# Stronger Super: Regulating Risk Through Transparency

## 6 February 2014

> Transparency is critical to the efficiency and operation of a market-based savings system. It improves understanding, awareness and engagement at various levels; not always directly at member level.
>
> *Super System Review, Final Report – Part Two*

With the commencement of the Stronger Super regime, the 2013 calendar year heralded a new high water mark in disclosure for the Australian superannuation industry. The Super System Review found that there was a lack of transparency, comparability and accountability in the superannuation system – particularly in the areas of fees, costs and investment returns. As a result, new laws were enacted expanding APRA's ability to collect and publish superannuation data and enhancing the disclosure requirements for superannuation funds.

As with any new regime, the implementation of the Stronger Super transparency measures has not been without its complexities. This paper considers the issues involved in APRA data collection and publication, portfolio holdings, MySuper product dashboards and the disclosure of executive remuneration.

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## 1. Inconsistent application of look-through rules

A dominant theme running through the Stronger Super reforms is the need for greater transparency when investing through intermediate investment structures. As a result, tracing or 'look-through' rules were introduced to superannuation reporting and disclosure. In particular, 'look-through' rules can be found in the APRA's new powers to collect and publish superannuation fund data, portfolio holdings and indirect cost ratio in Product Disclosure Statements (**PDS**). However, the formulation of the 'look-through' rules differ in each regime.

The following table provides a summary of the differences between all three look-through regimes:

| | APRA Reporting | Portfolio Holdings | Indirect cost ratio |
|---|---|---|---|
| ***Regulator*** | APRA | ASIC | ASIC |
| ***Formulation of the look-through rule*** | APRA may require an RSE licensee to provide information in relation to the investment of or *assets derived from the assets* of a registrable superannuation entity (**RSE**) | The trustee of an RSE must publish on the RSE's website information that is sufficient to identify each of the financial products or other property in which *assets derived from assets* of the entity are invested | Disclose in PDS any *amount that will directly or indirectly reduce the return on the investment* of a member and is not charged to the member as a fee. |
| ***Express legislative limits on the look-through rule*** | APRA may only require information in relation to the investment by the RSE licensee or a *person connected with the RSE licensee* | No express legislative limits. However, statutory defences are available where the trustee is unable to obtain information after taking reasonable steps to do so | Only obliged to disclose amounts that a trustee knows or reasonably ought to know |

| | | | |
|---|---|---|---|
| ***Structures / products that must be looked-through*** | Managed funds, PSTs and other trusts. Arguably, not derivatives.<br><br>APRA also requires certain investment life policies and listed trusts to be looked through. However, it believes that the rules do not permit listed investment companies and hedge funds to be looked-through. | Arguably, managed funds, PSTs and other trusts, but not derivatives.<br><br>ASIC has not stated its views on other investment structures. However, it is hoped that it would adopt the same positions as APRA. | No guidance on what structures or products must be looked-through. |
| ***Types of liability arising from a breach*** | Criminal only | Criminal and civil | Criminal and civil |
| ***Availability of statutory defences*** | No defences available | Legislation provides 'due diligence' defences to liability where reasonable steps at compliance were taken | Legislation provides 'due diligence' defences to liability where reasonable steps at compliance were taken |
| ***Obligation to notify underlying investment structures*** | Yes | Yes | No |
| ***Mechanism of obligation to give notice*** | Legislation implies contractual duty to give notice. | Legislation imposes obligation to give notice. | N/A |
| ***Content requirements of the notice*** | The notice must state that the entity is investing assets, or assets derived from assets, of a superannuation fund. | The notice must state that an asset that is the subject of the arrangement is, or is derived from, the assets of an RSE. It must also set out | N/A |

| | | | |
|---|---|---|---|
| | | details of the trustee. | |
| ***Consequences of a failure to give notice*** | May give rise to general law remedies for breach of contract eg. compensation, specific performance. No criminal consequences. | It is a criminal offence not to provide the required notice. | N/A |
| ***Obligation to provide notice – extra-territorial application*** | Obligation can be implied into contracts involving foreign investment structures, as determined by rules of private international law. | Notice only needs to be provided where a financial product is acquired in Australia. | N/A |
| ***Who must the underlying investment structure provide information to?*** | To the entity who gave the notice. | To the trustee. | N/A |

The above table demonstrates that there are many differences between each of the look-through rules. As a practical matter, these differences are likely to result in different outcomes. For example:

(a) what is looked-through for one regime is not necessarily looked-through for another, resulting in different information being reported or disclosed depending on the applicable regime. The likelihood of different information being reported or disclosed is exacerbated by the limits in the APRA reporting regime (eg. to investment by persons connected with the RSE licensee) compared to the lack of limits in the other two regimes;

(b) the need to give a notice under two different regimes and the differing content requirements can cause confusion regarding whether one or both of the notice obligations have been complied with;

(c) the lack of statutory defences for APRA reporting renders this a higher risk area for trustees who are not able to obtain look-through information required by APRA. Further, the need for information to filter through successive levels of investment structures until it is provided to the RSE licensee results in timing issues – even if an RSE licensee is able to obtain look-through information it may not receive the information by APRA's due

date;

(d) the mechanism in the APRA reporting regime of implying obligations is weak compared to the imposition of criminal liability for non-compliance in the portfolio holdings regime; and

(e) while there is no extra-territorial limit on disclosure or reporting, there are extra-territorial limits on the notice provisions which significantly limit the usefulness of this mechanism.

The outcome of the different look-through regimes implemented by the Stronger Super reforms would seem to be inconsistent information provided to superannuation fund members and APRA. Accordingly, there is a case for aligning all three regimes.

Section 2 below provides further information about the look-through regime for APRA reporting and Section 3 discusses portfolio holdings disclosure.

## 2. APRA's data collection and publication

The Stronger Super regime witnessed the granting of a broader mandate to the Australian Prudential Regulation Authority (**APRA**) to monitor and regulate the efficiency and outcomes of superannuation funds.

The hub of APRA's new responsibilities is:

(a) the ability to determine prudential standards pursuant to Part 3A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**); and

(b) the expansion of APRA's powers under section 13 of the *Financial Sector (Collection of Data) Act 2001* (Cth) (**FSCDA**) to determine reporting standards in relation to the indirect investments of RSEs.

This paper focuses on the second of these new powers – APRA's new 'look-through' capability in the FSCDA.

Prior to the Stronger Super amendments, subsection 13(1) of the FSCDA empowered APRA to determine mandatory reporting standards for financial sector entities (such as RSE licensees and RSEs) with respect to:

(a) statements, reports, returns, certificates or other documents containing information of a financial or accounting nature relating to the business or activities of the entities; and

(b) surveys, reports, returns, certificates or other documents containing other information relating to the business or activities of the entities.

Pursuant to subsection 13(1), APRA had issued:

(a) five reporting standards for quarterly reporting on financial performance and position, fund assets and derivatives and asset concentration; and

(b) nine reporting standards for annual reporting on financial performance and position, fund assets and derivatives, asset concentration, related party transactions, membership and fund profile and a statement of compliance.

The *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* (Cth) (**Tranche 3 Act**) expanded APRA's powers to facilitate 'look-through' reporting in relation to RSEs. The policy behind these amendments is to ensure that the full costs of investing the assets of members are provided to APRA and, through APRA's publication of that data, to members.

The Tranche 3 Act inserted a new subsection 13(4A) into the FSCDA, which provides that a reporting standard determined pursuant to subsection (1) may require an RSE licensee to provide information in relation to:

(a) the investment of "***relevant assets***" – that is, the investment of the assets of an RSE, or assets derived from the assets of the RSE,

by:

(b) an "***investor***" – that is, the RSE licensee or a person connected with the RSE licensee.

Subsection 13(4A) goes on to provide that a reporting standard determined by APRA could require the provision of information about:

(a) any deductions (whether to cover fees, taxes, costs or for any other purpose) from the return on the investment made by an investor before all or part of the remainder of the return is paid or reinvested;

(b) if an investor has invested all or part of the relevant assets in financial products or other property – the financial products or other property in which the investor has invested the relevant assets;

(c) if an investor has invested all or part of the relevant assets in a managed investment scheme and the assets of the scheme have been invested in whole or part in financial products or other property – the financial products or other property in which the assets of the scheme have been invested;

(d) if an investor has invested all or part of the relevant assets in a pooled superannuation trust or other kind of trust and the assets of the trust have been invested in whole or part in financial products or other property – the financial products or other property in which the assets of the trust have been invested;

(e) the operations of an investor.

As a result of subsection 13(4A), APRA can collect information on fees, costs and other information of not just the RSE, but of underlying investment structures – that is, not just APRA-regulated entities but other entities (including those regulated by the Australian Securities and Investments Commission (**ASIC**)).

### *2.1 Meaning of 'assets derived from assets'*

Subsection 13(4A) achieves 'look-through' reporting through use of the term 'assets derived from assets' of the RSE. The term is not defined in the FSCDA.

However, as subsection 13(4A) expressly refers to investors invested in managed investment schemes, pooled superannuation trusts and other kinds of trusts, it is clear that the term 'assets derived from assets' includes these types of investment structures.

The Revised Explanatory Memorandum to the Tranche 3 Act does not discuss the term in the context of APRA reporting. However, the term is also used in the portfolio holdings rules that were also introduced by the Tranche 3 Act (see Section 3 below). The Revised Explanatory Memorandum states the following in this context:

> 3.69 The publishing requirement extends to financial products in which 'assets derived from assets' of the RSE are invested. The concept of 'assets derived from assets' is intended to capture situations where assets are invested through intermediaries; for example, where assets are invested through fund of funds structures such as multiple levels of pooled investments, including managed investment schemes.
>
> 3.70 In other words, an RSE licensee may invest and in return acquire an interest in an entity. That entity may then in turn use the assets contributed by the RSE, or perhaps part of those assets, pooled with the assets contributed by other investors, to invest and in return acquire an interest in a third party. At the point that the pooled assets are invested by the entity in the third party they are 'assets derived from assets' of the RSE. To avoid confusion, the term is not intended to refer to derivative products, such as contracts for difference. This may, in fact, be an asset of the RSE.

Accordingly, the Revised Explanatory Memorandum provides strong ground for maintaining that the term 'assets derived from assets' does not permit reporting standards to require look-through information on derivative products.

In the case of companies, partnerships and limited partnerships, the "relevant asset" could arguably be the share or partnership interest in the entity (in which case, look-through reporting on the investment of assets by these investment structures is not permitted). However, as it would normally be possible to trace the investment of assets through each of these types of structures, this position is not free from doubt.

