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Submission to Treasury with respect to: Better regulation and governance, enhanced transparency and improved competition in superannuation – Discussion Paper 28 November 2013

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About ASFA

ASFA is a non-profit, non-politically aligned national organisation. We are the peak policy and research body for the superannuation sector. Our mandate is to develop and advocate policy in the best long-term interest of fund members. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through ASFA's service provider membership, represent over 90% of the 12 million Australians with superannuation.

Approach to Submission

ASFA is pleased to provide this submission in response to the Discussion Paper: *Better regulation and governance, enhanced transparency and improved competition in superannuation*.

In developing our submission we have where ever possible developed or sourced objective research. We have also tested many of our answers across all superannuation sectors to ensure they are robust, structure neutral and provide the best outcome to fund members possible.

Under each boxed discussion paper question we have included a short answer to each focus question. In many instances we have also provided further background, context or explanatory information beneath.

Our submission identifies a number of factors we consider would help to reduce the regulatory compliance burden. These are based on the premise that the regulatory framework in which superannuation funds operate should be well-conceived, clear, accessible and certain. It should operate in a way that allows trustees to deliver retirement income products in the best interest of fund members as efficiently as possible. There should be appropriate levels of support provided by way of guidance from regulators (and, in appropriate cases, from responsible portfolios such as the Attorney-General's Department).

We have also focused on the processes that are adopted to implement regulatory change, once a policy decision has been made to proceed. The manner in which these processes are executed can be critical to the compliance outcome, and generally determines the extent to which the resulting regulation can readily be subsumed into a trustee's 'business as usual' activities without unreasonable cost or effort, or will create an ongoing unnecessary compliance burden.

Should you have any queries regarding the contents of this submission, please do not hesitate to contact me on (02) 8079 0805 or pvamos@superannuation.asn.au.

Yours sincerely

Pauline Vamos
CEO

Part 1: A better approach to regulation

Focus Question

1. **The Government has committed to identifying (in dollar terms) measures that offset the cost impost to business of any new regulation. What suggestions do you have for how the regulatory compliance burden can be reduced?**

Summary answer

Firstly the process of consultation needs to be improved. We have highlighted how that can be done below. In relation to areas where the compliance burden can be reduced we suggest the following areas as a starting point:

- Concept of 'interdependency';
- The work test
- Approach to APRA reporting
- Lost member and unclaimed money definitions
- Trans-Tasman portability

Background and detail

We list below five discrete areas of regulation which we consider need to be revisited with a view to directly reducing the regulatory compliance burden on trustees. Some of these relate to areas which effectively have been overtaken by later reform. Others have been created by amendments which have occurred in a piecemeal fashion over time so as to produce requirements which are unnecessarily complex and even internally inconsistent, or result from reform which was implemented in an unsatisfactory manner from the outset.

1. Concept of 'interdependency':

   Recognition of persons in 'interdependency relationships'[1] as 'dependants' for superannuation purposes and 'death benefit dependants' for tax purposes pre-dated wider reforms to treat persons in same-sex relationships as 'spouses' and therefore as 'dependents'.

   In light of the subsequent same-sex amendments, and the fact that potential beneficiaries were often able to make a claim to be entitled to a death benefit on the basis of financial dependency, it is unclear whether there is any continuing need for 'interdependency' as a freestanding concept. Its retention creates a compliance burden, as it significantly complicates the process of claim-staking for death benefits by fund trustees, is confusing to potential beneficiaries, and has the potential to protract the Superannuation Complaints Tribunal's consideration of complaints in relation to disputed death benefit distributions.

[1] Superannuation Industry (Supervision) Act 1993, section 10A; Income Tax Assessment Act 1997, section 302-200

2. Contributions acceptance standards – the 'work test':

   It is not readily apparent what the policy objective is behind requiring a member over the age of 65 to be gainfully employed a specified number of hours in order to contribute to superannuation. Monitoring of eligibility with respect to contributions creates considerable additional complexity for superannuation funds, necessitating process, procedures and system capability to verify and record eligibility for contributions to be received. A strong argument could be made for consideration to be given to removing the occupational nexus altogether and simply legislating that contributions may continue to be made until the specified age, say 75, after which time contributions must cease.

   This issue has previously been considered by the Productivity Commission, which stated as follows: -

   > *"**Current age limits and the associated requirements** of the legislation … appear to **impose significant compliance costs** on particular funds, which raise their administration costs, as well as on their members. ..... **there is scope to reduce these costs without compromising** the purpose of **the legislation**, with benefits for fund members and from a community-wide perspective" (emphasis added).*[2]

3. APRA data reporting:

   (i) Calendar days as opposed to business days **-** The APRA Data Reporting standards for quarterly reporting prescribe that data must be lodged by the 28th calendar day of specified months. Depending on when public holidays occur, this can result in trustees having a reduced, and variable, number of days after period end in which to meet their obligations. By way of example, the month of January generally contains two public holidays: New Year's Day and Australia Day. Similarly, depending on when Easter falls, the month of April frequently contains three public holidays: Good Friday, Easter Monday and Anzac Day. With state-based public holidays, this can result in trustees in one state\territory having fewer days to comply than others located in another state\territory. This impedes a trustees' ability to meet their reporting obligations and can result both in higher costs and increased risk of error. Businesses only have business days in which to do things, not calendar days. This is why the concept of business days exists: in recognition of this fact.

   (ii) 28 calendar day period – This time frame will prove especially difficult, costly and risky for funds to meet with respect to data relating to investments. Custodians need up to between day 12 and day 16 to provide 'hard close' investment data. Even if a custodian were able to provide data by day 10 (currently not feasible), this would only leave five days for the fund to collate reconcile and prepare draft submissions and five days for the trustee to review and sign-off. The only option to meet business day 20 would be to provide data on the basis of 'soft close' data, however, as many firms cannot lock soft closes, this increases the risk of duplication\omission. Soft close data is less accurate / more variable and would reduce comparability. There is little to be gained by insisting on a 28 day time fame and a lot to lose.

   (iii) Absence of materiality – We understand that APRA has indicated that there is to be no concept of 'materiality' with respect to data to be reported to them and that,

[2] The Productivity Commission 2001, *Draft Report on the Superannuation Industry (Supervision) Act 1993 and certain other Superannuation Legislation*, released in Canberra in September 2001; Page 62.

accordingly, any differences in data, irrespective of how small they may be, will necessitate a re-report of data. Materiality is an accepted concept within accounting. APRA data reporting is statistical in nature, where arguably a concept of materiality is equally, if not more, appropriate. As such, APRA should introduce a concept of materiality into data reporting to reduce the potential need for funds to re report immaterial changes in data.

4. 'Lost member' and 'unclaimed money' definitions:

   The definition of 'lost member'[3] for ATO reporting purposes has been amended numerous times in a piecemeal fashion, with each amendment introducing unnecessary complexity and internal inconsistency. For example, the previously distinct sub-categories of 'returned mail' and 'inactive' lost members have been blurred through the recent introduction of an activity test into the 'returned mail' sub-category[4], while the test for the 'inactive' lost member sub-category requires a person to have been a member of a fund for longer than *two* years, but no activity within the last *five* years[5]. In addition to unnecessarily complicating the six-monthly lost member reporting process for fund trustees, these definitions are difficult to clearly communicate to members.

   A further layer of complexity is encountered when the definition of 'lost member' is imported into the concept of 'lost member account' for unclaimed money purposes[6]. The concepts of 'small lost member account' and 'inactive account of an unidentifiable member' cross refer to the 'lost member' definition but involve numerous other criteria which require substantial time and effort for fund trustees to work through on a member by member basis. More significantly, it is extremely difficult for members to understand whether their account balance is likely to be classified as a 'lost member account' and transferred to the ATO as unclaimed money – this is especially of concern given the proposed increases in the threshold for transfer of small lost member accounts[7] and the potential for members to lose insurance cover when their balances are compulsorily transferred.

   The concepts of 'lost member' for reporting and unclaimed money purposes need to be comprehensively reviewed and simplified.

5. Trans-Tasman portability – requirement for Australian statutory declaration:

   These rules require a person applying to an Australian fund for transfer of their benefits to a KiwiSaver account to provide to the trustee of the Australian fund a 'statutory declaration' as to certain factual matters. While this application can only be made after the person has exited Australia, the member must supply a statutory declaration that complies with the Australian *Statutory Declarations Act 1959* and the *Statutory Declarations Regulations 1993*, including requirements as to format and witnessing.[8]

   This requirement imposes an onerous burden on the applicant – for example, it potentially requires members now resident in New Zealand to travel considerable distances to access staff from the Australian High Commission in Wellington, or the offices of the Australian Consulate

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[3] Superannuation Industry (Supervision) Regulations 1994, regulation 1.03A
[4] Superannuation Industry (Supervision) Regulations 1994, subregulation 1.03A(1)(a)(ii)
[5] Superannuation Industry (Supervision) Regulations 1994, subregulation 1.03A(1)(b)
[6] Superannuation (Unclaimed Money and Lost Members Act) 1999, Section 24B
[7] Superannuation - increases to the lost member small account threshold
[8] Note – this was recently confirmed and restated by the Australian Taxation Office – see Trans-Tasman retirement savings portability under the heading 'Can your member use a New Zealand statutory declaration?'

General in Auckland, who are able to witness a statutory declaration in compliance with Australian law. It also places an unnecessary administrative burden on fund trustees, who are inevitably required to deal with member complaints triggered by rejection of non-compliant applications, and creates a perception that Australian funds are in some way obstructing the transfer of member monies under the new rules.

It is unclear whether the requirement for an Australian statutory declaration was intended on (unspecified) policy grounds or whether it was caused by a rushed consultation process and an oversight in drafting. In ASFA's view it should be acceptable for a member located in New Zealand to supply a statutory declaration which complies with either the Australian or New Zealand law, as is the case for a member in Australia who wishes to transfer their money from a KiwiSaver account. This outcome could easily be achieved by providing a special-purpose definition of 'statutory declaration', for the purposes of trans-Tasman portability only, within the SIS Regulations. It need not disrupt the application of the established rules around statutory declaration used for other purposes. On balance, the current requirement seems difficult to justify.

The above is by no means an exhaustive list of potential areas of regulatory reform to reduce the compliance burden on fund trustees. We would welcome the opportunity to discuss others, with a view to simplifying the member's experience of superannuation and enhancing the efficiency of the superannuation industry.

The remainder of our response to Part 1 of the Discussion Paper focuses on the regulatory reform process more generally. In ASFA's view, the key factors that will assist with the minimisation of the regulatory compliance burden are:

1. Adequate consultation – which requires:
    - A clear statement of the policy outcomes to be achieved.
    - Preliminary, confidential, high level consultation with key industry stakeholders to consider the need for, and appropriate scope of, any regulation.
    - Adequate assessment of potential impacts, including:
        - consideration of the fact that the system comprises both pooled and self-managed vehicles;
        - recognition of these different structures and products (past, current and future);
        - sufficient consideration of the potential impacts on different categories of members;
        - consideration of any lessons from post-implementation reviews of previous regulatory change

      There must be an opportunity for stakeholders to provide input on these, and other matters, when responsible agencies are developing Regulation Impact Statements. These statements should also specifically address the outcomes of any previous post-implementation reviews of relevant regulation.
    - Consideration of the appropriate format for public consultation (for example, 'passive' release of draft regulatory material or a more 'active' consultation involving the use of stakeholder working groups and roundtables).
    - Sufficient time for stakeholders to properly review the materials and formulate a considered response. This includes allowing adequate time for the consultation, and avoiding consultations at times when stakeholders are unable to give them sufficient attention - for example, over the Easter or Christmas/New Year period or at financial year end. It also

includes recognition by the responsible portfolio or regulator of the extent to which stakeholders are currently impacted by other consultations or implementation of finalised regulatory change.
    - Release of related materials in a contemporaneous manner, avoiding the release of 'tranches' over an extended period of time. The latter approach does not allow stakeholders to fully assess the potential implications of the regulatory materials and creates the risk of inconsistencies and omissions between the individual pieces in the reform package.
    - Continued consultation as necessary throughout the implementation phase (for example, as the relevant regulator begins to release guidance material).
2. Clear drafting of regulatory material and provision of effective explanatory material. This includes clear, unambiguous drafting of the regulatory materials themselves, as well as explanatory material which actually does explain the changes in the law and its application in particular circumstances rather than simply restating it.
3. Avoidance of unnecessarily burdensome requirements which make it difficult for trustees or fund members to comply, without demonstration of clear need or benefit to fund members.
4. Adequate time for implementation by affected parties, with:
    - Lead-times which reflect the materiality of the change, and in general terms, from the passage of legislation, are no shorter than:
        - 24 months for changes which impact the design of the system;
        - 12 months for changes to disclosure; and
        - 12 months for regulation which requires stakeholders to change systems, processes and procedures.
    - Clear effective dates (including with respect to any transitional rules, 'phasing in' and 'grandfathering'); and
    - The creation of carve-outs and grandfathering rules as appropriate to avoid unintended consequences on particular fund members or the imposition of undue compliance burdens on particular product structures and legacy products.
5. Appropriate guidance from regulators to help stakeholders comply with regulatory reform, coupled with appropriate integrity over the provision of guidance material on regulators' websites, including dating and version control, effective search engine functionality and subscriber alerts.
6. Post-implementation reviews of all material new regulation, to assess whether the intended benefits to members were realised, whether the cost and additional compliance burden was proportionate to those benefits, and whether Government could have achieved those benefits in a more efficient and effective manner.

Our detailed thoughts on each of the above matters are set out in Annexure B.

Part 2: Better Governance

What should 'independent' mean for superannuation fund trustees and directors?

Focus question:
2. **What is the most appropriate definition of independence for directors in the context of superannuation boards?**

Summary answer

ASFA is of the view that due to the nature of superannuation trust structures, the compulsory nature of the system, and the fact that trustees are fiduciaries, the definition of independence should be in an APRA standard and should be as follows:

"An individual should be taken to be 'independent' in the context of a superannuation fund trustee board if he/she:-

1. is not, or has not within the last three years been, a director of, a representative of or employed at an executive level by:
   - the fund, the RSE licensee or a related entity of the fund or RSE licensee,
   - a standard employer-sponsor or sponsoring organisation of the fund or a related entity of the fund or RSE licensee,
   - any organisation directly representing the interests of one or more members (or groups of members);
   - any organisation directly representing the interests of one or more standard employer-sponsors of the fund
   - an associate (as defined in section 10 of the SIS Act) of any such entities listed above; or
2. as a principal, director or employee of a material service provider, professional adviser or consultant to the fund, the RSE licensee or a related entity to the fund or RSE licensee – has not had significant and material involvement with a service provided to the fund, the RSE licensee or a related entity to the fund or RSE licensee within the last three years;
3. is not a substantial shareholder of the RSE licensee or an officer of, or otherwise associated directly with, a substantial shareholder of the RSE licensee;
4. is not an officer or employed at an executive level by a material supplier to the fund, the RSE licensee or a related entity, or otherwise associated directly or indirectly with a material supplier;
5. does not have a material contractual relationship with the fund, the RSE licensee or a related entity other than as a director; and (unless an individual is personally exempted by APRA) does not sit on the board of another APRA regulated superannuation fund."

Background and detail

ASFA's view is that neither the *Superannuation Industry (Supervision) Act 1993* ("SIS Act") nor the ASX Principles, on their own, adequately reflect the appropriate characteristics of independence that is required in the context of superannuation trustee boards[9].

The ASX Principles, whilst providing a useful reference point for companies about their corporate governance structures and practices, are not mandatory and do not seek to prescribe the corporate governance practices that a listed entity must adopt. The choice of such practices is fundamentally a matter for the entity's board of directors. Indeed, the latest instalment of the ASX principles, which will apply from July 1 this year, states that "different entities may legitimately adopt different governance practices, based on a range of factors, including their size, complexity, history and corporate culture". Fundamentally, an individual must be free from any interest in any business or other relationship which could materially interfere, or be perceived to materially interfere (on an objective basis), with the individual's ability to act in the members' best interests.

ASFA also believes that the definition of independence should be removed from the SIS Act and instead be included in a Prudential Standard. The structure of the industry and the standards relating to governance are constantly evolving and Prudential Standards are easier to change/update than legislation. In addition, Prudential Standards are more flexible instruments in that, although the requirements in the Prudential Standards are legally binding, there is scope for trustee boards to lodge an application to APRA for an adjustment or exclusion from specific prudential requirements in the Prudential Standards.

Having the definition of independence in a Prudential Standard would allow boards to make an application to APRA for special consideration in particular circumstances – e.g. where an individual does not quite satisfy all the requirements in the definition in order to be classified as independent, say as a result of having been associated with standard employer-sponsor or sponsoring organisation two-and-a-half years ago (i.e. within the 3-year requirement) and special consideration is sought.

Proportion and role of independent directors

Focus question:

3. **What is an appropriate proportion of independent directors for superannuation boards?**

Summary answer

ASFA contends that some independence on trustee boards is necessary. Trustee boards should have the ability to appoint more than one independent director. As a minimum, the SIS Act should be amended to allow trustee boards that comply with the equal representation rules to appoint more than one independent director if they wish to do so.

Whilst there is no conclusive research on the appropriate proportion, ASFA supports the position that at least one-third of the directors on superannuation boards should be independent. However In transitioning to any new structure, consideration needs to be given to the appropriate number of

[9] See Appendix 2 for the current SIS Act and ASX Principles definitions of independence

directors required on the board to provide sufficient expertise whilst still maintaining an efficient governance and decision making framework.

Background and detail

There is no single piece of research that can be used to determine the "right number" of independent trustees. There is no doubt that in many circumstances a highly skilled, experienced and informed independent director can add real value to board decision making.

There is also research that indicates that forcing boards to have independent directors could, if anything, result in less discursive boards and, ultimately, potentially inferior decision-making.[10]

ASFA believes that at a minimum:

(i) A trustee board must have the flexibility to appoint the right people with the right level of experience, skills and knowledge.
(ii) A person should not automatically be entitled to a board position based upon their role within a holding company or employer/union sponsor.
(iii) There must be the ability to appoint directors who provide diversity and are able to manage the rapidly changing superannuation environment, including a increasing larger proportion of post retirement members.
(iv) Trustee board structures should reflect changing community expectations.

Regardless of how many independent directors are appointed, the trustee board should be structured in such a way that it:

- is able to focus on the retirement outcomes of fund members at a group, cohort and increasingly at an individual level;
- understands financial services regulation and business operations, investments, insurance, and financial advice;
- understands and competently deals with all major issues relevant to the fund;
- exercises independent judgment;
- encourages enhanced performance; and
- effectively reviews and challenges the performance of management[11]

Subject to "Fit and Proper" guidelines there are no other requirements as to the composition, tenure or independence of board members except that a majority of directors must be ordinarily resident in Australia.

Some trust deeds and/or company constitutions permit the appointment of an independent director, although under the SIS Act, where equal representation applies, only one independent director can be appointed and they cannot have a casting vote.[12] APRA can modify the operation of

[10] Research by Professor Sally Wheeler, Professor in the Faculty of Law, Queen's University Belfast – presented to ASFA Sydney and Melbourne luncheon series, August 2013.
[11] *ASX Corporate Governance Principles and Recommendations*, page 16.
[12] SIS Act, sub-section 89(2)

the equal representation rules to allow a trustee board to appoint more than one independent director.

It is vital that vested interests (sponsors, holding companies, employer groups, unions, employee groups etc) should not be allowed to have control over, or be perceived to have control over, trustee boards. In order to manage the risk of such control occurring, ASFA contends that some independence on trustee boards is necessary. Trustee boards therefore should have the ability to appoint more than one independent director. As a minimum, the SIS Act should be amended to allow trustee boards that comply with the equal representation rules to appoint more than one independent director if they wish to do so.

ASFA notes that those not for profit funds that have moved to one-third independents are finding the structure workable. Of those industry funds that have not yet moved to this structure, many (despite being supporters of the equal representation model of governance) are considering the appointment of independent directors in order to fill a skills or knowledge gap.

Key to this discussion is the importance of the trustee board having appropriate representation of the interests of the fund's membership and flexibility to achieve the appropriate level of skill and diversity of views to ensure quality decisions are made in the best interests of members in accordance with legislative requirements.

Board composition is one of the most important components of a successful trustee board. It is important for the successful operation of a trustee board that individuals appointed to the board are effective in their roles and have the ability to work well together and with management.

Effective board membership requires high levels of intellectual ability, experience, soundness of judgement and integrity. There is also the question of the collective capacity of the board in terms of the mix of abilities/skills, experience and personality that best makes up the board as a collective body.

Trustee boards should ensure that there is a suitable mix of individuals on the board with the appropriate skills relevant to the needs of their fund, irrespective of the number of independent directors on the board.

Focus question:

4. **Both the ASX Principles for listed companies and APRA's requirements for banking and insurance entities either suggest or require an independent chair. Should superannuation trustee boards have independent chairs?**

Summary answer

Yes. ASFA supports the introduction of a requirement, or at the very least a recommendation, for trustee boards to appoint an independent chair. Further, the (independent) chair should in all instances have the ability to vote, but, given the chair generally already exerts significant influence on the board, not necessarily have a casting vote (i.e. an *extra* vote to decide an issue). Instead, it should be left up to each board to have procedures in place to deal with deadlocks.

Background and detail

ASFA believes a prudent trustee would at the very least consider the appointment of an independent director as chair of the trustee board. This is in keeping with contemporary governance standards and is required of entities in other prudentially regulated sectors[13].

From a good governance perspective, trustee boards should seek to achieve consensus on all decisions wherever possible. Where there is insufficient support for a decision, trustee boards should be encouraged to undertake more work/discussion to resolve the impasse rather than force a 'tie breaker' scenario through an additional vote from the chair.

ASFA’s view is that the chair should be a strong leader, independent of sponsor and appointer interests. The importance of the role played by the chair in ensuring the effectiveness of a trustee board cannot be overstated. The trustee board therefore should consider the characteristics it seeks in a chair, including whether or not he/she is independent, and devise suitable procedures for the chair’s appointment.

Although not strictly a requirement under the legislation or the superannuation prudential standards, from a best practice perspective we strongly recommend that a trustee board documents the duties of the chair and establishes appropriate appointment procedures, including a mechanism for succession planning. This could be addressed by way of prudential guidance from APRA rather than being prescribed in legislation.

In addition, from a good governance perspective, we believe that the roles of the chair and Chief Executive Officer should not be exercised by the same individual. Such a requirement, if introduced, should be addressed in the prudential standards rather than through legislated requirements, with an appropriate transition period provided. Alternatively, this issue could be addressed through prudential guidance, with trustee boards reporting to APRA on an 'if not, why not' basis.

Focus question:

5. **Given the way that directors are currently appointed varies across funds, does it matter how independent directors are appointed?**

Summary answer

It does matter and in order to be considered independent, an individual must be nominated and appointed through a formal and transparent process based on minimum competency standards (skills, knowledge and experience) set by the trustee board, their ability to act independently as well as their ability to function with the other board members.

Current trustee directors should be actively engaged in approving any nominees. Where a potential new director has been suggested by a current director or an associate of the director, that director should not take part in the final appointment decision.

[13] Including Prudential Standard CPS 510 – Governance, which sets out minimum foundations for good governance of a regulated institution in the deposit-taking, general insurance and life insurance industries. It requires that “the chairperson of the Board of directors must be an independent director”.

Background and detail

ASFA's strongly contends that the manner in which independent directors are appointed to trustee boards is critical to ensuring good governance and the effective operation of the trustee board. It should be noted that there are a number of different models that can be used to achieve this outcome, including member election.

Current trustee directors should be actively engaged in approving any nominees. Where independent directors are nominated by an external organisation, there is also a role to be played by the trustee board in providing feedback to these organisations about any gaps that have emerged in the collective skill set of the board.

ASFA considers that, where a person has been suggested by a current director or an associate of the director, that director should not take part in the final appointment decision.

Focus question:

6. **Should the process adopted for appointing independent directors be aligned for all board appointments?**

Summary answer

Yes. ASFA considers that the appointment process for independent directors should be aligned for all board appointments. Consistent with our response to focus question 5, our view is that every trustee director should be nominated and appointed through a formal and transparent process based on competency. The individual should meet certain minimum competency standards (skills, knowledge, and experience), be able to work with the other Board members and have the ability to be independently minded so that the members' best interests can be put first.

Background and detail

Trustee boards need to ensure that there is an appropriate mix of individuals on the board with the appropriate skills relevant to the needs of their fund. The degree to which this can readily be achieved could, in turn, affect the number of directors that are ultimately required. That is, issues of board size and appropriate mix of skills/experience are to some degree inherently interlinked.

