



4 June 2025

General Manager  
Policy Development  
Policy and Advice Division  
Australian Prudential Regulation Authority

By email to: [PolicyDevelopment@apra.gov.au](mailto:PolicyDevelopment@apra.gov.au)

Dear General Manager,

Thank you for the opportunity to provide a submission to APRA's consultation on its Governance Review.

***Preliminary***

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## **Submission**

Before progressing to the specific proposals in the Discussion Paper, I would like to make some submissions of a general nature that inform my more specific submissions:

- Attempts are often made to resist regulatory initiatives involving board composition by referencing the peculiar way in which the directors of RSE licensees are appointed. It is true that there are a number of ways in which the constitutions of RSE licensees (and sometimes the constitutions of the RSEs themselves) arrange for directors to be appointed.<sup>1</sup> It is also true that the legal differences matter because a failure to follow them results in an ineffective appointment. However, with careful drafting those intricacies ought not distract APRA from achieving its regulatory objective. In particular, a right to nominate a person to the board does not amount to an unqualified right to appoint any particular person to the board in circumstances where there are regulatory (such as fit and proper) requirements to which the RSE licensee is subject. I submit that proposals which refer to issues such as director selection and succession planning need to accommodate, but not be waylaid by, the existence of bespoke director nomination and appointment arrangements in the profit-for-member and retail sectors.
- APRA needs to be careful not to over-extend its regulatory ambitions. As Professor Black argued astutely in 2005,<sup>2</sup> APRA is most effective when it is clear about what it does and does not attempt to regulate. That observation is just as pertinent today. Some of the recommendations in the Discussion Paper would see APRA encroaching upon the management of supervised entities. Despite the over-arching narrative of APRA's regulatory success in the superannuation sector over the past two decades, as the Hon Kenneth Hayne noted in 2019,<sup>3</sup> the regulatory scheme shaping the superannuation system relies on the entities, and those who control them, being responsible for compliance with the regulatory regime. Over-extension into management decision-making by APRA risks undermining APRA's ability to do its job by blurring this demarcation.
- APRA places much supervisory attention on systemically significant entities. Systemic significance is commonly seen as a function of size. This is consistent with practice overseas in the banking sector in particular. I believe there are two problems with this in relation to Australia's superannuation sector:
  1. I submit that systemic significance is not a function of size, but of connectivity and substitutability.<sup>4</sup> This has been illustrated in the superannuation system in recent years by disruptions to web services and to the member administration platforms that support death benefits and TPD claims.

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<sup>1</sup> M. Scott Donald and Suzanne Le Mire, 'Independence in Practice: Superannuation Fund Governance through the Eyes of Fund Directors' (2019) 42 *UNSW Law Journal* 300.

<sup>2</sup> Julia Black, 'Managing Regulatory Risks and Defining the Parameters of Blame: A Focus on the Australian Prudential Regulation Authority' (2006) 28 *Law and Policy* 1.

<sup>3</sup> Kenneth Hayne, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, (Vol 1, 2019), 4.

<sup>4</sup> This observation is not new, see M. Scott Donald, Hazel Bateman, Ross Buckley, Kevin Liu and Rob Nicholls, 'Too connected to fail: the regulation of systemic risk within Australia's superannuation system' (2016) 2(1) *Journal of Financial Regulation* 56.

2. I submit that the severity of losses is not necessarily a function of the current size of the entity. Many of the most serious threats to members' funds have occurred in relation to parties who are not systemically significant, and indeed it is far more likely that bad actors will operate at the margins of an industry rather than that they will inhabit its established core. This is not to say that large players do not contravene; history tells us that they do, but large players typically have the resources and incentives to contribute to any remediation process.

As of March 2025 there are just 89 RSE licensees, down from over 420 in June 2010. This is a much more manageable number of entities to supervise effectively, given APRA's resources and the considerable volume of data now available to assist in that process. Reserving the most intense supervisory attention to a small number of the largest funds does not properly reflect where the risk lies nor is it necessary given the rich data environment.

