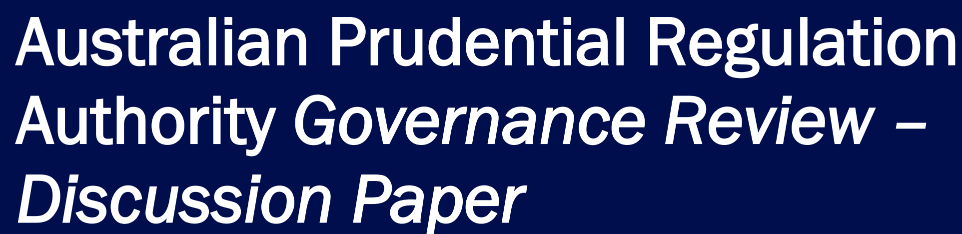

Australian Prudential Regulation Authority *Governance Review – Discussion Paper*

Submission by the Australian Council of Trade Unions

ACTU Submission, 6 June 2025
ACTU D. No 16/2025

ACTU
australian council of trade unions

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Introduction

Since its formation in 1927, the Australian Council of Trade Unions (ACTU) has been the peak trade union body in Australia. There is no other national confederation representing Australian unions. Together with its affiliate unions, the ACTU represents 1.7 million trade union members around Australia who work across a broad spectrum of industries and occupations in both the public and private sectors.

The Australian trade union movement led the campaign to establish superannuation to provide workers with dignity in retirement. Through industrial action, bargaining and advocacy at both the Australian Conciliation and Arbitration Commission and the High Court, the union movement won the introduction of superannuation for many workers. The ACTU and affiliates were instrumental to the creation of the Accord which introduced universal and compulsory superannuation through the legislation of the Superannuation Guarantee (SG) by the Keating Labor Government.

In the 30 years since the establishment of universal, compulsory, fully vested and portable superannuation, the ACTU and affiliates remain dedicated to ensuring that all workers live and retire with dignity and out of poverty. To do so, unions remain active contributors to the superannuation system. Member-representative trustee directors, nominated by the ACTU and affiliates, ensure that members' interests are the priority of superannuation funds and that these funds continually demonstrate industry-leading, best-practice governance, investment performance and administration.

Best Practice Governance

This submission will primarily deal with the impacts of APRA's proposals in the *Governance Review - Discussion Paper* on the superannuation industry.

Unions and member-representative trustee directors are committed to the highest standards of organisational, fund and corporate governance. Best practice governance is critical to our work of representing and serving members across their working and retirement lives.

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To ensure best practice governance, unions and profit-to-member, representative funds engage in continuous governance uplift. Ongoing governance advancement is critical to exemplary member outcomes.

The union movement and industry funds broadly welcome ongoing discussion on how to continually improve superannuation governance practices to deliver the highest quality outcomes for members.

Best Practice Regulatory Principles

Superannuation members, and all customers of financial institutions, deserve best practice governance.

The superannuation industry should be overseen and guided by best practice regulatory principles. Best practice regulation is:

- Principles-based rather than prescriptive
- Purpose-built for the regulated industry
- Evidence-based
- Member-focused
- User-centred
- Outcome-oriented
- Objective
- Transparent
- Equitable
- Proportionate
- Distributive and
- To the extent required to achieve good governance while preventing regulatory overreach.

Principles-based regulation, consistent with the above, enables institutions to tailor their governance practices to their risks and objectives while demonstrating the highest standards of governance.

These features of regulatory best practice are recognised as such by the Australian Government *Best Practice Principles* and *Regulatory Policy, Practice & Framework*, New

South Wales Government *Better Regulation Principles*, Victorian Government *Principles for Good Regulatory Practice*, Council of Australian Governments (COAG) *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, OECD *Best Practice Principles for Regulatory Policy*, European Securities and Markets Authority (ESMA) supervisory approach and UK Financial Conduct Authority (FCA) *Principles of Good Regulation.*

Many of the proposals within the APRA *Governance Review - Discussion Paper* are inconsistent with best practice regulatory principles and demonstrate concerning regulatory overreach and insufficient consideration of member outcomes. To succeed in the shared objective of continuous governance uplift, the regulator's proposals must be drafted according to best practice regulatory principles.

Vetoes

An important thematic way that APRA has overstepped in developing these standards is by creating soft and hard vetoes for itself in the appointment of directors. The discussion paper opens with a complaint that "some overseas jurisdictions have gone further than Australia by giving their regulators a statutory power to approve or veto appointments to regulated entities"[1] while APRA does not have this power, unless the law changes. Instead of waiting for legislative change, APRA proposes to award itself a series of vetoes on nominations and appointments so "some entities (SFIs and non-SFIs subject to heightened supervision) should engage more closely with APRA in the appointment process".[2]

In giving itself these vetoes, APRA has ignored the will of Parliament and overstepped the authority delegated to it by the legislation within which it creates and enforces standards.