APRA refers to 'assets derived from assets' as 'indirectly held investments'[1]. From the fields in the new reporting standards, it appears that APRA considers 'indirectly held investments' to extend to listed trusts, life company guaranteed contracts and life company investment linked contracts. However, APRA has stated that it considers that the reporting standards impose no obligation to look-through listed investment companies, because such investments are an investment in a company (i.e. a share[2]), or hedge fund investments[3].

### *2.2 Meaning of a 'person connected with the RSE licensee'*

Subsection 13(4A) applies look-through reporting only to the investment by the RSE licensee or by a person connected with the RSE licensee. A new subsection 13(4C) provides that:

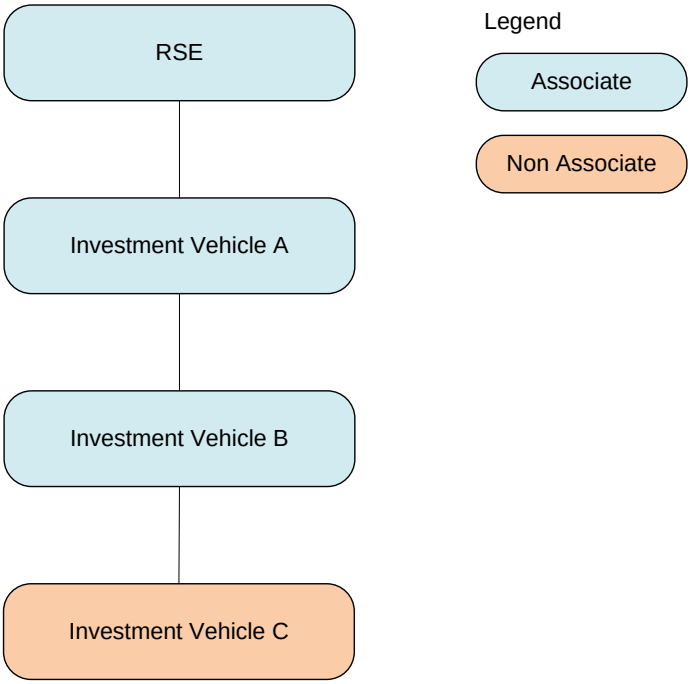
| **. . . a person is 'connected with an RSE licensee' if the person is:** | | **Comments** |
|---|---|---|
| (a) | a related body corporate of the RSE licensee | This limb appears to be designed to facilitate look-through reporting in group arrangements. |
| (b) | a custodian in relation to assets, or assets derived from assets, of the RSE licensee's registrable superannuation entities, and in relation to the RSE licensee or a related body corporate of the RSE licensee | The inclusion of custodians as a person connected with the RSE licensee appears mainly directed to counter arguments that the holding of assets in custody is a bar to look-through reporting. |
| (c) | a person who invests assets, or assets derived from assets, of the RSE licensee's registrable superannuation entities under a contract or other arrangement with:<br>(i) the RSE licensee; or<br>(ii) a related body corporate of the RSE licensee; or<br>(iii) a custodian in relation to assets, or assets derived from assets, of the RSE licensee's registrable superannuation entities, and in relation to the RSE licensee or a related body corporate of the | In group arrangements, this limb effectively means that the first level of investments outside a group structure is a person connected with the RSE licensee, but not any further underlying investment structures.<br>For RSE licensees with no related bodies corporate, this limb means that only the issuers of investments directly to the RSE licensee (or its custodian) are persons connected with the RSE licensee, and not any further underlying investment structures. |

[1] See Reporting Standard SRS 530.0 *Investments*.
[2] See Reporting Framework – Frequency Asked Question 72: How should listed investment companies be classified in APRA's investments reporting forms?
[3] See Reporting Framework – Frequently Asked Question 31.

RSE licensee

The above analysis demonstrates that the concept of a person connected with the RSE licensee limits the scope of look-through reporting to the first level of investment outside a group structure (or to the individual RSE licensee that has no related bodies corporate).

APRA provides an illustration of the application of the look-through rules in Reporting Standard SRS 532.0 *Investment Exposure Concentrations*. In the following structure, APRA states that an RSE licensee must report on all the levels of investment shown, but further look-through reporting on the investment structures underlying Investment Vehicle C is not required.




APRA explains that the RSE licensee must report on Investment Vehicle A because that vehicle invests superannuation funds assets. It must report on Investment Vehicle B because it is an associate of the RSE licensee, and reporting on Investment Vehicle C is required because it is the first non-associated level of investment.

### *2.3 Reporting standards which require 'look-through' reporting*

APRA repealed the 14 reporting standards issued prior to the Stronger Super amendments and issued 36 new reporting standards in their place. However, only a fraction of the new reporting standards require look-through reporting. APRA requires reporting of the following information in relation to indirectly held investments:

| APRA Reporting Standard | Items to be reported on a look-through basis |
|---|---|

| APRA Reporting Standard | Items to be reported on a look-through basis |
|---|---|
| SRS 530.0 Investments<br>SRS 530.1 Investments and investment flows<br>SRS 531.0 Investment flows | • Type of indirect investments<br>• Movements in indirectly held investments<br>• Movements in indirectly held investments |
| SRS 532.0 Investment exposure concentrations | • Indirectly held large exposures |
| SRS 533.0 Asset concentration | • Value of indirect investments (by investment option)<br>• Movements in indirectly held investments (by investment option) |
| SRS 700.0 Product dashboard | • Indirect cost ratio |
| SRS 702.0 Investment performance | • Indirect cost ratio – divided into investment and administration<br>• Base fee and performance fee of underlying investment manager |

### *2.4 Criminal liability in relation to the reporting standards*

Under section 13 of the FSCDA, failure to provide the information required by a reporting standard is a criminal offence of strict liability carrying a penalty of $8,500.

Alternatively, APRA can issue an infringement notice under Division 3 of Part 3 of the FSCDA which has a penalty of $1,700[4].

The FSCDA does not provide any defences to a breach of the reporting standards. This could prove problematic for superannuation funds given the marked increase in APRA's data collection requirements and the need for RSE licensees to rely on information provided to them by underlying investment structures, some of which will not be associated with the RSE licensee and may not have a direct relationship with the RSE licensee.

### *2.5 Implication of terms into investment contracts and arrangements*

The Tranche 3 Act also amended section 13 of the FSCDA to facilitate look-through reporting through the implication of terms into investment contracts and arrangements. Where relevant assets are invested under a contract or other arrangement between, on the one hand, the RSE licensee, a related body corporate or a custodian and, on the other hand, a person

[4] APRA will issue an infringement notice in accordance with its *Infringement Notices: Guidelines on the use of Infringement Notices* dated 1 July 2013.

connected with the RSE licensee, a new subsection 13(4B) implies the following terms into the contract or arrangement:

(a) ***Implied Term 1***: a term which requires the RSE licensee, its related body corporate or custodian to notify the person connected with the RSE licensee that it is investing assets, or assets derived from assets, of a superannuation fund. The notice must be provided at the time the relevant assets are invested or as soon as reasonably practicable after that time; and

(b) ***Implied Term 2***: a term which requires the person connected with the RSE licensee to provide the information required by the reporting standards of which the person connected is aware to the RSE licensee, its related body corporate or custodian who issued the notice.

The legislation does not prescribe any formal requirements for the form of the notice or procedural requirements in relation to the issue of notices for the purposes of Implied Term 1.

In the context of the diagram in SRS 532.0, reproduced in Section 2.2 above, subsection 13(4B) would imply Implied Term 1 into the contract or arrangement between:

(a) the RSE licensee and Investment Vehicle A, for the RSE licensee to notify Investment Vehicle A that it invests assets of a superannuation fund[5];

(b) Investment Vehicle A and Investment Vehicle B, for Investment Vehicle A to notify Investment Vehicle B that it invests assets derived from a superannuation fund[6]; and

(c) Investment Vehicle B and Investment Vehicle C, for Investment Vehicle B to notify Investment Vehicle C that it invests assets derived from a superannuation fund.

Implied Term 2 would also be implied into each of the contracts or arrangements listed above. Once notice is provided, Implied Term 2 would be triggered and the recipient would be required to provide the relevant information to the person providing the notice.

The operation of Implied Term 2 in a layered series of investment structures has a cascading effect. For example, provided it received the requisite notice, Investment Vehicle C would be obliged to forward information about itself to Investment Vehicle B. Investment Vehicle B would be obliged to forward information about itself (and information it is aware of about Investment Vehicle C) to Investment Vehicle A. Investment Vehicle A would be obliged to forward information about itself (and information it is aware of about Investment Vehicles B and C) to the RSE licensee.

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[5] In practice, an RSE licensee would hold the assets of the superannuation fund in custody. As a result, the RSE licensee would be obliged to give a notice to the custodian, and it would be the custodian who is obliged to issue the notice to Investment Vehicle A.

[6] If the assets of Investment Vehicle A were held in custody, Investment Vehicle A would be obliged to give a notice to its custodian, and the custodian would be obliged to notify Investment Vehicle B.

A person does not commit a criminal offence if it fails to provide the requisite notice or fails to provide the requisite information, and APRA does not appear to have any power to direct a party to comply with an implied term.

Accordingly, breach of an implied term is not a criminal or regulatory issue but rather a private or civil issue. This places the onus squarely on the RSE licensee to manage the information flows in a manner which enables compliance with its APRA reporting obligations.

In this regard, Implied Term 2 is the sole legislative tool granted to RSE licensees. However, RSE licensees should approach Implied Term 2 with caution. While RSE licensees must report information to APRA within certain time limits, Implied Term 2 does not specify time limits for the provision of that information to the RSE licensee. Nor does Implied Term 2 address issues such as the quality or format of information.

In light of the criminal consequences for an RSE licensee for breach of the APRA reporting standards and the lack of statutory defences, an RSE licensee may not wish to rely solely on Implied Term 2. It may consider seeking to impose 'service standards' when negotiating its investment contracts and arrangements which covers matters such as the timeframe, quality and format of information.

The Tranche 3 Act amendments to section 13 commenced on 1 July 2013. Accordingly, the notice obligations are already in operation.

The application and transitional provisions in the Tranche 3 Act state that subsection 13(4B) applies to any investment contract or arrangement, whether entered into before, on or after 1 July 2013 except in limited circumstances[7]. In effect, there is no grandfathering of existing arrangements except in limited circumstances.

