

GOVERNANCE TOOLKIT

Conflict Management Framework

Version 1: 1 July 2014



THIS TOOLKIT PROUDLY SUPPORTED BY

MO MILLS OAKLEY
LAWYERS



Purpose of the Governance Toolkits


AIST has developed the Governance Toolkits to assist **trustees** with maintaining strong prudential frameworks. They are created specifically to assist AIST members and are a benefit of membership.

The Toolkits contain functional tools such as diagrams, decision trees, flowcharts and checklists, to assist **trustees** with understanding and applying their legal obligations, regulatory guidance and AIST governance guidelines.

How to use this Toolkit



The **Conflicts** Management Framework Toolkit is designed to assist **trustees** with understanding and implementing the Superannuation Prudential Standard SPS 521 **Conflicts of Interest (SPS 521)**.

Tools

Obligations Map	showing the source of the Conflicts of Interest requirements and how they interconnect with the broader regulatory framework
Implementation Flowchart	to implement Conflicts of Interest obligations
Decision Tree	<ul style="list-style-type: none"> – to review governing rules
Checklists	<ul style="list-style-type: none"> – to develop a Conflicts Management Framework – to develop a Conflicts Management Policy
Dictionary	words in bold font are defined in a Dictionary at the back of the Toolkit. AIST recommends that members of the Board and other relevant staff familiarise themselves with the key concepts in the Dictionary.
Alerts	<p>Symbol  is used to identify an issue that needs particular care. It may denote:</p> <ul style="list-style-type: none"> – an issue or uncertainty arising from different, overlapping requirements; or – a matter that requires particular care in interpretation or application to a trustee's particular circumstances.
Workshops	<p>AIST recommends that Trustee directors consider attending training workshops to assist them with understanding the breadth and depth of their duties as regards managing Conflicts.</p> <p>For more information about available workshops, visit www.aist.asn.au or call 03 8677 3800</p>

Warning & Disclaimer

The Toolkit is intended to assist **trustees** but does not replace or exhaustively replicate primary sources of a **trustee's** legal obligations, such as general law, legislation, regulations, prudential standards and regulatory guidance.

While the  symbol identifies issues requiring particular care, content without a  symbol should not be regarded as any less significant. The **trustee** will have to make its own judgements on how to apply the information in this Toolkit and should seek professional advice if uncertain.

This Toolkit does not constitute legal advice and should not be relied upon to demonstrate compliance with any legal obligation or standard of conduct expected of **trustees** or their directors. While this Toolkit is a valuable tool for a **trustee** considering its obligations, it will not guarantee compliance or sound prudential outcomes.

Content in this Toolkit is adapted from the Australian Prudential Regulation Authority (APRA) publications Superannuation Prudential Standard **SPS 521** – Conflicts of Interest (July 2013) (**SPS 521**), and Prudential Practice Guide **SPG 521** – Conflicts of Interest (July 2013) (**SPG 521**).

The information is current as at 1 July 2014. The Prudential Standards and Prudential Practice Guides can change and any changes made on or after 1 July 2014 will need to be taken into account.

Further assistance

If you would like further assistance, contact your professional advisers or alternative contact AIST at info@aist.asn.au or Mills Oakley Lawyers at super@millsoakley.com.au.

Index

RSE licensee's obligations.....	5
Obligations map.....	8
Implementation flowchart.....	9
Review of governing rules decision tree.....	10
Conflicts Management Framework checklist.....	11
Conflicts Management Policy checklist.....	16
Dictionary.....	18

1. RSE licensee’s obligations

1.1 Source of obligations

The covenants contained in section 52(2)(d) and section 52A(2)(d) of the **SIS Act** (the **Conflicts Covenants**) impose obligations that an **RSE licensee** and the trustee directors must satisfy, to give priority to the interests of **Beneficiaries**, resulting in potential liability should they fail to satisfy these obligations. SPS 521 **Conflicts of Interest** creates the obligation to have a **Conflicts Management Framework (Framework)** which includes, at a minimum, a **Conflicts Management Policy (Policy)**.