APRA has proposed to give itself overlapping soft vetoes in proposals 1 and 2, noting they 'overlap':

> *"Where APRA is not satisfied with a regulated entity's proposed or incumbent responsible person(s) or board performance, APRA will share its views with the*

[1] Australian Prudential Regulation Authority, "Governance Review: Discussion Paper," 12.
[2] Australian Prudential Regulation Authority, 13.

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> *regulated entity. If the entity does not act to address concerns, this will inform the intensity of APRA supervision. APRA may also trigger a reassessment of an individual's fitness and propriety if they are already in a responsible person role (Proposal 2) or use its other supervisory or enforcement powers to address outstanding risk to the regulated entity."* [3]

While the ACTU submission goes into detail about the inadequacies of the recommendations in Proposal 2, that APRA seeks to provide itself with a soft veto through the application of supervisory intensity or other enforcement powers, should it not be satisfied, is unacceptable. APRA has not been awarded a veto power by the Parliament and should not assume one through the weaponisation of supervision intensity and the unspoken acknowledgement of the increased regulatory burden and cost this would place on funds.

While not explicitly mentioned, this stick could be used should APRA deem the skills of the *next cab off the rank* nominated Director not to meet APRA's expectation of immediately filling a skill gap on the board, which, as the submission will articulate, could be being addressed by other means.

APRA suggests a hard veto in proposal 8:

> APRA proposes to introduce a 10-year lifetime tenure limit on a regulated entity board for non-executive directors, with the possibility of an extension at APRA's discretion.[4]

While the ACTU has more detailed criticism of the proposal to reduce lifetime tenure further in this submission, the creation of a hard veto for APRA, without legislative authority, is regulatory overreach. APRA does not have the legislated power to veto board appointments and should not seek to create it.

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[3] Australian Prudential Regulation Authority, 19.
[4] Australian Prudential Regulation Authority, 28.

Superannuation Industry

Good regulation addresses the risks and objectives of the industries they apply to. Regulation will not succeed in achieving its objective of best practice governance if it is not informed by a detailed understanding of the regulated industry.

The *Governance Review - Discussion Paper* proposals fail to consider the unique characteristics of superannuation and its significant differences to the for-profit banking and insurance sector.

Superannuation funds are not typical financial institutions. Superannuation funds are membership organisations which exist to deliver a universal industrial right to working people of income for a dignified retirement. The purpose of superannuation funds, and the risks that regulation needs to guard against, differ significantly to the design, operations, remit and objectives of the retail banking and insurance industry.

In seeking to harmonise regulations between banking, insurance and superannuation, APRA misunderstands the different risks and objectives of the industries. Rather than guard against risks borne by members, it appears to be done in an attempt to make its job easier as the regulator. The design of superannuation regulation should be different to that for retail finance to ensure that members' needs and expectations are met.

Superannuation regulation must consider and prioritise member input, representation and outcomes, in a way that is not present in the retail financial industry.

APRA Governance Review Discussion Paper Proposals

1 Skills and Capabilities

This proposal seeks to change a core part of building a successful board – collective assessments of skills and capabilities and collective responses to it:

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> *In considering nominees to the board, APRA expects entities to consider existing skills gaps so that each new appointment makes progress towards addressing them.*[5]

By individualising the assessment and development of skills and capabilities, the APRA proposal would fundamentally change how boards consider their skills and experience and come to decisions. In order to form a collective skills assessment, individual assessments are required however, imposing upon boards the expectation that each subsequent director appointment makes progress towards addressing the current skills gap will lead to an individualisation of skills assessment and a *next cab off the rank* approach to building skills.

The proposal has the unintended consequence of concentrating subject matter responsibility and risk management in certain expert-directors, increasing risk for the fund and its members.

If the assessment of skills and capabilities is designed as proposed, funds will necessarily seek to plug the skills and capabilities gaps of the board through the next appointed director's skill/s and capability/ies. While this may superficially appear appropriate, it has the unintended consequence of establishing a board where an individual director is expected to, and likely only capable of, contributing to their area of individual subject matter expertise and therefore, structurally discouraging board-wide accountability and contributions to the area in question by other directors. Board members cannot rely on the expertise of another board member in order to alleviate themselves of responsibility.

By individualising skills assessments, it further discourages other directors from accepting their responsibility to continually uplift their skills and capabilities to ensure that they can oversee all areas of fund governance including new and emerging areas of risk such as cybersecurity.

[5] Australian Prudential Regulation Authority, 16.

An understanding of, and ability to oversee and contribute to, the fund-wide strategy and the management of the broad range of risks experienced by a fund, is critical for every board member.

2 Fitness and Propriety

APRA's proposal to implement opaque and subjective criteria, alongside a soft veto on the appointment of directors by funds, is regulatory overreach.

The proposals are a departure from current regulatory standards and advice in significantly expanding the regulator's power to involve itself in the fitness and propriety assessment of directors to additional, subjective and opaque criteria. The proposed criteria extend beyond the current legal definition and beyond those applied to entities overseen by other regulators.