### *2.6 Extra-territorial operation of the APRA reporting standards*

An important question to resolve for look-through reporting is its extra-territorial application to international investment structures. In particular:

(a) Do APRA's powers in subsection 13(4A) to collect look-through information extend to information on international investment structures?

(b) Does subsection 13(4B) operate to imply terms into investment contracts and arrangements outside Australia?

Extra-territorial operation of APRA's powers of collection

Subsection 13(4A) is expressed generally and does not refer to the jurisdiction of the "relevant assets" or the "investor". Further, the FSCDA contains no provisions regulating the application

[7] Where the application of the reporting standards would result in an acquisition of property on unjust terms (within the meaning of paragraph 51(xxxi) of the Constitution).

of the Act to international arrangements and there are no comments pertaining to this issue in the Revised Explanatory Memorandum.

The application of Australian law to international jurisdictions is a difficult area of law. However, it is worthwhile making some initial remarks.

Paragraph 51(i) of the Commonwealth *Constitution* grants the Commonwealth Parliament power to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries, and among the States. It is recognised that this section empowers the Commonwealth Parliament to make laws regulating activities outside Australia provided there is a sufficient nexus with trade and commerce between Australia and other countries. Accordingly, it is possible for the Commonwealth Parliament to make laws with extraterritorial application.

That said, in the interpretation of the general words of a statute, there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most statutes, if their general words were taken literally, would apply outside the jurisdiction, but are presumed to be restricted in their operation within territorial limits[8].

This general law presumption is reinforced by the rules of interpretation in section 21 of the *Acts Interpretation Act 1901* (Cth) which provide that in any Act, references to localities, jurisdictions *and other matters and things* shall be construed as references to such localities, jurisdictions *and other matters and things* in and of the Commonwealth.

However, if the application of the general law presumption against extra-territoriality would defeat the purpose of the legislation, it is assumed that Parliament's intention was to override the presumption[9].

There are good arguments both for and against the proposition that subsection 13(4A) was intended to have extra-territorial application. On the one hand, limiting the application of subsection 13(4A) to those in Australia is consistent with the general operation of the FSCDA which is an Act which applies only to entities in Australia.

On the other hand, it would seem to impose an additional and unduly significant limitation on APRA's powers if subsection 13(4A) only permitted APRA to collect information on investments in Australia.

However, the view which seems to be more consistent with the policy behind look-through reporting is that subsection 13(4A) does grant APRA the power to collect information about international investment structures underlying an RSE.

APRA has not stated its view on the application of these rules in the international context. However, the reporting standards do request information on whether an indirect investment has

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[8] *Jumbunna Coal Min NL v Victorian Coal Miners' Association* (1908) 6 CLR 309.
[9] *Kumagai Gumi Co Limited v Federal Commissioner of Taxation* (1999) 90 FCR 274.

an Australian domicile (which is defined as an investment issued in Australia) or international domicile (which is defined as an investment issued outside Australia)[10]. Accordingly, it appears that APRA is applying subsection 13(4A) as having extra-territorial operation.

Extra-territorial operation of the implied terms

Subsection 13(4B) operates to imply terms into private investment contracts and arrangements. As result, the rules of private international law will determine whether these terms will be implied into international investment contracts and arrangements.

The first step in this regard is to determine the governing law of the contract or arrangement. For the most part, the proper law of a contract dictates various aspects of the contract or arrangement including the enforceability of the provisions and whether there are any obligations implied by law. As a result, subsection 13(4B) will imply terms into each investment contract or arrangement governed by Australian law, regardless of whether one or both of the parties are outside Australia or the contract or arrangement is performed outside Australia.

Where the contract or arrangement is expressed to be governed by the laws of a jurisdiction outside Australia, there is greater difficulty in maintaining that subsection 13(4B) operates to imply terms into that contract or arrangement.

More problematic is the situation where there is limited connection with Australia, such as where the only connection is that one party is in Australia and, otherwise, the other party is outside Australia, the contract or arrangement is not governed by Australian law and the contract or arrangement is performed outside Australia. In the absence of clear guidance from the legislature or the courts, the best that can be said is that there are sound arguments for maintaining that subsection 13(4B) does not imply terms into the investment contract or arrangement in this situation.

This analysis suggests that there is a disconnect between the information that an RSE licensee must provide to APRA under reporting standards made pursuant to subsection 13(4A), which may extend to international investment structures, and the machinery implied by subsection 13(4B) to facilitate the provision of that information to APRA, which may not extend to those investments. This serves as further justification for RSE licensees seeking to impose service standards in relation to investment information.

### *2.7 Quality control, auditing and the use of third party service providers*

Section 13 of the FSCDA permits reporting standards to include matters in relation to the auditing of reporting documents.

In the previous reporting standards, APRA required information provided by a trustee under the reporting standards to be the product of processes and controls developed by the trustee for the internal review and authorisation of that information. It was the responsibility of the trustee to

[10] See for example, Reporting Standard SRS 530.0 *Investments*.

ensure that an appropriate set of policies and procedures for the authorisation of information submitted to APRA was in place.

APRA's new reporting standards impose a similar obligation, but now state that it is the responsibility of the Board and senior management (as opposed to the trustee) to ensure that policies and procedures for the authorisation of information is in place. However, the difference between a trustee and the board / senior management of the trustee arguably has little practical impact in this context.

Previously, APRA did not require quarterly reporting to be audited or tested by the auditor of the superannuation entity. However, APRA did require annual reporting to be the product of processes and controls that have been reviewed and tested by the auditor of the superannuation entity. This required the auditor to review and test the systems, processes and controls supporting the reporting of the information at least annually to ensure that they produce accurate data and are otherwise reliable.

Under the new APRA reporting standards, the systems, procedures and internal controls used to produce annual reports must be reviewed and tested by the RSE auditor at least annually. On their face, the reporting standards apply the auditing requirements to quarterly reporting. However, Reporting Framework – Frequently Asked Question 50 provides that the audit requirements are intended to apply to the full year of income of an RSE only and are not in respect of the quarterly reporting periods.

Each reporting standard provides that the auditor's review and testing is to be done on at least a limited assurance engagement consistent with professional standards and guidance notes issued by the Auditing and Assurance Standards Board[11]. However, Prudential Standard SPS 310 *Audit and Related Matters* (**SPS 310**) states that certain reporting forms[12] must be audited on a reasonable assurance basis[13]. APRA has clarified that the reasonable assurance

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[11] The Auditing and Assurance Standards Board's *Framework for Assurance Engagements* issued April 2010 defines a 'limited assurance engagement' as an assurance engagement where the practitioner's objective is a reduction in assurance engagement risk to a level that is acceptable in the circumstances of the assurance engagement, but where that risk is greater than for a reasonable assurance engagement, as the basis for a negative form of expression of the assurance practitioner's conclusion – for example, "*Based on our work described in this report, nothing has come to our attention that causes us to believe that internal control is not effective, in all material respects, based on XYZ criteria*". A limited assurance engagement is commonly referred to as a 'review'.

[12] These are Reporting Standard SRS 114.1, Reporting Standard SRS 320.0, Reporting Standard SRS 330.0, Reporting Standard SRS 530.0, Reporting Standard SRS 530.1, Reporting Standard SRS 531.0, Reporting Standard SRS 602.0, Reporting Standard SRS 800.0 and Reporting Standard SRS 801.0.

[13] The Auditing and Assurance Standards Board's *Framework for Assurance Engagements* issued April 2010 defines a 'reasonable assurance engagement' as an assurance engagement where the assurance practitioner's objective is a reduction in assurance engagement risk to an acceptably low level in the circumstances of the assurance engagement as the basis for a positive form of expression of the assurance practitioner's conclusion – for example, for example: "*In our opinion internal control is effective, in all material respects, based on XYZ criteria*". A reasonable assurance engagement is commonly referred to as an 'audit'.

requirements in SPS 310 override the limited assurance requirements in the reporting standards themselves[14].

Further, APRA has advised that it expects RSE licensees will have internal processes in place to ensure the quality and accuracy of the data reported to APRA in respect of the full annual reporting period ending 30 June 2014, but that audit of processes is not required to be completed until the 2013-2014 year of income concludes[15].

In practice, many RSE licensees may outsource the preparation and lodgement of the new APRA reports to their administrator and/or custodian. The question arises how RSE licensees can comply with the quality control and auditing requirements imposed on them by the APRA reporting standards where much of the preparation of the reports is outsourced.

The outsourcing of APRA reporting does not derogate from the RSE licensee's obligations in relation to quality control and auditing, although an RSE licensee's policies, procedures and controls will differ where reporting has been outsourced. To assist the RSE licensee in satisfying its quality control and audit obligations, it may be worthwhile undertaking appropriate due diligence on the service provider's APRA reporting policies and to impose quality control obligations on the service provider mirroring those set out in the APRA reporting standards.

RSE licensees should also engage with their auditors to determine what (if anything) the auditor needs from the service provider in order to provide the requisite audit opinion and factor the auditor's comments into the service provider's obligations.

### *2.8 APRA's publication of MySuper 'league tables'*

The Tranche 3 Act inserted a new section 348A into the SIS Act imposing an obligation on APRA to publish superannuation data on MySuper products – that is, the MySuper league tables. According to the Revised Explanatory Memorandum, this obligation is designed to provide a central source of information on MySuper products, help inform members and drive competition.

Section 348A requires APRA to, as soon as practicable after the end of each quarter, publish the following information on its website in respect of the quarter:

(a) the fees charged in relation to MySuper products, on a product by product basis;

(b) the costs incurred in relation to MySuper products, on a product by product basis;

(c) the net returns to beneficiaries of regulated superannuation funds who hold MySuper products, on a product by product basis; and

[14] See Reporting Framework – Frequently Asked Question 62.
[15] See Reporting Framework – Frequently Asked Question 63.

(d) any other information prescribed by regulations[16].

Importantly, the obligation is limited to the publication of fees, costs and net return information in relation to MySuper products. However, this does not prevent APRA from publishing other MySuper data on its website where APRA has determined under section 57 of the *Australian Prudential Regulation Authority Act 1998* (Cth) that the data is not confidential.

The application and savings provisions in the Tranche 3 Act state that section 348A applies in relation to the quarter beginning on 1 July 2013 and all later quarters.

APRA has yet to publish the requisite information on MySuper products on its website. However, APRA issued a Discussion Paper in November 2013 called *Publication of superannuation statistics and confidentiality of superannuation data* where it flagged the release of the MySuper statistics report for the September 2013 quarter in late 2014.