In particular, the **Policy** must include processes and controls for avoiding **Conflicts** where the **RSE licensee** is required to do so under the general law and must address the matters referred to in the **Conflicts Covenants**. Such an instance can arise under the general law where the **Conflict** is fundamentally adverse to the interests of fund **Beneficiaries** and is incapable of being managed in a way that ensures that the **RSE licensee’s** duty to **Beneficiaries** can be satisfied and that **Beneficiaries’** interests can be protected. The processes and controls in the **Policy** must apply to all **Responsible Persons** and all employees of the **RSE licensee**.

SPG 521 provides additional guidance for the implementation of SPS 521 and sets out APRA’s view of sound Trustee practice.

For those RSE licensees who are AFS licensees, the general obligations in section 912A of the **Corporations Act** include the duty to have in place arrangements for the management of conflicts of interest that may arise in relation to the activities of the licensee or its representatives.

The **Framework** required by SPS 521 is an integral part of an **RSE licensee’s** Risk Management and Insurance Management Frameworks, and is a key consideration in respect of outsourcing arrangements. Actual and potential **Conflicts** must be identified, considered and managed in all aspects of the **RSE licensee’s business operations**, especially outsourced business functions (see SPS 231 and SPG 231). The Risk Management Framework (see SPS 220) must cover, among other things, governance risk, of which conflicts of interest and duty are both examples.

A key requirement of the **RSE licensee** under SPS 521 is to consider the duties and interests of its **Responsible Persons** to other persons and organisations and identify any potential or actual **Conflicts**. These **Responsible Persons** are required to be identified under the **RSE licensee’s** Fit and Proper Policy, as part of its Governance Framework (see SPS 520 and AIST’s Fit and Proper Toolkit). Also, the **RSE licensee’s** Remuneration Policy (see SPS 510 and AIST’s Remuneration Toolkit) must ensure performance-based remuneration for its executives aligns financial incentives with long-term, successful stewardship of the **RSE licensee**.

The **RSE licensee’s** Insurance Management Framework must outline the **RSE licensee’s** approach in relation to **Conflicts** that may arise through making available insured benefits to **Beneficiaries** (see SPS 250 and AIST’s Insurance Management Framework Toolkit).

SPS 231 Outsourcing requires that an **RSE licensee** must have a process for undertaking regular and thorough enquiry to identify all **Conflicts** that have the potential to affect a service provider’s performance and arise from the **RSE licensee’s** relationship, or the relationship of a **Responsible Person** or employee, with an existing or prospective service provider or adviser.

APRA’s guidance recognises that **Conflicts** related to outsourcing may arise in a range of different circumstances including **Conflicts**:

- (a) that arise from an arrangement with associated entities; or
- (b) where individuals are able to receive direct or indirect benefits, financial or non-financial, as a consequence of an arrangement.

APRA provides some non-exhaustive examples of **Conflicts** which might arise as a consequence of an outsourcing arrangement including where there is a right to a controlling interest or to a Board, committee or management position in respect of the **RSE licensee** or another entity, including a service provider, as a consequence of that arrangement.

In addition to the management of **Conflicts**, the **RSE licensee** has obligations in respect of disclosure under s 29QB of the **SIS Act** and **SIS Regulation 2.38** (⚠️ Note s29QB(1A), which is inserted into the **SIS Act** by ASIC Class Order 14/509). An RSE licensee must publish a summary of its **Conflicts Management Policy** as well as its registers of **Relevant Interests** and **Relevant Duties**.

