

Our ref SC:SD

24 July 2015

The Manager
Insurance and Superannuation Unit
Financial System and Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuationgovernance@treasury.gov.au

Dear Sir/Madam

**Submission – Reforms to superannuation governance
Exposure draft *Superannuation Legislation Amendment (Governance) Bill 2015: Governance arrangements for APRA regulated superannuation funds***

Although yesterday was the closing date for submissions, we would like to make a brief submission on one point.

Draft section 88(1) reads (emphasis added):

88 Determination that a person is *independent* from an RSE licensee

- (1) APRA may determine that a person is *independent* from an RSE licensee if APRA is reasonably satisfied that the person is likely to be able to exercise independent judgement in performing the role of:
- (a) if the RSE licensee is a body corporate—a director of the licensee; or
 - (b) if the RSE licensee is a group of individual trustees—one of those trustees.

We suggest that this be reworded to read:

88 Determination that a person is *independent* from an RSE licensee

- (1) APRA may determine that a person is *independent* from an RSE licensee if APRA is reasonably satisfied that the person is likely to act with undivided loyalty to the interests of the beneficiaries of the regulated superannuation fund in performing the role of:
- (a) if the RSE licensee is a body corporate—a director of the licensee; or
 - (b) if the RSE licensee is a group of individual trustees—one of those trustees.

We make this suggestion because:

1. the concept of a person acting with undivided loyalty to the interests of the beneficiaries is a well-established legal concept. In particular, under the general law a fiduciary has an overarching duty of undivided loyalty to the interests of the beneficiary;¹ and
2. in the superannuation context, the concept of a person being able to exercise "independent judgement" is new and untested and, on one view, unclear. It could be seen as just another way of describing the concept of a person acting with undivided loyalty to the interests of the beneficiaries, or it could be seen as indicating something different or more. A related difficulty is that the word "independent" connotes a relationship, ie independent *of something*, but the "something" is not identified.

We would be happy to discuss this submission with you, if you wish.

Yours faithfully



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¹ For example, in *In Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593 at 607 Waddell CJ in Eq said:
A fiduciary relationship exists where a person has undertaken or agreed to act for or on behalf of or in the interests of another in the exercise of a power, and not in his own interests ...