The Discussion Paper proposes that APRA publish the following five MySuper reports on a quarterly basis:

(a) MySuper product profile, which sets out high level information about each MySuper product, such as name, start date, total assets and whether it is a lifecyle product;

(b) MySuper product dashboard and investment performance (for a MySuper product or lifecycle stage), which sets out return target, level of investment risk, investment, administration and advice fees, net investment returns and net returns for a representative member;

(c) MySuper fees disclosed (for a MySuper product), which sets out more detailed fee information;

(d) MySuper target return and strategic asset allocation (for a MySuper product or lifecycle stage); and

(e) MySuper insurance premiums disclosed (for a MySuper product), which contains summary information about the MySuper insurance arrangements such as type, benefit design and cost.

APRA proposes that each of these reports would be published approximately two months after quarter end.

The information proposed to be published by APRA clearly exceeds the information it is obliged by section 348A to publish on its website. That said, most (but not all) of the additional information would already be publicly available either through MySuper product dashboards or the Product Disclosure Statements.

[16] No regulations have been made for the purposes of section 348A as at the date of this paper.

Submissions on the Discussion Paper closed on 31 January 2014.

APRA will also publish an annual MySuper report which will contain more detailed information. APRA will consult on annual superannuation statistical publications, including the annual MySuper report, in mid-2014.

# 3. Portfolio holdings disclosure

The Super System Review believed strongly in the need for a portfolio holdings regime in the Australian superannuation system. This belief was informed by submissions from Morningstar, as set out the Super System Review's Report, regarding the benefits of disclosing portfolio holdings, which benefits included:

(a) creating an information platform that would promote better analysis of superannuation funds;

(b) creating an alignment with global practice;

(c) allowing interested members to minimise overlap with their non-super investments;

(d) providing much greater transparency without significant cost or externalities;

(e) allowing the level of illiquid assets to be more observable;

(f) not facilitating front-running if there was a time lag before disclosure was required;

(g) discouraging undesirable manager behaviour like excess turnover; and

(h) enabling better monitoring of 'true-to-label' issues.

The Super System Review's belief was also informed by its view that Australia was behind in this area – it was one of the only two countries among the 16 assessed that did not require regular full portfolio holdings disclosure.

Despite industry concerns that increased disclosure can aid competitors and increase costs for the superannuation industry, Parliament proceeded to pass legislation providing for portfolio holdings disclosure.

Whilst the model for portfolio holdings disclosure is yet to be finalised, the main provisions have been enacted. In particular, the Tranche 3 Act inserted section 1017BB into the *Corporations Act 2001* (Cth) (**Corporations Act**) to require disclosure of portfolio holdings, and inserted sections 1017BC to 1017BE into the Corporations Act to facilitate the provision of information required for disclosure. Each of these sections is discussed below.

### *3.1 Obligation to publish portfolio holdings*

Section 1017BB requires the trustee of an RSE (other than a pooled superannuation trust) to

make the following information publicly available on the entity's website no later than 90 days after each 30 June and 31 December (each, a **reporting day**):

(a) information that is sufficient to identify each of the financial products or other property in which assets, or assets derived from assets, of the entity are invested, at the end of a reporting day;

(b) the value of the assets, or assets derived from assets, of the entity, at the end of a reporting day, that are invested in each of the financial products or other property.

In this regard, the Revised Explanatory Memorandum refers to the website listing each share held by the RSE, the number of shares held and the price at the end of the reporting day.

Regulations may prescribe the way in which portfolio holdings information must be organised on a website. Previous models for organising portfolio holdings information were met with significant industry resistance and were ultimately aborted. Treasury closed consultation on a new model on 12 February 2014[17] (**Treasury Discussion Paper**). Accordingly, this paper will not further discuss the model for organising portfolio holdings information.

Two concerns arising from the publication of portfolio holdings are the ability to facilitate "front running" and "free riding". "Front running" occurs where other traders buy (or sell) securities in anticipation of the fund buying (or selling) the same securities, forcing the fund to trade at unfavourable prices. "Free riding" essentially allows other funds to mimic the holdings of an actively managed fund by re-balancing based on the portfolio holdings disclosure of the actively managed funds. Section 1017BB addresses "front running" concerns by allowing 90 days to publish portfolio holdings information and addresses "free riding" concerns by only requiring disclosure on a semi-annual basis.

As a result, industry's main concerns with the portfolio holdings regime are as follows:

(a) the requirement to publish commercially sensitive information such as in relation to valuations of infrastructure and direct property;

(b) while regulations may be made imposing a materiality threshold on disclosure, the absence of any regulations setting materiality thresholds[18];

(c) the requirement to publish portfolio holdings of underlying investment structures through the look-through disclosure obligation discussed in Section 3.2 below.

The obligation to publish portfolio holdings information applies from 30 June 2014[19]. Trustees should note that, at the time of preparing this paper, they will be obliged to publish portfolio

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[17] See the *Better regulation and governance, enhanced transparency and improved competition in superannuation* Discussion Paper, 28 November 2013.

[18] The Treasury Discussion Paper seeks industry responses on the materiality threshold which could be applied to portfolio holdings, and suggests the materiality threshold in APRA Reporting Standard Reporting Standard SRS 532.0 *Investment Exposure Concentrations* of one per cent of the assets of the RSE as a possible threshold.

holdings information on their website within 90 days of 30 June 2014, even if regulations prescribing the manner in which portfolio holdings must be published have not been made.

### *3.2 Obligation to publish look-through portfolio holdings information*

Section 1017BB requires a trustee to publish information about the assets of the RSE, together with information about assets derived from those assets. The look-through reporting in subsection 13(4B) of the FSCDA adopts the same terminology. Accordingly, the investment structures which must be looked-through for APRA reporting purposes must also be looked-through for portfolio holdings purposes.

An important limitation which applies to APRA reporting is that the obligation to look-through investment structures is limited to persons connected with the RSE licensee. As a result, APRA look-through reporting extends only to the first level of investment outside a group structure or individual trustee, but not any further underlying investment structures. However, section 1017BB is not limited in this way. Accordingly, a trustee is obliged to publish portfolio holdings information for all levels of look-through investment structures, regardless of whether or not they are associated with the trustee.

There is also no extra-territorial limitation on a trustee's obligation to publish. On its face, the legislation requires publication of portfolio holdings on the investment of assets by both Australian and international investment structures.

The principles discussed in Section 2.4 above also apply to portfolio holdings disclosure. As a result, there are good arguments both for and against the proposition that section 1017BB requires a trustee to publish information on international assets. However, the view which seems to be more consistent with policy intent is that section 1017BB does require publication of the portfolio holdings of international investment structures underlying an RSE.

ASIC also appear to have adopted this position[20]. In Frequently Asked Question C1, ASIC describes the rules as operating as follows:

> However, the RSE licensee is not required to publish information relating to financial products or other property which is not acquired in this jurisdiction unless the RSE licensee knew, or reasonably ought to know, information sufficient to identify the financial products or other property acquired.

### *3.3 Criminal and civil liability in relation to disclosure of portfolio holdings information*

A new section 1021NB of the Corporations Act establishes the following criminal offences in relation to portfolio holdings:

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[19] The Treasury Discussion Paper does contemplate deferral beyond 30 June 2014.
[20] See Frequently Asked Question C1.

(a) An offence of a failure to make portfolio holdings information publicly available, where required to do so by section 1017BB. The penalty for this offence is a fine of up to $85,000 for a corporate trustee,[21] 2 years imprisonment or both.

(b) An offence of publication of portfolio holdings information where the person knows that the information is misleading or deceptive or there is an omission from the information. The penalty for this offence is a fine of up to $170,000 for a corporate trustee, 5 years imprisonment or both.

(c) A strict liability offence of publication of portfolio holdings information where the information is misleading or deceptive or there is an omission from the information. The penalty for this offence is a fine of up to $85,000 for a corporate trustee, 2 years imprisonment or both.

Broadly speaking, section 1022B of the Corporations Act permits a member to recover from the trustee loss or damage suffered by the member as a result of the failure to publish portfolio holdings or the portfolio holdings information being misleading or deceptive or there was an omission of information from the portfolio holdings. Civil action under section 1022B be may commenced at any time within six years after the date on which the cause of action arose.

'Due diligence' defences

Subsections 1021NB(5), (6) and (7) grant statutory 'due diligence' defences to the following criminal offences:

(a) It is a defence to criminal liability for failing to publish portfolio holdings if the information would have been made publicly available but for the fact that the trustee was unable to obtain the information after taking *reasonable steps* to do so.

(b) It is a defence to criminal liability for knowingly or otherwise publishing portfolio holdings with an omission of information where:

(i) the omission was because the trustee was unable to obtain the information after taking *reasonable steps* to do so; or

(ii) the information was omitted because it would have been misleading or deceptive and the trustee took *reasonable steps* to obtain information that would not have been misleading or deceptive.

[21] Under section 1312 of the Corporations Act, where a body corporate is convicted of an offence under the Corporations Act, the penalty that the court may impose is a fine not exceeding 5 times the maximum amount that the court could impose as a pecuniary penalty for an individual (except for a limited number of listed offence provisions).

(c) It is a defence to criminal liability for knowingly publishing portfolio holdings with misleading or deceptive information if the trustee took *reasonable steps* to ensure that the information would not be misleading or deceptive.

It is also a defence to civil action under section 1022B if the person took *reasonable steps* to ensure that the information would not be misleading or deceptive and took *reasonable steps* to ensure that there would not be an omission of information.

In the absence of limits on the look-through rules for portfolio holdings, the adoption of an appropriate framework to satisfy the 'due diligence' (ie reasonable steps) defences is vital for a trustee.

The Corporations Act contains no rules regarding what constitutes taking 'reasonable steps' for the purposes of these statutory defences. Further, ASIC has not published guidance in this regard.

At this stage, it is questionable whether mere reliance on the notice regime discussed in Section 3.5 below constitutes reasonable steps for the purposes of the statutory due diligence defences. Presumably, some further action is required.

Arguably, undertaking a proper due diligence process prior to publishing portfolio holdings information is important in demonstrating that the trustee has taken 'reasonable steps' for the purposes of each statutory defence.

This could include a well drafted due diligence policy and robust procedures to both seek information and to verify the information received. It should also include effective monitoring of those procedures. This is because the Courts have held that policies are only valuable with systems and people in place to enforce those policies by checking from time to time that they are being applied[22].

### *3.4 ASIC Stop Orders*

Section 1020E of the Corporations Act grants ASIC the power to make a stop order on disclosure of portfolio holdings where the information is misleading or deceptive or there is an omission of required information.

