



Superannuation Legislation Amendment (Further Measures) Bill 2012

November 2012

AIST Submission

AIST

The Australian Institute of Superannuation Trustees (AIST) is an independent, not-for-profit professional body whose mission is to protect the interests of Australia's \$450 billion not-for-profit superannuation sector. AIST's members are the trustee directors and staff of industry, corporate and public-sector superannuation funds, who manage the superannuation accounts of two-thirds of the Australian workforce.

AIST is a registered training organisation and has recently expanded its education program to encompass the growing and changing needs of all members of the not-for-profit superannuation sector.

AIST offers a range of services including compliance and consulting services, events - both national and international - as well as member support. AIST also advocates on behalf of its members to relevant stakeholders.

AIST's services are designed to support members in their endeavour to improve the superannuation system and build a better retirement for all Australians.

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1 Comments

1.1 Chapter 1 - Service providers

AIST supports the view that service provider arrangements must be in the best interests of members. Consequently, we support giving the SIS Act an override power in relation to fund requirements for contracting a specific service provider.

AIST notes that the amendments do not require the termination of existing contracts, but do require a determination whether or not the arrangements are consistent with the obligation to act in the best interests of members.

Contracts covering MySuper members must meet members' best interest test. While arrangements determined not to be in members' best interests may be able to continue until the end of the relevant contract, AIST submits that the legislation should be explicitly amended to preclude the provision of services or investments in such cases in relation to a member who has an interest in a MySuper product.

An existing and continuing contract that is not in a member's interest should not be permitted to apply in relation to a MySuper member. It should be allowed to continue, but only insofar as it applies to interests in a Choice product.

Any other outcome would not be consistent with a fundamental tenet of the MySuper regime, that is, for trustees to ensure that their overriding obligation is to operate a MySuper product in the best interests of members with an interest in that product.

1.2 Chapter 2 – Infringement notices

It is noted that the infringement notice provisions in the bill relate only to provisions in the SIS Act, and AIST supports the giving to APRA the power to issue infringement notices as an alternative to criminal prosecution for selected SIS Act provisions.

1.3 Chapter 3 – Reasons for decisions and Superannuation Complaints Tribunal time limits

The proposed amendment to section 101(1) of the SIS Act allowing complainants to request reasons for decisions is supported by AIST.

However, we recommend an amendment to section 101(1) to include the requirement for the request for reasons to be in writing, and within a prescribed and limited period of time from the date that notification of the decision is received. The purpose for this is to ensure that there is clear communication of the request for reasons, and that the trustee does not have to keep records indefinitely.

Also, AIST submits that in addition to conferring the right to receive reasons for decisions, trustees should be required to inform beneficiaries of their entitlement to reasons upon a request in writing, within a certain time frame. The trustee should be required to inform beneficiaries in its communications about their entitlement to request reasons.

Super funds are subject to existing requirements to advise their members about their dispute settlement procedures, and to provide information about the Superannuation Complaints Tribunal. These requirements should be extended to advise members that they can request reasons for decisions. Knowledge of a right is crucial to people being able to access it.

AIST supports the amended time limits for lodging complaints to the Superannuation Complaints Tribunal, an initiative that more closely aligns the time limits with those for the courts. AIST supports equal access to the SCT for complainants, as it offers complainants a more cost effective complaint mechanism with specialist expertise in the superannuation sector.

1.4 Chapter 4 – Dual regulated entities

AIST supports the new obligations for trustees that also manage non-superannuation registered managed investment schemes.

1.5 Chapter 5 – Actions for breaches of directors' duties

We support the proposed changes to sections 55(4) and 29VP of the SIS Act and the introduction of 29VPA. Requiring leave of the court to pursue trustee directors in a civil action provides an appropriate protection to individual trustees about possibly frivolous and vexatious actions being lodged against them. However, the right balance is achieved in that legitimate actions can be pursued where the circumstances warrant.

AIST also supports the proposed changes to section 323 of the SIS Act whereby breaches of MySuper obligations will be similarly open to the reasonable mistakes defence.

In our joint submission of 19 July 2012 with other industry associations (copy attached), we raised a number of additional concerns with the then Superannuation Legislative Amendment (Trustee Obligations and Prudential Standards) Bill 2012. That submission outlined proposals for workable trustee and director obligations and corresponding penalties or remedies. We take this opportunity to reiterate our support for the public policy outcomes the legislation aims to achieve and the lifting of governance standards across the superannuation industry. We do remain concerned however that trustees and trustee directors, in a claim against them for loss or damage, are required to positively demonstrate compliance with each of their enhanced obligations, regardless of whether the alleged breaches are significant or not, or whether those breaches contributed to the alleged loss.

AIST supports existing prudential requirements on the trustee to meet their obligations and submits that our recommendations are consistent with those expectations.

AIST submits that a small change to section 55(5) and 55(6) of the Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012 could address our concerns regarding the materiality or relevance of the alleged breach to the loss or damage suffered. The defences in these paragraphs require a positive demonstration by the defendant/s that they have complied with all of the covenants that apply in relation to the investment (55(5)) or the management of the reserve (55(6)).

AIST submits that the covenants applying to the particular loss or damage suffered are a more appropriate requirement, as there is a potential causal nexus between the breach of duty and the damage suffered.

Accordingly, AIST submits that paragraph 55(5) be amended as follows:

1. Omit “to the investment” and substitute “the particular loss or damage suffered”.
2. Omit “to the management of the reserve” and substitute “the particular loss or damage suffered”.

Example, the trustee has failed to comply with the covenant contained at section 52(2)(j) “to allow a beneficiary of the entity access to any prescribed information or any prescribed documents”. The claim is the result of an investment loss suffered by the applicant, and the applicant has previously been denied information unrelated to the investment loss from the trustee. The requirements of the section 55(5) defence would arguably deny the trustee access to the defence, for breach of section 52(2)(j), even though they had complied with all of the general covenants and investment covenants. We suggest that this outcome is not commensurate with the principles of fairness and due process and submit that the amendments be made as outlined above.