Whilst each director brings to the board their own set of skills (e.g. general business acumen, accounting, financial, investment and/or insurance insight), it is important to ensure there are minimum competency standards and expertise for all trustee directors (particularly in relation to governance) for the protection not only of fund members, but also of the directors themselves. Trustee boards have a duty to seek advice where required, however, seeking and relying on advice is not in and of itself sufficient. There needs to be adequate experience and expertise to ensure that directors can understand and, where necessary, challenge the advice provided by external parties (e.g. professional advisers, consultants, service providers).

ASFA considers that aligning the process for appointing all trustee directors and ensuring the board is actively involved in the nomination/appointment process will increase the likelihood of trustee boards having the appropriate mix of directors with the requisite skill sets relevant to the needs of their fund.

If the process for all board appointments is not aligned, every trustee director should still be appointed through a formal and transparent process based on competency.

Management of conflicts of interest

Focus question:

7. Are there any other measures that would strengthen the conflict of interest regime?

Summary answer

Other measures that ASFA believes could strengthen the conflict of interest regime include:

i. Pre-appointment disclosure of potential conflicts of interest or duty at the time an individual is nominated for appointment or election to the trustee board;

ii. Ongoing disclosure of potential conflicts of interest and duty in the fund's annual report;

iii. A requirement for trustee directors to excuse themselves from all board meeting agenda items, discussions, communications and decisions relating to matters where a conflict of interest or duty exists; and

iv. A ban on multiple trustee board directorships in certain circumstances.

Background and detail

A trustee board has a fiduciary duty to ensure that the decisions of directors are not compromised or biased by conflict. ASFA supports the current requirement that trustee boards need to formulate and document their conflicts management policy, including procedures for identifying, assessing and effectively managing actual and potential conflicts of interest or duty. With respect to item (iv) above in our summary answer, a not uncommon situation is that one individual is a director on more than one superannuation fund trustee board. There are also situations where a professional trustee company, with the same board (composed of the same directors), acts as the trustee for multiple funds, often including public offer funds that may be competing in the same space. Such situations lead to the potential for conflicts of interest or conflicts of duty to arise.

The key issues to consider with respect to such conflicts of interest or duty are:

- Whether an individual who is on the trustee board of more than one APRA-regulated superannuation fund can properly fulfil their fiduciary duties;
- Does the presence of that individual compromise discussion at board level? For example, whether their presence would impact on the ability or willingness of other board members to discuss issues which may be commercially sensitive or involve proprietary information; and

- What would fund members think of the presence of that individual? That is, the perception of a conflict, which arguably can be as important as the existence of an actual conflict.

- If a trustee director has an association with a service provider that is, or could be, used by the fund, the question in this situation is whether the actual or potential conflict of interest or duty which would arise can adequately be managed.

New covenants in section 52 and 52A of the SIS Act require that trustee boards and directors must give priority to the duties owed to, and interests of, beneficiaries over those of other persons, and must ensure that this duty of priority is met despite any conflict. This obligation takes priority over any conflicting obligations an executive officer or employee of a corporate trustee has under Part 2D.1 of the *Corporations Act 2001* or Division 4 of Part 3 of the *Commonwealth Authorities and Companies Act 1997*.[14]

Arguably, if the tests outlined above are applied in practice, then such conflicts are being managed according to the law and consistent with the APRA prudential standard. There is therefore an argument that these heightened obligations in relation to the management of conflicts and the duty of priority, which must be satisfied by trustee boards and individual directors, are sufficiently robust to allow trustee boards to fulfil their fiduciary duties despite the presence of directors who serve on the board of more than one APRA-regulated superannuation fund. That is, the enhanced trustee duties with respect to conflicts management and the duty of priority provide for adequate accountability and render any proposed ban on multiple trusteeships redundant.

That being said, there is a counter-argument that, despite the heightened obligations that have been imposed on trustee board and directors as a result of these new legislative provisions and the prudential standards, the potential conflicts of interest or duty arising from individuals serving on more than one APRA-regulated superannuation trustee board cannot sufficiently be overcome.

Notwithstanding these conflicting positions on multiple directorships, our view is that, with the exception of closed defined benefit corporate funds and related funds, an individual should not be allowed to be a trustee or director on more than one APRA-regulated superannuation fund trustee board.

In particular, ASFA considers that:

- An individual who is on more than one trustee board cannot properly fulfil their fiduciary duties to the beneficiaries of each fund simultaneously.

- The presence of that individual on multiple trustee boards would be likely to compromise discussion at board level to some extent. That is, their presence would impact on the ability or willingness of other board members to discuss issues which may be commercially sensitive or involving proprietary information.

- Despite the fact that multiple trustee board memberships do occur at present, the negative perception that arises as result of the conflicts which arise from this is unacceptable. This negative perception is not just limited to the funds in question. It has the potential to detrimentally affect the reputation of the entire industry, particularly the public’s perception of the industry’s governance practices.

[14] Refer sub-section 52(4) of the SIS Act.

There is an argument that, where the funds are not directly competing with each another for members (for example, a retail fund and a corporate fund which have different target memberships), they should be allowed to have a common director serving on each fund's board. ASFA contends, however, that the reality is that virtually all funds (with very few exceptions, such as closed defined benefit funds or related funds) are competing with each other – for members, investments, shelf space etc. With choice of fund and portability allowing members to switch funds, the reality is that there will be circumstances which arise from time to time where an individual looking to select or change their superannuation fund will consider/compare funds from different sectors, regardless of whether or not these funds believe they are in direct competition with one another.

Also, there is nothing to prevent a director sitting on multiple trustee boards taking potentially sensitive information (i.e. commercially sensitive or propriety information), whether it be consciously or sub-consciously, from one fund to the other. In fact, we would argue that it would be virtually impossible for individuals to completely disregard certain information gained in their capacity as a director of one fund and to not take that information with them to the other fund. An example of this is where the first fund (Fund A) undertakes a tender process to appoint a service provider (e.g. administrator, custodian, insurer etc). ASFA contends that, once Fund A's board is furnished with the results of that tender process and, as a result, the director is aware of the assessment of each service provider's capabilities/shortcomings, pricing etc, it would virtually be impossible for that director's view of those service providers not to be coloured in some way if and when Fund B looks to undertake a similar tender or due diligence process in the future. This situation is particularly critical in the superannuation context because there are very few third party administrators and custodians that provide services to superannuation funds.

Finally, there is the negative perception brought on by multiple directorships (discussed in point 3 above), which we believe has the capacity to detrimentally affect the reputation of the entire industry from a governance perspective.

For all these reasons, ASFA considers that it would be in the best interest of fund members and the industry to ban multiple directorships except in very limited circumstances, for example where one of the multiple directorships relates to a closed defined benefit fund or a related fund.

ASFA contends that the banning of multiple directorships should not have an impact on a large number of individuals (or funds). According to the latest APRA statistics[15], there were 974 individual trustee directors at 30 June 2013. Of these individuals, 69 (7 per cent) were directors of more than one trustee board. This compares to 136 individuals (8 per cent) who were directors of more than one trustee board in 2006. Of these 69 individuals with multiple directorships, almost two-thirds (65 per cent) only held two directorships.

As well, almost half of the directors on multiple trustee boards (32 of the 69) sat on 'affiliated boards' in 2013 (i.e. trustee boards owned by parties within the same group structure or related group structure). ASFA considers that it may be appropriate to continue to allow individuals to serve as directors on 'affiliated boards'.

Also, where dealings with a related party are permitted, these dealings must be on a commercial arm's length basis. Consideration should be given to creating an obligation to disclose the details of

[15] APRA Annual Superannuation Bulletin – June 2013 (issued 8 January 2014)

any such dealings to members in the fund's annual report, including confirmation that the dealings are at all times being conducted on a commercial arm's length basis.

Ongoing effectiveness of superannuation trustee boards

Focus question:

8. In relation to board renewal, should there be maximum appointment terms for directors? If so, what length of term is appropriate?

Summary answer

Trustee boards should be required to implement a policy which includes a maximum appointment term for its directors. ASFA's view is that an appropriate maximum appointment term for trustee directors would fall somewhere in the range of 9 to 12 years.

Background and detail

The advantages of setting maximum appointment terms for directors include:

1. A regular infusion of fresh ideas and new perspectives is brought onto the trustee board.
2. It eliminates a sense of entitlement for those who wish to retire into a directorship.
3. Incoming directors know that their contribution and commitment has to be made within a limited timeframe.
4. Managing diversity is made easier through regeneration of the board as the membership of the board can be continuously replenished.
5. The trustee board can have a built-in balance of continuity and turnover.
6. Passive, ineffective or troublesome directors can more easily be rotated off.
7. Trustee boards without maximum tenure limits, and therefore numerous long-serving members, can experience stagnation, perpetual concentration of power within a small group, diminished debate over critical issues, potential alienation and even intimidation of any new directors, tiredness, boredom and loss of commitment by the directors.

The disadvantages of setting maximum appointment terms for directors include:

- There is a risk that considerable expertise could be lost at one time if board succession planning is not managed effectively.
- The inability to retain the services of an experienced director with good corporate memory, who has witnessed recurrent trends and cycles over time.
- By prescribing an arbitrary period of time, the ability of the board to take account of their circumstances in managing their membership could be limited – for example, the mandatory

loss of a key person without the ability readily to replace that director with another person of similar expertise, knowledge and experience.

Whilst ASFA recognises that the imposition of a maximum appointment term may be an issue for some trustee boards, we believe that the advantages resulting from the regular replenishment of board members and the introduction of fresh ideas and thinking outweigh any disadvantages.

There is also the issue of board control/influence that needs to be considered – i.e. generally speaking, long serving directors tend to exert greater influence on, or control over, the board, often at the expense of newer/less experienced directors. Unlike shareholders of a company, members of a superannuation fund do not have the capacity to remove trustee directors.

ASFA therefore considers that trustee boards should be required to implement a policy which includes a maximum appointment term for its directors. This could be done by setting maximum fixed renewable terms. For example, a common approach in corporate boards is to have a four-year term with an optional additional four-year term, with a maximum of two terms, but directors could serve again after a given period of time off the board. Another approach is to have multiples of three-year terms up to a maximum of, say, three or four terms.

Such arrangements could be supported by a comprehensive succession planning process, including staggering the end of director's terms in order to avoid a major loss of experienced directors from the board all at once.

ASFA's view is that an appropriate maximum appointment term for trustee directors would fall somewhere in the range of 9 to 12 years (e.g. three to four terms of three years or three terms of four years).

Although ASX Principles do not specifically set a maximum tenure for listed company directors, they do state that "Board renewal is critical to performance, and directors should be conscious of the duration of each director's tenure in succession planning. The nomination committee should consider whether succession plans are in place to maintain an appropriate mix of skills, experience, expertise and diversity on the board".

There is also research in the listed company space (i.e. based on a sample of S&P 1500 firms) which suggests that there is an 'inverted U' shape relationship between board tenure and firm value resulting from board decisions[16]. Empirically, this research suggests that "the highest firm value is reached at a board tenure of around nine years. For firms with greater advisory needs or with less entrenchment costs, firm value could increase up to 12 years."

Given the fact that many boards have set a maximum of either three or four three-year terms (totalling 9 to 12 years), and the results of the research discussed above which shows that the optimal board tenure is around 9 years and that performance starts to deteriorate after about 12 years, ASFA considers that setting an absolute maximum appointment term of 12 years for all trustee directors would be appropriate for superannuation. Such a policy, we believe, would address the concerns discussed previously around stagnation of ideas, perpetual concentration of power

[16] Research by Huang, S. (July 2013) – *"Board Tenure and Firm Performance"*

within a small group, diminished debate over critical issues, potential alienation and even intimidation of any new directors, tiredness, boredom and loss of commitment by the directors.

In terms of implementation, the requirement to set a policy on maximum tenure should be introduced by way of an APRA prudential standard rather than being enshrined in legislation. APRA should also provide guidance to trustee boards on the setting of an appropriate maximum appointment term for directors. Trustee boards would then be required to demonstrate to APRA why their policy on tenure does not align with the requirements of the prudential standard (i.e. on an 'if not, why not' basis).

Focus question:

9. **Should directors on boards be subject to regular appraisals of their performance?**

Summary answer

Yes. Such performance appraisals should be conducted on an annual basis. There are three levels of trustee board performance that need to be considered:

1. performance of the individual directors;
2. performance of the trustee board as a whole; and
3. the ability of the individual directors and the board to be high performing in the future.

Background and detail

In terms of skills/experience, all trustee directors need to have sound superannuation and investment knowledge up to a certain level. ASFA considers that, in addition to superannuation and investments, there are other areas in which trustee boards collectively should have a sufficient level of expertise or prior experience including, for example, business/strategy, finance (accounting & audit), legal, risk management (both at investment and operational level), governance (previous board or senior executive/management experience), insurance, marketing & communications, tax and actuarial (for defined benefit funds). Each trustee board should determine the required mix of abilities/skills and experience that will best make up their board as a collective body – i.e. these should not be prescribed.

To ensure the annual performance assessment process is effective in its ability to remedy any imbalance or underperformance, it is imperative that trustee boards have the ability to remove non-performing directors. There needs to be an enabling provision in the trustee company's constitution that allows boards to remove directors who are underperforming.

Prudential Practice Guide SPG 510 provides examples of objectives that could be set for the trustee board and for individual directors.[17]

[17] SPG 510 – Governance, paragraphs 23 and 24.

Performance standards could be framed around issues such as:

- the degree of achievement of the fund's strategic objectives;
- the extent to which the trustee board has adhered to its own governance policies;
- whether material decisions have been made on a fully informed basis, and after adequate discussion;
- whether all directors have been given equal opportunity to provide input into the decision-making process;
- whether decision-making has been influenced by outside allegiances, rather than being based only on the interests of fund members;
- whether the trustee board's ability to function in a productive manner has been reduced by personality clashes or political differences within the board; and
- whether the trustee board has effectively managed strategic risks

One approach is for each director individually to assess the trustee board's performance against a range of measures, followed by a collective discussion and review by the trustee board as a whole. A potential alternative is to employ a consultant to provide an independent review of how well the trustee board functions. In particular, the issue of a person or persons who dominate the decision making process of the trustee board should be addressed in this annual review. Those who passively 'follow the leader' need to understand that a failure to contribute falls short of meeting their fiduciary obligations.

Implementation issues

Focus question:

10. **Would legislation, an APRA prudential standard, industry self-regulation or a combination be most suitable for implementing changes to governance? What would the regulatory cost and compliance impacts of each option be?**

Summary answer

Self-regulation provides the greatest flexibility in achieving appropriate outcomes, and allows trustees to manage compliance costs and the impact of changes on resourcing. ASFA, however, recognises that self-regulation is not workable in all instances. APRA prudential standards are useful, particularly when kept at a fairly high level, accompanied with appropriate guidance and supported by constructive discussions between trustee boards and their APRA supervisors. Ultimately, the manner in which the relevant governance changes are implemented largely will depend on the precise nature of what is introduced.

Background and detail

ASFA contends that any changes in relation to the definition of independence and the other rules around directors (i.e. proportion of independent directors, process for appointing directors, maximum appointment terms and regular appraisal of performance) should be implemented through the APRA prudential standards rather than legislation, and that they should be principle based. It may be, however, that some of the other proposed requirements would need to be enshrined in legislation.

Unlike the general prescriptiveness of legislation, the prudential standards for superannuation, in the main, consist of high-level principles that are flexible enough to cater for different arrangements/models. Implementing the governance changes, particularly around the appointment and ongoing appraisal of directors, through a clearly detailed prudential standard would provide trustee boards with sufficient flexibility to enable them to develop appropriate policies and procedures around these governance-related matters which reflect the size, scale and nature of their funds. Also, prudential standards are much easier to change/update than legislation, which is particularly important given the evolving nature of superannuation fund governance.

Focus question:

11. **What is the appropriate timeframe to implement the Government's governance policy under each option?**

Summary answer

The implementation timeframes will depend on the changes introduced which are outlined in the table below.

Background and detail

It is vital that, in introducing any new requirements, consideration be given to the cumulative effect of recent regulatory changes and the affect this has had on the superannuation industry – in terms of the resources that have had to be spent on implementing the reforms, ensuring ongoing compliance with the requirements and keeping fund members fully informed of the changes.

Any changes that are implemented without a sufficient transition period will further exacerbate the difficulties that fund trustees have faced over the last three or four years and will have a significant negative effect on the industry and, ultimately, the confidence that fund members have in the system.

ASFA considers that the transition period required in relation to directors' appointment terms, number of independent directors (particularly if the industry were to move to one-third or a majority of independent directors), and changes to director appointment processes would for example need to allow directors to serve out their existing terms (which could be up to three or four years). This transition period would give funds time to amend their internal processes and procedures to comply with the new requirements, particularly given the number of funds and potentially limited supply of appropriately qualified candidates.

The table below outlines what ASFA believes would be suitable transition/implementation periods for the various governance changes proposed in the discussion paper. These minimum transition

timeframes are necessary regardless of how any changes are to be effected (i.e. by legislation, an APRA prudential standard, industry self-regulation or a combination).

Governance-related change discussed/proposed (numbers in brackets refer to relevant focus question)	**Transition/implementation period required (minimum)**
New definition of independence (2)	1.5 – 2 years
Min. number/proportion of independent directors (3)	3 years
Independent chair (4)	3 years
Appointment process for independent directors through formal and transparent process based on competency* (5)	2 years
Alignment of appointment process for all directors (6)	2 years
Pre-nomination disclosure of potential conflicts* (7)	1 year
Ongoing disclosure of potential conflicts in annual report* (7)	1 year
Ban on most multiple directorships* (7)	3 years
Maximum appointment terms for directors (8)	3 years
Regular performance appraisal of directors (9)	1 year

*ASFA recommendations

Focus question:

12. **Given that there will be existing directors appointed under a variety of terms and conditions, what type of transitional rules are required?**

Summary answer

Any transition in relation to director's appointment terms, number of independent directors, changes to director appointment processes etc. would need to allow directors to serve out their existing terms (which could be up to three or four years) in order to minimise the disruption to fund boards and directors and allow the industry sufficient time to transition to the new governance regime.

Background and detail

As discussed in our response to focus question 8, trustee boards should be required to implement a policy which includes maximum appointment terms for its directors by setting maximum fixed renewable terms (e.g. maximum three terms of three years = nine years), in conjunction with an absolute maximum appointment term for all trustee directors of 12 years.

Any directors that have served more than the maximum appointment term when the requirement is introduced, or who would have been on the board for longer than the maximum period at the end of their current term, would be required to resign at the end of their current term.

Once the relevant transition period(s) have elapsed (subject to any extensions or special dispensation received from APRA), any appointments and re-appointments to the trustee board would need to take into account the new requirements in relation to independent directors (including any new definition of independence), appraisals of performance, appointment process as well as any other board objectives – for example, greater experience in accounting, investments, law etc. together with any diversity issues (professional, educational, gender etc.).

Part 3: Enhanced transparency

Part 3A. Choice product dashboard

Focus question:

13. **Should a choice product dashboard present the same information, in the same format, as a MySuper product dashboard?**

Summary answer

The MySuper product dashboard needs to be properly consumer tested and redesigned to make it more comprehensible and usable for consumers. Once the revised MySuper product dashboard has been implemented for 12 months Treasury should consult on the need for, and appropriate design of, choice product dashboard(s).

Background and detail

The product dashboard has moved from that recommended by the Stronger Super Review Panel.

Most significantly, the ASIC consumer testing revealed a number of issues of concern with respect to consumers, including lack of comprehension of what various measures were conveying; misapplication, misinterpretation or misunderstanding of some information and even the potential to be misled by such factors as the use of different scales on the axis of graphs. Significantly, a number of recommendations necessitate the dashboard only being accessed on-line, while others require it to be developed as an interactive tool, neither of which was envisioned.

We have provided an analysis of the Stronger Super Review Panel recommendation and of the ASIC consumer testing in Annexure D.

The Australian School of Business Research Paper "As Easy as Pie: How Retirement Savers Use Prescribed Investment Disclosures" [18] reported on the results of two laboratory experiments that study how university student and staff participants chose retirement savings investment options using 'user-friendly' information prescribed by regulators. Among other things the paper demonstrated that

- choices of more than 20% of participants could not be predicted using any of the prescribed information items; and
- 30% of participants used all, or almost all, items, frequently in unexpected ways.

The authors concluded that the results: -

- highlighted that information contained in prescribed investment disclosures may not be used in the manner intended by the regulator; and

[18] Australian School of Business Research Paper No. 2013ACTL06 – "As Easy as Pie: How Retirement Savers Use Prescribed Investment Disclosures" by H. Bateman I. Dobrescu B. Newell A. Ortmann and S. Thorp

- pose interesting methodological questions about the way ‘user-friendly’ information prescribed by regulators is validated before being legislated”.

The spectrum of choice products is vast. At one end of the spectrum are platforms offering a number of direct investment options and levels of control which resemble self-managed superannuation funds and at the other end there are funds which offer a range of fully constructed and diversified investment options.

Given the issues with the MySuper product dashboard and the diversity and complexity of choice products we submit that once the MySuper product dashboard has been properly consumer tested and redesigned to make it more comprehendible and usable for consumers, and has been implemented for 12 months, Treasury should consider the need for, and appropriate design of, choice product dashboard(s).

Focus question:

13(a) **In answering this question you may wish to consider, if the choice product dashboard is to present different information, what should it include and why?**

Summary answer

As per our response to the previous question, this can only be addressed once the MySuper product dashboard is redesigned appropriately, consumer tested and implemented and consultation has occurred as to the need for, and appropriate design of, choice product dashboards. It is conceivable that this could result in there being some minor variations in dashboard depending on the “type” of choice product and the exclusion of some choice products.

Net investment return versus net return

Focus question:

14. **Is it appropriate to use a single benchmark (CPI plus percentage return) for all choice product return targets?**

Summary answer

It would not be appropriate to use a single benchmark for choice product return targets for those investment options which are “single asset” direct investments, such as equities or indexed funds. This is not feasible to achieve and any attempt to do so would produce artificial results which would not be meaningful to members. “Single asset” would not include an option which is invested in a single “intermediary” (pooled) asset (such as a managed investment scheme) – such an option would still need to disclose a target.

Focus question:

15. **Should both net investment return (investment return net of investment costs only) and net return (investment return net of all associated costs) be used to measure a product's investment return on the choice product dashboard?**

Summary answer

A product's investment return on the product dashboard should be measured as the net investment return – net of tax and investment costs only.

We appreciate there is a desire to illustrate the combined effect of: -

- taxes and investment fees (on investment returns); and
- administration fees (on member accounts)

so that attention is drawn to the effect which both have on a member's end benefit.

In our view, however, this should be achieved separately through the use of a worked example with respect to one or more "representative members".

Background and detail

There are a number of reasons why net investment return should be calculated net of tax and investment costs only, including: -

- A measure of a product's investment returns should be measuring just that – the net return on that product's investments across the product. This has nothing to do with fees and charges with respect to administering a member's account, which is a totally separate matter;

  Investment return targets should be established on the basis of an expected return net of tax and investment fees. It does not make sense to set an investment return target with respect to a "representative member" and the administration fees which they would be charged. This is not how "product wide" investment returns targets are set and is a meaningless concept – only relevant to the one, hypothetical, member whose account happens to align with the "representative member";
- Investment returns being disclosed on a "net of tax, investment and administration fees" basis introduces an "apples and oranges" element into the disclosure of investment returns as historically, and potentially in future, products will have disclosed investment returns on the - arguably correct – basis of return net of taxes and investment fees only. Members – incorrectly – will be comparing these two figures; and
- The deduction of administration fees from returns is inconsistent with the methodology used historically to disclose to members, for example in past PDSs.

Illustrating the effect of administration fees should not be done through the generation of a "notional" net return figure based on a "representative member".

The current prescribed methodology whereby a trustee must: -

- determine the amount of an administration fee for a "representative member"; and
- deduct that from the returns net of tax and investment fees for that member

to produce a "return net of tax, investment fees and administration fees" figure - which is then purported to relate to the product as a whole - produces an outcome which is not meaningful and, depending on the fee structure within the fund, misleading. This is increasingly the case as any amount calculated by reference to a "fixed, flat fee" component of an administration fees is proportionally higher than any amount determined by reference to a percentage fee.

Such a net return figure would only be applicable to a (hypothetical) member who actually happened to have a final account balance and cash flow identical to that of the "representative member". It would be of no relevance to any other member for whom their net return figure, taking into account administration fees, will be different in every case (except in the rare instance where the administration fees are totally percentage based).

Generally, the net return for every member in a fund will be different, depending on their account balance and contributions. This is the case even with modelling which is not performed on a time or money weighted basis. Once the timing of contributions and returns is taken into account, the variation in net returns between members is even greater.