### *3.5 Notice obligations*

The Tranche 3 Act imposes a series of notice obligations to facilitate compliance with the portfolio holdings regime.

The first notice obligation, found in a new section 1017BC of the Corporations Act, applies where:

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[22] *Rahmat Ali v Hartley Poynton Limited* [2002] VSC 113 per Smith J.

(a) a party acquires a financial product in Australia; and

(b) that party knows, or reasonably ought to know, that an asset that is the subject of the arrangement is, or is derived from, an asset of an RSE.

Where section 1017BC applies, the person acquiring the financial product must notify the party selling or issuing the financial product that an asset that is the subject of the arrangement is, or is derived from, the assets of an RSE and details of the trustee of the RSE. The notice must also set out details of the trustee of the RSE. The notice must be given when entering into the arrangement.

Where a replacement trustee is appointed to a superannuation fund or assets are transferred to another superannuation fund under a successor fund transfer or accrued default amount transfer, the new trustee could be said to acquire the financial product. Accordingly, the obligation to give a notice may well be triggered in these circumstances.

Notice under section 1017BC is only required if the party acquires the financial product in Australia. This term has three possible meanings:

(a) the party who acquires the financial product is in Australia;

(b) the acquisition occurs in Australia; or

(c) the asset being acquired is situated in Australia.

The Revised Explanatory Memorandum gives no guidance on this issue. However, the third interpretation arguably represents the better view. This is because it is the act of issuing a financial product that *causes* a product to be acquired, rather than the act of applying for the product. This view is supported by the definition of the term 'acquire' set out in subsection 761E(1) of the Corporations Act. Subsection 761E(1) provides that, if a financial product is issued to a person:

(a) the person acquires the financial product from the issuer; and

(b) the issuer provides the product to the person.

There are a variety of principles to determine where an asset is situated. Different rules apply depending on the type of asset. The following are some of the principles which apply in determining where an asset is situated:

(a) a share or other interest of a member in a company or interest of a person in a registered scheme is situated[23]:

[23] Section 1070A of the Corporations Act.

(i) if the share or interest is entered on a register kept under section 169 of the Corporations Act, the State or Territory where the register is kept; or

(ii) if the share or interest is entered on an overseas branch register kept under section 178 of the Corporations Act, in the foreign country where the register is kept;

(b) a simple contract debt is situated where the debtor resides[24]. If the debtor has several distinct places of business, the debt is situated at the place where it would be properly enforced or primarily payable (even though an action for breach of the obligation to pay could be brought elsewhere)[25];

(c) specialty debts are situated where the instrument is situated[26];

(d) Commonwealth inscribed stock and other inscribed or registered stock of Governments and other public bodies are situated where the stock is registered[27];

(e) where an insurance policy takes the form of a deed, the rights of the insured are situated where the policy is[28]; and

(f) an interest in a partnership is situated where the business is carried on, even if some of the assets are physically located elsewhere[29].

If an agent (other than a custodian) acquires a financial product on behalf of a person, the agent must notify the party selling or issuing the financial product. In these cases, the party acquiring the financial product is taken to have complied with its obligations under section 1017BC (subsection 1017BC(4)).

Arguably, this rule does not apply to an investment manager because, while it may make a decision that a financial product should be acquired for an investment structure, the investment manager will normally give the custodian an instruction to acquire the financial product and the financial product will be acquired by the custodian – that is, the investment manager does not normally acquire the financial product itself. Accordingly, it is not clear how this rule will operate in practice.

Section 1017BC applies in relation to arrangements entered into on or after 3 December 2012[30]. Accordingly, at the date of this paper, the notice obligations have been in operation for approximately 15 months already and apply well before commencement of the associated

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[24] *English Scottish & Australian Bank Limited v IRC* [1932] AC 238.
[25] *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 1.
[26] *Commissioner of Stamps v Hope* (1891) 8 WN (NSW) 66.
[27] *Attorney-General v Bouwens* (1838) 4 M & W 171.
[28] *Gurney v Rawlins* (1836) 2 M & W 87.
[29] *Laidlay v Lord Advocate* (1980) 15 App Cas 468.
[30] Section 1541, inserted into the Corporations Act by the Tranche 3 Act.

disclosure obligation[31]. However, ASIC has stated that it does not expect reporting by third parties before the disclosure obligations formally start. Presumably, this position extends to the notice obligations.

Sections 1017BD and 1017BE impose notice obligations in relation to custodial arrangements. Section 1017BD imposes an obligation to notify the provider of a custodial arrangement where the party appointing the provider of the custodial arrangement knows, or reasonably ought to know that:

(a) under the custodial arrangement, a financial product may be acquired in Australia; and

(b) an asset that is the subject of the custodial arrangement is, or is derived from, an asset of an RSE.

For these purposes, the terms 'provider' and 'custodial arrangement' take on the meaning in section 1012IA of the Corporations Act. While section 1012IA has traditionally only been applied in the context of wraps and platforms, the definitions are wide and can apply to traditional custody arrangements. The Revised Explanatory Memorandum confirms that this is the intended position.

However, the definitions in section 1012IA are limited to a custodian in relation to the acquisition of financial products. Accordingly, section 1017BD will not apply where a custodian acquires other investments (ie which are not financial products, such as direct property) on behalf of the trustee.

Where section 1017BD applies, the party appointing the custodian must, at the time the custody arrangement is entered into, notify the custodian that an asset held in custody is, or is derived from, the assets of an RSE and details of the trustee of the RSE together with details of the trustee.

The legislation imposes no obligation on the custodian to provide information to the trustee. Instead, the legislation merely imposes a notification obligation to ensure that the custodian is aware that the assets held in custody are assets, or assets derived from assets, of the trustee, so that the custodian will have a notification obligation under section 1017BC in appropriate circumstances.

Section 1017BE is perhaps the most problematic section in the portfolio holdings rules. It imposes a notification obligation on custodians where:

(a) the custodian enters into a transaction with another party where that party is the acquirer in relation to the custodial arrangement and the custodian is the provider of the custodial arrangement;

[31] See ASIC letter to trustees dated 17 December 2013.

(b) the custodian knows, or ought reasonably to know, that under the custodial arrangement the other party may acquire a financial product in Australia;

(c) the custodian knows, or ought reasonably to know, that an asset that is the subject of the custodial arrangement is, or is derived from, an asset of an RSE.

While not clear, it appears that section 1017BE imposes an obligation on custodians of RSEs to give the requisite notice to its sub-custodians who may acquire a financial product in Australia.

Where section 1017BE applies, the custodian must, at the time the transaction is entered into, notify the other party that an asset that is the subject of the transaction is, or is derived from, the assets of an RSE and details of the trustee of the RSE. However, there is no obligation on the party acquiring the financial product to provide information to the trustee.

Regulations may prescribe exceptions to the application of sections 1017BC, 1017BD or 1017BE. However, no regulations have been made for this purpose at the date of this paper.

The legislation does not prescribe any formal or procedural requirements for notices given under sections 1017BC, 1017BD or 1017BE.

No transitional rules are prescribed for sections 1017BD or 1017BE.

Section 1021NC of the Corporations Act provides that a person commits a criminal offence if they fail to give a notice when required by sections 1017BC, 1017BD or 1017BE. The penalty for this offence is a fine of up to $85,000 for a body corporate, 2 years imprisonment or both.

### *3.6 Obligation to provide portfolio holdings information to the trustee*

Once the party selling or issuing the financial product receives the requisite notice, section 1017BC requires the party to provide the trustee of the RSE with sufficient information about:

(a) the financial product it has sold or issued; and

(b) if it is known (or it ought reasonably to be known) that the asset used to acquire the financial product will be used to acquire a second financial product or other property, that second financial product or other property,

to allow the trustee to satisfy its obligations under section 1017BB.

The obligation to provide information is dependent on receipt of a notice in accordance with subsection 1017BC(2). This drafting suggests that a party has no obligation to provide information if it receives a notice under one of the sections 1017BD or 1017BE, discussed in section 3.5 above. However, sections 1017BD and 1017BE do not themselves impose an obligation to provide information to the trustee.

An example of the how these rules are intended to operate is set out in the Revised Explanatory Memorandum. The example refers to a custodian providing notice to a managed investment scheme, resulting in the managed investment scheme being obliged to provide its portfolio holdings information directly to the trustee. This is at least suggestive that the intention is for the obligation to provide information to be imposed regardless of whether the notice was provided pursuant to sections 1017BC, 1017BD or 1017BE of the Corporations Act.

If a party entering an investment contract or arrangement has not been notified that the contract or arrangement covers the assets of an RSE, or assets derived from assets of an RSE, it will have no obligation to provide information under section 1017BC.

While not expressly contemplated by the legislation, it appears that the obligation to provide information under section 1017BC is semi-annual once the requisite notice is received up-front. However, section 1017BC does not specify the timeframes within which the party must provide the information. Accordingly, trustees should consider negotiating appropriate reporting timeframes to enable them to publish within 90 days of each 30 June and 31 December.

A person commits a criminal offence if they fail to provide the information to the trustee required by section 1017BC (section 1021NC). The penalty for this offence is a fine of up to $85,000 for a corporate trustee, 2 years imprisonment or both.

It is also a criminal offence under section 1021NC:

(a) if a party provides information to the trustee which it knows to be defective (which carries a fine of up to $170,000 for a body corporate, 5 years imprisonment or both); and

(b) of strict liability if a party provides defective information to the trustee, whether or not the party knows the information is defective (which carries a fine of up to $85,000 for a body corporate, 2 years imprisonment or both).

However, the legislation does provide 'due diligence' defences for these two offences.

### *3.7 Role of the investment manager*

The notice obligations in the portfolio holdings regime impose obligations on trustees, custodians, product issuers, those selling and acquiring financial products and certain agents. An investment manager may have delegated authority to make investment decisions, including whether financial products should be acquired. However, it appears that an investment manager is not caught by the reference to agents (as discussed in section 3.5 above) and does not otherwise fall within the class of persons contemplated by sections 1017BC to 1017BE.

Accordingly, the Corporations Act does not impose any express obligations on investment managers in relation to the portfolio holdings regime.

Should a trustee wish for its investment manager to have an active role in the portfolio holdings regime, it will need to insert appropriate provisions into the investment management agreement.

### *3.8 Extra-territorial operation of the notice obligations*

Each of the notice obligations is limited by reference to the acquisition of a financial product in Australia. There is no obligation to give a notice, or to provide information, if the financial product is acquired outside of Australia. This requirement effectively restricts the operation of the notice regime to those in Australia.

