



# Strengthening APRA's Crisis Management Powers

**December 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 \$500 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 Introduction

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The consultation paper<sup>1</sup> covers other APRA regulated industries in addition to superannuation. In this submission AIST limits its comments to its area of expertise, the superannuation aspects of the proposals.

AIST supports the strengthening of APRA's crisis management powers for the superannuation industry and acknowledges the growing importance of superannuation in the lives of Australian working people. As superannuation savings outstrip gross domestic product and the superannuation guarantee grows towards 12 per cent of ordinary earnings, the strength and robustness of the system and its regulatory framework is paramount. Australians need to be able to have confidence in the compulsory superannuation system and this is partly achieved by having strong regulatory oversight.

AIST recognises that APRA already has significant regulatory powers, particularly with the recent introduction of standards making powers. Together with its regulatory partner ASIC, APRA can seek to influence and make determinations on a wide variety of issues affecting the superannuation industry. However, in relation to its ability to act decisively in a crisis, if required, we support increased proportional powers with accompanying safeguards.

In the event that APRA is given additional powers for early intervention in the event of a crisis, AIST submits that those powers should be exercised swiftly and decisively in a crisis situation in order to avert loss or damage to beneficiaries and the reputation of the industry as a whole.

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<sup>1</sup> Strengthening APRA's Crisis Management Powers: Consultation Paper, September 2012, Commonwealth of Australia.

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## 2 Enhancing direction powers

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### 2.1 Clarifying directions powers

AIST supports additional directions powers being afforded to APRA to respond to crisis situations where their other powers are insufficient to deal with the problem at hand. AIST insists however, that these powers should be subject to appropriate review.

### 2.2 Protection from liability when complying with an APRA direction

AIST supports the protections proposed for compliance with an APRA direction. The proposed directions powers would allow APRA to make very specific instructions on how to remedy a situation it has determined needs addressing. Having the entity and its officers protected from penalty for complying with an APRA direction is vital, including any directions that lead to a breach of the RSE licensee's governing rules.

AIST welcomes the approach to use draft proposed directions together with discussion and consultation in resolving issues so that APRA's concerns and the entity's views can be worked through, and possible resolutions, if required, can be determined in a framework where all of the issues and facts are on the table.

### 2.3 New direction powers for superannuation

The proposed new triggers for direction powers are intended to resolve APRA's inability in a variety of circumstances to act pre-emptively to a prudential breach. The proposals are intended to more closely align the superannuation industry with other APRA regulated industries in this regard.

Five additional triggers have been proposed for direction-making powers:

- Breach of the RSE licensee law or licence condition
- Anticipated breach of the RSE licensee law or a licence condition
- Promoting instability in the Australian financial system
- Conducting affairs in an improper or financially unsound way
- The failure to issue the direction would materially prejudice the interests or reasonable expectations of beneficiaries of the superannuation industry

AIST supports the proposed amendments to the *Superannuation Industry (Supervision) Act 1993* (SIS Act) subject to appropriate safeguards. It is proposed that there be a precondition to APRA issuing certain directions, namely that a 'material prejudice' exists to the 'interests or reasonable expectations of beneficiaries'. AIST submits that a material prejudice threshold is appropriate for each of the five proposed triggers, so that interventionist mechanisms are only used when a significant event is likely to occur where existing regulatory powers of either ASIC or APRA are unable to address the situation in a timely and effective manner.

The consultation paper states that an APRA decision to issue a direction is intended to be a reviewable decision at first instance with APRA, and if still dissatisfied, through the Administrative Appeals Tribunal. AIST supports these mechanisms for review.

## 2.4 Contents of a direction

It is proposed that the SIS Act be amended to enable APRA to give prescriptive directions to RSE licensees after a relevant trigger has been identified.

AIST supports the proposal to allow APRA to make prescriptive directions to RSE licensees provided that compliance with those directions does not place the licensee or its officers at risk of criminal or civil liability. Similarly, there should be a protection that extends to breaches of the governing rules of the fund, in compliance with an APRA direction. The directions should be reviewable, by APRA at first instance and the Administrative Appeals Tribunal if the outcome of that review is unsatisfactory.