The combined effect of investment fees and administration fees should be disclosed separately by providing, with respect to one or more "representative members": -

- the amount of investment return (net of tax and investment fees) determined with respect to that member;
- the amount of administration fees deducted with respect to that member;
- the amount of "net return credited to that member's account"

This could look something like this: -

For a member whose account balance as at 30 June 2014 was $50,000 and who made contributions of $5,000 between 1 July 2013 and 30 June 2014: -

- *the amount of investment return was $5000*
- *the amount of administration fees was $500*
- *the amount of* ***net returns credited to that members account*** *was* ***$4,500***

It has repeatedly been identified that there is strong evidence that investors better understand and feel more comfortable with disclosure which is in dollars rather than percentages. [19]. It was this finding which resulted in the "dollar disclosure" legislation which necessitated the disclosure of various costs, fees, charges, expenses, benefits and interests to be stated as amounts in dollars in materials such as Product Disclosure Statements and Statements of Advice from 1 July 2005.

As such, we would argue that disclosure on this basis is more appropriate and meaningful to member as it: -

- discloses the amount in dollars;
- is explicit that it is with respect to a "representative member";
- does not purport to represent the net return across the entirety of the product, as the generation of a single, product "net return" figure impliedly does

Given that fixed, flat fees and percentage based administration fees have a varying effect upon the quantum of administration fees ASFA also submits that consideration be given to there being worked examples with respect to two different "representative members" to go some way towards demonstrating these differing effects.

[19] Ian Ramsay - Disclosure of fees and charges in managed investments; Review of Current Australian Requirements and Options for Reform; Report to the Australian Securities and Investments Commission; Released 25 September 2002, Page 212

By way of illustration, utilising the example provided above, this could look like: -

For a member whose account balance as at 30 June 2014 was **$50,000** and who made contributions of **$5,000** between 1 July 2013 and 30 June 2014: -	For a member whose account balance as at 30 June 2014 was **$100,000** and who made contributions of **$10,000** between 1 July 2013 and 30 June 2014: -
• the amount of investment return was $5,000 • the amount of administration fees was $500 • the **amount of net returns credited** was **$4,500**	• the amount of investment return was $10,000 • the amount of administration fees was $750 • the **amount of net returns credited** was **$9,250**

This is on the basis that administration fees are charged in accordance with the following: -

(i) $250 per annum fixed fee; plus
(ii) 0.005% of final account balance.

The example goes some way to demonstrating the differing effect of fixed, flat fees and percentage based fees on the net return. The second member has twice as much in their account but their administration fee is only 50% higher and, accordingly, the net return credit to their account is a higher proportion of their final account balance than it is for the lower account balance.

We submit that this worked example has the benefit: -

1. of revealing more than a simple "net return of 9%" figure (calculated with respect to the $50,000 member) would do; and
2. more significantly – of not being misleading in the same way, given that the net return for the $100,000 member was in fact 9.25% and for a $25,000 member would be 8.5%. These differences are material.

ASFA strongly submits that: -

- the methodology of deducting the administration fees with respect to a "representative member" from the investment return to determine a notional, product-wide "net return" figure be abolished; and
- in order to illustrate the combined effect of investment and administration fees on member accounts - that worked examples, in dollars, are provided with respect to two prescribed "representative members"

We understand that the submission made by the Actuaries Institute makes a similar observation and recommends that the investment return target and investment return be disclosed on a net of investment fees and tax basis. As such we would urge that this aspect of the product dashboard, at least, be reviewed as a matter of urgency.

Focus question:

15 (a)	**In considering this question, you may wish to consider: If including an additional measure for a product's investment return would add unnecessary complexity.**

Summary answer

As per above, the current measure of net return should be abolished and replaced with two worked examples on the basis that this is not only more accurate but is less complex for a member to understand.

Focus question:

15(b)	**In considering this question, you may wish to consider: If both net investment return and net return are used on the choice product dashboard, whether they should also be used on the MySuper product dashboard.**

Summary answer

Whatever methodology is finally adopted, it is important that the same methodology is employed in both the MySuper product dashboard as well as in any choice product dashboards, as the information and format should be consistent to facilitate comparisons by consumers.

Focus question:

15(c)	**In considering this question, you may wish to consider: Whether it is appropriate to use a single time horizon, for example 10 years, when calculating target net return and net return for the range of possible choice products.**

Summary answer

As per above, this question can only be addressed once the MySuper product dashboard is redesigned appropriately, consumer tested and implemented and consultation has occurred as to the need for, and appropriate design of, choice product dashboards. It is conceivable that this could result in there being some minor variations in dashboard depending on the "type" of choice product.

Measuring a product's investment risk

Focus question:

16. Should the choice product dashboard include both a short-term (volatility) and long-term (inflation) risk measure?

Summary answer

In the long term, once an appropriate long term risk measure is developed, it would be beneficial to have the two risk measures - (volatility and inflation risk).

Disclosure of risk is important for investors. ASFA and ASIC research indicates that having two risk measures based on different conceptual bases (a short term one identifying volatility and a long term one identifying probable returns compared to inflation) will potentially add to confusion unless well designed and clearly explained.

Background and detail

We know consumers find it difficult to understand investment risk and comparisons of investment risk (including the Standard Risk Measure (SRM)).

ASFA supports the development of a long term risk measure and is prepared to lead an industry working group to facilitate its development.

This being said, in the short term there should only be the one risk measure; until the long term risk measure is developed and consumers are educated and become familiar with different measures of investment risk.

In regards to the existing SRM, ASFA is of the view that it would be more appropriate and accurate for it to be renamed *[something like]* the "investment volatility risk measure".

Focus question:

16(a) In considering this question, you may wish to consider: Is the SRM model the best measure of short-term investment risk?

Summary answer

The SRM model is the best existing measure of short term investment (volatility) risk. That being said it does need to be refined and improved and this will take time, effort and commitment.

Background and detail

Since its release in July 2011 the SRM has been criticised on a number of fronts:

1. The SRM is based on the likely number of negative annual returns over any 20 year period. While the SRM contemplates the number of annual negative returns it does not take into account the *severity or magnitude* of such negative returns.
2. The SRM contemplates each trustee developing capital market assumptions (return, volatility and correlation) for the asset classes in their fund/investment options. Without

standard capital market assumptions being imposed on trustees there is arguably too much discretion and it provides opportunities for gaming.

This being said, developing a risk measure that allows consumers to properly understand investment risk and compare products (from a risk perspective) is really difficult. Until its release in July 2011 there was no common methodology for calculating and describing investment risk – notwithstanding that it was common practice to describe funds/investment options as "high", "medium" or "low" risk. There was significant concern amongst industry participants and regulators that this situation was unacceptable in that there was the possibility/probability that consumers were being misled about the "riskiness" of products, which was highlighted during the GFC.

The production and release of the SRM was a response to a request by APRA and ASIC that the industry bodies (ASFA and the FSC) develop industry guidance for the disclosure of risk, based on a consistent methodology. The industry associations formed a working group comprising 15 industry experts representing superannuation funds and asset consultants (representing both industry and retail funds). The working group met on a number of occasions (between itself and with the regulators) over more than nine months to develop the SRM. While it was understood at the time that the SRM was imperfect (due to the shortcomings listed above) it was agreed that it was better than what existed (being nothing) and that properly addressing the known shortcomings risked significant time delays and/or not being able to reach agreement on a risk measure. Creating a risk measure is complex and contentious.

When it was released it was understood and agreed that the SRM would need to be reviewed after a period of time and that such a review would need to be comprehensive. Such a review will:

1. require the input of relevant experts;
2. need to be properly managed to address valid concerns and avoid vested interests;
3. require commitment and input from the relevant regulators and industry associations as well as industry participants; and
4. take time to complete

Focus question:

16(b) In considering this question, you may wish to consider: What would be the most suitable measure of long-term risk to include on the product dashboard?

Summary answer

The most appropriate long term risk measure should address the likelihood (or non-likelihood) of members meeting their retirement outcomes/goals.

Background and detail

As stated above, the development of risk measures is extremely complex and challenging. Understanding and developing the most suitable measure of long-term risk will require a structured process, the commitment of regulators, industry associations and participants and will take time.

It is vital though that we start to focus on the actual risk of a member not meeting their retirement goals. ASFA proposes that a working group be set up with regulators to build the framework on

which to develop such a measure. ASFA also suggests that the ASFA Retirement Standard provides a good starting point for such a measure.

Focus question:

16(c) In considering this question, you may wish to consider: Is it possible to present a long-term risk measure in a similar format to the short-term risk measure (that is High/Medium/Low)?

Summary answer

The development of risk measures is extremely complex and challenging. Understanding and developing the most suitable measure of long-term risk will require a structured process, the commitment of regulators, industry associations and participants and will take time.

Focus question:

16(d) In considering this question, you may wish to consider: Would including an additional risk measure add unnecessary complexity to the product dashboard?

Summary answer

Including an additional risk measure will add complexity. However, if the long term risk measure is properly developed and consumers are adequately educated/informed, the added level of complexity will be manageable and consumer outcomes will be enhanced.

Additional carve outs

Focus question:

17. **Are additional carve outs from the choice product dashboard obligations required? If so, why are these additional carve outs required? In considering this question, you may also wish to consider identifying where the gaps in the current carve out provisions are.**

Summary answer

As stated previously, this question can only be addressed once the MySuper product dashboard is properly consumer tested, redesigned appropriately, and implemented and consultation has occurred as to the need for, and appropriate design of, choice product dashboards. It is conceivable that this could result in there being some minor variations in dashboard depending on the “type” of choice product and the exclusion of some choice products.

A liquidity measure

Focus question:

18. **Should a measure of liquidity be included on the choice and/or MySuper product dashboard? If so, what would a suitable measure be**?

Summary answer

No. A measure of liquidity should not be included on a product dashboard for two reasons:

- Feedback from ASFA members indicates that consumers will not understand a liquidity measure and including it is likely to confuse them and add unnecessary complexity to the product dashboard – detracting from the more relevant information.

- A liquidity measure largely is not relevant to consumers/members. Fund liquidity generally is a trustee/investment management issue – not a consumer issue. Under current rules a fund is deemed to be either liquid or illiquid. If liquid, rollovers must be processed within three days or withdrawals within 30 days. If illiquid, the rollover/withdrawal period must be agreed between the member and the trustee prior to the member joining the fund. Accordingly, liquidity from a member's perspective is generally known.

It could possibly be argued that a liquidity measure may assist potential members in assessing the trustee's ability to comply with its rollover/withdrawal obligations. While this could possibly be the case for an exceedingly small and well informed/educated part of the population we believe it will add confusion and complexity for the vast majority of members/potential members.

This being said, ASFA supports the concept of an illiquidity warning being presented on product dashboards for illiquid funds.

Implementation issues

Focus question:

19. **Should the commencement date for the choice product dashboard be delayed beyond 1 July 2014? If so, what date would be suitable for its commencement? What would be the benefits and costs to such a delay?**

Summary answer

The commencement date for the choice product dashboard should be delayed beyond 1 July 2014.

As stated above, the need for, and appropriate design of, a choice product dashboard should be considered after the redesigned MySuper product dashboard has been in operation for some time and has been properly consumer tested and refined. Once the revised MySuper product dashboard has been implemented for 12 months Treasury should consult on the need for, and appropriate design of, choice product dashboard(s).

Part 3B. Portfolio holdings disclosure

Presentation of portfolio holdings

Focus question:

20. **Which model of portfolio holdings disclosure would best achieve an appropriate balance between improved transparency and compliance costs?**

Summary answer

Of the models contemplated in the Treasury Discussion Paper, ASFA's believes that the model which best achieves the balance between transparency and compliance costs is the second alternative model. In this model Trustees would look through associated entities and disclose the assets they hold but would not need to look through non-associated entities (similar to the basis for reporting required under SRS 532.0).

We believe this will provide sufficient granularity for informed members (and/or their advisers) to understand how the fund is invested. However we are of the view that other more innovative disclosure models, probably pictorially based, would be more useful to most members. We attach, as Annexure E, a sample of innovative disclosure.

Background and detail

ASFA supports member directed and systemic transparency. This being said, feedback from ASFA members suggests that the purpose of the proposed portfolio holdings disclosure regime is unclear and they are unsure what it will achieve.

The current regime provides systemic transparency from a prudential perspective as funds are already required to provide significant reporting of investments to APRA under the superannuation reporting standards (SRS 530.0 Investments, SRS 530.1 Investments and investment flows, SRS 531.0 Investments Flows, SRS 532.0 Investment Exposure Concentrations, SRS 533.0 Asset Allocation, SRS 534.0 Derivative Financial Instruments and SRS 535.0 Securities Lending).

In regards to member directed transparency, members (and potential members) are interested in information which assists them to understand the likely risks and returns associated with the fund – such as broad asset classes, geographical exposures and levels of diversification. Some members are also interested in specific investments, such as tobacco or gambling related investments, from an ethical perspective.

Disclosure of fund assets (on a full "look through" basis) will not assist members to better assess the level of diversification and risk in particular products or likely future returns. Such information will be too voluminous, not standardised and potentially too complex to be of assistance to retail investors.

For these reasons we support a disclosure model which provides members with comprehensible information which will assist them to understand the important investment information relevant to their fund.

Disclosure of specific assets for ethical screening can be achieved by requiring trustees to disclose, upon request, whether they hold any such assets.

Specific Comments (on the full look through model)
The gathering and disclosure of fund assets (on a full look through basis) has a number of significant problems.

- If a total look-through regime were established funds would be disadvantaged in that they potentially would have to disclose information which is commercial in confidence or market sensitive and may be precluded from investing in certain (hedge type or private equity) funds which would refuse to disclose underlying investments.

- It will be time consuming and expensive for the trustee/fund, the costs of which ultimately will be borne by the members.

Disclosure of commercial in confidence or market sensitive information is a significant concern for funds and their investment managers.

With respect to unlisted (direct) assets, disclosure of the book value will put the superannuation funds at a material commercial disadvantage with respect to all other participants in the market, who do not need to disclose such information. This will have a deleterious effect upon the investment returns of members of those funds.

By way of example is the experience of one large fund: -

- It successfully acquired an additional interest in an existing asset through the exercise of a pre-emptive right at a discount to the fund's book value. Had the fund been in the position of having to disclose its book value, the market would have "bid up" the asset to at least an equivalent level thereby eliminating any advantage to the fund and denying its members the opportunity to acquire an investment at an attractive price;
- It sold an asset at a price above the fund's book value. In a difficult market, as was the case, the likelihood of receiving an offer at or above book value was unlikely and had the fund been forced to disclose its book value to the market the opportunity of making a sale above that value would have been lost.

It is important to note in this context that no corporation active in these markets is subject to similar disclosure requirements, which places superannuation funds at a considerable disadvantage and represents a considerable distortion of the market.

Another example is large funds which trade directly in some securities. The funds and their managers are wary of market moving sensitivity, particularly in Australia's very thin markets. While there is a 90 day delay in reporting, nevertheless concerns have been raised as funds tend to trade in patterns and other market participants would be interested in finding out about these patterns, generally considered to be commercially sensitive information. There is a risk that investment traders would become keen students of the patterns of securities trading of various superannuation funds.

Focus question:

20(a) **In considering this question, you may wish to consider the various options discussed above: Should portfolio holdings disclosure be consistent with the current legislative requirements (that is, full look through to the final asset, including investments held by collective investment vehicles)?**

Summary answer

As stated above ASFA's preferred model is the partial look through so the short answer to the question is no. Further the partial look through should be subject to a carve-out in respect of commercial-in-confidence and market sensitive information. Trustees should be able to withhold such information on an "if not – why not" basis.

Focus question:

20(b) In considering this question, you may wish to consider the various options discussed above: Should the managers/responsible entities of collective investment vehicles be required to disclose their assets separately? To give effect to this requirement, legislation would require all collective investment vehicles to disclose their asset holdings, regardless of whether some of its units are held by a superannuation fund.

Summary answer

As stated above, ASFA's preferred model is the second alternative model whereby trustees would look through associated entities and disclose the assets they hold but would not need to look through non-associated entities (similar to the basis for reporting required under SRS 532.0).

Focus question:

20(c) In considering this question, you may wish to consider the various options discussed above: Should portfolio holdings disclosure be limited to the information required to be provided to APRA under Reporting Standard SRS 532.0 Investment Exposure Concentrations?

Summary answer

Subject to the materiality threshold comments in question 23, ASFA supports portfolio holdings disclosure being limited to the information required to be provided to APRA under SRS 532.0 as this would reduce costs and "red tape".

Focus question:

21. **What would be the compliance costs associated with each of these models for portfolio holdings disclosure?**

Summary answer

Compliance costs associated with disclosing investments on a full look-through basis with no materiality threshold would be significant. The amount of data that would need to be reported potentially would be vast and the data may need to be sourced from a variety of sources.

Compliance costs associated with a model based on SRS 532.0 would be materially less significant.

Focus question:

22. **Should portfolio holdings information be presented on an entity level or at a product (investment option) level?**

Summary answer

Investors/consumers invest in (have an economic exposure to) a product (investment option) not an entity. To be in any way meaningful to investors/consumers the information must be presented at a product (investment option) level.

Materiality threshold

Focus question:

23. **Is a materiality threshold an appropriate feature of portfolio holdings disclosure?**

Summary answer

A materiality threshold would be an appropriate feature of portfolio holdings disclosure. Consideration should be given to a materiality threshold between 0.1% and 0.5% which would provide more meaningful disclosure. An alternative threshold may be to disclose the top fifty holdings.

Background and detail

The materiality threshold concept outlined in the Discussion Paper, whereby trustees would only need to disclose at least 95 per cent of their portfolio holdings and are allowed selective disclosure, would not be appropriate. While such a model would potentially alleviate the "commercial-in-confidence and market sensitive information" problem, it has the potential to significantly reduce systemic transparency and consumer protection by allowing trustees selectively to not disclose potentially controversial or under-performing assets.

A minimum (%) asset size threshold (as applied in SRS 532.0) would be more appropriate in that trustees would not have discretion around what they disclose. The 1% limit specified in SRS 532 is probably too high a limit to provide meaningful information to consumers. Feedback from members suggests that a threshold between 0.1% and 0.5% would provide more meaningful disclosure. An alternative materiality threshold may be to disclose the top fifty holdings.

Focus question:

24. **What is the impact of a materiality threshold on systemic transparency in superannuation fund asset allocation?**

Summary answer

Given that under the existing disclosure model consumers will not be able to understand the material provided due to its volume and complexity, and data is reported to APRA separately, a materiality threshold (based on a minimum (%) asset size or the top 50 holdings) should have limited or no impact on systematic transparency in superannuation fund asset allocation.

Focus question:

25. **What would be the most appropriate way to implement a materiality threshold?**

Summary answer

The most appropriate way to implement a materiality threshold would be firstly to develop an appropriate threshold model through consultation with the industry and other key stakeholders. Developing such a model is complex and will require industry consultation to ensure that it is workable, cannot be gamed and produces a disclosure outcome that assists and protects consumers.

Implementation issues

Focus question:

26. **Should the commencement date for portfolio holdings disclosure be delayed beyond 1 July 2014? Is so, what date would be suitable for its commencement? What would be the benefits and costs to such a delay?**

Summary answer

The commencement date for portfolio holdings disclosure should be deferred until 1 January 2015 at the earliest.

The commencement date will be dependent on when final regulations are promulgated. If the partial look through model is adopted (based on SRS 532.0) funds should be in a position to make relevant disclosures six months after promulgation. If a full look through model is adopted funds will need significantly longer in order to develop systems and processes to comply.

Part 4: Enhancing competition in the default superannuation market

Focus question:

27. Does the existing model (which commences on 1 January 2014) meet the objectives for a fully transparent and contestable default superannuation fund system for awards, with a minimum of red tape?

Summary answer

The existing model is not transparent in all aspects, it arguably duplicates other processes such as APRA approval of MySuper products, and involves new and extensive documentation.

The rules and processes for employers to choose a default fund for their employees should have the following minimum characteristics:

- A clear, efficient and transparent process or processes in which the criteria for a fund being chosen as a default fund or potential default fund are well defined.
- The selection of a default fund for an employee should be based on which fund is most suitable for the employee or class of employees as the focus should be on obtaining the best possible outcomes for employees.
- Employees should be encouraged to engage with their superannuation arrangements and to make their own choice of fund if they consider that the default fund is not the most suitable fund for them.
- Any application processes that forms part of the selection of default funds should be as simple as possible and generally make use of information readily available to applicant funds and/or already required to be provided by funds. "Red tape" and any unnecessary costs should be avoided.
- Any changes to default fund arrangements should be subject to appropriate transitional arrangements which provide an opportunity for employees to exercise choice of fund or to consolidate their superannuation accounts should they wish to do so.

Background and detail

The existing legislated model is contestable in the sense that all providers of MySuper products have opportunities to be considered for selection as a default fund in an award or awards. Where the employer associations and unions associated with an award have the final say, however, this in effect restricts the range of funds that might be considered for inclusion in an award.

The criteria that the expert panel of the Fair Work Commission will use in determining funds eligible for consideration in the first stage of the FWC process are clearly specified. This first stage is transparent in terms of both the criteria that will be applied and the process of decision making to be used.

Different parties will have their own views as to the transparency of the second part of the process where funds found to be eligible following the consideration of the expert panel are either included or excluded by the Fair Work Commission following input from the employer associations and unions that are respondents to the award concerned. Reasons for inclusion or exclusion may not necessarily be given.

Given the complexity of the current legislated process it cannot be said to involve a minimum of red tape.

The existing model that has been legislated involves the ending of “grandfathering” arrangements through which employers were able to continue to make default contributions to funds to which they were making contributions prior to 12 September 2008. The ending of such “grandfathering” provisions has the potential to have significant implications for both employers and employees.

These grandfathering arrangements currently are scheduled to cease from 1 January 2015. That date may not be very long after the list of default funds is settled for each award. This could lead to compliance challenges for employers in terms of understanding and acting on changes in the list of funds that can be used as a default fund. In addition, if an employee commences contributing to a new fund employees may wish to exercise choice of fund or consolidate their accounts.

The *Fair Work Act 2009,* in Section 156K, provides that the Fair Work Commission (FWC) may make a transitional authorisation in relation to a superannuation fund being an allowable default fund if the FWC is satisfied that it is appropriate to make the authorisation. ASFA considers that generally it will be appropriate to make such a transitional arrangement when a fund is no longer listed as a default fund.

Focus question:

28. **If not, is the model presented by the Productivity Commission the most appropriate one for governing the selection and ongoing assessment of default superannuation funds in modern awards or should MySuper authorisation alone be sufficient?**

Summary answer

An alternative approach which would be more transparent and contestable, but still involve roles for the Fair Work Commission and the employer and union organisations that are respondents to awards, would be to:

- limit the number of funds that could be listed in each award to 10 to 15 in order to keep the number of funds to be considered by employers to a manageable number;
- have a one stage process where the expert panel is directly involved in the final decision making on default funds;
- provide an opportunity for funds to be heard by the Fair Work Commission, not just by the expert panel

Background and detail

The model presented by the Productivity Commission cannot be said to involve a minimum of red tape given that it involve a detailed layer of requirements. Funds - that is MySuper product issuers - would need to prepare a detailed application and possibly to attend one or more hearings.

There is substantial overlap in the criteria that would be used by the expert panel with those used by the Australian Prudential Regulation Authority (APRA) in approving MySuper products in the first

place. Accordingly, the use of an expert panel may not necessarily lead to the selection of products substantially superior to other products that have met the criteria to provide a MySuper offering.

In ASFA's view, if the government decides to remove the role of the full Fair Work Commission in deciding which funds should be included in a modern award then there is not a strong case for an alternative mechanism which limits the number of eligible MySuper products.

There would be potential advantages and disadvantages for fund members in moving to MySuper authorisation alone. An employer might choose a MySuper product that is arguably better than one found to be eligible under the Fair Work Commission process commencing 1 January 2014, but they also might not. Employers do not necessarily have the skills to choose a "better fund". An employer might apply criteria which are not necessarily based on what is appropriate for the employee base which has not exercised choice of fund. In addition, a change in default fund might lead to employees having more than one fund.

Please also refer to our answer to question 30.

Focus question:

29. **If the Productivity Commission's model is appropriate, which organisation is best placed to assess superannuation funds using a 'quality filter'? For example, should this be done by an expert panel in the Fair Work Commission or is there another more suitable process?**

Summary answer

Please refer to our answer to question 28. ASFA does not believe that another organisation should be used to assess superannuation as an alternative mechanism to the expert panel.

If the Fair Work Commission is not involved in any way, various organisations such as rating agencies and superannuation consulting firms already provide information to employers and employees as to the characteristics of funds and what might be regarded as "better" funds.