The proposed criteria are inconsistent with best practice regulatory principles as they are subjective, opaque, inequitable and lack an evidence base for the necessity of their inclusion or their connection to member outcomes.

The additional proposal to empower the regulator to heighten regulatory supervision of an entity, including requiring the reassessment of the fitness and propriety of a director due to a subjective determination of the regulator, is contrary to best practice regulatory principles in that regulations are to be objective, equitable and proportionate. In doing so, it is providing the regulator with a veto over the appointment, or continuation, of individual directors and therefore, significant regulatory overreach and inconsistent with international best practice governance and pension system regulation.

It is widely acknowledged that the role of the regulator is to provide regulated entities with guidance and oversight to ensure best practice, not to undertake the decision-making and administrative functions of the regulated entities and their shareholders through determining the composition of their board.

If a regulator assumes the roles and responsibilities of its regulated entities, the shareholders, fund and directors have their responsibility and accountability diluted or removed. It is instead the role and responsibility of the regulator to design regulation to foster a culture of responsibility and accountability within its regulated entities.

3 Conflicts Management

The proposal to extend the current conflict management regime to consider personal affiliations is inconsistent with best practice regulatory principles in that it is introducing an irrelevant and subjective consideration into the assessment of director fitness and propriety. Given the subjective nature of the classification, it is not possible to ensure that it is administered equitably and transparently as required by best practice regulatory principles.

5 Board Performance Review

Externally administered, triennial board reviews are undertaken by most sophisticated entities and are an appropriate regulatory requirement. It is of critical importance that such reviews do not individualise board assessment and thereby, diffuse or remove the collective responsibility and accountability of all directors or fail to consider the collective culture and dynamics required for an effective board.

6 Role Clarity

The proposal to more clearly define the expectations of the board, chair and senior management to ensure clarity, accountability and to enable the board to dedicate sufficient time to strategic considerations, is welcome. To do so, the regulator must consider the ways in which it can ease the increasing regulatory burden placed on directors that has prevented them from dedicating the desired time to strategic matters.

7 Board Committees

Many high-performing superannuation funds incorporate alternate directors and/or expert advisers into their governance structures and deliver significant benefit to their members from doing so. The involvement of such members brings further diversity to enhance the quality of board outcomes.

The proposal to restrict such members from genuine governance engagement through voting is contrary to best practice regulatory principles and overly prescriptive, over-regulation and inconsiderate of evidence, member experience and fund outcomes. Without voting, these members are unable to fully contribute to the fund and are

discouraged from taking responsibility for their advice and decisions, both contrary to best practice governance.

8 Director Tenure and Board Renewal

The proposal to introduce a lifetime tenure limit for directors is in stark contrast to the realities of best practice governance, contrary to best practice regulatory principles and inconsistent with international best practice regulatory regimes and institutions including the OECD Principles of Corporate Governance, UK Corporate Governance Code, European Banking Authority, US Federal Reserve, US Office of the Comptroller of the Currency and the ASX Corporate Governance Guidelines.

The proposal represents a lack of understanding that an effective board is one which practices a culture of robust accountability and challenge, and that such a culture cannot be created through rigid compliance obligations, including the removal of directors at arbitrary points, thereby, revoking an institution's capability for decision-making, accountability and leadership.

Advocacy for tenure limits is driven by the assumption that tenure limits create independence from management when, in reality, independence from management is a function of director character and a robust board culture, neither of which are cultivated by increasing mechanistic compliance obligations. There is no evidence to suggest that tenure limits improve governance practices, member experience or fund outcomes.

In contrast, the most highly functioning boards blend the stability, expertise and experience of longstanding directors with the integration and benefit of newer directors with less fund-specific experience and perspectives.

The proposal fails to acknowledge the further realities that previous iterations of a fund - prior to merger/s - often bear no similarity to the current merged entity and furthermore, that it is widely considered that board and committee chairs are most effective when they have experience as a director, prior to serving as chair, something that tenure limits effectively prohibit.

Finally, the proposal to enable extension to the tenure limit at the discretion of the regulator, acts as another veto over the fund and its shareholders' rights to select the directors that best provide for its membership. This is significant and concerning regulatory

overreach, lacking an evidence base and inconsistent with international best practice regulatory regimes and principles.

Conclusion

Continuous organisational and fund governance uplift is a critical objective of the ACTU, affiliates and member-representative superannuation trustee directors. To achieve this, regulation and supervision of the sector must be informed by best practice regulatory principles in that regulation is to be principles-based, purpose-built, evidence-based, member-focused, user-centred, outcome-oriented, objective, transparent, equitable, proportionate, distributive and to the extent required to achieve good governance while preventing regulatory overreach.

Many of the proposals within the *Governance Review - Discussion Paper* are inconsistent with best practice governance practices and regulatory principles. A principles and evidence-based approach to superannuation governance is essential to ensure the continual uplift of fund governance to deliver the best possible outcomes for members.

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