AIST submits that the proposed ability to direct a RSE licensee to remove an individual trustee, director or officer should only be used as a last resort. Trustee boards make decisions as a collective, and therefore the actions or decisions of one individual should not influence outcomes. APRA with its supervisory powers and ability to question individual trustee directors, coupled with the fitness and propriety requirements under the new prudential standard SPS510 should identify any potential problems early on. Officers of the RSE licensee are also covered by SPS510. Accordingly, while we recognise that an extraordinary event may occur where the power to direct the removal of an individual trustee, director or office may be necessary, this power should only be used as a last resort.

AIST submits that it is appropriate for a failure to comply with a direction given by APRA should be a strict liability offence, and a continuing offence. It should not however result in personal liability for the RSE officers who failed to comply, unless that failure was clearly wilful and the result of gross misconduct attributable only to the individual or individuals concerned.

AIST submits that APRA should not be able to issue a direction that contravenes state or federal laws.

## 2.5 Additional recommendation

AIST supports the ability of the regulator to intervene to avert a crisis that may result in losses for beneficiaries and damage to the reputation of the superannuation industry. Confidence in Australia's compulsory superannuation system is vital so that the retirement savings of Australians continue to grow and provide people with dignified retirements. Accordingly, AIST submits that when APRA (or its sister regulator, ASIC) identifies a potential crisis that they act swiftly and decisively to avert, or at least mitigate, the potential consequences.

## Recommendations relating to enhancing directions powers:

- AIST supports the creation of new directions powers for APRA to intervene in times of crisis.
- AIST supports the reviewability of APRA directions, and their contents, by APRA at first instance and the Administrative Appeals Tribunal in the event that the result of that review is unsatisfactory.
- AIST recommends that each of the proposed triggers be subject to a material prejudice threshold.
- AIST recommends that the power to remove individual trustees, directors and officers only be used as a last resort.
- AIST supports the protection of the RSE entity and its officers from liability for complying with APRA directions, including directions that result in breaches of the fund's governing rules.
- AIST recommends that failure to comply with an APRA direction should not result in personal liability for the officers of RSEs unless the failure was wilful and the result of gross misconduct attributable to the individual/s concerned.
- AIST recommends that APRA should be required to comply with State and Federal laws in issuing directions.
- AIST submits that it is vital with the introduction of any new directions-making powers that APRA be required to act swiftly and decisively in a time of crisis to avert losses and damage to the industry's reputation.

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## 3 Simplification and streamlining of Acts administered by APRA

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### 3.1 Register of authorised persons

AIST supports the proposal to introduce a provision across the industry Acts for keeping and publishing a register of authorised persons. AIST welcomes this initiative as we believe it will provide access to relevant information to consumers of financial services, improve transparency and thereby build improved confidence in the system.

### 3.2 Investigation powers

AIST supports the proposed changes to APRA's investigation powers and acknowledges the efficiencies achieved in harmonising the requirements across the APRA regulated industries. Expanding the investigation powers of APRA as proposed however should only extend as far as determining if the breach has or is occurring, and should not extend to purely speculative investigations.

AIST also supports the proposed reporting changes at the conclusion of an investigation. AIST agrees that providing transcripts is costly and often unnecessary. In the event that an investigation is abandoned, AIST agrees that no report should be required.

### 3.3 Actuarial investigation powers

AIST supports the new proposed APRA powers, in particular the power to appoint an actuary to conduct an actuarial investigation of a RSE licensee and set terms of reference for that investigation.

### 3.4 Whistleblower protections

AIST supports the proposed changes to the whistleblower provisions, to bring them in line with the SIS Act.

### 3.5 Disclosure of information

AIST supports increased transparency in the superannuation industry and has itself set standards for its members around the public disclosure of information in its Governance Framework for the Not-for-profit Superannuation Industry.<sup>2</sup> In principle AIST supports increased powers for APRA to be able to require disclosure of 'information of a nature, and in a manner, prescribed by APRA by way of prudential standards'<sup>3</sup> and that the proposed changes be made to section 57 of the *Australian Prudential Regulation Authority Act 1998*.

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<sup>2</sup> AIST, September 2012.

<sup>3</sup> APRA Consultation Paper, September 2012, p134.

AIST recommends however that a right of review be available in relation to APRA's powers to require public disclosure. This would ensure that RSE licensees have the opportunity to question directions concerning, among other things, the disclosure of private and commercially sensitive material, and the appropriateness of the prescribed manner of disclosure considering the size, nature and business mix of the RSE licensee.