As a result, trustees have a prima facie obligation in section 1017BB to publish portfolio holdings of international investment structures. However, the jurisdictional limits built into the notice regime limit the information trustees will receive from international investment structures. Accordingly, the statutory defences should be available to a trustee who can demonstrate that it did not include information on international investment structures because the information was not provided to it after taking reasonable steps to obtain that information.

Trustees will be receiving look-through information from certain underlying international investment structures for the purposes of APRA reporting. The statutory defences will not be available in relation to this information to the extent it can also be applied for portfolio holdings purposes.

## 4. MySuper product dashboard

Perhaps the most direct outcome of the Government's acceptance of the Super System Review's findings of a lack of transparency, comparability and accountability in the areas of superannuation costs, fees and investment returns are the new product dashboard rules.

The aim of product dashboards are to display simple, plain-English information about investment strategies focussing on risk, returns, fees and costs. Consumer testing of the product dashboard has produced mixed results in this regard[32].

While the rules inserted by the Tranche 3 Act impose product dashboard obligations in relation to both MySuper products and choice investment options, Treasury only commenced consultation on the detailed requirements for choice product dashboards in late November 2013[33]. Accordingly, this paper focuses on the rules for MySuper product dashboards.

The Tranche 3 Act inserted a new section 1017BA into the Corporations Act. Section 1017BA requires the trustee of a regulated superannuation fund with five or more members to make a product dashboard for each of the fund's MySuper products publicly available at all times on the fund's website.

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[32] Report 378 *Consumer testing of the MySuper product dashboard* December 2013, commissioned by ASIC and produced by Latitude Insights.

[33] See the *Better regulation and governance, enhanced transparency and improved competition in superannuation* Discussion Paper, 28 November 2013.

The requirement for the product dashboard to be publicly available means that the product dashboard must not be published only on a private member's portion of the website. However, the obligation would arguably be satisfied if a product dashboard was included in a PDF document published on the fund's website.

### *4.1 Presentation of the MySuper product dashboard*

The product dashboard for a MySuper product must be set out as follows (including the headings)[34]:

| **PRODUCT DASHBOARD** | |
|---|---|
| **Return Target** | |
| **Return** | |
| **Comparison between return target and return** | |
| **Level of investment risk** | |
| **Statement of fees and other costs** | |

The Explanatory Memorandum for the *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013* (Cth) (**MySuper Regulations**) states that the specified information must be set out in a table, and the completed table will form the product dashboard.

As a result, it appears that:

(a) the product dashboard should be in the form of a table;

(b) the table must contain the rows set out above; and

(c) the rows must be in the order set out above.

However, it appears that ASIC will accept a product dashboard as being compliant where the requisite information is not set out in separate rows, but still follows the order set out above. The example product dashboard published by ASIC, reproduced in Appendix 1 of this paper, shows a product dashboard where the return and return target information is provided on the

[34] Regulation 7.9.07Q of the *Corporations Regulations 2001* (Cth), inserted by the *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013* (Cth).

same row and the level of investment risk and statement of fees and other costs are set out on the same row.

Further, the comparison in the table must be set out as a graph containing[35]:

(a) columns representing the return for each year in the comparison period;

(b) a line representing the moving average return target for the comparison period; and

(c) a line representing the moving average return for the comparison period.

### *4.2 Publication of multiple product dashboards*

For lifecycle MySuper products, regulation 7.9.07Q of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) requires information on each item of the table to be set out in relation to each lifecycle stage. This effectively requires a separate product dashboard for each lifecycle stage.

The legislation contains no further rules regarding the presentation of product dashboards for a lifecycle MySuper product. Accordingly, it is arguably open to a trustee to (for example) set the product dashboards for each lifecycle stage on the one webpage (for example, with each lifecycle stage only displayed with a drop down menu) or to set them out on separate web pages with a link between each.

Section 1017BA only contemplates the provision of one product dashboard for a MySuper product. This can be problematic in the case of white-labelled MySuper products. Gross returns of the MySuper product must be identical across each superannuation product offering the white-labelled MySuper product. However, as discussed below, the product dashboard must set out returns net of taxes. Where each superannuation product has different effective rates of tax, the net returns for each white-labelled version of the MySuper product will be different.

Arguably, because the legislation does not prevent separate product dashboards to be prepared for the same MySuper product, it would be possible to have a separate MySuper product dashboard for each superannuation product.

### *4.3 Content requirements*

Section 1017BA requires each item in the product dashboard to be calculated in accordance with the regulations, and the regulations require each of the items in the product dashboard to be worked out in accordance with the relevant APRA reporting standards[36]. In this regard, APRA Reporting Standard SRS 700.0 *Product Dashboard* (**SRS 700.0**) provides that:

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[35] Regulation 7.9.07U of the *Corporations Regulations 2001* (Cth).
[36] Regulations 7.9.07R, 7.9.07S, 7.9.07T and 7.9.07V of the *Corporations Regulations 2001* (Cth).

(a) the **return target** is the annualised estimate of the percentage rate (to one decimal place) of net investment return that exceeds the growth in CPI over 10 years, where 'net investment return' is the time weighted rate of investment return net of investment fees and costs (whether directly incurred by the RSE licensee or in underlying investment structures);

(b) the **return** is the percentage rate (to two decimal places) of the net investment return of a representative member less administration fees, costs and taxes (whether directly incurred by the RSE licensee or in underlying investment structures) and, in certain cases, advice fees, costs and taxes (whether directly incurred by the RSE licensee or in underlying investment structures), where a 'representative member' is a member with a stable $50,000 account balance through the year. While not immediately apparent from SRS 700.0, ASIC's product dashboard example discloses the return in this row as an average return;

(c) in relation to the **comparison between the return target and return**:

(i) return is the return calculated in accordance with paragraph (b) above for each year in the period; and

(ii) the moving average return target must be calculated in accordance with the complex mathematical formula set out in SRS 700.0; and

(iii) the moving average return is the average of the returns for the relevant year and previous years and must be calculated in accordance with the complex mathematical formula set out in SRS 700.0[37];

(d) the **level of investment risk** is determined in accordance with the Financial Services Council's and Association of Superannuation Fund of Australia's standard risk measure reported as a whole number to one decimal place; and

(e) the **statement of fees and other costs** is the whole dollar amount of the sum of investment fees and costs, administration fees and costs and advice fees and costs calculated for a representative member, where each category of fees and costs include those directly incurred by the RSE licensee and in underlying investment structures.

When calculating the above amounts:

(a) where administration fee discounts are provided or fees are subsidised by additional employer contributions, SRS 700.0 requires the product dashboard to set out the highest fee level and the fee payable from all sources (not just member-paid fees);

[37] See APRA Reporting Practice Guide SRPG 700 *Superannuation Disclosure Reporting* September 2013 for an explanation and examples of the moving average return.

(b) where fees and costs have changed over time, the fees and costs that were in place as at each 30 June must be used in the net return calculation for that year; and

(c) when calculating net investment returns, dollar based fees must be converted into percentage amounts in accordance with Reporting Standard SRS 702.0 *Investment Performance*.

The period in relation to which:

(a) the return target must be worked out is 10 years starting at the beginning of the current financial year[38];

(b) the return and the comparison must be worked out is the last 10 whole financial years, if the MySuper product has been offered for at least 10 years or the MySuper product and a predecessor product[39] have been offered for a total of at least 10 years. Otherwise, the period of calculation for the return and the comparison is the offer period of the MySuper product[40]; and

(c) the level of investment risk and the fees and other costs is to be worked out is the current financial year[41].

The return target is a forward projection for 10 years. The level of investment risk and fees and costs are also forward projections (if only for 12 months). The obligation to include forward projections in a product dashboard gives rise to two further issues for RSE licensees.

Firstly, a trustee will need to be satisfied that there are reasonable grounds for the statements it makes in the product dashboard in relation to return targets, level of investment risk and fees and costs. Otherwise, section 769C of the Corporations Act will deem the statements to be misleading.

Secondly, in Information Sheet 170 *MySuper product dashboard requirements for superannuation trustees*, ASIC recommends that trustees consider Regulatory Guide 170 *Prospective financial information*, including about giving warnings on the product dashboard page, so that consumers will understand the predictive character of the measures on the return target and level of investment risk.

The requirements in relation to return and comparison information involve the provision of information on the past performance of the MySuper product. As a result, trustees should consider the inclusion of an appropriate past performance disclaimer with the product dashboard.

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[38] Subregulation 7.9.07R(3) of the *Corporations Regulations 2001* (Cth).
[39] Regulation 7.9.07N of the *Corporations Regulations* 2001 (Cth) defines a 'predecessor product' as a default investment option that was rebadged into a MySuper product, as contemplated by subregulation 9.46(2) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth).
[40] Subregulations 7.9.07S(2) and (4) and 7.9.07T(2) and (4) of the *Corporations Regulations 2001* (Cth).
[41] Subregulations 7.9.07V(4) and 7.9.07W(3) of the *Corporations Regulations 2001* (Cth).

### *4.4 Inclusion of other information in a product dashboard*

While there are prescriptive rules regulating the content of product dashboards, the law does not prohibit the inclusion of additional information. Accordingly, arguably a trustee can include information in a product dashboard that is additional to the prescribed content requirements set out in section 4.3 above provided it satisfies those content requirements. It can also include additional information on the same webpage as the product dashboard.

The following are examples of additional information a trustee may wish to include:

(a) an introduction to the product dashboard;

(b) the prospective financial information and past performance warnings;

(c) general advice warning;

(d) a cross reference to the Product Disclosure Statement;

(e) links to the ASIC MoneySmart calculator and/or the trustee's own super calculators;

(f) a high level explanation of each item in the product dashboard table (including time periods);

(g) if the MySuper product was rebadged from a default investment option, an explanation of this;

(h) the date the product dashboard was published; and

(i) the asset allocation of the MySuper product.

### *4.5 Updating the product dashboard*

Information in a product dashboard must be updated as follows:

(a) the information on fees and costs, within 28 days after a change to the fees or other costs (subregulation 7.9.07W(4) of the Corporations Regulations); and

(b) all other information, within 14 days of a change.

The requirement to keep a product dashboard up-to-date is an ongoing requirement and not merely an annual requirement.

That said, the need to disclose the level of investment risk and the fees and other costs for the current financial year necessarily involves a review of the product dashboard at least annually before the beginning of each financial year, with any resulting changes to fees and costs to be updated in accordance with the above timeframes.