Focus question:

30. **Would a model where modern awards allow employers to choose to make contributions to any fund offering a MySuper product, but an advisory list of high quality funds is also published to assist them in their choice, improve competition in the default superannuation market while still helping employers to make a choice? In this model, the advisory list of high quality funds could be chosen by the same organisation referred to in focus question 29.**

Summary answer

If an employer is allowed to choose any fund offering a MySuper product then arrangements should be put in place to lead to employers choosing a default fund for employees that is likely to provide the best possible outcomes for the employees.

In this context, there should be prohibitions on both employers receiving, and superannuation funds and their associates offering, financial incentives for an employer to choose a particular fund.

Currently in section 68A of the *Superannuation Industry (Supervision) Act 1993* there is a prohibition on the offering of inducements to employers, with a civil action also available to any person who suffers loss or damage as a result.

The general competition law also has provisions that prohibit a business from forcing a customer to also purchase a good or service from a third party or another good or service from the business itself. These anti-competitive behaviours are known as "third line forcing" and "full line forcing".

In order to provide clarity for funds, their associates and employers, ASFA considers that there should be explicit legislative prohibitions on "third line forcing" and "full line forcing" where an employer is induced to select a fund through being offered collateral benefits by an entity which is associated directly or indirectly with the superannuation fund in question.

Focus question:

31. **If changes are made to the selection and assessment of default superannuation funds in modern awards, how should corporate funds be treated?**

Summary answer

In principle corporate funds should be treated the same as any other funds. That said, there are relatively few MySuper products associated with corporate funds. In addition, corporate funds often have defined benefit divisions which are exempt from the MySuper provisions.

Many corporate funds have a strong connection with the employees of the corporate sponsor of the funds. As a result, corporate funds and their associated employer(s) are often able to deal with default fund issues through the use of an industrial agreement outside the award system and/or by employees using individual choice of fund to select a corporate fund. This is likely to be the reason relatively few corporate funds have a MySuper authorisation.

The over-riding principle should be that the framework for employers selecting a default fund should neither advantage or disadvantage corporate funds.

Annexure A: Summary of ASFA's positions

<table>
<tr><th></th><th>Discussion paper focus question</th><th>ASFA position</th></tr>
<tr><td></td><td colspan="2"><h3>A.1 Part 1: A better approach to regulation</h3></td></tr>
<tr><td>1.</td><td>The Government has committed to identifying (in dollar terms) measures that offset the cost impost to business of any new regulation. What suggestions do you have for how the regulatory compliance burden can be reduced?</td><td>There is no doubt that poor processes in relation to the consultation about, and implementation of, regulatory change increases the cost of compliance.
ASFA believes the regulatory compliance burden can be mitigated by ensuring that the regulatory framework in which superannuation funds operate is well-conceived, clear, accessible and certain. It must operate in a way that does not frustrate trustees' efforts to comply and guidance must be provided where necessary.
In particular, ASFA sees a need for:
1. Adequate consultation – which in our view necessitates:
• A clear statement of the outcomes to be achieved;
• Private (confidential) high level consultation with key industry stakeholders to consider the need for, and scope of, any regulation;
• Adoption of an appropriate format for public consultation;
• Adequate assessment of potential impacts, including recognition of different structures and issues with legacy products and the opportunity for stakeholder input into Regulation Impact Statements;
• Sufficient time for stakeholders to respond - avoiding inappropriately short consultation timeframes and consultation on major pieces at inappropriate times (for example, over the Christmas period or financial year end);
• Release of related materials in a timely manner, avoiding the release of interrelated 'tranches' over an extended period of time.
• Publication of the outcomes of consultation; and
• Continued consultation throughout the implementation phase.
2. Clear drafting of regulatory material and explanatory materials.
3. Avoidance of unnecessarily burdensome requirements without demonstration of clear need or benefit.
4. Adequate time for implementation by affected parties, with:
(i) Appropriate transitional periods – e.g. minimum lead times of at least:
• 24 months for regulation which changes the design of the system;
• 12 months for regulation which requires stakeholders to change systems, process and procedures, or disclosure.
(ii) Clear effective dates (including with respect to any transitional rules, 'phasing in' and grandfathering); and
(iii) Carve-outs and grandfathering rules as appropriate to avoid unintended consequences on particular fund members or the imposition of an undue compliance burden on particular product structures and legacy products.</td></tr>
</table>

	Discussion paper focus question	ASFA position
		5. Publication of appropriate guidance from regulators, with integrity over presentation of guidance material on regulators' websites. 6. Post implementation reviews of all material regulation, to assess whether the intended benefits to members were realised, whether the cost and additional compliance burden was proportionate to those benefits, and whether Government could have achieved those benefits in a more efficient and effective manner
	A.2 Part 2: Better governance	
	What should 'independent' mean for superannuation fund trustees and directors?	
2.	What is the most appropriate definition of independence for directors in the context of superannuation boards?	ASFA has proposed a more comprehensive definition of independence, which we believe is better suited to superannuation in the post-reform world and is in line with both community expectations and industry best practice: "An individual should be taken to be 'independent' in the context of a superannuation fund trustee board if he/she:- 1. is not, or has not within the last three years been, a director of, a representative of or employed at an executive level by ▪ the fund, the RSE licensee or a related entity of the fund or RSE licensee, ▪ a standard employer-sponsor or sponsoring organisation of the fund or a related entity of the fund or RSE licensee, ▪ any organisation directly representing the interests of one or more members (or groups of members); ▪ any organisation directly representing the interests of one or more standard employer-sponsors of the fund; ▪ an associate of any such entities listed above (as defined in section 10 of the SIS Act); or 2. as a principal, director or employee of a material service provider, professional adviser or consultant to the fund, the RSE licensee or a related entity to the fund or RSE licensee – has not had significant and material involvement with a service provided to the fund, the RSE licensee or a related entity to the fund or RSE licensee within the last three years; 3. is not a substantial shareholder of the RSE licensee or an officer of, or otherwise associated directly with, a substantial shareholder of the RSE licensee; 4. is not an officer or employed at an executive level by a material supplier to the fund, the RSE licensee or a related entity, or otherwise associated directly or indirectly with a material supplier; 5. does not have a material contractual relationship with the fund, the RSE licensee or a related entity other than as a director; and does not sit on the board of another APRA regulated superannuation fund." The definition of independence should be removed from the SIS Act and instead be included in a Prudential Standard.

	Discussion paper focus question	ASFA position
	Proportion and role of independent directors	
3.	What is an appropriate proportion of independent directors for superannuation boards?	It is vital that vested interests (sponsors, holding companies, employer groups etc) should not be allowed to have control over, or be perceived to have control over, trustee boards. In order to manage the risk of such control occurring, ASFA contends that some independence on trustee boards is necessary. Accordingly, trustee boards should have the ability to appoint one or more independent directors. From a good governance perspective, ASFA supports the position that at least one-third of the directors on superannuation boards should be independent. Having at least one-third independent directors would be useful in bringing additional independent judgement to the trustee board, as well as filling any gaps that may exist in the collective skills and experience of the board. Independent directors can also serve to improve the 'perception' of good governance. That being said, we would not want to see boards simply appointing additional independent directors if it results in overly large and unwieldy boards. Rather, in transitioning to a new 1/3rd independence structure, consideration needs to be given to the appropriate number of directors required on a board to provide sufficient expertise whilst maintaining an efficient governance and decision making framework.
4.	Both the ASX Principles for listed companies and APRA's requirements for banking and insurance entities either suggest or require an independent chair. Should superannuation trustee boards have independent chairs?	Yes. ASFA supports the introduction of a requirement for trustee boards to appoint an independent chair, in line with the ASX Principles for listed companies and APRA's requirements for banking and insurance entities. Further, our view is that the (independent) chair should in all instances have the ability to vote but, given the chair generally already has a lot of influence on the board, should not necessarily have a casting vote (i.e. an *extra* vote to decide an issue). Instead, it should be left up to each board to have procedures in place to deal with deadlocks. From a good governance perspective, trustee boards should seek to achieve consensus on all decisions wherever possible. Where there is insufficient support for a decision, trustee boards should be encouraged to undertake more work/discussion to resolve the impasse rather than forcing a 'tie breaker' scenario through the casting of an additional vote from the chair.
	Process for appointing directors on superannuation trustee boards	
5.	Given the way that directors are currently appointed varies across funds, does it matter how independent directors are appointed?	Yes. The manner in which independent directors are appointed to trustee boards is critical to ensuring good governance and the effective operation of the trustee board. In order to be considered independent, the individual must be nominated and appointed through a formal and transparent process based on competency – i.e. the person should meet certain minimum standards (skills, experience etc) set by the trustee board. Knowledge, skills and experience in regard to superannuation and fund related matters should be the primary qualification for a trustee director no matter under what process the director is appointed. There could be a number of different models to achieve this, including member election.

	Discussion paper focus question	ASFA position
6.	Should the process adopted for appointing independent directors be aligned for all board appointments?	Yes. Ideally the appointment process for independent directors should be aligned for all board appointments. Consistent with our response to question 5 regarding independent directors, our view is that every trustee director should be nominated and appointed through a formal and transparent process based on competency. The individual should meet certain minimum standards (skills, knowledge, experience etc) set by the trustee board prior to being appointed, and the trustee board should be actively involved in the nomination/appointment process to ensure that the new director has the relevant experience and skill set required by the board.
	Management of conflicts of interest	
7.	Are there any other measures that would strengthen the conflict of interest regime?	Other measures that ASFA believes could strengthen the conflict of interest regime include: (i) Pre-appointment disclosure of potential conflicts at the time an individual is nominated for appointment or election to the trustee board; (ii) Ongoing disclosure of potential conflicts of interest and duty in the fund's annual report; (iii) A requirement for trustee directors to excuse themselves from all board meeting agenda items, discussions, communications and decisions relating to matters where a conflict of interest or duty exists; and (iv) A ban on multiple trustee board directorships in certain circumstances. With respect to (iv), notwithstanding the conflicting positions on multiple directorships (including within ASFA's membership), our view is that, with the exception of closed defined benefit corporate funds and related funds, an individual should not be allowed to be a director on more than one APRA-regulated superannuation fund trustee board. The reality is that all funds (with few exceptions, such as closed defined benefit funds) are competing with each other – for members, investments, shelf space etc. With choice of fund and portability allowing members to switch funds, the reality is that there will be circumstances which arise from time to time where an individual looking to select or change their super fund will consider/compare funds from different sectors, regardless of whether or not these funds believe they are in direct competition with one another. There is the risk that a director who sits on multiple trustee boards, whether it be consciously or sub-consciously, may take potentially sensitive information (or a fund's intellectual property) from one fund to the other – e.g. information gained as part of a tender process, through disputes with service providers, pricing information etc. There are also the following arguments behind the banning of multiple directorships (except in very limited circumstances): (i) The presence of the individual on multiple trustee boards would be likely to compromise discussion at board level to some extent. That is, their presence would impact on the willingness or ability of the other board members to discuss issues which may be commercially sensitive or involve proprietary info. (ii) An individual who is on the trustee board of more than one superannuation fund is less likely to be able properly to fulfil their fiduciary duties to the members of both funds simultaneously. (iii) Despite the fact that multiple trustee board memberships do occur at present, the negative perception that arises as result of such conflicts is, we believe, unacceptable. This negative perception is not just limited to the funds in question. It has the potential to

	Discussion paper focus question	ASFA position
		detrimentally affect the reputation of the entire industry, particularly the public's perception of the industry's governance practices. ASFA potentially is open to allowing directors who have some association with a service provider to the fund to serve on the fund's trustee board, subject to some form of materiality threshold. Where related party dealings are permitted, the nature and severity of the conflict can vary greatly depending on the situation. Where dealings with a related party are permitted, these dealings must be on a commercial arm's length basis and the details disclosed to members in the annual report.
	Ongoing effectiveness of superannuation trustee boards	
8.	In relation to board renewal, should there be maximum appointment terms for directors? If so, what length of term is appropriate?	Whilst ASFA recognises that the imposition of maximum appointment terms may be an issue for some trustee boards, we believe that the advantages resulting from the regular replenishment of board members and the introduction of their fresh ideas and thinking outweigh any disadvantages. There is also the issue of board control/influence that needs to be considered – i.e. generally speaking, long serving directors tend to exert greater influence on, or control over, the board (often at the expense of newer/less experienced directors). ASFA's position is that trustee boards should be required to implement a policy which includes maximum appointment terms for its directors. This could be done by setting maximum fixed renewable terms (e.g. maximum three terms of three years). Our view is that an appropriate maximum appointment term for trustee directors would fall somewhere in the range of 9 to 12 years. The requirement to set a policy on maximum tenure should be introduced by way of APRA prudential standards rather than being enshrined in legislation. APRA should also provide guidance with respect to this. ASFA submits that the requirement for trustee boards to set a maximum appointment term needs to operate in conjunction with an absolute maximum tenure for all trustee directors of 12 years. From a good governance perspective, the introduction of an absolute maximum appointment term would ensure that all boards are regularly replenished and would eliminate the sense of entitlement of those who wish to 'retire into a directorship'. It would also serve to minimise the instances of excessive control/influence being exerted by long serving directors.
9.	Should directors on boards be subject to regular appraisals of their performance?	Yes. Such performance appraisals should be conducted on an annual basis. To ensure the annual performance assessment process is effective in its ability to remedy any imbalance or underperformance, it is imperative that trustee boards have the ability to remove non-performing directors.
	Implementation issues	
10.	Would legislation, an APRA prudential standard, industry self-regulation or a combination be most suitable for implementing changes to	Depending on exactly what changes are implemented, we envisage that a combination of legislation and prudential standards will be required. Any changes to governance in relation to the definition of independence and the other rules around directors (i.e. proportion of independent directors, process for appointing directors, maximum appointment terms, regular appraisal of performance etc) should be

<table>
<tr><th></th><th>Discussion paper focus question</th><th>ASFA position</th></tr>
<tr><td></td><td>governance? What would the regulatory cost and compliance impacts of each option be?</td><td>implemented through the APRA prudential standards rather than legislation, and they should be principles based.
It may be that some of the other new requirements would need to be enshrined in legislation.</td></tr>
<tr><td>11.</td><td>What is the appropriate timeframe to implement the Government’s governance policy under each option?</td><td>The implementation timeframes will depend on the changes introduced. It is vital that, in introducing any new requirements, consideration needs to be given to the cumulative effect of the recent regulatory changes and the effect this has had on the superannuation industry – in terms of resources that have had to be spent on implementing the reforms, ensuring ongoing compliance with the requirements and keeping fund members fully informed of the changes.

Any transition in relation to directors’ appointment terms, number of independent directors, changes to director appointment processes etc. would need to allow directors to serve out their existing terms (which could be up to three years). This transition period would also give funds time to amend their internal processes and procedures to comply with the new requirements.

The following table outlines what we believe would be a suitable transition/implementation period for the various changes discussed in the Treasury paper:

<table>
<tr><th>Governance-related change discussed/proposed
(number in brackets refers to relevant focus question)</th><th>Transition/ implementation period required (minimum)</th></tr>
<tr><td>New definition of independence (2)</td><td>1.5 – 2 years</td></tr>
<tr><td>Min. number/proportion of independent directors (3)</td><td>3 years</td></tr>
<tr><td>Independent chair (4)</td><td>3 years</td></tr>
<tr><td>Appointment process for independent directors through formal and transparent process based on competency* (5)</td><td>2 years</td></tr>
<tr><td>Alignment of appointment process for all directors (6)</td><td>2 years</td></tr>
<tr><td>Pre-nomination disclosure of potential conflicts* (7)</td><td>1 year</td></tr>
<tr><td>Ongoing disclosure of potential conflicts in annual report* (7)</td><td>1 year</td></tr>
<tr><td>Ban on most multiple directorships* (7)</td><td>3 years</td></tr>
<tr><td>Maximum appointment terms for directors (8)</td><td>3 years</td></tr>
<tr><td>Regular performance appraisal of directors (9)</td><td>1 year</td></tr>
</table>
*ASFA recommendations</td></tr>
</table>

	Discussion paper focus question	ASFA position
		Any changes that are implemented without a sufficient (and realistic) transition period will further exacerbate the difficulties that fund trustees have faced over the last three or four years and will have a significant negative effect on the industry and, ultimately, the confidence that fund members have in the superannuation system.
12.	Given that there will be existing directors appointed under a variety of terms and conditions, what type of transitional rules are required?	As discussed in our response to question 8, trustee boards should be required to implement a policy which includes a maximum appointment term for its directors by setting maximum fixed renewable terms (e.g. maximum three terms of three years = nine years), in conjunction with an absolute maximum appointment term for all trustee directors of 12 years. Any directors who have served more than the maximum appointment term when the requirement is introduced, or who would be on the board for longer than the maximum period at the end of their current term, would be required to resign at the end of their current term. The requirement to set a policy on maximum tenure should be introduced by way of APRA prudential standards rather than being enshrined in legislation.
	A.3 Part 3: Enhanced transparency	
	Part 3A. Choice product dashboard	
	ASIC released a report in December 2013 on consumer testing of the MySuper product dashboard. Given some findings– and that the legislated dashboard is different from the Super Review (Cooper) recommendation – we have prefaced our responses to the specific questions with a recommendation for an urgent review. The ASIC consumer testing revealed a number of issues of concern, including: - • lack of comprehension of what some measures were	We have revisited the Stronger Super Review Panel (Cooper review) recommendation with respect to the development of a product dashboard and provided an analysis of the ASIC Report on consumer testing in an appendix to the submission. Our conclusion – given the results of the ASIC consumer testing, including the potential for consumers to be misled – is that consideration be given to the need to re-design, and adequately consumer test, the MySuper product dashboard as a matter of urgency.

	Discussion paper focus question	ASFA position
	conveying; • potential misinterpretation or misunderstanding of some information; • potential to be misled by such factors as the use of different scales on the axis of a graph. Further, a number of recommendations necessitate the dashboard only being accessed on-line, while others require it to be an interactive tool. Neither of these was envisioned for what was intended to be simple, snap-shot product summary.	
13.	Should a choice product dashboard present the same information, in the same format, as a MySuper product dashboard? In answering this question you may wish to consider, if the choice product dashboard is to present different information, what should it include and why?	Given the issues with the MySuper product dashboard and the diversity and complexity of choice products we submit that, once the MySuper product dashboard has been redesigned to make it more comprehensible and usable for consumers, properly consumer tested and been implemented for 12 months, Treasury should consult as to the need for, and appropriate design of, a choice product dashboard(s). N/A

	Discussion paper focus question	ASFA position
	Net investment return versus net return	
14.	Is it appropriate to use a single benchmark (CPI plus percentage return) for all choice product return targets?	This question should be addressed as a part of the consultation of the need for, and appropriate deign of, choice product dashboards. Having said that, it would not be appropriate to use a single benchmark for choice product return targets for those investment options which are "single asset" direct investments, such as equities. "Single asset" would not include an option which is invested in a single "intermediary" (pooled) asset (such as a managed investment scheme) – such an option would still need to disclose a target.
15.	Should both net investment return (investment return net of investment costs only) and net return (investment return net of all associated costs) be used to measure a product's investment return on the choice product dashboard? In considering this question, you may wish to consider: • If including an additional measure for a product's investment return would add unnecessary complexity. • If both net investment return and net return are used on the choice product dashboard, whether they should also be used on the	ASFA is making two key recommendations: - 1. the methodology of deducting the administration fees with respect to a "representative member" from the product's investment return to determine a "net return target" and "net return" figure for the product should be abolished; and 2. in order to illustrate the combined effect of investment and administration fees on member accounts, two worked examples, in dollars, should be provided with respect to two prescribed "representative members". The concept of utilising the effect of administration fees on a "representative member" to generate a "product" level figure is misguided and misleading. Our position is that: - • there is no need for an additional measure for investment return; • instead, the current measure should be abolished and replaced with investment return (net of tax and investment fees only); • the illustration of the effect of administration fees should be achieved through separate worked examples with respect to prescribed "representative members" In any event, MySuper and choice dashboards should be consistent. Any time horizon used must be identical to mitigate the risk of causing confusion for consumers and to facilitate comparison between products on a consistent basis. Given the long term nature of superannuation, 10 years would appear to be an appropriate time horizon.

	Discussion paper focus question	ASFA position
	MySuper product dashboard. Whether it is appropriate to use a single time horizon, for example 10 years, when calculating target net return and net return for the range of possible choice products.	
	Measuring a product's investment risk	
16.	Should the choice product dashboard include both a short-term (volatility) and long-term (inflation) risk measure? In considering this question, you may wish to consider: • Is the SRM model the best measure of short-term investment risk?	Research indicates that consumers find risk measures and risk comparisons complex and confusing. While ASFA supports disclosure of short term (volatility) and long term (inflation) risk measures, introducing another risk measure immediately will add to member confusion. In the short term there should be only one risk measure until consumers are better educated and become familiar and comfortable with measures of investment risk. In the long term, once an appropriate long term risk measure is developed, it would be beneficial to have the two risk measures. In regards to the existing Standard Risk Measure (SRM), ASFA is of the view that it would be more appropriate and accurate for it to be renamed *[something like]* the "investment volatility risk measure". The SRM was developed by the industry at the request of the regulators) to provide a consistent and comparable methodology to describe the risk profile of underlying investment portfolios. The SRM has been criticised because it has shortcomings, most of which were known at the time of its release. The development of the SRM proved extremely complex, challenging and time consuming. The SRM model is the best existing measure of short term investment (volatility) risk. That being said it does need to be refined and improved and this was envisaged at the time of its release. Improving and refining it will take time, effort and commitment.

	Discussion paper focus question	ASFA position
	• What would be the most suitable measure of long-term risk to include on the product dashboard?	As stated above the development of risk measures is extremely complex and challenging. Understanding and developing the most suitable measure of long-term risk will require a structured process, the commitment of regulators, industry associations and participants and will take time. Feedback from members indicates that an appropriate long term risk measure should address the likelihood of a member meeting their retirement outcomes/goals.
	• Is it possible to present a long-term risk measure in a similar format to the short-term risk measure (that is High/Medium/Low)?	This question can only be answered after undertaking the consultation and development process referred to above.
	• Would including an additional risk measure add unnecessary complexity to the product dashboard?	Including an additional risk measure will add some complexity, but if it is properly developed and consumers become better educated then it will not add unnecessary complexity.
	Additional carve outs	
17.	Are additional carve outs from the choice product dashboard obligations required? If so, why are these additional carve outs required? In considering this question, you may also wish to consider identifying where the gaps in the current carve out provisions are.	This question can only be addressed once the MySuper product dashboard is redesigned appropriately, consumer tested, implemented and consultation has occurred as to the need for, and appropriate design of, choice product dashboards. It is conceivable that this could result in there being some minor variations in dashboard depending on the "type" of choice product.
	A liquidity measure	
18.	Should a measure of liquidity be included on the choice and/or MySuper product dashboard? If so, what would a suitable	No. A measure of liquidity should not be included on either product dashboard for two reasons: • We do not believe that consumers will understand a liquidity measure and including it is likely to confuse them and add unnecessary complexity to the product dashboard – detracting from the more relevant information. • A liquidity measure generally is not relevant to consumers/members. Fund liquidity generally is a trustee/investment

	Discussion paper focus question	ASFA position
	measure be?	management issue – not a consumer issue. Under current rules a fund is either liquid or illiquid. If liquid, rollovers must be processed within three days or withdrawals within 30 days. If illiquid, the rollover/withdrawal period must be agreed between the member and the trustee prior to the member joining the fund. Thus liquidity from a member's perspective is generally known and certain. ASFA supports the concept of an illiquidity warning being presented on product dashboards for illiquid funds.
	Implementation issues	
19.	Should the commencement date for the choice product dashboard be delayed beyond 1 July 2014? Is so, what date would be suitable for its commencement? What would be the benefits and costs to such a delay?	As stated above, the need for, and appropriate design of, a choice product dashboard should be considered after the redesigned MySuper product dashboard has been in operation for some time and has been properly consumer tested and refined.
	Part 3B. Portfolio holdings disclosure	
	Presentation of portfolio holdings	
20.	Which model of portfolio holdings disclosure would best achieve an appropriate balance between improved transparency and compliance costs?	ASFA is of the view that disclosure of fund assets (on a "look through" basis) will not assist consumers in choosing a fund or deciding whether to remain in one, nor will it assist members to better assess the level of diversification and risk in particular products. Such information will be far too voluminous and complex to be of assistance to retail investors. The gathering and disclosure of such information has other significant problems. • If a total look-through regime were established funds would be disadvantaged in that they potentially would have to disclose information which is commercial in confidence or market sensitive and may be precluded from investing in certain (hedge type or private equity) funds which would refuse to allow the disclosure underlying investments. • It will be time consuming and expensive for the trustee/fund, the cost of which ultimately will be borne by the members. Funds already provide significant transparency of their investments to APRA under the superannuation reporting standards (SRS 530.0 Investments, SRS 530.1 Investments and investment flows, SRS 531.0 Investments Flows, SRS 532.0 Investment Exposure Concentrations, SRS 533.0 Asset Allocation, SRS 534.0 Derivative Financial Instruments and SRS 535.0 Securities Lending) – thus providing systemic transparency.