### 3.6 Offence to mislead actuaries

AIST supports the proposals making it an offence to mislead an actuary and the requirement to report attempted misleading or coercion of an actuary.

### 3.7 Disqualified persons

AIST supports the proposals concerning disqualified persons. With the introduction of SPS510, AIST agrees that it is appropriate for the federal court to take into consideration the fitness and propriety requirements set out in that prudential standard.

AIST agrees with the proposal to ensure that someone disqualified under one industry Act also be disqualified across each of the APRA regulated industries. AIST prefers option A in the consultation paper, where the disqualification is automatic across all APRA regulated industries. This better protects consumers of financial services and beneficiaries, and we submit more cost-effective than requiring APRA to make an application to the court.

### 3.8 Right to intervene in court proceedings

AIST supports the proposal that APRA be able to intervene, where appropriate, in court proceedings where this is in the public interest.

### 3.9 International precedent

AIST recognises that the Australian superannuation industry invests heavily overseas and this is expected to grow over time. Accordingly AIST supports in principle the proposals for the collection and sharing of information with foreign regulators in an effort to better protect the members and beneficiaries of Australia's superannuation system.

AIST recommends that the remit of these new powers be very clearly defined. AIST's experience in negotiating on the proposed FATCA<sup>4</sup> requirements has demonstrated that there is a risk of superannuation funds being subject to unreasonable and onerous requirements unless these requirements are clearly defined and constrained.

Furthermore, the provision of information to foreign regulators should be subject to at least the same level of protections to consumers and regulated entities as would apply to the Australian counterpart of the

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<sup>4</sup> *Foreign Account Tax Compliance Act (US) 2010*

foreign regulator. APRA regulated entities should not in any way be subject to fines or other penalties as a consequence of APRA's responsibilities to cooperate with foreign regulators pursuant to these proposed new reforms.

In addition to the proposed confidentiality obligations, AIST also submits that security obligations and some "fair use" rules should apply (ie, access and requirements have to be reasonable).

## **Recommendations relating to Acts administered by APRA:**

- AIST supports the introduction of a register of authorised persons across all APRA regulated industries.
- AIST recommends that any expansion of APRA's investigative powers be clearly defined and that they do not allow for purely speculative investigations.
- AIST supports the proposed changes to investigations reporting requirements.
- AIST supports the harmonisation of whistleblower provisions.
- AIST supports increased transparency and disclosure in the superannuation industry and recommends that powers to direct disclosure outside of existing prudential regulation and legislative instruments should be reviewable directions.
- AIST supports the proposed changes concerning the misleading of actuaries.
- AIST supports the proposed changes regarding disqualified persons and recommends that automatic disqualification across APRA regulated industries be adopted.
- AIST supports the proposed right for APRA to intervene in court proceedings where this is in the public interest.
- AIST supports international cooperation initiatives between international regulators and recommends that the scope be clearly defined and protects RSE licensees in the event that APRA does not meet its obligations under these proposals.

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## 4 Proposals specific to Acts supervised by APRA

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### 4.1 Power to appoint an acting trustee

AIST supports the proposal for APRA to be able to appoint an acting trustee in circumstances where they have taken all reasonable steps to identify or locate the trustee for the purposes of winding up the fund.

### 4.2 APRA's powers to investigate contraventions

AIST opposes any power of investigation being afforded to APRA relating to speculative matters. There should be a trigger of material significance before any investigation powers should be available to APRA. Accordingly, any expansion of APRA's investigative powers should be strictly defined.

With regard to the proposed extension of investigation powers to employers who fail to pay their employees' superannuation contributions, AIST questions the ability of APRA's powers to extend outside of their regulated entities. Further, this falls under the remit of the ATO and AIST does not support an unnecessary duplication of regulatory oversight.

### 4.3 Disqualification powers

AIST recognises the desirability of being able to disqualify persons from holding office in entities outside of the APRA regulated industries. However, we question whether APRA's powers can indeed extend that far. We recommend that appropriate legal advice on this point should be sought.

#### Recommendations regarding Acts supervised by APRA:

- AIST supports the ability of APRA to appoint an acting trustee where the trustee cannot be identified or located.
- AIST recommends strict definitions of scope be applied to any expansion of APRA's investigative powers. They should not be able to use these powers speculatively.
- AIST recommends that legal advice be sought regarding APRA's ability to investigate employers and extending its disqualification powers to non-APRA regulated entities.