1.2 Conflicts Management Framework

The **RSE licensee** must have in place a Board-approved **Conflicts Management Framework (Framework)** to identify all potential and actual **Conflicts** in the **RSE licensee’s business operations** and take all reasonably practicable actions to ensure that they are avoided or prudently managed. The RSE licensee’s **Framework** must:

- (a) be appropriate to the size, business mix and complexity of the **RSE licensee’s business operations**;
- (b) include a Board-approved **Conflicts Management Policy**;
- (c) clearly define the roles, responsibilities and resources for the oversight of **Conflicts** management;
- (d) include a process for ensuring **Responsible Persons** and other employees are aware of the **Framework** and that their compliance with the Framework is appropriately monitored. ⚠️ The criteria for determining the **RSE licensee’s Responsible Persons** can be found in section 2 of our Fit and Proper Toolkit .
- (e) include a process by which the **RSE licensee** identifies all potential and actual **Conflicts** in the **RSE licensee’s business operations** by:
 - i. identifying and considering the duties and interests of **Responsible Persons**, including on an ongoing basis;
 - ii. including a process that outlines how the RSE licensee determines a duty or an interest to be relevant in the sense that the duty or interest might reasonably be considered to have the potential to have a significant impact on the capacity of the RSE licensee (or an associate or Responsible person) to act in a manner that is consistent with the best interest of **Beneficiaries**;
 - iii. determining whether a **Relevant duty** or **Relevant interest** creates a **Conflict**;
 - iv. if it does, determining whether that **Conflict** must be avoided; and
 - v. if it does not have to be avoided, determining how it can be managed, including by recording the **Relevant duty** or **Relevant interest**.
- (f) include up to date registers to record **Relevant duties** and **Relevant interests**;
- (g) include a process by which **Conflicts** are managed and the management of **Conflicts** is monitored to measure the outcomes in terms of the effect of the **Conflicts** on the interests of the **Beneficiaries**;
- (h) include a process by which the Board monitors the compliance of the **RSE licensee’s business operations** with the **Framework**; and
- (i) include a process for reviewing the appropriateness, effectiveness and adequacy of the **Framework**, including the **Conflicts Management Policy**.

1.3 Management of Conflicts

The **RSE licensee** is obliged to identify all potential and actual **Conflicts** and take ‘all reasonably practicable actions’ to ensure **Conflicts** are avoided or prudently managed. ⚠️ What is ‘reasonably practicable’ will depend on the size, business mix and complexity of the **RSE licensee’s business operations**. Measures APRA refers to in SPS 521 and SPG 521 would generally include:

- (a) prior to conflicts arising, instilling a strong conflicts management culture in the organisation which includes openness to ongoing disclosure of duties and interests and resulting potential and actual conflicts;

- (b) recording in the minutes of Board, board committee and other relevant meetings the details of each conflict identified and the action taken to avoid or manage it along with the determination that such action is consistent with giving priority to the duties to, and interests of, **Beneficiaries**;
- (c) excluding a director of an **RSE licensee**, who has a **Relevant interest** or **Relevant duty** that conflicts with the duty to or interests of the RSE licensee's **Beneficiaries**, from being present at a directors' meeting while the matter is being considered or voted on;
- (d) prohibiting the retention of gifts and hospitality above a certain value;
- (e) on-going evaluation of the management of each Conflict and escalation or alternative action if required; and
- (f) clearly defined and documented processes for the escalation of issues, including any whistleblowing procedures.

1.4 Continual assessment of Framework

The Board is ultimately responsible for the **Conflicts Management Framework** and should continually assess it in light of changes. APRA suggests such matters include changes in:

- (a) the **RSE licensee's business operations**;
- (b) the structure of the **RSE licensee**;
- (c) the **RSE licensee's** service providers and any changes to or within service providers;
- (d) the composition of **Responsible Persons**.