	Discussion paper focus question	ASFA position
	In considering this question, you may wish to consider the various options discussed above:	Given the above, ASFA's preferred model is the second alternative model whereby trustees would look through associated entities and disclose the assets they hold but would not need to look through non-associated entities (similar to the reporting required under SRS 532.0).
	• Should portfolio holdings disclosure be consistent with the current legislative requirements (that is, full look through to the final asset, including investments held by collective investment vehicles)?	No – as stated above ASFA's preferred model is the partial look through. The partial look through should be subject to a carve-out in respect of commercial-in-confidence and market sensitive information. Trustees should be able to withhold such information on an "if not – why not" basis.
	• Should the managers/responsible entities of collective investment vehicles be required to disclose their assets separately? To give effect to this requirement, legislation would require all collective investment vehicles to disclose their asset holdings, regardless of whether some of its units are held by a superannuation fund.	N \ A
	• Should portfolio holdings	ASFA supports portfolio holdings disclosure being limited to the information required to be provided to APRA under SRS 532.0 in that this

	Discussion paper focus question	ASFA position
	disclosure be limited to the information required to be provided to APRA under Reporting Standard SRS 532.0 Investment Exposure Concentrations?	would be meaningful to members and would reduce costs and "red tape".
21.	What would be the compliance costs associated with each of these models for portfolio holdings disclosure?	Compliance costs associated with disclosing investments on a full look-through basis with no materiality threshold would be significant. The amount of data that would need to be reported potentially would be vast and the data may need to be sourced from a variety of sources. Compliance costs associated with a model based on SRS 532.0 would be materially less significant.
22.	Should portfolio holdings information be presented on an entity level or at a product (investment option) level?	Investors/consumers invest in (have an economic exposure to) a product (investment option) not an entity. To be in any way meaningful to investors/consumers the information must be presented at a product (investment option) level.
	Materiality threshold	
23.	Is a materiality threshold an appropriate feature of portfolio holdings disclosure?	Yes. A materiality threshold would be an appropriate feature of portfolio holdings disclosure. The materiality threshold concept outlined in the Discussion Paper, whereby trustees would only need to disclose at least 95 per cent of their portfolio holdings and are allowed selective disclosure, would not be appropriate. While such a model would potentially alleviate the "commercial-in-confidence and market sensitive information" problem, it has the potential to significantly reduce systemic transparency and consumer protection by allowing trustees selectively to not disclose potentially controversial or under-performing assets. A minimum (%) asset size threshold (as applied in SRS 532.0) would be more appropriate in that trustees would not have a discretion around what they disclose. The 1% limit specified in SRS 532 is probably too high a limit to provide meaningful information to consumers. Feedback from members suggests that a threshold between 0.1% and 0.5% would provide more meaningful disclosure. An alternative materiality threshold may be to disclose the top fifty holdings.
24.	What is the impact of a materiality threshold on systemic transparency in superannuation fund asset allocation?	Given that under the existing disclosure model consumers will not be able to understand the material provided due to its volume and complexity, and data is reported to APRA separately, a materiality threshold (based on a minimum (%) asset size or the top 50 holdings) should have limited or no impact on systematic transparency in superannuation fund asset allocation.

	Discussion paper focus question	ASFA position
25.	What would be the most appropriate way to implement a materiality threshold?	The most appropriate way to implement a materiality threshold would be to firstly to develop an appropriate threshold model through consultation with the industry and other key stakeholders. Developing such a model is complex and will require industry consultation to ensure that it is workable, cannot be gamed and produces a disclosure outcome that assists and protects consumers.
	Implementation issues	
26.	Should the commencement date for portfolio holdings disclosure be delayed beyond 1 July 2014? Is so, what date would be suitable for its commencement? What would be the benefits and costs to such a delay?	The commencement date for portfolio holdings disclosure should be delayed beyond 1 July 2014. The commencement date will be dependent on when final regulations are promulgated. If the partial look through model is adopted (based on SRS 532.0) funds should be in a position to make relevant disclosures six months after promulgation. If a full look through model is adopted funds will need significantly longer in order to develop systems and processes to comply. Portfolio holdings disclosure should be delayed until 1 January 2015 at the earliest.
	A.4 Part 4: Enhancing competition in the default superannuation market	
27.	Does the existing model (which commences on 1 January 2014) meet the objectives for a fully transparent and contestable default superannuation fund system for awards, with a minimum of red tape?	The existing legislated model is contestable in the sense that all providers of MySuper products have opportunities to be considered for selection as a default fund in an award or awards. Where the employer associations and unions associated with an award have the final say, however, this in effect restricts the range of funds that might be considered for inclusion in an award. The criteria that the expert panel of the Fair Work Commission will use in determining funds eligible for consideration at the next stage of the FWC process are clearly specified. Different parties will have their own views as to the transparency of the second part of the process where funds found to be eligible following the consideration of the expert panel are either included or excluded by the Fair Work Commission. Reasons for inclusion or exclusion may not necessarily be given. Given the complexity of this process it cannot be said to involve a minimum of red tape. An alternative approach which would be more transparent and contestable, but still involve roles for the Fair Work Commission and the employer and union organisations that are respondents to awards, would be to: • limit the number of funds listed in each award to 10 to 15 in order to keep the number of funds to be considered by employers to a manageable number; • have a one stage process where the expert panel is directly involved in the final decision making on default funds; • provide an opportunity for funds to be heard by the Fair Work Commission, not just by the expert panel The existing model that has been legislated involves the ending of "grandfathering" arrangements through which employers were able to

	Discussion paper focus question	ASFA position
		continue to make contributions to funds to which they were making contributions prior to 12 September 2008. This will have significant implications for both employers and employees. If only funds listed in a modern award are to be eligible to receive default contributions from employers covered by the award then a reasonable transition period, say 12 months, should be set to allow employees and employers to adjust to the change in default fund arrangements.
28.	If not, is the model presented by the Productivity Commission the most appropriate one for governing the selection and ongoing assessment of default superannuation funds in modern awards or should MySuper authorisation alone be sufficient?	The model presented by the Productivity Commission cannot be said to involve a minimum of red tape given that it involves a detailed layer of requirements. Funds which have a MySuper product, would need to prepare a detailed application and possibly attend hearings. It is not clear that the criteria that would be used by the expert panel would lead to the selection of products substantially superior to other products that have met the criteria for providing a MySuper offering. In ASFA's view, if the government decides to remove the role of the full Fair Work Commission in deciding which funds should be included in modern award then there is not a strong case for an alternative mechanism which limits the number of eligible MySuper products. There would be potential advantages and disadvantages for fund members in moving to MySuper authorisation alone. An employer might choose a MySuper product that arguably is better than one found to be eligible under the process commencing 1 January 2014. On the other hand employers may not have the skills to choose a "better fund". An employer might apply criteria which are not based on what is best for the employees who have not exercised choice. In addition, a change in default fund might lead to employees having more than one fund. Please refer to the answer to question 30.
29.	If the Productivity Commission's model is appropriate, which organisation is best placed to assess superannuation funds using a 'quality filter'? For example, should this be done by an expert panel in the Fair Work Commission or is there another more suitable process?	Please refer to the answer to question 28. ASFA does not believe in there being an alternative mechanism to the expert panel. Various organisations, such as rating agencies and superannuation consulting firms, already provide information to employers and employees as to the characteristics of funds and what might be regarded as "better" funds.
30.	Would a model where modern awards allow employers to choose to make contributions to any fund offering a MySuper product, but an advisory list of high quality funds is also published to assist them in their	If an employer is allowed to choose any fund offering a MySuper product there should be prohibitions on both employers receiving, and financial institutions offering, financial incentives for an employer to choose a particular fund. There should be strong legislative prohibitions on both "third line forcing" and "full line forcing", where an employer is induced to select a fund through being offered collateral benefits by an entity which is associated, directly or indirectly, with the superannuation fund in question.

	Discussion paper focus question	ASFA position
	choice, improve competition in the default superannuation market while still helping employers to make a choice? In this model, the advisory list of high quality funds could be chosen by the same organisation referred to in focus question 29.	
31.	If changes are made to the selection and assessment of default superannuation funds in modern awards, how should corporate funds be treated?	In principle corporate funds should be treated the same as any other fund. That said, there are relatively few MySuper products associated with corporate funds. In addition, Corporate funds often have Defined Benefit divisions which are exempt from the MySuper provisions. Many corporate funds have a strong connection with the employees of the corporate sponsor of the funds. As a result, corporate funds and their associated employer are often able to deal with default fund issues through the use of industrial agreements outside the award system and by employees using individual choice of fund to select a corporate fund. Where such arrangements are not in place the framework for employers selecting a default fund should neither advantage or disadvantage corporate funds.

Annexure B: Part 1: A better approach to regulation

Focus question:
1. The Government has committed to identifying (in dollar terms) measures that offset the cost impost to business of any new regulation. What suggestions do you have for how the regulatory compliance burden can be reduced?

As noted above, some of the key factors that will in ASFA's view assist with minimisation of the regulatory compliance burden are:

1. Adequate consultation – which in our view requires:
   - A clear statement of the policy outcomes to be achieved.
   - Preliminary, confidential, high level consultation with key industry stakeholders to consider the need for, and appropriate scope of, any regulation.
   - Adequate assessment of potential impacts, including recognition of different structures and issues with legacy products, and opportunity for stakeholder input into Regulation Impact Statements.
   - Consideration of the appropriate format for public consultation (for example, 'passive' release of draft regulatory material or a more 'active' consultation involving the use of stakeholder working groups and roundtables).
   - Release of related materials in a contemporaneous manner, avoiding the release of 'tranches' over an extended period of time. The latter approach does not allow stakeholders to fully assess the potential implications of the regulatory materials and creates the risk of inconsistencies and omissions between the individual pieces in the reform package.
   - Sufficient time for stakeholders to properly review the materials and formulate a considered response. This includes allowing adequate time for the consultation, and avoiding consultations at peak times when stakeholders are unable to give them sufficient attention - for example, over the Easter or Christmas/New Year period or at financial year end.
   - Communication of the outcomes of consultation.
   - Continued consultation as necessary throughout the implementation phase (for example, as the relevant Regulator begins to release guidance material).
2. Clear drafting of regulatory material and provision of effective explanatory material. This includes clear, unambiguous drafting of the regulatory materials themselves, as well as explanatory material which actually does explain the change to the law and its application in particular circumstances, rather than simply restating it.
3. Avoidance of unnecessarily burdensome requirements which make it difficult for trustees or fund members to comply, without demonstration of clear need or benefit.
4. Adequate time for implementation by affected parties, with:
   (i) Lead-times which reflect the materiality of the change, and in general terms are no shorter than:
   - 24 months for changes which impact the design of the system;
   - 12 months for changes to disclosure; and
   - 12 months for regulation which requires stakeholders to change systems, processes and procedures.

(ii) Clear effective dates (including with respect to any transitional rules, ‘phasing in’ and ‘grandfathering’ rules); and
(iii) The creation of carve-outs and grandfathering rules as appropriate to avoid unintended consequences or imposition of undue compliance burdens on particular product structures and legacy products.

5. Appropriate guidance from regulators to help stakeholders comply with regulatory reform, coupled with integrity over the provision of guidance material on regulators’ websites, including dating and version control, effective search engine functionality and subscriber alerts.
6. Post-implementation reviews of all material new regulation, to assess whether the intended benefits to members were realised, whether the cost and additional compliance burden was proportionate to those benefits, and whether Government could have achieved those benefits in a more efficient and effective manner.

Our thoughts on each of the above matters are set out below. We would be very pleased to provide further detail on any of these matters.

B.1 Adequate consultation

B.1.1 Clear statement of policy outcomes

A clear statement of the policy outcomes that are intended to be achieved by a piece of regulation should be provided at the outset of each consultation. This will help ensure that all stakeholders have a common understanding of the objectives, and allow consultation to focus on the critical issues, including administrative requirements that minimise implementation and ongoing costs while achieving the policy outcome.

We note that this recommendation is consistent with guidance from the Office of Best Practice Regulation (“OBPR”) regarding the need for transparency in the consultation process:

> *The objectives of the consultation process should be clear. To avoid creating unrealistic expectations, any aspects of the proposal that have already been finalised and will not be subject to change should be clearly stated. For example, if a decision to regulate has been made already, stakeholders should be made aware that their views are sought primarily on regulatory design and implementation, not on the merits of the policy itself.*
>
> *Being clear about the areas of policy on which views are sought will also increase the usefulness of responses. For example, explicitly stating any assumptions made about those likely to be affected by the proposed action or identifying particular areas where input would be valuable will encourage respondents to address these issues*.[20]

There should also be a clear statement of the timeframe in which the achievement of the policy objectives will be tested and measured, through a Post-implementation Review – see B.6.

B.1.2 Preliminary (confidential) consultation with key stakeholders

In ASFA’s view, there is significant value to be obtained from a preliminary, confidential consultation process prior to commencing any public consultation on major regulatory reform. We note that this is not inconsistent with recommendations of the OBPR:

[20] Office of Best Practice Regulation: Guidance Note – Consultation and the RIS Process, July 2013, page 3

Agencies should ensure that the diversity of stakeholders affected by the proposal are consulted. It is also important to proactively identify relevant interested parties and those the proposal will be likely to affect. Consultation is also an opportunity to seek input and involvement from those who can make a meaningful contribution to the decision making process. Business and community organisations and consultative bodies may be able to help in identifying target groups and those with technical knowledge or subject matter expertise.[21]

In particular, ASFA is of the view that engaging in confidential consultation with industry associations and other key stakeholders can provide valuable early insight into matters such as:

- Whether, as a threshold matter, there is a genuine need for regulation to address a perceived issue. In some cases, consultation reveals that there is no real need for regulation at all, because the existing law is in fact operating correctly and satisfactorily, whilst in other cases a perceived issue might reflect a misunderstanding (or ignorance) of existing law which might readily be addressed through the use of regulatory guidance.
- The appropriate format for the regulation – which might range anywhere along the spectrum from prescriptive legislation to principles based prudential standards.
- The appropriate scope and coverage for the regulation, including recognition of the impacts on different product structures and on legacy products.
- An appropriate timeframe and format for public consultation (see B.1.4 and B.1.5 below).
- Likely implementation issues, including the need for appropriate lead-time and transitional arrangements (see B.4.1 and B.4.3 below).

Addressing such matters at a preliminary stage will, in ASFA's view, significantly improve the conduct and outcome of the subsequent consultation process.

B.1.3 Adequate assessment of potential impacts

In order to minimise the potential compliance burden and cost, there needs to be a clear understanding of the potential impacts of any proposed regulation on all affected stakeholders. This requires a deep understanding of the industry, including:

- a recognition of the fact that the superannuation industry comprises both pooled and self-managed vehicles;
- an appreciation of different product structures and the relative complexity of some of those structures – for example, defined benefit funds, platforms, wrap accounts and legacy (closed) products; and
- sufficient consideration of the potential impacts on different categories of members.

A regulation which operates effectively and sensibly for one type of product can be overly burdensome, or produce unintended consequences, when applied to some of these more complex product types. Consideration of different product types when formulating regulation is critical to avoid such outcomes. In some cases, it may be appropriate that a proposed piece of regulation does not apply to particular product structure in the same way but that the regulatory requirements are tailored with respect to different types of arrangements. In other cases, it may be appropriate to provide specific exemptions or 'carve-outs'. There may also be a need for a carve-out to apply to

[21] Office of Best Practice Regulation, Consultation and the RIS Process, op. cit., p 5

avoid unintended consequences from application of the regulation to particular categories of members or in particular circumstances.

Early involvement of industry associations (as recommended at B.1.2 above) would help to ensure that potential issues are highlighted at an early stage, allowing for targeted public consultation with key stakeholders.

We note that the Australian Government's Best Practice Regulation Handbook[22], issued by the OBPR, requires the preparation of a Regulation Impact Statement ("RIS") to aid decision making in terms of whether a particular piece of regulation should be proceeded with.

On many occasions it has appeared to ASFA that the RIS prepared for proposed regulation has lacked detail, however, there are few examples of an RIS in the superannuation/financial services sector having formally been determined to be 'non-compliant'. One such example is the OBPR's finding in August 2011 that the RIS prepared for some of the previous Government's Future of Financial Advice reforms did not meet best practice requirements, in that it did not provide adequate information to allow an assessment of the cost-benefit of the regulation at the decision making stage[23].

We understand that where a RIS is found to be non-compliant, the responsible agency is required to conduct a Post-Implementation Review ("PIR") of the regulation within one to two years of its implementation date. PIRs are in our view highly valuable (and should, in our view, be conducted for all material regulation, not limited to cases regulation proceeds without a RIS – see B.6 in this submission). PIRs are not, however, a substitute for adequate assessment of impacts at the consultation stage.

We acknowledge that the ability of a portfolio to provide a meaningful cost-benefit analysis depends to some extent on industry being prepared to provide costing information, and that this Discussion Paper specifically requests such information in relation to Parts 2, 3 and 4. It is, however, often extremely difficult for stakeholders to provide information about potential cost impacts, based only on a high level outline of a proposal, when the details about the manner in which the proposal will be implemented are unclear.

B.1.4 Appropriate format for the public consultation

The format adopted for a consultation can have a significant influence on the outcome.

The technique most commonly adopted is the 'passive' release of draft legislation for comment. While this is typically sufficient for routine or minor pieces of regulation, a more 'active', consultative approach would often be beneficial, particularly for more substantial pieces of regulation. This might include stakeholder forums, with industry represented by the relevant industry associations, potentially as a precursor to the public release of draft material but also throughout the public consultation period.

Where utilised, such forums can play a constructive role in ensuring that amendments are scoped and designed appropriately and can optimise the quality of the drafts released for public consultation. We note that APRA has held a number of such forums during the Stronger Super

[22] Office of Best Practice Regulation: Best Practice Regulation Handbook, July 2013
[23] Non-compliance with best practice regulation requirements - Future of Financial Advice 2011 - Treasury

reforms, particularly in relation to the expansion of the data reporting requirements. These forums have typically been attended by representatives of all relevant industry associations and their member organisations, thus providing a representative cross-section of affected stakeholders. In ASFA's view, these forums have enhanced the understanding, of both industry and APRA, of the issues presented by the proposals, and have enhanced the quality of the resulting regulatory material.

Similarly, the Australian Taxation Office ("ATO") has consulted extensively on how best to implement the announced SuperStream policy. On numerous occasions this has resulted in changes to proposed administrative arrangements being made that have significantly reduced potential administration and implementation costs whilst delivering the desired policy outcome.

ASFA recommends that responsible portfolios and regulators incorporate consultation forums as an element of the consultation process for all major reform pieces. We note that the OBPR endorses the use of alternate consultation methods, rather than simply written consultation:

> *Consultation can take a variety of forms other than written consultation; for example, stakeholder or public meetings, working groups, focus groups, surveys or web forums such as blogs or wikis. The appropriateness of each approach will depend on the issues under consideration, the nature of the groups being consulted and the time available*.[24]

B.1.5 Allowing sufficient time for consultation

The OBPR accepts that "where it is necessary to consider a proposal promptly, some limitations on periods and timing of consultation may be unavoidable"[25]. However, in general terms:

> *Timeframes for consultation should be realistic to allow stakeholders sufficient time to provide a considered response. Holiday periods and the end of the financial year should be avoided, particularly where stakeholders are small businesses. The amount of time required will depend on the specifics of the proposal (for example, the diversity of interested parties or the complexity of the issue).*[26]

The superannuation industry has undergone several years of extensive regulatory reform. Regrettably there have been numerous occasions where the time period allowed for consultation (and subsequent implementation – see B.4.1 below) has been manifestly inadequate, given the magnitude of a particular piece of proposed regulation and/or the number of individual pieces of proposed regulation under consultation at the same time, and the timing of the consultations have also often been less than ideal.

For example:

- Exposure draft of regulations to support the Stronger Super reforms[27] – consultation opened on 30 April 2013 and closed on 15 May 2013. These regulations comprised 52 pages of detailed and complex amendments to the *Superannuation Industry (Supervision) Regulations 1994* ("SIS Regulations" and the *Corporations Regulations 2001*, which were then not finalised and

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[24] Office of Best Practice Regulation, Consultation and the RIS Process, op. cit., p. 3
[25] ibid.
[26] ibid.
[27] *Superannuation Legislation Amendment Regulations 2013 (No.)*

registered[28] until Friday 28 June 2013, despite many of the obligations taking effect from Monday 1 July 2013 (while some were deferred by Class Order relief[29] issued at the same time as the regulations, this could not be anticipated or relied upon by stakeholders).

- Exposure drafts of two Bills introducing the new 'Division 293 tax'[30] – consultation opened on 1 May 2013 and closed on 8 May 2013, with the Bills introduced into Parliament on 15 May 2013. Note that these Bills introduced an entirely new tax impost on superannuation contributions and comprised some 56 pages of primary regulation. An exposure draft of supporting regulations[31] - a further 19 pages of regulation - was open for consultation between 31 May and 6 June 2013. A further legislative instrument[32] was released for consultation between Friday 7 June and Friday 14 June 2013, but then not finalised and registered until 5 December 2013.
- Exposure draft of amendments to the SIS Regulations to provide for trans-Tasman portability of superannuation[33] – consultation opened on 15 May 2013 and closed on 21 May 2013. The regulations were then registered (with minimal amendments) on 30 May 2013 and took effect from 1 July 2013.
- Exposure draft of 'tranche 4' of the Stronger Super legislation[34] – consultation opened on 18 October 2012 and closed on 2 November 2012, with the Bill introduced[35] into Parliament on 29 November 2012.

The consultation period in each of the above examples was significantly shorter than recommended in guidance from the OBPR:

> *The length of consultation rounds depends on the nature and impact of the proposal, the objective of each round, the number of rounds, the form of consultation and who is being consulted. For example, where stakeholders are being asked to consider the whole proposal and there has been little previous consultation, a longer round is appropriate.*
>
> *There is a broad range in the length of consultation rounds across agencies. However as a guide, six to 12 weeks seems appropriate for effective consultation depending on the significance of the proposals.*[36]

Providing only a short time for consultation simply does not allow for full consideration by the stakeholders of the potential impacts, with the regulation often needing to be amended at a later stage once defects become apparent. For example, after its introduction into Parliament, the Bill to

[28] as *Superannuation Legislation Amendment (MySuper Measures) Regulations 2013*
[29] Class Order [CO 13/830]
[30] *Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Bill 2013* and *Tax Laws Amendment (Sustaining the Superannuation Contribution Concession) Bill 2013*, see Sustaining the Superannuation Contribution Concession
[31] *Income Tax Assessment and Other Legislation (Sustaining the Superannuation Contribution Concession) Amendment Regulation 2013; Superannuation Contributions*
[32] *Sustaining the Superannuation Contribution Concession (Meaning of End Benefit) Instrument 2013*
[33] Superannuation Industry (Supervision) Amendment Regulation 2013 (No. C)
[34] *Superannuation Legislation Amendment (Further Measures) Bill 2012*
[35] as *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012*, subsequently renamed *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2013*
[36] Office of Best Practice Regulation, op. cit., p. 7

implement tranche 4 of the Stronger Super reforms[37] underwent a number of amendments, and there were five pieces of explanatory material issued to support it - an explanatory memorandum, two supplementary explanatory memoranda, a correction to one of those explanatory memoranda, and a revised explanatory memorandum[38]. In addition to significantly increasing the difficulty stakeholders faced in assessing the impacts of this Bill, this outcome highlights that a rushed consultation process can markedly affect the quality of drafting and clarity of outcomes.

The examples above should be contrasted with recent consultations undertaken by APRA and ASIC, which have typically scheduled more reasonable periods for industry to respond to discussion papers – two or three months is not uncommon. This appropriately recognises the time needed for industry to assess the implications of the proposals and formulate a considered response.

We note that where a proposed regulatory reform has cross-portfolio implications which might not be readily appreciated by the originating portfolio, the consultation process will need to be more extensive. Examples of such reforms which have impacted the superannuation industry include amendments to the:

- *Family Law Act 1975* allowing splitting of superannuation benefits between parties to a marriage (and subsequently a de facto relationship) that has broken down; and
- *Bankruptcy Act 1966* allowing a trustee in bankruptcy to recover contributions made with an intention to defeat creditors.