### *4.6 Criminal and civil liability in relation to product dashboards*

A new section 1021NA of the Corporations Act establishes the following criminal offences in relation to product dashboards:

(a) An offence of a failure to make a product dashboard publicly available, where required to do so by section 1017BA. The penalty for this offence is a fine of up to $85,000 for a corporate trustee, 2 years imprisonment or both.

(b) An offence of publishing a product dashboard where the person knows that the information has not been updated in accordance with section 1017BA, the information is otherwise misleading or deceptive or there is an omission from the information. The penalty for this offence is a fine of up to $170,000 for a corporate trustee, 5 years imprisonment or both.

(c) A strict liability offence of publication of a product dashboard where the information has not been updated in accordance with section 1017BA, the information is otherwise misleading or deceptive or there is an omission from the information. The penalty for this offence is a fine of up to $85,000 for a corporate trustee, 2 years imprisonment or both.

Subsection 1021NA(5) grants statutory defences to three of these criminal offences as follows:

(a) It is a defence to criminal liability for knowingly or otherwise publishing a product dashboard with an omission of information where:

  (i) the trustee took reasonable steps to ensure that there would not be an omission from the information in the product dashboard;

  (ii) the information was omitted because it was not up to date and the trustee took reasonable steps to obtain up-to-date information; or

  (iii) the information was omitted because it would have been misleading or deceptive and the trustee took reasonable steps to obtain information that would not have been misleading or deceptive.

(b) It is a defence to criminal liability for knowingly publishing a product dashboard which has not been updated in accordance with section 1017BA if the trustee took reasonable steps to ensure that the information set out in the product dashboard was updated as required by section 1017BA.

(c) It is a defence to criminal liability for knowingly publishing a product dashboard with misleading or deceptive information if the trustee took reasonable steps to ensure that the information set out in the product dashboard would not be misleading or deceptive.

Broadly speaking, section 1022B of the Corporations Act permits a member to recover from the trustee loss or damage suffered by the member as a result of the failure to publish a product dashboard, a product dashboard containing out of date information, the information in the

product dashboard being misleading or deceptive or the product dashboard having omitted required information.

Civil action under section 1022B may be begun at any time within six years after the date on which the cause of action arose.

It is a defence to civil action under section 1022B if the person took reasonable steps to ensure that the information would not be misleading or deceptive and took reasonable steps to ensure that there would not be an omission of information.

### *4.7 ASIC Stop Orders*

Section 1020E of the Corporations Act grants ASIC the power to make a stop order on a product dashboard which contains out of date information, is otherwise misleading or deceptive or there is an omission of required information.

## 5. Disclosure of executive remuneration

### *5.1 Systemic transparency*

The Super System Review recommended the introduction of a new concept to the Australian superannuation industry, which it called 'systemic transparency'. This concept involves the disclosure of information to the system at large, including regulators, academics, analysts, advisers and informed investors.

The Super System Review maintained that the benefit of systemic transparency is the provision of high quality information to experts who would be able to use such information for the ultimate benefit of members as a whole.

Systemic transparency is not directly related to consumer protection. As a result, arguments that a member would not read information disclosed due to systemic transparency miss the mark. In fact, the Super System Review agreed that ordinary consumers would be unlikely to read information published under the 'systemic transparency' heading. Instead, the Review considered systemic transparency to sit alongside the consumer protection disclosure obligations.

One facet of systemic transparency recommended by the Review was the inclusion of the trustee's remuneration policy on its website as well as remuneration details similar to that for major listed entities.

The position ultimately adopted in the legislation is to only require publication of information on executive's remuneration. Further, while the types of information to be disclosed are based on the corresponding rules for listed companies, the superannuation rules contain a number of aspects which are more onerous.

In particular, the Tranche 3 Act inserted section 29QB into the SIS Act. Section 29QB obliges the RSE licensee of an RSE to ensure that details of the remuneration of each executive

officer in relation to the RSE licensee is made publicly available, and kept up to date, at all times on the RSE's website.

Failure to publish the requisite information in accordance with section 29QB is a strict liability offence which carries a penalty of $8,500.

### *5.2 Who is an executive officer?*

Section 10 of the SIS Act defines an 'executive officer' as a person, by whatever name called and whether or not a director of the body, who is concerned, or takes part, in the management of the body.

The term includes directors of the corporate trustee. More problematic is its application to management. On one view, the term could include any level of management of the RSE licensee. However, adopting such a wider interpretation effectively renders the term meaningless.

Until 1 July 2004, the Corporations Act contained a definition of 'executive officer' which was identical to that set out in section 10 of the SIS Act[42]. The cases which consider the definition of 'executive officer' in the Corporations Act assist in interpreting the definition in the SIS Act.

The Corporations Act definition was considered by Austin J in *ASIC v Vines*[43]. Austin J's judgement included the following comments:

(a) There are two lines of cases on the meaning of 'management' in the definition. The first line of cases equate 'management' with central management only which excludes activities confined to particular aspects of the company's business (see cases such as *R v Campbell* (1984)[44], which involved for the purposes of the English provision prohibiting a bankrupt from taking part in the management of a company, and *Holpitt Pty Ltd v Swaab* (1992)[45] which considered whether a person was liable for a company's debts under the statutory insolvent trading provisions of the time because he took part in the 'management' of the company).

The second line of cases is represented by Ormiston J of the Supreme Court of Victoria in *Commissioner for Corporate Affairs v Bracht* [1989][46], which considered whether a bankrupt was "in any way (whether directly or indirectly) concerned or take part in the management of a corporation without the leave of the Court". Ormiston J stated as follows:

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[42] The definition of 'executive officer' was removed from the Corporations Act by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).
[43] *ASIC v Vines* [2005] NSWSC 738.
[44] *R v Campbell* (1984) 78 Cr App R 95.
[45] *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474 per Burchett J.
[46] *Commissioner for Corporate Affairs v Bracht* [1989] VicRp 72; [1989] VR 821.

> . . . the concept of 'management' for present purposes comprehends activities which involve policy and decision-making, related to the business affairs of a corporation, and affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.
>
> . . .
>
> Thus, although the decisions of a branch manager, subject to predetermined restrictions, may not be comprehended, there are those involved in large, discrete parts of a corporation's business who, although not participating in the central administration of that corporation, nevertheless are involved in its management to the extent that their policies and decisions have a significant bearing on its business and its overall financial health.

The two lines of cases can be reconciled because of their application to different statutory provisions.

Austin J adopted Ormiston J's decision in *Bracht* with respect to the statutory directors' and officers' duties in s 232 as His Honour considered that the purpose of the definition of "executive officer" was to identify, amongst those who work for the corporation, that group whose responsibilities are significant enough to justify the imposition of special statutory duties.

(b) The term 'management' includes those who communicate directly to the board, but His Honour did not answer the question of whether it includes others.

(c) According to Ormiston J in the *Bracht* case, "taking part in" connotes active participation, which must be real and direct, but not necessarily in a role in which ultimate control is exercised. That said, it would have to be more than the administrative carrying out of the orders of others. The idea of being " concerned" in management was held by Ormiston J to have "a much wider operation", connoting "participation at a variety of levels and at differing intensities", some of which "may be relatively modest". It covered "a wide range of activities relating to the management of a corporation, each requiring an involvement of some kind in the decision-making processes of that corporation". Merely clerical or administrative activities would be insufficient.

The comments in *ASIC v Vines* suggest that the concept of 'executive officer' should not be interpreted too widely and should be given a realistic and practical application. It appears that the term includes those who report directly to the board and may include others whose activities involve policy and decision-making affecting the whole or a substantial part of the RSE licensee.

ASIC also appears to have adopted a narrower position on the definition. In Frequently Asked Question D1, ASIC states that it considers an executive officer to only include a senior manager of the RSE licensee as defined in paragraphs 16(a), 16(b) or 16(c) of APRA's Prudential Standard SPS 520 *Fit and Proper*. Broadly, this is a person who may significantly influence the RSE licensee's financial standing or a substantial part of its business operations. In practice, this means that ASIC considers that those in management who are designated as

responsible persons for fitness and propriety purposes are executive officers under the SIS Act.

Examples given by ASIC of executive officers are the Chief Executive Officer and General Manager of Risk Management. However, ASIC states that a Call Centre Manager is generally not an executive officer, as he or she does not participate in decisions affecting a substantial part of the RSE licensee's business, nor have the capacity to significantly affect the licensee's business operations or financial standing.

Even under ASIC's narrower interpretation, the obligation to disclose remuneration of executive officers is broader than the corresponding obligation in section 300A of the Corporations Act for listed companies to disclose remuneration information about key management personnel. Section 300A adopts the definition of 'key management personnel' in the accounting standards, which is:

> *Key management personnel* are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.

The element of control required by the definition of key management personnel means that the key management personnel of a company is a smaller group than executive officers of a company.

Accordingly, the remuneration of more persons must be disclosed under section 29QB of the SIS Act as compared to section 300A of the Corporations Act.

### *5.3 What information must be disclosed?*

The remuneration information required to be disclosed in relation to executive officers is set out in regulation 2.37 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**). Regulation 2.37 is modelled on, and is consistent with, the remuneration disclosure requirements for key management personnel of listed companies.

Broadly speaking, subregulation 2.37(1) requires disclosure of:

(a) short-term employee benefits (eg salary) and bonuses

(b) long-term employee benefits;

(c) termination benefits and post-employment benefits; and

(d) share-based payments.

See Appendix 2 for a full description of the matters required to be disclosed under subregulation 2.37(1).

The RSE licensee must apply the requirements of the accounting standards when completing the table. Subregulation 2.37(2) requires that payments from a related party to the RSE

licensee to an executive officer (eg. payments from a group service company) must be reported.

However, difficulties arise in relation to apportionment of remuneration. The goal of disclosing executive officer remuneration is to inform the market of the amount an executive officer receives for his or her role in relation to an RSE licensee. However, what amounts should be disclosed if a person is a director of more than one group trustee company? What if only part of an executive officer's time is spent in relation to work for the RSE licensee?

Currently, regulation 2.37 does not expressly permit the remuneration of an executive officer to be apportioned so that only part of their remuneration is disclosed under these rules. While the previous Government flagged that it would require apportionment, this issue was not expressly discussed in the current Government's Discussion Paper in November 2013.

### *5.4 When must executive remuneration information be updated?*

Section 29QB obliges an RSE licensee to keep the details of remuneration of executive officers up-to-date at all times. As a result, the legislation requires the immediate updating of the website upon the appointment, removal or other change of a director, when a new manager is appointed or a manager retires, resigns or is terminated and when a pay rise commences.

