Act 2011*, and, as such, are compatible with human rights. The Parliamentary Joint Committee on Human Rights considered the bills in its *Report 10 of 2017* and made no comment.¹⁷

1.35 The Measures No. 1 bill and the STA bill were also considered by the Senate Standing Committee for the Scrutiny of Bills in its *Scrutiny Digest 12 of 2017*. In relation to the Measures No. 1 bill, the Scrutiny of Bills committee has sought information from the Treasurer regarding the proposed penalties, and for a broadly framed offence that reverses the evidential burden of proof and allows exceptions to be prescribed in regulations.¹⁸

Structure of this report

1.36 The report is structured in two chapters—this introductory chapter, which provides a brief overview of the bills and the context; and chapter two which discusses the bills in more detail, and the related issues raised in submissions and by participants in the inquiry.

16 Explanatory Memorandum, p. 6.

17 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, October 2017, p. 60.

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, October 2017, pp. 57–61.