These reforms originated from the Attorney-General's portfolio which has less familiarity with the superannuation regime than, for example, the Treasury. They imposed significant obligations on stakeholders in the superannuation industry, requiring them to become conversant with legislative regimes (family law and bankruptcy) to which they had previously had little or no exposure.

Other examples include the introduction of – and subsequent amendments to - the *Privacy Act 1988* and the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 ("AML/CTF Act").

B.1.6 Avoiding 'tranche' style releases

With the recent Future of Financial Advice and Stronger Super reforms, we saw a trend toward releasing draft material for consultation, and then introducing it into Parliament or releasing it in final form as regulations/regulatory standards, in 'tranches'.

ASFA accepts that in some major pieces of reform it will be neither possible, nor practicable, to release all of the components of the reform package at the same time. It is our view, however, that 'tranche style' releases should be avoided unless each tranche is independent of the other and can 'stand alone'. Where the full implications of one tranche cannot be understood without access to material from another, later tranche, it is inappropriate to release them for consultation (or, indeed, to legislate them) individually. Doing so prevents stakeholders from forming a fully considered view of how they may be impacted by the proposed regulation, and it increases the likelihood of inconsistencies between the tranches or omissions.

[37] *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012*, subsequently renamed *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2013*

[38] See Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2013

For example, we note that the following timeline can be plotted for the release and finalisation of the major components of the Stronger Super reforms (leaving aside SuperStream, which was legislated separately):

- Tranche 1[39] –released September 2011, introduced into House of Representatives 3 November 2011, received Royal Assent 28 November 2012.
- Tranche 2[40] – released December 2011, introduced into House of Representatives 16 February 2012, received Royal Assent 8 September 2012
- APRA prudential standards – discussion paper released in September 2011, draft standards released in April 2012, final standards released between November 2012 and July 2013 - relevant to tranche 2.
- Tranche 3[41] – released April 2012, introduced into House of Representatives 19 September 2012, received Royal Assent 3 December 2012
- APRA reporting standards - discussion paper released in September 2012, final standards released between March and December 2013 – relevant to tranche 2.
- Tranche 4[42] - released in draft 18 October 2012[43], introduced into House of Representatives 29 November 2012[44], received Royal Assent 26 June 2013 – included amendments to provisions included in tranches 1 and 3.
- Regulations released in draft 8 November 2012[45], registered 4 March 2013[46] – relevant to requirements introduced in tranches 1 and 4.
- Regulations released in draft 30 April 2013[47], registered 28 June 2013 – relevant to requirements introduced in tranches 3 and 4.

None of the major components of the Stronger Super reforms was entirely stand-alone – each could only be fully understood (and implemented) when taken in context with one, or many, subsequent components of the package. The delay between releasing (and finalising) subsequent tranches and components impeded the stakeholders' ability to assess the implications of the proposals, served to increase compliance costs through inefficiency and duplication of effort, and led to rework where details introduced in one tranche were amended in a later tranche.

[39] Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012
[40] Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012
[41] Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012
[42] Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013
[43] As *Superannuation Legislation Amendment (Further Measures) Bill 2012*
[44] As *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012*, subsequently renamed *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2013*
[45] http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/Stronger-Super-Regulations-Insurance-and-MySuper
[46] Superannuation Legislation Amendment Regulation 2013 (No. 1)
[47] http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2013/Superannuation-Legislation-Amendment-Regulation-2013

B.1.7 Communication of the outcomes of consultation

Industry's confidence in the consultation process is enhanced when the portfolio or regulator responsible for the consultation provides some level of communication about the outcomes of that consultation. As well as providing reassurance as to the veracity of the consultation process, these communications serve to reduce uncertainty about whether particular matters were taken into consideration and should explain why particular decisions were taken.

In this respect, we acknowledge the efforts made by APRA to publish detailed 'response to submissions' documents for each consultation process it undertakes. These documents provide valuable insight to the thought process behind the regulation, as well as reassurance that the matters raised by industry during the consultation process have been duly considered.

Outside APRA, we have seen relatively few examples of such communications, although the Treasury has on occasion published an 'outcome of consultations' document at the conclusion of a consultation on draft bills or regulations released as part of the Stronger Super reforms and some Treasury officials have individually advised on specific matters raised in submissions.

It is ASFA's view that the publication of 'outcome of consultation' documents should be encouraged, expanded to other agencies (in particular, ASIC), and should become the norm for major consultations.

B.1.8 Continued consultation throughout implementation phase

We note that the reform process often does not end with the passage of legislation or the registration of regulations or other legislative instruments. There is an increasing – and welcome – trend for the regulators to issue guidance material such as Information Sheets and Frequently Asked Questions ("FAQs").

Where the underlying regulatory material is sufficiently open to interpretation to warrant the release of such guidance, there will often be a need for consultation on the content of that guidance material. The level of consultation required might vary from case to case, but at a minimum it might generally be appropriate for such material to be reviewed by the relevant industry bodies before its release.

We note that ASIC has adopted this approach throughout the Stronger Super reforms, and it has in our view tended to result in the provision of more meaningful guidance material. In contrast, APRA generally has not consulted with industry prior to publishing its FAQs, and this has resulted in some unfortunate 'surprises', when published FAQs reflected an interpretation of the regulatory materials that differed from industry expectations or even reflected an apparent misinterpretation of the law[48].

[48] For example, APRA's reporting framework FAQ 77, which in ASFA's view appears to conflate two separate 'conditions of release' for data reporting purposes.

B.2 Clear drafting of regulatory material, including explanatory material

B.2.1 Clear drafting of regulatory material

The language adopted in regulatory material should, in general terms, be such that a user with some level of relevant expertise and/or experience can discern the meaning without resorting to specialist advice. We accept that, in particular cases, there will be a need for some regulatory requirements to be drafted in a more complex style (for example, some areas of the tax law), and their interpretation/application is likely to require a more advanced level of legal or compliance expertise. We submit, however, that this should not be the case for routine regulatory requirements.

It is also critical that regulatory material is clearly drafted, so as to avoid ambiguity or uncertainty as to the intended meaning.

It is not difficult to identify examples of poorly drafted regulatory material which has the effect of causing uncertainty as to the intent and application of the law, and therefore leads trustees to incur considerable costs in engaging external legal and other advisers. Examples of poor drafting technique include:

- Provisions which are circular in nature. This is commonly an issue with definitions, for example the definition of 'member' in sub-regulation 1.03(1) of the SIS Regulations, which states (emphasis added):

  member, except in Part 2, **means**:
  (a) in relation to an approved deposit fund—a depositor in the fund; and
  (b) in relation to a regulated superannuation fund—**a member of the fund**; and
  (c) in relation to a PST—a unit-holder in the PST.
- Unnecessarily repetitive legislation - for example, replication of definitions and rules regarding corporate trustees and individual trustees in the SIS Act, instead of simply defining a relevant concept of 'trustee'.
- Insertion of layers of definitions and concepts which are identical, or only slightly different, to existing definitions elsewhere in the same, or related, regulation. For example, there are definitions of:
  - 'Defined benefit fund' in section 83A of the SIS Act, regulations 1.03(1) and 12.01 of the SIS Regulations;
  - 'Defined benefits superannuation scheme' in section 8 of the *Superannuation (Unclaimed Money and Lost Members) Act 1999 ("SUMLM Act")* and section 6 of the *Superannuation Guarantee (Administration) Act 1993* ('SGA Act");
  - Defined benefit member' in section 83A of the SIS Act, regulations 1.03 and 1.04 of the SIS Regulations, sections 6 and 6AA of the SGA Act and regulation 6A of the *Superannuation Guarantee (Administration) Regulations 1993*;
  - 'Defined benefit interest' in regulation 1.03AA of the SIS Regulations, section 291-175 of the *Income Tax Assessment Act 1997*, and section 8 of the SUMLM Act; and
  - 'Defined benefit component' in regulation 6.31 of the SIS Regulations.
- Excessive cross-referencing, where a provision cannot be understood, even at the highest level, without regard to numerous other provisions and/or pieces of regulatory material. For example, the SUMLM Act includes detailed rules regarding the reporting of 'lost members' and in some cases the transfer of their benefits to the ATO as a type of unclaimed money. The critical

definition of 'lost member', however, is not contained in that Act but in the SIS Regulations, which no longer contain any substantive regulatory requirements regarding 'lost members'.

- Related provisions being scattered throughout legislation instead of being grouped together.
- The use of generic or 'one size fits all' provisions which do not 'fit' superannuation products without modification (this is particularly prevalent with the disclosure requirements in the Corporations Act and *Corporations Regulations 2001*).

One of the most striking examples of poor quality drafting that ASFA has noted involves the insertion into the SIS Regulations of amendments providing for the transfer of retirement benefits between Australian superannuation funds and New Zealand KiwiSaver accounts[49] ("Trans-Tasman portability rules"). Aspects of the amending regulations adopt a drafting style which, in ASFA's view, creates significant uncertainty as to the scope of a fund trustee's obligations and is likely to be the cause of member complaints, increased fund administration burden and the need to incur expenditure on external legal advice, for some years to come. This is unacceptable

In particular we note that, rather than incorporating rules regarding Trans-Tasman portability into the existing structure of the SIS Regulations, the amending regulations inserted a new standalone part (Part 12A) which states that that the existing parts of the Regulations to the SIS Act are "modified to the extent necessary" to allow or ensure compliance with the new Part 12A. This drafting style requires a fund trustee to determine for itself the 'extent' of modification necessary and fragments the law. The effect is, for example, that in considering whether a transfer from a KiwiSaver account can be accepted a trustee will need to refer to Part 7 (contributions standards) plus Part 12A (trans-Tasman retirement savings portability). There is nothing within Part 7, however, to indicate that in certain circumstances its operation is modified by Part 12A. In ASFA's view, this drafting style creates significant risk – and ongoing compliance costs - for trustees and is unacceptable.

B.2.2 Certainty regarding the current state of the law, including modifications

The 'traditional' method of amending acts or regulations is via an amending bill/regulation respectively, with that amendment subsequently consolidated into the primary act/regulation so the relevant provision can be viewed *as amended*. Key pieces of regulatory material relevant to the superannuation industry, however, are also amended or 'modified' in ways that are less obvious to the uninformed user. In particular:

- The SIS Act can be modified by way of a 'modification declaration' or 'temporary modification declaration' issued by APRA;
- The Corporations Act and Regulations are frequently modified by way of Class Orders made by ASIC, and amendments to the Act are also effected by way of provisions inserted into the Schedules to the Corporations Regulations.

For example, section 1017D was inserted into the Corporations Act to set out rules about the provision of periodic statements to holders of financial products, including superannuation products. Section 1017D has subsequently been amended many times via modifications inserted into the Schedules of the Corporations Regulations to incorporate additional rules - see for example items

[49] *Superannuation Industry (Supervision) Amendment Regulation 2013 (No. 3)*

7.1, 12.1, 14.3, 14.4 and 16.1 in Schedule 10A. None of these modifications are apparent on the face of section 1017D when the Corporations Act is viewed from the official 'comlaw.gov.au' website, although 'pointer' provisions have in some cases been inserted into the body of the Corporations Regulations (not the Act) to refer the reader to Schedule 10A[50].

ASFA considers that the power to make such modifications is extremely useful as a means of effecting an amendment that is time-critical or has a short lifespan. Inevitably, however, they impede a user's ability readily to identify, with certainty, the regulatory provisions which apply to a particular matter. As such, they reduce the accessibility of the law and increase the potential for inadvertent non-compliance. They also create a tendency for trustees to seek legal advice 'just in case' there are relevant legislative provisions that they have not themselves been able to locate.

As a result, it is ASFA's view that where such an amendment has long-term effect, it should be incorporated into the underlying material whenever it is next amended. In the meantime the underlying legislation, as published on regulatory websites such as comlaw.gov.au, should be annotated in some way to draw attention to the existence and location of the modification. We note that many commercial publishers of regulatory material provide 'annotated' versions drawing attention to modifications. It should not, in our view, be necessary for stakeholders to utilise a commercial service simply to obtain certainty as to the current state of the law. Trustees are entitled to be able readily to identify the existence of all legal and regulatory obligations which affect them. If "ignorance of the law is no excuse", this is accompanied by a complimentary obligation on the part of the lawmakers to make the law readily accessible.

B.2.3 Effective explanatory material

Explanatory material provided to support bills, regulations and other regulatory instruments should explain, rather than simply restate, the relevant provisions. The Legislation Handbook[51] makes a number of comments to this effect, including:

- "*An explanatory memorandum must be written in plain English and should focus on explaining the effect and intent of the bill, or the amendments, rather than repeating the provisions.*"[52]
- *"Notes on clauses are intended to be a companion explanation to the clauses of a bill. They should not simply repeat the words of the bill or restate them in simpler language. The notes should explain the purpose of the clause and relate it to other provisions in the bill, particularly where related clauses do not appear consecutively in a bill. Examples of the intended effect of the clause, or the problem it is intended to overcome, may assist in its explanation."*[53]
- *"Officers drafting explanatory memoranda should ensure that notes on clauses clearly and adequately explain their operation and purpose*."[54]

Despite this, examples abound of explanatory materials for bills/regulations which provide no meaningful explanation whatsoever but simply paraphrase the wording of the amending material itself.

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[50] See for example Corporations Regulations 7.9.24, 7.9.51 and 7.9.60
[51] Department of Prime Minister and Cabinet, Legislation Handbook
[52] ibid., paragraph 8.8
[53] ibid., paragraph 8.18
[54] ibid.

For example, it is not uncommon for explanatory memoranda and statements to contain statements along these lines: “item 1 inserts a new definition of ‘abc’ into regulation xyz”. While such statements are presumably included for completeness, they merely refer the user to the regulatory material itself without providing any additional insight into the meaning of the inserted provision, and thereby increase the length of the explanatory material without adding any value in the way of genuine explanation.

This should be contrasted with examples of explanatory materials which do provide valuable guidance to industry on how to apply the regulatory material. For example:

- The explanatory statement to the *Superannuation Industry (Supervision) Amendment Regulations 2011 (No. 4)* provided clear and practical examples of what would be considered to be acceptable means of obtaining a member’s consent when seeking to use their Tax File Number for the purpose of consolidating their superannuation benefits.
- The explanatory statement to the Incom*e Tax Assessment Amendment (Superannuation Measures No. 1) Regulation 2013*, included detailed examples applying the amending provisions to different scenarios where a person had died while in receipt of an income stream.
- The explanatory memorandum to the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012* provided valuable advance notice of the likely content of regulations to support the disclosure requirements in new section 29QB of the SIS Act. 29QB imposes an obligation on trustees to disclose, on fund websites, unspecified information and documents as “prescribed by the regulations”. Unusually, the explanatory memorandum to the amending Bill (and its preceding exposure draft) contained a detailed listing of the types of information and documents that would be prescribed by the regulations. Without this information, it would have impossible for trustees to even begin to appreciate the magnitude of the proposed disclosure requirement until the draft regulations were released, some 12 months after the release of the draft Bill (see B.1.6 regarding our concerns about ‘tranche style’ releases of legislation).

One useful feature which is typically included in explanatory memoranda issued by the Treasury is a summary table comparing the features of the ‘old’ and ‘new’ (proposed) laws. This provides a helpful snapshot of what is often complex and lengthy regulatory material. There would, in ASFA’s view, be value in including such comparisons in explanatory statements for lengthy or substantial amendments to regulations, as well as in explanatory memoranda and statements issued by other portfolios (for example, the Attorney-General’s Department).

B.3 Avoid burdensome requirements without clear need or benefit

The question of whether regulation is needed at all is a threshold matter which will be addressed by the relevant portfolio as part of the policy decision making process. Having made a decision to regulate, it is critical that lawmakers avoid imposing regulation which is overly prescriptive, or includes overly formal or burdensome requirements, unless a clear need to do so can be demonstrated. Such regulation often makes it difficult for fund trustees and/or members to comply, and thereby adds to their compliance burden. Where the portfolio considers there is a compelling need for regulation to be drafted in a particular way, it would be helpful for this to be expressed in

the explanatory material - an understanding of underlying reasons can often assist in interpreting and applying the regulatory material and help to make compliance more palatable.

One stark example of recently introduced regulation which contains a burdensome requirement without apparent need or benefit relates to the new Trans-Tasman portability rules, referred to in 2.1 above. These rules require a person applying to an Australian fund for transfer of their benefits to a KiwiSaver account to provide to the trustee of the Australian fund a 'statutory declaration' as to certain factual matters. While this application can only be made after the person has exited Australia, the member must supply a statutory declaration that complies with the Australian *Statutory Declarations Act 1959* and the *Statutory Declarations Regulations 1993*, including requirements as to format and witnessing.[55]

This requirement imposes an onerous burden on the applicant – for example, it potentially requires members now located in New Zealand to travel considerable distances to access staff from the Australian High Commission in Wellington, or the offices of the Australian Consulate General in Auckland, who are able to witness a statutory declaration in compliance with Australian law. It also places an unnecessary administrative burden on fund trustees, who are inevitably required to deal with member complaints triggered by rejection of non-compliant applications, and creates a perception that Australian funds are in some way obstructing the transfer of member monies under the new rules.

It is unclear whether the requirement for an Australian statutory declaration was intended on (unspecified) policy grounds or whether it was caused by a rushed consultation process and an oversight in drafting. In ASFA's view it should be acceptable for a member located in New Zealand to supply a statutory declaration which complies with either the Australian or New Zealand law, as is the case for a member in Australia who wishes to transfer their money from a KiwiSaver account. This outcome could easily be achieved by providing a special-purpose definition of 'statutory declaration', for the purposes of trans-Tasman portability only, within the SIS Regulations. It need not disrupt the application of the established rules around statutory declaration used for other purposes. On balance, the current requirement seems difficult to justify.

B.4 Adequate timeframe for implementation

B.4.1 Time allowed for implementation

In B.1.5 above we note the importance of allowing an adequate period of time for consultation on a proposed regulatory change. Once consultation has concluded and the content of the regulatory obligation is settled, stakeholders then need an adequate period of time in which to implement the necessary changes. In ASFA's view it is critical that the implementation period allowed reflects the materiality and impact of the regulatory changes.

We accept that, on occasion, an urgent need for regulatory action may be identified and in such cases a shorter lead time, or even immediate commencement, might be appropriate. In general, however, we believe there should be a commitment to adopting minimum lead times for particular

[55] Note – this was recently confirmed and restated by the Australian Taxation Office – see Trans-Tasman retirement savings portability under the heading 'Can your member use a New Zealand statutory declaration?'

types of changes which involve significant implementation and compliance effort, and resultant cost, for stakeholders. For example:

- Regulation which affects the design of the superannuation system – no shorter than 24 months' lead time;
- Regulation which changes the disclosure framework – no shorter than 12 months' lead time; and
- Regulation which requires stakeholders to change systems, processes and procedures – no shorter than 12 months' lead time.

Minor refinements to existing regulation can often be implemented with relatively little disruption to a fund trustee's operations. It needs to be acknowledged, however, that implementation of major regulatory change is not a 'business as usual' activity – it is an expensive undertaking, in terms of financial cost and utilisation of resources. The ability of stakeholders to manage this cost is heavily impacted by the time allowed for implementation.

In determining an appropriate 'lead time' for implementation of new regulatory obligations it is necessary for lawmakers to recognise that implementation efforts cannot commence until a degree of regulatory certainty has been achieved. ASFA has observed numerous occasions where a manifestly insufficient period of time was allowed between the passage of legislation, or the release of regulatory material, and its commencement date. The following are just a few very recent examples:

- Changes to the concessional contributions cap – following an extremely short consultation period, legislation reforming the cap arrangements for older Australians[56] received Royal Assent on 28 June 2013 and applied with effect from the financial year commencing 1 July 2013. This gave trustees very little time to communicate the change to members and update their administration systems and processes.
- Introduction of the product dashboard for MySuper products – regulations specifying the required content for the product dashboard to be made available on the fund's website (and provided to members with periodic statements) from 31 December 2013 were registered on 28 June 2013[57]. These, however, cross-referred extensively to an APRA reporting standard which was not finalised until 25 September 2013[58]. ASIC guidance on the dashboard, including a 'mocked up' example, was not published until late November 2013[59]. This gave trustees very little time to implement a key new piece of product disclosure.

[56] *Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Act 2013*

[57] *Superannuation Legislation (MySuper Measures) Amendment Regulation 2013*

[58] Financial Sector (Collection of Data) (reporting standard) determination No. 98 of 2013 - SRS 700.0 - Product Dashboard

[59] See MySuper product dashboard requirements for superannuation trustees. The precise date of this guidance is unclear – ASFA understands it was possibly published on 25 November 2013, however an ASIC media release announcing the publication of the information was not issued until 6 December 2013 (see 13-328 MR - ASIC issues further super reforms guidance). See section 5.2 of this submission for comments regarding ASFA's concerns about dating of material on regulators' websites.

- Introduction of requirements to give reasons for decisions in relation to complaints – enabling legislation received Royal Assent on 28 June 2013[60], and regulations imposing member disclosure requirements were also registered on 28 June 2013[61]. These requirements applied to decisions made from 1 July 2013, giving trustees very little time to update their complaints handling processes and related member communication materials.
- Introduction of the rules for trans-Tasman portability of superannuation[62] – following an extremely short consultation period (see 1.5 above), the regulations were registered on 30 May 2013 and took effect from 1 July 2013. Note that while Australian fund trustees could choose whether to accept transfers of money from a KiwiSaver account, they were required to comply with valid requests to transfer a member's superannuation monies to a KiwiSaver account from 1 July 2013. As a result, trustees had only one month to implement significant changes to systems and processes, and deliver appropriate training, to accommodate these reforms.
- Abolition of the member protection rules – the amending regulations[63] were registered on 16 May 2013 and took effect from 1 July 2013. For many funds, implementation of these regulations will have led to an increase in fees and costs for some (formerly protected) members, requiring trustees to provide at least 30 days advance notice[64]. The late registration of these regulations effectively gave trustees only two weeks to issue notifications to affected members.

In many of the above examples, the release of the regulatory material was preceded by a high level statement of intention, a report emanating from an inquiry, and/or the release of draft materials. Such preliminary material, however, rarely provides enough clarity around specific requirements and dates to allow stakeholders to commence implementation. In addition, given competing demands on finite resources (financial, technological and personnel), and the interrelatedness of IT systems (increasing the risk of unintended consequences when changes are made) trustees understandably are cautious about commencing work on implementing an announced change until there is certainty that it will proceed, its effective date and clarity about the detailed specifications.

A constrained implementation period effectively requires trustees to divert resources away from other initiatives or to need to engage additional resources, typically at a premium cost. This is especially the case during times of major regulatory reform, when consultants and similar resources are in demand. It also reduces the time available for analysis of impacts on a fund's IT systems, processes and procedures, as well as to make the necessary amendments to fund documentation such as governing rules, product disclosure statements and member communication materials.

These concerns are exacerbated where the trustee is already in the process of implementing other regulatory reforms or product innovation. Change management, especially where there is any degree of scale and/or interrelatedness, is expensive. More importantly, making significant alterations to member databases and IT systems poses considerable risks of lost or corrupted data, resulting in inaccurate or incomplete member records. The most effective means of mitigating such risk involves the use of robust project management methodologies to determine timelines, identify

[60] *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013*
[61] *Superannuation Legislation (MySuper Measures) Amendment Regulation 2013*
[62] *Superannuation Industry (Supervision) Amendment Regulation 2013 (No. 3)*
[63] *Superannuation Industry (Supervision) Amendment Regulation 2013 (No. 2)*
[64] Under sub-section 1017B(5) of the *Corporations Act 2001*

interdependencies, produce a staged project plan, include sufficient time for regression and user acceptance testing, and then execute in accordance with the plan. All of this takes time. There are often capacity constraints, interdependencies and unintended consequences, especially when it comes to coding and testing system changes. Rushing to meet deadlines materially increases the risks to a project.

Any delays in, or changes to, any aspect of announced regulation significantly impact on a trustee's ability to implement the required changes in an orderly and appropriately risk-managed fashion.