The costs involved in keeping a website up to date can be significant and it is difficult to see the benefit the market would receive with such immediate updating.

In November 2013, ASIC released Consultation Paper 219 *Keeping superannuation websites up to date* where it proposes generally allowing 14 days to update a website as a result of changes in executive officer remuneration.

This can be compared to the disclosure requirements for listed companies found in section 300A of the Corporations Act. Section 300A requires disclosure of remuneration details in the annual director's report. As remuneration details need only be set out in an annual report, there is no ongoing obligation to update those details throughout the year. As a result, again the remuneration disclosure rules for RSE licensees are more onerous compared to listed companies.

### *5.5 Transitional rules and retrospective operation*

ASIC Class Order [CO 13/830] defers the commencement of subsection 29QB(1) until 1 July 2014.

However, regulation 2.37 requires certain items of remuneration to be disclosed 'for the two most recently completed financial years'. This gives rise to questions of what information should be disclosed in the first two years of the regime operating.

On its face, compliance with regulation 2.37 in the first two years would involve the disclosure of executive remuneration information in relation to a period before section 29QB commenced. In effect, the literal application of regulation 2.37 would involve retrospective operation of

delegated legislation.

The concern is that this infringes on the rights of executive officers to privacy in relation to the details of their pay.

In this regard, section 12 of the *Legislative Instruments Act 2003* (Cth) states that a legislative instrument, or a provision of a legislative instrument, has no effect if, apart from section 12, it would take effect before the date it is registered and as a result:

(a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of registration would be affected so as to disadvantage that person; or

(b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of registration.

The effect of section 12 on a legislative instrument is subject to any contrary provision for commencement of the instrument in the enabling legislation for the instrument if the enabling legislation is an Act or a provision of an Act. However, there is no provision in the MySuper Regulations which provides for the retrospective operation of regulation 2.37.

Section 12 mirrors the general law presumption that, in the absence of a clear statement to the contrary, legislation will be assumed not to have retrospective operation[47].

An argument can be built upon section 12 that remuneration for the period before 1 July 2013 need not be disclosed under regulation 2.37. The argument would be based on the retrospective nature of regulation 2.37 and the rights to privacy that executive officers had which would be adversely affected if this information was disclosed.

However, the law distinguishes between legislation having a prior effect on past events and legislation basing future action on past events. The former is considered to have retrospective operation but not the latter. Accordingly, the contrary argument is that there is no retrospective operation of regulation 2.37 as the action required of publishing information only has prospective effect. The fact that it relates to past events does not mean that it has retrospective operation.

On balance, it would seem that the argument that the amendments have retrospective operation is more persuasive. Accordingly, it is argued that remuneration details of the period before 1 July 2014 need not be disclosed under regulation 2.37.

[47] *Maxwell v Murphy* (1957) 96 CLR 261 and *Fisher v Hebburn Limited* (196) 105 CLR 188.

# 6. Conclusion

The successful implementation of any new regime requires the adoption of a consistent approach to the mechanics of the new regime. Unfortunately, the Stronger Super regime contains a demonstrated lack of consistency across the look-through rules, as well as a lack of consistency with the current requirements of listed companies to disclose executive remuneration.

Further, the complexities involved in implementing portfolio holdings and executive remuneration disclosure can again lead to inconsistent outcomes for members.

The inconsistent approach to common issues can only serve against member interests, suggesting a case for further reform in this area.

# Appendix 1

## MySuper product dashboard example - XYZ Super prepared by ASIC

XYZ Super

Search

Home | Personal | Business | Investments | Calculators | Forms

Home > Superannuation & retirement > XYZ MySuper Dashboard

- How super works
- Investment options
- Performance
- Growing super
- Combining your super
- Accessing super
- Insurance

### XYZ MySuper Dashboard

Use this dashboard to compare this XYZ MySuper with other MySuper products. Go to ASIC's MoneySmart website for more information on how to pick the right MySuper fund for you.

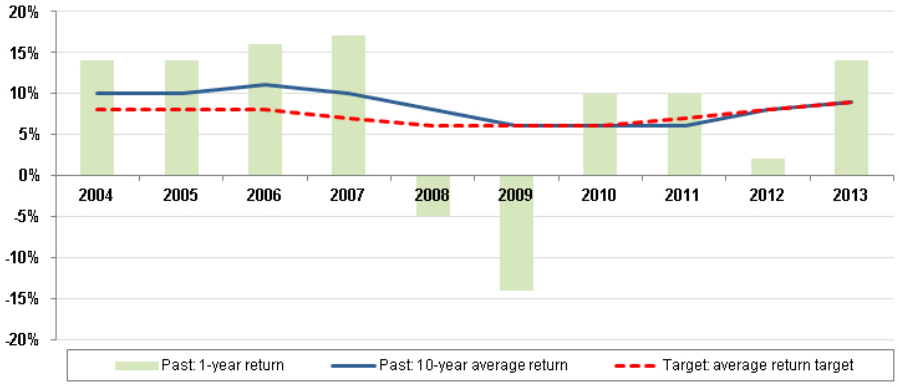
**Return**

10 year average return of 7.1% as at 30 June 2013.

**Return target**

Return target for 2014-2023 of 3% per year above inflation, after fees and taxes. Future returns cannot be guaranteed. This is a prediction.

**Comparison between return target and return**




Past performance is not necessarily an indication of future returns.

**Level of investment risk**

**High**
Negative returns expected in 5 out of every 20 years

*The higher the expected return target, the more often you would expect a year of negative returns.*

**Statement of fees and other costs**

**$437** per year

*Fees and other costs for a member with a $50,000 balance.*

**Glossary links:**

- Return
- Return Target
- 10 year average
- Fees and other costs
- Average Return Target

Last updated: 14 Nov 2013

# Appendix 2 – Prescribed remuneration details

Regulation 2.37 of the SIS Regulations requires disclosure of the following matters:

(a) the name of each executive officer;

(b) where a person commenced as an executive officer or retired from that position during the current financial year, the date of the change;

(c) if the position of an executive officer changes during the current financial year, the person's name and position and the date of the change;

(d) for an executive officer not mentioned in paragraph (c) who retires during the current financial year, the person's name and position and the date of retirement;

(e) the short-term employee benefits for the two most recently completed financial years, divided into at least the following components:

  (i) cash salary, fees and short-term compensated absences;

  (ii) short-term cash profit-sharing and other bonuses;

  (iii) non-monetary benefits; and

  (iv) other short-term employee benefits;

(f) the post-employment benefits for the two most recently completed financial years, divided into at least the following components:

  (i) pension and superannuation benefits;

  (ii) other post-employment benefits;

(g) the long-term employee benefits other than benefits mentioned in paragraphs (e) and (f) for the two most recently completed financial years (any amount attributable to a long-term incentive plan being separately identified);

(h) if an executive officer is terminated, the termination benefits;

(i) where a person commenced as an executive officer during the most recently completed financial year and received payment for agreeing to the position, the value of the payment and the date paid;

(j) share-based payments during the two most recently completed financial years, divided into at least the following components:

(i) equity-settled share-based payment transactions, showing separately:

(A) shares and units; and

(B) options and rights;

(ii) cash-settled share-based payment transactions;

(iii) all other forms of share-based payment compensation (including hybrids);

(k) if a grant of a cash bonus, performance-related bonus or share-based payment compensation benefit, whether part of a specific contract for services or not, was made during the most recently completed financial year, the terms and conditions of each grant affecting compensation, including the following:

(i) the grant date;

(ii) the nature of the compensation granted;

(iii) the service and performance criteria used to determine the amount of compensation;

(iv) if there has been any alteration of the terms or conditions of the grant since the grant date – the date, details and effect of each alteration;

(v) the percentage of the bonus or grant for the financial year that was paid to the person, or that vested in the person, in the financial year;

(vi) the percentage of the bonus or grant for the financial year that was forfeited by the person (because the person did not meet the service and performance criteria for the bonus or grant) in the financial year;

(vii) the financial years, after the most recently completed financial year, for which the bonus or grant will be payable if the person meets the service and performance criteria for the bonus or grant;

(viii) estimates of the maximum and minimum possible total value of the bonus or grant (other than option grants) for financial years after the most recently completed financial year;

(l) if, during the most recently completed financial year, a contract for services was negotiated between the RSE licensee and the executive officer, an explanation of:

(i) how the amount of compensation was determined; and

(ii) how the terms of the contract affect compensation in future periods;

(m) if the terms of share-based payment transactions (including options or rights) granted as compensation were altered or modified during the most recently completed financial year:

(i) the date of the alteration or modification;

(ii) the market price of the underlying equity instrument at the date of the alteration or modification;

(iii) the terms of the grant of compensation immediately before the alteration or modification, including:

(A) the number and class of the underlying equity instruments;

(B) the exercise price for any option or other right affected by the alternation or modification, immediately before and after the alteration or modification; and

(C) the time remaining until expiry of the underlying equity instruments; and

(D) each other condition in the terms affecting the vesting or exercise of an option or other right;

(iv) the modified or altered terms; and

(v) the difference between:

(i) the total of the fair value of the options or other rights affected by the alteration or modification immediately before the alteration or modification; and

(ii) the total of the fair value of the options or other rights immediately after the alteration or modification;

(n) if, during the most recently completed financial year, options and rights over an equity instrument issued or issuable by the RSE licensee or by a related body corporate were provided as compensation to an executive officer:

(i) the number of options and the number of rights that, during the financial year, were granted and were vested;

(ii) the terms and conditions of each grant made during the financial year, including:

(A) the fair value per option or right at grant date;

(B) the exercise price per share or unit;

(C) the amount, if any, paid or payable by the person;

(D) the expiry date of the grant;

(E) when the options or rights may be exercised; and

(F) a summary of the service and performance criteria that must be met before the beneficial interest vests in the person;

(o) if an equity instrument that is issuable by the RSE licensee or a related body corporate was issued as a result of the exercise, during the most recently completed financial year, of options and rights that were granted as compensation to an executive officer:

(i) how many equity instruments were issued;

(ii) if the number of options or rights exercised differs from the number of equity instruments disclosed under paragraph (i) – how many options or rights were exercised; and

(iii) the amount paid under each instrument; and

(iv) the amount payable under each instrument that is yet to be paid;

(p) if an amount attributable to the service of a director, for the most recently completed financial year is paid to an organisation or entity rather than to the director, the amount paid and the name of the organisation the amount is paid to.