I would like now to make submissions specifically in relation to Proposals 1, 2, 6 and 8.

### **Proposals 1 and 6 Skills and Capabilities / Role Clarity**

I submit that Proposal 1 is sound in principle, but ought to be informed by Proposal 6. My experience tells me that when APRA states in a Prudential Standard that an RSE Licensee board is responsible for a particular process or decision, that many boards assume they cannot delegate that process or decision to someone within the RSE Licensee, such as a sub-committee or executive. I don't know if that is what APRA intends but I don't believe that is necessary from a legal perspective given the way that corporate and trust law operates.<sup>5</sup> From a practical perspective, the wording of the Prudential Standards often draws boards into deliberations that belong elsewhere, being too technical or intricate to be addressed effectively in a board meeting, or else not sufficiently strategic to warrant board attention.

Clarifying the role of the board, as proposed in Proposal 6, will simplify the process of defining the skills required of the board collectively. It will dispel suggestions that boards ought to have members with specialist skills in areas that are properly the domain of management such as cyber security, retirement product design or social media strategy. Those are all very important skillsets and the board should be relevantly literate in respect of the issues, but the technical details are matters for management, not for strategic direction and, to the extent that meetings of the boards get mired in the detail of such matters, have the potential to distract boards from their unique responsibilities at the helm of the entity.

### **Proposal 2 Fitness and Propriety**

I believe that the fit and proper requirement imposed on participants in the industry has under-delivered on its promise. The fit and proper requirement, as currently practiced, is not especially expensive but it is ineffective. The problem, however, is not so much the standards that are expected, but the enforcement of the standards. Raising standards is a desirable objective, but it is also important to deal decisively with those who attempt to evade or disregard the rules.

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<sup>5</sup> M. Scott Donald, 'Delegation by Superannuation Fund Trustees' (2020) 37 *Company and Securities Law Journal* 319.

I therefore support the enhanced focus on fitness and propriety but only if it is accompanied by a willingness on the part of APRA to act decisively when an RSE licensee does not respond quickly to a deficiency in the fitness or propriety of an individual. If APRA is not prepared to play this role then this enhanced requirement will simply add costs to those who are already compliant and be ignored by those who are not.

### **Proposal 8 Director tenure and board renewal**

I support this proposal. Maximum board tenure is a subject that sometimes attracts passionate advocacy. In my experience, board members with long tenure often see themselves as repositories of institutional knowledge. Some even see themselves as standard-bearers of something deeply fundamental to the institution. I believe the focus on designing and documenting decision processes that APRA has championed for many years goes a considerable distance in addressing the issue of how institutional knowledge is embedded in an institution. Unlike the funds of the second half of the 1990s where the boards often represented the largest and longest standing resource, funds today are served by trustees with large and highly skilled executive teams managing large workforces. The idea that the example set by one person can uniquely exert an indispensable influence on such a large and diverse organisation, and that that influence can only be exercised if that person has a seat on the board, is disrespectful to others on the board with shorter tenure and to the broader team. In my opinion, good directorship necessarily includes consideration of its finite nature and the need to find ways to embed positive cultural norms into the institution.

### **Concluding Comments**

Good governance is hard to achieve by government fiat. Institutional processes and structures can be put in place but ultimately good governance depends on individuals acting together over time. As the superannuation system matures from the adolescent phase ushered in by the Cooper Review in 2010 to its current, more mature phase I believe it is important not to lose sight of the role played by responsible, accountable individuals in ensuring the system's integrity and perceived legitimacy. The imposition of rules raises costs that have to be weighed against the goals of those rules, and those costs are borne by members, so I submit that any rules that are imposed ought to be precisely targeted and carefully enforced.

I can be most easily contacted on [REDACTED] if you have any questions or if there is any way that I can be of assistance to you in the progress of your deliberations.

Yours sincerely

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