The short lead times noted above are in stark contrast with the more reasonable implementation periods allowed for major reform pieces in the past. Note that in each of the examples below, the indicated time period for implementation commenced from the passage of the primary legislation, not from the release of an exposure draft or the introduction of the legislation into Parliament:

- Registrable Superannuation Entity licensing regime (2004-06) – phased implementation ranging from 2 – 26 months after passage of the primary legislation[65] and 1 - 25 months from the gazettal of the supporting regulations[66].
- Financial Services Reform (2002-2004) –- phased implementation over 24 months, commencing 6 months after the passage of the primary legislation[67], although we note that shorter time was provided to implement subsequent pieces of the regulatory package[68].
- Family law and superannuation reforms (2001-02) – 18 months lead time between passage of the primary legislation[69] and commencement, 14 months between the gazettal of the supporting regulations[70] and commencement.
- Private sector privacy reforms (2000-01) – 12 months' lead time between passage of the primary legislation[71] and commencement (although we note that there were only 3 months between gazettal of the supporting regulations[72] and commencement).
- Anti-Money Laundering and Counter-Terrorism Financing regime (2006-08) – phased implementation over 24 months following passage of the primary legislation[73].

B.4.2 Clear effective dates

It is critical that regulatory material provides certainty around the date from which new obligations take effect.

There are generally a number of significant dates associated with regulatory obligations. For example, the date on which an act receives Royal Assent or a legislative instrument is registered on the Federal Register of Legislative Instruments may differ from the commencement date for the

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[65] *Superannuation Safety Amendment Act 2004*
[66] *Superannuation Industry (Supervision) Amendment Regulations 2004 (No. 3)*
[67] *Financial Services Reform Act 2001*, *Financial Services Reform (Consequential Provisions) Act 2001*
[68] *Financial Services Reform (Consequential Provisions) Act 2002* and Fin*ancial Services Reform Amendment Act 2003*, as well as numerous sets of supporting regulations
[69] *Family Law Legislation Amendment (Superannuation) Act 2001*
[70] *Family Law Legislation (Superannuation) Regulations 2001*
[71] *Privacy Amendment (Private Sector) Act 2000*
[72] *Privacy (Private Sector) Regulations 2001*
[73] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006, Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006*

act/instrument (or particular provisions thereof). This may in turn be affected by 'application rules' which specify that a particular provision applies with effect from another date or be referenced to another event. In some cases there are also transitional rules that apply to specific periods, 'phasing in' dates and 'grandfathering' to consider – these can be very useful to allow stakeholders time to implement regulatory obligations in an ordered and efficient manner, provided they are clearly framed.

When drafted poorly, application rules create uncertainty which increases the risk of inadvertent non-compliance leading to member complaints, regulator intervention and/or potential legal action. The need to mitigate such risks is another common reason for trustees seeking external legal advice, which adds to compliance costs.

For example, the SIS Act was recently amended to impose a new obligation on fund trustees to provide reasons for a decision made in relation to a complaint, and for a failure to make a decision within 90 days. The application and transitional provisions for these amendments make it clear that the new obligations apply to decisions made on or after 1 July 2013, and also to the failure to make a decision where the 90-day timeframe ends on or after 1 July 2013[74].

This should be contrasted with one of the least clear application provisions that ASFA has observed, in legislation which amended the SIS Act and *Income Tax Assessment Act 1997* to expand the concept of 'dependant' to include persons in an 'interdependency relationship'. The amendments in question were stated to apply to "the doing of things after the commencement of those items"[75]. This phrasing gave no clarity about how to apply the amendments in practice, and created enormous uncertainty for fund trustees and potential beneficiaries. While trustees sought to mitigate any potential risk by seeking external legal advice on how to implement the amendments, there was a considerable divergence of views on the matter amongst legal practitioners. The poor drafting of this application provision was highlighted by the Superannuation Complaints Tribunal when considering complaints from potential death benefit claimants. For example, in July 2005, the Tribunal said in its determination D05-06/007:

> "*Although the new law commenced on 1 July 2004, SIS did not clarify when the new provisions were to be implemented. Trustees have been faced with three possibilities in applying the new law (and amending their trust deed, if necessary). Subject to the relevant trust deed, a person could claim an entitlement to a death benefit on the basis of an interdependency relationship in respect of a deceased:*
>
> - *if payment of the death benefit is made after 30 June 2004;*
> - *if the trustee's decision about the distribution of the death benefit is made after 30 June 2004; or*
> - *if the deceased member died after 30 June 2004.*
>
> *This placed superannuation fund trustees are [sic] in a difficult position. They were forced to decide whether to implement the new interdependency relationship provisions and, if so, the*

[74] *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013,* see Schedule 1, Part 2, item 126

[75] *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*, see Schedule 2, item 10(2)

date of implementation, without guidance from the legislation. The Tribunal notes that draft regulations have been released and cite the date of death as the relevant date but these are merely in draft form and regulations cannot clarify this issue retrospectively."

The above example highlights the practical impacts that poor drafting of regulatory material can have on fund members, their beneficiaries, fund trustees and complaints handling bodies.

A further and more recent example involves the trans-Tasman portability rules referred to in B.4.1 above. The amending regulations[76] were registered on 30 May 2013, and were stated to commence "on the day the Arrangement between the Government of Australia and the Government of New Zealand on Trans-Tasman Retirement Savings Portability, signed at Brisbane on 16 July 2009, comes into force for Australia". Clause 21 of the Arrangement[77] stated: "*This Arrangement will come into effect on the first day of the second month following the month in which the two Governments have exchanged notes informing each other that their respective constitutional or legislative matters necessary to give effect to this Arrangement have been fulfilled.*" In effect, the commencement date for the new trans-Tasman portability rules was 1 July 2013 (as confirmed in a press release from the then Minister), however, this was unnecessarily complicated and difficult for trustees and interested members to ascertain from the regulatory material.

B.4.3 Carve-outs and grandfathering arrangements

Regulatory reform commonly adopts a 'one size fits all' approach which fails to take into account:

- the many different product structures that exist within the superannuation industry;
- the complexity of some structures, for example defined benefit funds, platforms and wrap accounts; and
- the challenges presented in applying some regulatory change to legacy products.

There is also the potential for proposed regulation to have unintended consequences if applied to particular categories of members, or in particular circumstances, in a way that was not envisioned when the regulatory obligations were created.

As noted at B.1.3 above, these are matters which we believe need to be taken into account early in the process of formulating regulation. In some cases, the appropriate outcome will be that a particular regulation is simply not applied to particular categories of members, or to particular product structures (that is, a complete exemption is provided at the outset),. If a complete exemption is considered to be inappropriate or unwarranted, often there will still be scope to minimise any undue compliance burden by providing targeted exemptions or carve-outs from specific aspects of the regulation or that it is applied in a different way. 'Grandfathering' rules can also effectively be applied to provide similar relief - for example, by providing that new regulatory obligations do not apply to persons who held a certain product prior to a specified date.

Targeted exemptions/carve-outs and grandfathering arrangements should be utilised where new regulation would cause an undue regulatory burden or unintended consequences for particular categories of members, legacy products or complex product types.

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[76] *Superannuation Industry (Supervision) Amendment Regulation 2013 (No. 3)*

[77] *Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability*, signed on 16 July 2009

B.4.4 Prompt communication of decisions to grant relief

Relief from onerous regulatory requirements is generally welcomed by industry, particularly when there has been insufficient time for implementation or a lack of certainty as to the requirements. ASFA has observed, however, a number of occasions when the granting of relief is delayed to such an extent that fund trustees have had no option but to make all efforts to ensure a state of readiness to comply, regardless of the cost involved. For example:

(i) Regulations[78] registered on 28 June 2013 imposing obligations as to disclosure of fees and costs information in Product Disclosure Statements with an intended effective date of 31 December 2013, deferred by Class Order registered on 12 December 2013[79]. An ASIC media release informing the industry that the relief had been granted was not issued until 16 December 2013 (although we understand that ASIC had communicated directly with trustees who had made a specific application for relief).

(ii) Regulations[80] registered on 6 August 2013, imposing an obligation to separately disclose Government co-contributions and Low Income Superannuation Contributions with immediate effect, substantially ameliorated by a Class Order registered on 28 November 2013[81]. No public announcement of this relief was made.

In both cases it appears that while the decision had been made within ASIC to grant relief some time before the Class Orders were registered, ASIC was unable to convey this to the industry. As a result, many fund trustees continued to incur costs and expend effort in order to comply with these requirements, which were then ameliorated or deferred. These monies, efforts and resources could , have been diverted instead towards ensuring compliance with other pressing obligations.

ASFA encourages Government and the Regulators to consider whether scope exists to provide earlier notification to industry when a decision to grant relief has been made.

B.5 Provision of guidance by regulators

B.5.1 An appropriate level of regulator guidance

The importance of regulatory guidance as an aid to implementing regulatory obligations cannot be overstated.

While some questions that arise as to application of new regulatory obligations will necessarily be specific to the characteristics and/or circumstances of a particular stakeholder, a great many have wider general application. The public statement of a response to such questions by a regulator reduces the compliance burden on industry in a number of ways:

- It avoids the need for individual stakeholders to each expend time, effort and cost seeking resolution of the question;
- It reduces the volume of identical or related queries that must be handled by the regulator; and

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[78] Superannuation Legislation (MySuper Measures) Amendment Regulation 2013
[79] Class Order [CO 13/1534]
[80] Superannuation and Corporations Legislation Amendment (Low Income Superannuation Contribution) Regulation 2013
[81] Class Order [CO 13/1420]

- Most significantly, it ensures that a consistent interpretation is communicated (as opposed to the potential for fund trustees to receive differing legal opinions) and provided certainty.

Similar benefits are experienced where a regulator issues guidance proactively - that is, not in direct response to questions from stakeholders.

We note that each of the regulators with any responsibility over the superannuation industry – APRA, ASIC, the ATO and AUSTRAC – makes genuine efforts to publish such guidance material, in a range of forms including Frequently Asked Questions (FAQs), fact/information sheets, generic 'letters to trustees', and guides, etc. Their efforts are very much appreciated by industry and are to be commended.

ASFA does not have a particular preference regarding the form in which guidance is presented[82]. This will vary depending on the length and detail of the content, and in many cases a brief but timely FAQ may provide more benefit than a more polished and lengthy guide that takes some months to produce and clear. For example, the Office of the Australian Information Commissioner ("OAIC") has not yet finalised supporting guidelines for major changes to the *Privacy Act 1988* that commence on 12 March 2014[83]. To be genuinely useful, and to assist in reducing the regulatory burden, detailed guidance material must be issued at a time when stakeholders are working to implement the regulatory change – not once the compliance date is imminent or even past.

The provision of adequate and effective guidance material is especially critical where regulatory reforms have cross-portfolio impacts. In this situation, the originating portfolio may have somewhat limited understanding of how a proposal may apply to particular industries, while stakeholders in those industries find their ability to assess the impacts limited because of a basic lack of familiarity with the regulatory regime that is being introduced or extended to cover them.

For example, with effect from 28 December 2002 the family law regime was extended to provide for the splitting of superannuation interests. These reforms involved some 220 pages of legislative amendments and regulations[84], largely drafted in language that was unfamiliar to fund trustees – and many legal advisers who had not specialised in family law. The amendments affected only the superannuation industry and family law practitioners (that is, they did not affect a wide range of industries). Despite this, no guidance material was provided by the Attorney General's department (as the originating portfolio), nor by APRA (as the prudential regulator with responsibility for enforcing the SIS Act provisions governing how trustees deal with member benefits). Indeed, the only guidance material that was available to assist fund trustees and their advisers consisted of commercially provided consultancy services and publications, and the Best Practice Paper published by ASFA to fill this gap.[85] This is, in ASFA's view, wholly unsatisfactory given the magnitude of the reforms, the complexity of the regulatory material, and the ongoing compliance burden that it created.

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[82] Irrespective of the format of the guidance material, ASFA does have genuine concerns about the way it is presented on some regulator websites, see 5.2 in this submission

[83] See *Privacy Amendment (Enhancing Privacy Protection) Act 2012*

[84] *Family Law Legislation Amendment (Superannuation) Act 2001*, *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2001* and *Family Law (Superannuation) Regulations 2001*

[85] Best Practice Paper 21 – *Superannuation and family law: a trustee guide to the splitting regime*, first published October 2003

This should be contrasted with the introduction of the Anti-Money Laundering and Counter-Terrorism Financing ("AML/CTF") regime. This regime has a wide impact across many industries, including financial services. During the introduction of the AML/CTF regime, and continuing afterward, AUSTRAC issued a large number and range of guidance materials to assist impacted stakeholders. Many of these materials were tailored to specific industries, based on the types of 'designated services' typically provided by those industries. These materials include formal 'guidance notes' and 'information circulars' along with less formal 'guides', information sheets and brochures, case study reports, typographies and an excellent e-learning module.

We appreciate that it may not always be possible to provide detailed guidance about cross-portfolio reforms to all affected industries. At a minimum, however, we recommend that portfolios and regulators responsible for such reforms endeavour to include in any guidance material that is published examples covering as many of the impacted industries as possible.

B.5.2 Integrity of presentation of guidance material on regulators websites

The availability of substantial amounts of regulatory material on websites has undoubtedly improved the accessibility of the law to stakeholders. The effort invested by many regulators and portfolios into developing functional, effective websites is to be commended.

ASFA has, however, observed that material published on regulators' websites is frequently undated. This creates uncertainty and makes it difficult and time consuming for users to ascertain whether the material:

- has been updated since it was last viewed; and/or
- reflects the current state of the law.

In such cases fund trustees may need to obtain legal advice, not to understand the legal implications of the regulation but rather to ensure they have correctly identified the current state of the law.

The Government's own 'webguide' notes that the potential ramifications of failure to effectively manage website content include legal exposure, if users act upon incorrect or outdated information on the site[86]. The comments about website content management in the webguide, however, appear to ASFA to be focussed more on style than on matters which are critical to users, such as clear dating and version control.

By way of example, a number of Information Sheets and Frequently Asked Questions (FAQs) in relation to the recent Stronger Super reforms appear on the ASIC website as undated webpages. This is particularly of concern where the relevant regulation is subsequently amended and there is a delay in updating the Information Sheet or FAQ, as users may unknowingly be relying on outdated guidance material. For example – as at 11 February 2014, FAQ E1[87] still referred to new fees and costs disclosure obligations being scheduled to commence from 31 December 2013 for superannuation funds, when these obligations were deferred by a Class Order registered on 12 December 2013[88].

[86] webguide.gov.au - managing content - content management
[87] E1: When do the new fees and costs disclosure obligations commence?
[88] Class Order [CO 13/1534]

Similarly, FAQs published by APRA in relation to the Stronger Super reforms[89] are not individually dated. Newly added FAQs are initially flagged as 'new', but this status is removed when the FAQ pages are next updated. Unless copies of the FAQ pages of the website were taken and retained for future reference, it would not be possible for a user to identify which individual FAQs were added on which dates.

The webguide notes that websites are Commonwealth records and agencies must meet their legal obligations for retention and disposal of records under the *Archives Act 1983*[90], and refers to various guidance provided to agencies by the National Archives of Australia[91]. The average stakeholder (or indeed, even the relatively well-informed one) would not know how to go about accessing records archived in this manner, and generally there is nothing on the face of individual regulator websites to alert them to the existence of such archived records.

In ASFA's view, aside from any archiving obligations imposed under the *Archives Act*, regulators should consider maintaining access to recently superseded materials within their website. We note that APRA has recently done this with some materials[92], but the process does not appear to be consistent throughout the website or even for particular areas of reform or types of material.

The tendency of regulators to update webpages without archiving a prior version makes it extremely difficult for a trustee to demonstrate that they were in compliance with the regulator's guidance as at a given point in time. To take an extreme example, a trustee might act in reliance on published guidance material that is subsequently amended to such an extent that the action taken by the trustee is no longer compliant, or even removed altogether. Without proper version control and access to archives containing the material previously displayed on the website, the trustee would be unable to demonstrate that it was in compliance at the relevant point in time. To mitigate this risk, a trustee would effectively be required to store a dated hard copy of every web page containing material that has been relied upon in the course of its decision-making process.

We note that there appears to be a difference in approach toward dating and archiving of material that is provided as a downloadable document (for example in 'pdf' or 'rtf' format), as opposed to material that simply appears as a self-contained web page (for example, FAQs). For example, whilst the APRA FAQs referred to above are undated and there does not appear to be provision for their archiving, more formal documents such as prudential practice guides and circulars are clearly dated and previous versions are archived. We submit that *all* material that appears on a regulator's website should be subject to the same rigour with regard to dating, version control and archiving.

B.5.3 Effective and reliable search engines and subscription facilities

The quality of the search engines utilised on regulator's websites varies enormously. Common deficiencies include an inability to filter results, so that an unmanageable number of (mostly irrelevant and/or duplicated) search results are returned, or a simple failure to return a document

[89] For example, see http://www.apra.gov.au/Super/ReportingFramework/Pages/Reporting-Framework-Frequently-Asked-Questions.aspx
[90] webguide.gov.au - recordkeeping - archiving a website
[91] For example: Archiving Web Resources: Guidelines for Keeping Records of Web-based Activity in the Commonwealth Government, March 2001
[92] See, for example: Superannuation reforms 2011-2013, under the heading 'note on archived documents'

that is known to exist on the site. We have noted that this is a particular issue with the APRA website.

It is not uncommon to browse and then search unsuccessfully for an item using the search engine on a regulator website, only to locate it by conducting a search of that website using an external search engine such as Google. Many trustees, however, may be unfamiliar with more advanced research techniques and will rely, in good faith, on the results (or lack thereof) returned by the search engine on the regulator's website.

Inability to readily – and reliably - locate material on regulator websites raises a number of issues, including:

- Inefficiency, in the sense that it takes longer than it should to locate material;
- The risk of non-compliance, where a trustee does not locate regulatory material dealing with a particular matter and therefore reasonably concludes that none exists; and
- Financial cost, where a trustee resorts to obtaining legal advice because of a lack of confidence in their ability to locate all relevant regulatory material.

Some regulatory websites allow users to subscribe to receive automated email alerts when material on the site has been updated – for example, the Treasury, ATO and APRA websites. These 'webmaster alert' and related subscription facilities vary in sophistication, but all play a valuable role in making users aware of changes to the regulatory environment in a timely manner. It would be extremely beneficial if this service were provided by other sites which publish regulatory material, for example ASIC.

B.6 Post Implementation Reviews of Regulation

The OBPR generally currently requires Australian Government agencies to undertake a Post-implementation Review ("PIR") for new regulation[93] where a RIS was not prepared because the Prime Minister provided an exemption due to exceptional circumstances, or the RIS has been determined to be non-compliant.

The OBPR's guidelines for PIRs state as follows:

> *A PIR will be very similar in form and substance to a RIS. Like a RIS, a PIR will outline the problem and objectives, provide evidence and analysis, present findings from consultation, and make a conclusion. The main difference is that the impact analysis for a PIR should include information about the actual impacts of the regulation, rather than just estimates. Stakeholder consultation is essential and will form a key part of a PIR.*
>
> *A PIR's conclusion should provide an assessment, based on the available evidence, that considers whether the regulation remains appropriate, and how effective and efficient the regulation has been in meeting its original objectives.*[94]

[93] The requirement to conduct a PIR does not apply where the regulation is of a minor or machinery nature and it did not substantially alter previous arrangements
[94] Office of Best Practice Regulation, OBPR Guidance Note: Post-implementation Reviews, page 1

The OBPR further states:

> *2.2 The Government's best practice regulation framework is designed to try and ensure that regulation has efficient outcomes and does not create an unnecessary burden of "red tape" on stakeholders. For this reason, if a regulatory change was not subject to scrutiny under the regulation impact analysis process at the pre-decision stage, it is necessary that it be subject to a PIR. It is also important for all regulatory decisions to be assessed within the same framework to ensure the ongoing quality of regulation, consistent with the OECD Guiding Principles of Regulatory Quality and Performance.*
>
> *2.3 Regular reviews are useful for evaluating the ongoing performance of regulation and the OBPR would encourage agencies to review regulation following implementation even if a PIR is not required.*[95]

ASFA considers that the above objectives for a PIR, while valid, do not go far enough.

In ASFA's view, the PIR process should not be limited to situations where a RIS has not been prepared. Rather, a PIR should be conducted for *all material new regulation*. As noted earlier in this submission, implementation of major regulatory change involves a significant investment of money and resources and therefore impacts on member's retirement incomes as well as the products and services that trustees can provide. It is not unreasonable for trustees and members to expect that Government will, when setting requirements which impact on members' benefits in this way, bear a level of accountability with regard to the outcome.

ASFA has observed many instances where the manner in which regulatory change has been conducted has resulted in requirements that are 'over-engineered' and have imposed excessive cost and compliance burden without a commensurate improvement in members' benefits. MySuper is one such example.

Further, if a PIR is undertaken for all material regulation, the outcomes can be used to test the accuracy and completeness of the RIS, since the RIS was necessarily prepared on the basis of anticipated impacts.

The PIR outcomes can also be used to inform and improve future consultations and implementation processes. The outcomes should be considered by responsible agencies whenever the regulatory settings in relevant areas are considered in future. A PIR conducted for one regulation should feed into the preparation of the RIS for any subsequent regulation on the same or related matters, so it forms part of a process of continuous improvement.

[95] ibid., page 4, paragraphs 2.2 – 2.3

Annexure C: Part 2: Better Governance

SIS Act and ASX Principles definitions of independence

C.1 SIS Act definition of independence

The SIS Act defines “independent director” and “independent trustee” as follows:

“Independent director”, in relation to a corporate trustee of a fund, means a director of the corporate trustee who:

(a) is not a member of the fund; and

(b) is neither an employer-sponsor of the fund nor an associate of such an employer-sponsor; and

(c) is neither an employee of an employer-sponsor of the fund nor an employee of an associate of such an employer-sponsor; and

(d) is not, in any capacity, a representative of a trade union, or other organisation, representing the interests of one or more members of the fund; and

(e) is not, in any capacity, a representative of an organisation representing the interests of one or more employer-sponsors of the fund”.

“Independent trustee” in relation to a fund, means a trustee of the fund who:

(a) is not a member of the fund; and

(b) is neither an employer-sponsor of the fund nor an associate of such an employer-sponsor; and

(c) is neither an employee of an employer-sponsor of the fund nor an employee of an associate of such an employer-sponsor; and

(d) is not, in any capacity, a representative of a trade union, or other organisation, representing the interests of one or more members of the fund; and

(e) is not, in any capacity, a representative of an organisation representing the interests of one or more employer-sponsors of the fund

SIS also provides that, “[f]or the purposes of paragraph (b) of the definition of independent director … a director of a corporate trustee of a fund that is also an employer-sponsor of the fund is not taken to be an associate of that employer-sponsor by reason only of being such a director”.

C.2 ASX Principles definition of independence

In the case of public companies, independence is achieved by having a majority of independent directors, who have no executive or commercial links with the management of the company.

The ASX Principles define an independent director as being "a non-executive director who is not a member of management and who is free of any business or other relationship that could materially interfere with - or could reasonably be perceived to materially interfere with - the independent exercise of their judgement".

The ASX Principles also identify relationships affecting independent status, stating that, when determining the independent status of a director, the board should consider whether the director:

1. is a substantial shareholder of the company or an officer of, or otherwise associated directly with, a substantial shareholder of the company;
2. is employed, or has previously been employed in an executive capacity by the company or another group member, and there has not been a period of at least three years between ceasing such employment and serving on the board
3. has within the last three years been a principal of a material professional adviser or a material consultant to the company or another group member, or an employee materially associated with the service provided
4. is a material supplier or customer of the company or other group member, or an officer of or otherwise associated directly or indirectly with a material supplier or customer
5. has a material contractual relationship with the company or another group member other than as a director.

Annexure D: Part 3: Enhanced transparency—choice product dashboard and portfolio holdings disclosure

D.1 Super System Review – recommendation to develop a product dashboard

The *Review into the Governance, Efficiency, Structure and Operations of the Australian Superannuation System* ("Super System Review") recommended in its Final Report that: -

> "*Members also need a certain minimum amount of information* ***when considering superannuation investment options, including MySuper.*** *The Panel believes this can be provided through the development of a plain English product 'dashboard' that would provide members with a* ***standardised format*** *in* ***which to compare****:*
> - *the investment option's risk and return targets;*
> - *whether the investment option was illiquid; and*
> - *fees and costs, including a projected Total Annual Expense Ratio (TAER)*"[96] (emphasis added).

We submit that this supports the contention that the concept of a product dashboard was developed to facilitate the consideration of all superannuation investment options, including MySuper, through the provision of information in a standardised format to enable comparison.

Furthermore, the Review Panel stated in its Final Report that: -

> *"The Panel believes that information about the investment strategies of MySuper products and choice investment options should be displayed in a* ***simple, plain-English*** *'product dashboard"* [97](emphasis added).

In order to prove useful to fund members it is critical that the product dashboard be simple and plain English, in order to be comprehensible to members. In ASFA's view it is arguable that the example provided in Attachment A of the Discussion Paper may not satisfy this requirement.

D.2 ASIC - Consumer testing of MySuper Product Dashboard

ASIC commissioned some consumer testing of the MySuper product dashboard, the results of which were published in *Report 378 – Consumer testing of the MySuper product dashboard* in December 2013 ("ASIC Report 378"). The research objective was stated as being: -

> *"To determine if the Product Dashboard will assist people to make better comparisons and decisions with their super, and lead to more confident and informed financial consumers"*[98].

[96] Super System Review, Final Report, Part 1, Page 14
[97] Super System Review, Final Report, Part 2, Page 114
[98] ASIC Report 378, Page 5

The specific research objectives were to: -

> *"* test the effectiveness, including consumer understanding, and appeal of various Product Dashboard designs (both within and outside current legislation);*
> ** highlight any issues with the proposed designs and their underlying elements;*
> ** suggest and test alternative Product Dashboards;*
> ** explore how the Product Dashboard would be used by consumers;*
> ** determine what information and tools ASIC (through MoneySmart), Treasury and others (such as Super funds) could provide to assist consumers to use the Dashboard effectively"*[99].

Questions have been raised as to the methodology employed, in particular the sample size, the population from which participants were drawn and the nature of the process itself, which may affect the robustness of some of the findings. It appears as though the approach adopted may not have fully tested the consumers' comprehension of the information, its useability or the extent to which the dashboard achieves its intended purpose in allowing people to validly compare products. We submit that a preferable approach to testing should involve the type of methodology utilised by the Australian Taxation Office in its testing centre in Brisbane, where consumers are asked to articulate their thoughts as they read various documents and are observed during this process.

Nevertheless the results of this testing are all that we have to rely on at this stage.

Some of the findings with respect to the product dashboard included the following: -

In general, only simple fundamentals on Return, Risk and Fees should be shown with more detail accessed via mouse rollover click, hyperlink or ALT text type tool to convey transparency[100]

In our view this finding reflects two things: -

2. a potential implication – the need for the product dashboard to be simplified to deal only with returns; risk and fees; and
3. an assumption – that the product dashboard will only be viewed on-line.

With respect to the latter, it is important to note that it is a regulatory requirement that a copy of the product dashboard be given to a member with their periodic member statement, including on exit. ASIC has provided interim relief through a Class Order [CO 13/1534] which

> *"provides* ***interim relief*** *from compliance with sub-regulation 7.9.20(1)(o), if a trustee includes in the periodic statement, or accompanies the periodic statement with, a website address for the latest product dashboard for the investment option. This also applies to periodic statements provided to members who are exiting the fund"*[101] (emphasis added).

Interestingly, the researchers observed that consumers considered that "*The Dashboard would be a valuable hardcopy summary of performance"*[102] and yet throughout the report make continual

[99] ibid
[100] ibid, Page 13
[101] ASIC Class Order [CO 13/1534], Explanatory Statement, Page 2
[102] ASIC Report 378, Page 65

references to mechanisms \ tools - such as mouse rollover click, hyperlinks or ALT text type tool - which can only be utilised online.

ASFA submits that it is inappropriate for the product dashboard to be designed such that it can only be used online.

Presenting Return on different axes is potentially misleading[103]

The researchers performed an exercise whereby participants were shown the preliminary dashboard design with respect to two hypothetical funds, with the primary difference between the two versions being that the axes of the return graphs were different.

The testing found that people could become easily confused if information were not presented consistently across funds.

Importantly, not all participants noted the different scales. Significantly, some chose the fund with the poorer returns simply on the basis of the "higher graph".

This is of major concern.

While the results may have been exacerbated by the similar "look and feel" of the two dashboards, nevertheless there appears to be a considerable risk of members being confused. While more informed users were more likely to notice the difference in axes, and expressly insisted that equivalent scales need to be used, less informed users were at a considerable risk of being misled or even deceived.

It is difficult to envision how this recommendation can be achieved, short of prescribing the exact scale of the axes which must be used and the size of any graph.

In ASFA's view, given the potential implications, this matter should be looked at with some urgency.

Past Returns –A simple graph has more visual appeal and … is easier to absorb than text[104]

When given the alternative of presenting information on past returns in text rather than graphically, the researchers observed that most users wanted to see a graph on past performance as they considered it had more visual appeal and it was easier to absorb the information at a glance.

Having said that, as the researchers themselves noted as their final conclusion: -

> *"The findings reported are based on consumer attitudes expressed during the research. It will ultimately be up to the discretion of the regulator to consider what is best for the user as consumers themselves are not necessarily the best judge of their needs regarding superannuation"[105].*

An example of this is the finding above, which revealed that consumers were misled by the different scales used for the axes of the graphs of the two hypothetical funds.

[103] ibid, Page 32
[104] ibid, Page 13
[105] ibid, Page 77

It should be noted that there were a few who expressed a preference for charted information in text as they find graphs hard to read[106].
Accordingly, we submit that perhaps consideration should be given to providing both a graph and charted information in text.

Lines overlaid on bar charts are too complex[107].

The research found that the use of line charts overlaid on the bar chart in the preliminary design tended to complicate the graph and made it overwhelming. When these lines were removed in the revised Dashboard users unanimously approved of the use of a simple graph to show performance.

The researcher's recommendation was: -

> *"Use a simple graph rather than a single figure of Past 1 year Return but other information such as Past 10 year average Return and Target average Return should be shown as text"[108].*

In our view this appears to indicate that: -

- a bar chart alone should be utilised to reflect past returns, not a superimposed line graph; and
- the past 10 year average return and target 10 year average return should be show as text, not graphically

Targets viewed with suspicion[109] & many confused by 'Return target'\'Current Return target'

The researchers found that, in general, many were confused by what a 'Return target' was and struggled to decide which option made more sense to them[110]. The research concluded that

> *"For this term to have any meaning to the less informed consumer, it needs to be simplified, either through:*
>
> - *provision of a simple definition of 'Return target' accessed via rolling the mouse cursor over the button to reveal more detail or provision of hyperlinks to access further information; or*
> - *development of more consumer friendly language such as 'The projected return ....'*

Provision of the year range … enhances comprehension since it indicates a future time frame"[111].

The researchers found that "Return target 2014-2023" was easiest to understand and recommended that trustees provide a definition of "Return target" accessed via mouse rollover or hyperlink.

In our view this indicates the need for clear, plain and simple terms – especially when it comes to returns and fees – such as "return target 2014 – 2023", which are easily understood by consumers.

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[106] ibid, Page 38
[107] ibid, Page 13
[108] Ibid, Page 38
[109] ibid, Page 39
[110] Ibid, Page 40
[111] Ibid

The recommendation also reveals the same assumption - that the product dashboard will only be accessed on-line – has been made. Given this is not the case, we submit that the second alternative – the development of more consumer friendly language such as 'The projected return' - is to be preferred over the first alternative.

People want to see the long-term projections[112]

The researchers found that the fact that super is a long-term investment meant that consumers were looking for a long-term view. For this reason they considered that the 'Return target for 2014-2023' was the preferred way of describing the return target as it fulfilled this need to demonstrate a promise of longevity.

We concur with this view.

'Current return' is misunderstood[113] & consumers asked for past year return vs. predicted[114]

The researchers observed that a number of times participants asked to see both 'return target' and 'current return target', which demonstrated that they had misunderstood the two terms, seeing 'return target' as a projection into the future and 'current return target' as the targeted return for the current year. They stated that users indicated it was important to view both in order to obtain an indication of whether the fund was achieving its targets as well as what the fund believes the return will be in future.

To provide a sense of transparency some people asked to see the return for the past year versus the projected return.

The researchers consider that key to these findings was that consumers failed to realise or see that this information was already provided in the graph, highlighting that the lines overlaid on the chart tended to be ignored.

In our view this suggests both that consumers desire to see actual returns in addition to target returns and demonstrates that there is confusion about the terms being used. Accordingly, a review of the terminology used should be performed as a matter of urgency.

Presenting Return as above inflation, fees & tax is the simplest[115] & avoid terms like CPI & AWOTE[116].

In our view this emphasises the need for "Plain English", such as "inflation" as opposed to "CPI", especially when disclosing returns.

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[112] ibid, Page 41
[113] ibid, Page 42
[114] Ibid, Page 13
[115] Ibid, Page 43
[116] Ibid, Page 13

Dashboard Layout and Presentation – location of Risk and Fees section on the page depends on … whether text or drop down menus are used … A simple drop box at top of page with industry average for comparison works well[117]"

As per above, this is based on an assumption that the dashboard will only be accessed on-line, which will not be the case.

Furthermore, it also assumes that an entity, presumably APRA, periodically will determine and publish, an "industry average" for the purposes of the dashboard. While this may be the case for MySuper it may prove difficult for choice products.

Risk is difficult to understand and simplicity is needed[118]

The researchers conclude that risk is a difficult concept for people to understand and has the potential to confuse and mislead as it varies significantly depending on people's individual circumstances. They found that the use of labelling such as High \ Medium \ Low etc was considered to be the simplest approach, because many consumers had been advised to choose a higher risk profile if young and then move to a lower risk profile as they near retirement and so they sought out this terminology.

The researchers found that the use of multiple numbers, percentages and time periods in the alternative options presented to them served to confuse those less number savvy and led to more cynicism.

The researchers observed that: -

> *"Risk is difficult to understand and has potential to confuse … Although confusing, a more complex approach to risk that was tested facilitates understanding of products' suitability for individuals. If the more complex approach is used (though not the recommended approach), provide a simple explanation of risk with a drop down menu to calculate risk profile"*[119].

This observation not only makes the assumption that the dashboard will only be accessed on-line but - significantly – assumes that, rather than being a static summary of the product, which was its stated intended purpose, the dashboard would become a dynamic, interactive tool which would take into account a member's circumstances.

In our view this is totally inappropriate in the context of a product dashboard. A product dashboard is a summary of the features of a product – it is not an interactive tool. Amongst other things, regulations require that a copy be given to members with their periodic statement.

Tailored fees preferred[120]

The researchers showed various alternatives for the presentation of fees and other costs to the consumers.
Somewhat disturbingly, the researcher's preferred option was to provide a figure that is customised to the customer's financial situation.

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[117] ibid, Page 14
[118] ibid, Page 47
[119] ibid, Page 14
[120] ibid, Page 48

As per above - the dashboard is a static summary of the product – it is not an interactive tool.

An industry average for comparison is useful[121]

The researchers observed that many consumers found information about the industry average valuable as it made comparisons between funds easier. In our view it is not readily apparent why this is the case as - in the context of comparing two or more products – an industry average is not as relevant as the specific details with respect to the products themselves.

More complex approach to risk potentially provides more comprehensive assessment[122]

The researchers exposed the consumers to a more complex approach to the presentation of risk as a further alternative to gauge reactions. They observed that there was only limited comprehension and understanding of this approach, and that consumers considered it too long, wordy and confusing, which they concluded would limit the level of engagement.

They observed that some members were confused by the fact that the information appeared to contradict what they had previously been told about risk (e.g. long term should take high risk). The researchers observed that, when consumers gave the approach careful consideration, this alternative approach did appear to have the potential to help people better understand the suitability of a product for their circumstances.

ASFA submits that the industry should be given an appropriate period of time to design, test and implement a complementary risk measure.

Personalisation of risk is needed if the more complex approach to risk is to be used[123]

The researchers observed that the more complex approach to risk caused a great deal of confusion. They recommended that, if the more complex approach to risk that was tested were to be used: -

- it needed to be substantially simplified, providing a short explanation of how risk varies depending on timeframe, and
- a dropdown menu used to determine risk profile based on how long until they retire

Again – in ASFA's view the recommendation to use a drop down menu is not appropriate in the context of a static product dashboard.

Investment mix pie chart appealing to most[124] & best provided through 'rollover' mouse clicks (or similar) as it would otherwise clutter the Dashboard[125].

The researchers found that the use of an Asset Allocation/ Investment Mix pie chart as another feature that could be provided to assess and compare funds was well received with most finding it to be a clear, simple way to see where their money would be invested.

[121] ibid, Page 49
[122] ibid, Page 50
[123] ibid, Page 51
[124] ibid, Page 54
[125] ibid, Page 14

They observed that even those who did not know much about investing indicated that they would like to have this information provided in a pie chart. The researchers indicated that, while they may not understand its full meaning, consumers indicated that they could form an idea of how 'balanced' the investment mix was, which could influence how comfortable they felt about a particular super fund.

ASFA notes in this context that this information generally is provided in the investment section of products PDSs and fund annual reports. Accordingly, there should be no need to include it with a product dashboard.

Indication of liquidity 'nice to know'[126]

The researchers observed that when consumers were asked whether they would be interested in an indication of 'liquidity' not all commented on the liquidity option. Of those who did, most felt it would be 'nice to know' and useful (including a number of the less informed), especially when clearly explained.

The researchers concluded that this suggested that an indication of liquidity is not essential for a quick assessment of a super fund but that nonetheless it could be made accessible via a rollover mouse click or link to 'other features' for those who are interested in liquidity.

ASFA agrees this conclusion and submits that the only circumstances in which liquidity should be included in a product dashboard should be on an "exceptions" basis with respect to a product which is illiquid under sub-regulation 6.21(3) of the *Superannuation Industry (Supervision) Regulations 1994.* Such products should be disclosed as being illiquid.

We note that, again, the researcher's recommendation assumes that the dashboard will be accessed on-line.

Consumer understanding indicates that inflation figures should be adjusted by CPI[127]

It was stated that "[o]ne of the objectives of the research was to determine whether figures relating to inflation need to be adjusted by CPI or AWOTE" and that "this question was simplified and re-phrased to ascertain consumer interpretation of the term 'inflation'"[128].

If this is the case then it would appear as though the wrong question may have been asked, as consumer interpretation of the term "inflation" will – by definition – refer to increases in the cost of living, as measured by the CPI, and the risk of the loss of value (purchasing power) over time. Accordingly, it is hardly surprising that "[m]ost consumers had a good understanding of the concept of inflation as an increase in the cost of living – thereby the cost of goods and services"[129].

It may have been preferable to ask whether should be adjusted to take into account the loss of value over time through inflation \ loss of purchasing power (CPI) or loss of wage parity \ standard of living (AWOTE).

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[126] ibid, Page 56
[127] Ibid, Page 59
[128] ibid
[129] ibid

It is perhaps a reflection of financial illiteracy that the researchers observed that "[t]here was also a sense that costs are constantly rising, while wages rarely increase to match". If this is the perception of consumers then perhaps this goes some way to reinforce the researcher's final conclusion that: -

> *"The findings reported are based on consumer attitudes expressed during the research. It will ultimately be up to the discretion of the regulator to consider what is best for the user as consumers themselves are not necessarily the best judge of their needs regarding superannuation"[130].*

By comparison, the revised Dashboard is perceived to be even easier to understand for a number of reasons:

The graph is clearer – percentages on the bars are labelled and the confusing/'busy' average return lines are removed;

The historical return target information is depicted in figures rather than lines - requiring less analysis for the individual;

The language is simplified and easier for the less informed user to understand.

Feedback on revised product dashboard[131]

The researchers observed that consumers felt that the revised product dashboard had further advantages over the original – ion particular: -

> *"The graph is clearer – percentages on the bars are labelled and the confusing/'busy' average return lines are removed;*
> *The historical return target information is depicted in figures rather than lines - requiring less analysis for the individual;*
> *The language is simplified and easier for the less informed user to understand …*
> *The Fees section is a welcome improvement – consumers find the comparison to the MySuper Industry Average and the ability to personalise the fee estimate based on their balance, useful;*
> *The order of the information makes more sense – most consumers prefer to see the risk and fees information at the top"[132].*

It is unclear what is meant by "the percentages on the bars are labelled" as this appears to be the case with the original product dashboard as well.

ASFA supports:

- the removal of the "average return" lines; and
- the depiction of the historical return target information in figures rather than lines.

As raised above, however, we are concerned about the personalisation of the fee estimate based on the members account balance in the context of what is intended to be a static product dashboard, not an interactive tool.

[130] ibid, Page 77
[131] ibid, Page 63
[132] ibid

ASFA wholeheartedly endorses the use of simplified language, making it easier for the less informed user to understand.

Use as a comparison tool was widely endorsed[133]

The researchers observed that all face-to-face interviewees saw the value in having a consistent layout and format when comparing between funds and that this was further highlighted by the confusion demonstrated between the original and revised product dashboards.

ASFA endorses that product dashboards should be prepared and disclosed on a consistent basis, to aid comparability.

D.3 Stronger Super Review Panel – recommended approach to design of product dashboard

By way of contrast to the final MySuper product dashboard, the Super System Review panel suggested a materially different approach, aspects of which are potentially more straightforward and easier to understand than the product dashboard.

The Super System Review Panel's suggested design of the product dashboard was as follows: -

Figure 4.1: A sample product 'dashboard'

XYZ Blue MySuper	
Type of option	**MySuper**
Investment return target	**CPI + 4-5% over rolling 10-years**
Risk target — range of possible 10-year outcomes (per $100)	$250 $200 $150 $100 $50 $0 Returns above aim, but below 90th percentile Aim of option (CPI + 4-5%) Returns below aim, but above 10th percentile
Projected liquidity	**High**
Projected TAER	**1.21%**
Relative fees ranking	**$$ out of $$$$**

133 ibid, Page 67

It is important to note the following: -

- the product dashboard is “generic” for all products – the type of investment option (MySuper in the example) is indicated in the first row;
- the investment return target is indicated as a figure not as graphically;
- the risk target reflects the approach taken by the Squam Lake Working Group in their paper ‘*Regulation of Retirement Saving*’ dated July 2009 whereby [134], whereby a range of likely possible outcomes (or ‘payout’ scenarios), over an appropriate investment horizon, is provided – in this instance graphically. In ASFA’s view it would be worth obtaining consumer feedback about the level of comprehension and usefulness of this approach;
- fees \ costs are disclosed as a single percentage reflecting the combined effect of direct and indirect investment and administration expenses; and
- there is a relative fees ranking, the basis of which the Panel recommended would be determined in consultation with the industry.

D.4 Conclusion

The product dashboard has moved from that recommended by the Stronger Super Review Panel.

Most significantly, the ASIC consumer testing revealed a number of issues of concern with respect to consumer, including lack of comprehension of what various measures were conveying; misapplication, misinterpretation or misunderstanding of some information and even the potential to be misled by such factors as the use of different scales on the axis of graphs. Significantly, a number of recommendations necessitate the dashboard only being accessed on-line, while others require it to be developed as an interactive tool, neither of which were envisioned.

[134] <www.cfr.org/content/publications/attachments/Squam_Lake_Working_Paper6.pdf>.

Annexure E: Sample Innovative Disclosure

Slides reproduced courtesy of Andrew Coates, Founder, CEO, CloudSuper. Extract from his PowerPoint presentation 'Engagement wars - how funds can use mobile devices to compete in the battle for attention'. Presentation to ASFA 2012 WA State Forum. 27 March 2012. Slides 14-16.

Engagement wars - how funds can use mobile devices to compete in the battle for attention: Andrew Coates**,** Founder, CEO, CloudSuper – Presentation to ASFA 2012 WA Super Forum, slides 14-16

What's more engaging… this?

Table

Date	Growth	Balanced	Defensive Growth	Conservative	International Shares	Australian Shares	Property	Fixed Interest	Cash
loading									
21/03/2012	1.82177	1.84403	1.13471	1.69390	1.62512	2.37423	1.28267	1.48759	1.49102
20/03/2012	1.82521	1.84653	1.13646	1.69486	1.62658	2.38415	1.28304	1.48730	1.49087
19/03/2012	1.82668	1.84788	1.13765	1.69549	1.62750	2.38802	1.28220	1.48723	1.49071
18/03/2012	1.82415	1.84603	1.13599	1.69468	1.62868	2.37887	1.28198	1.48736	1.49028
17/03/2012	1.82415	1.84603	1.13599	1.69468	1.62868	2.37887	1.28198	1.48736	1.49028
16/03/2012	1.82415	1.84603	1.13599	1.69468	1.62868	2.37887	1.28198	1.48736	1.49028
15/03/2012	1.82377	1.84586	1.13621	1.69464	1.62794	2.37723	1.28298	1.48714	1.49011
14/03/2012	1.82202	1.84509	1.13697	1.69520	1.62217	2.37938	1.28262	1.49075	1.48992
13/03/2012	1.80635	1.83246	1.13289	1.69000	1.60457	2.35331	1.28082	1.49273	1.48975
12/03/2012	1.79639	1.82370	1.12950	1.68512	1.59363	2.33778	1.27949	1.49022	1.48911
11/03/2012	1.79639	1.82370	1.12950	1.68512	1.59363	2.33778	1.27949	1.49022	1.48911
10/03/2012	1.79639	1.82370	1.12950	1.68512	1.59363	2.33778	1.27949	1.49022	1.48911
09/03/2012	1.79639	1.82370	1.12950	1.68512	1.59363	2.33778	1.27949	1.49022	1.48911
08/03/2012	1.78444	1.81421	1.12602	1.68108	1.57681	2.32076	1.27908	1.49102	1.48899
07/03/2012	1.77848	1.80935	1.12378	1.67880	1.56962	2.31192	1.27867	1.49090	1.48883
06/03/2012	1.79491	1.82231	1.12845	1.68435	1.59040	2.33835	1.27953	1.48960	1.48867
05/03/2012	1.80286	1.82848	1.13219	1.68696	1.59367	2.36052	1.27956	1.48902	1.48856
04/03/2012	1.80260	1.82772	1.13254	1.68593	1.59354	2.36052	1.27929	1.48746	1.48812
03/03/2012	1.80260	1.82772	1.13254	1.68593	1.59354	2.36052	1.27929	1.48746	1.48812

Or this?

Analytics

Charts

Key Stats

Portfolio Value $67,635.00

Annual Return

Price to Earnings (P/E) 17.16

Price to Book (P/B)

Return on Assets (ROA)

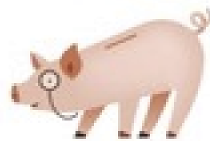
Return on Equity (ROE) 34.50%

P/E to Growth (PEG) 0.21

EV/EBITDA 8.77

Portfolio Turnover

SigFig



iPad 11:18 AM 100%

Total $ 10,113

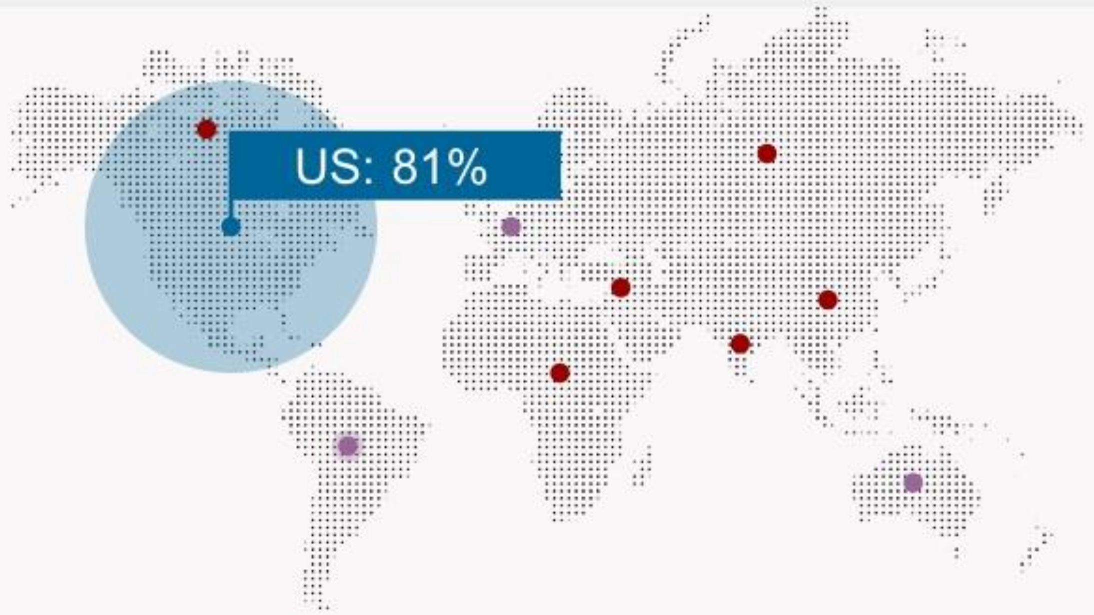
Overview Holdin

Performan

Asset Allocation

Dividends

Geographic Distribution



Geographic Area	% of Portfolio
US	80.68%
South America	8.85%
Europe	4.82%

My Portfolio

ary Metrics

Value $10,056

$2,113,399

eturn -8.6%

162.2%

ion Metrics

Earnings (P/E) 20.0

54.6

Book (P/B) 1.8

9.0

Assets (ROA) 5.0%

27.5%

Equity (ROE) 12.8%

98.2%