In addition, AIST recommends the following be considered:

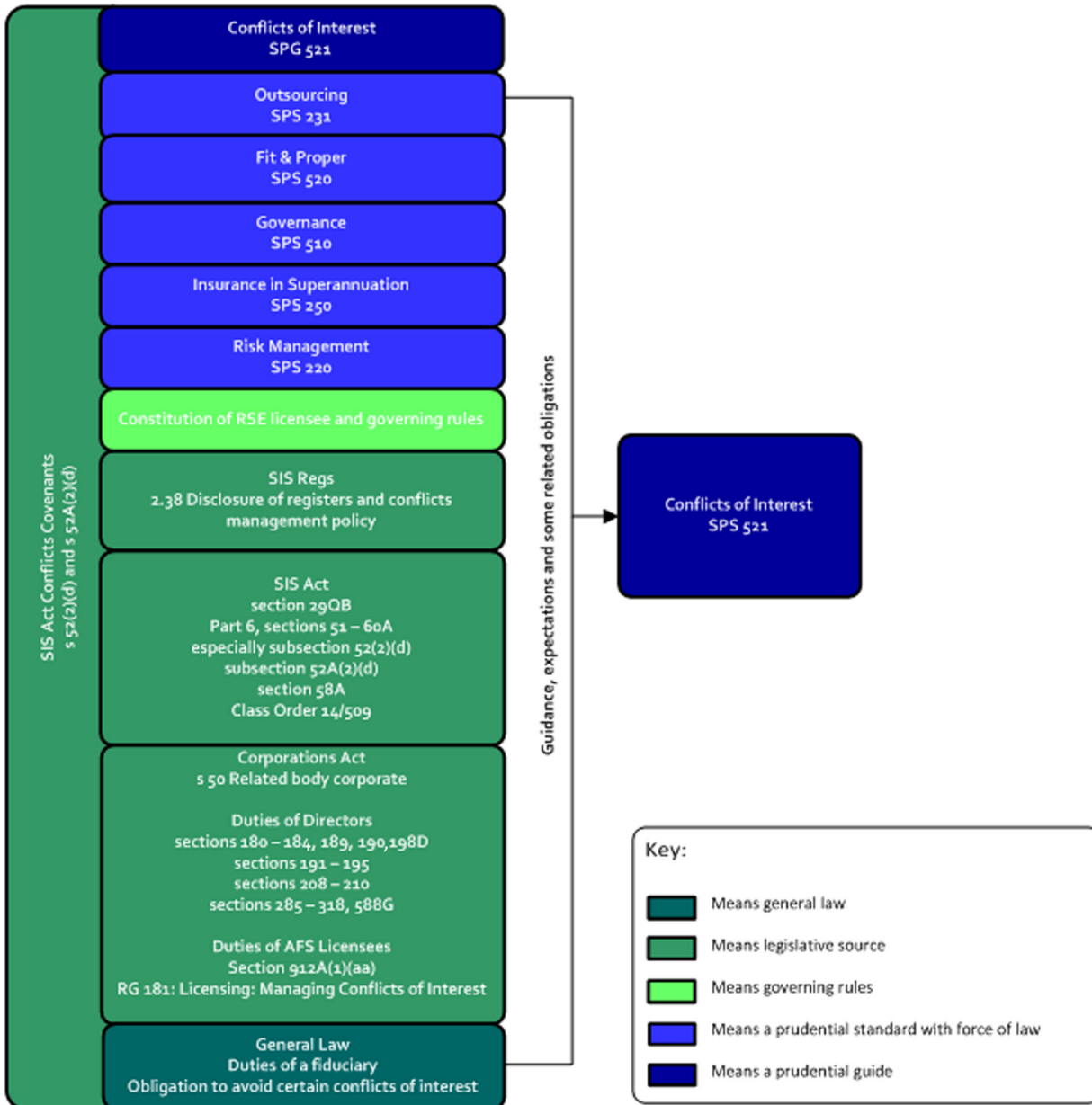
- (e) changes in fund experiences and the experiences of other funds;
- (f) changes in relevant legislation, regulations or the economic environment; and
- (g) other circumstances which would impact the **RSE licensee's business operations**.

1.5 Liability for breach of a covenant

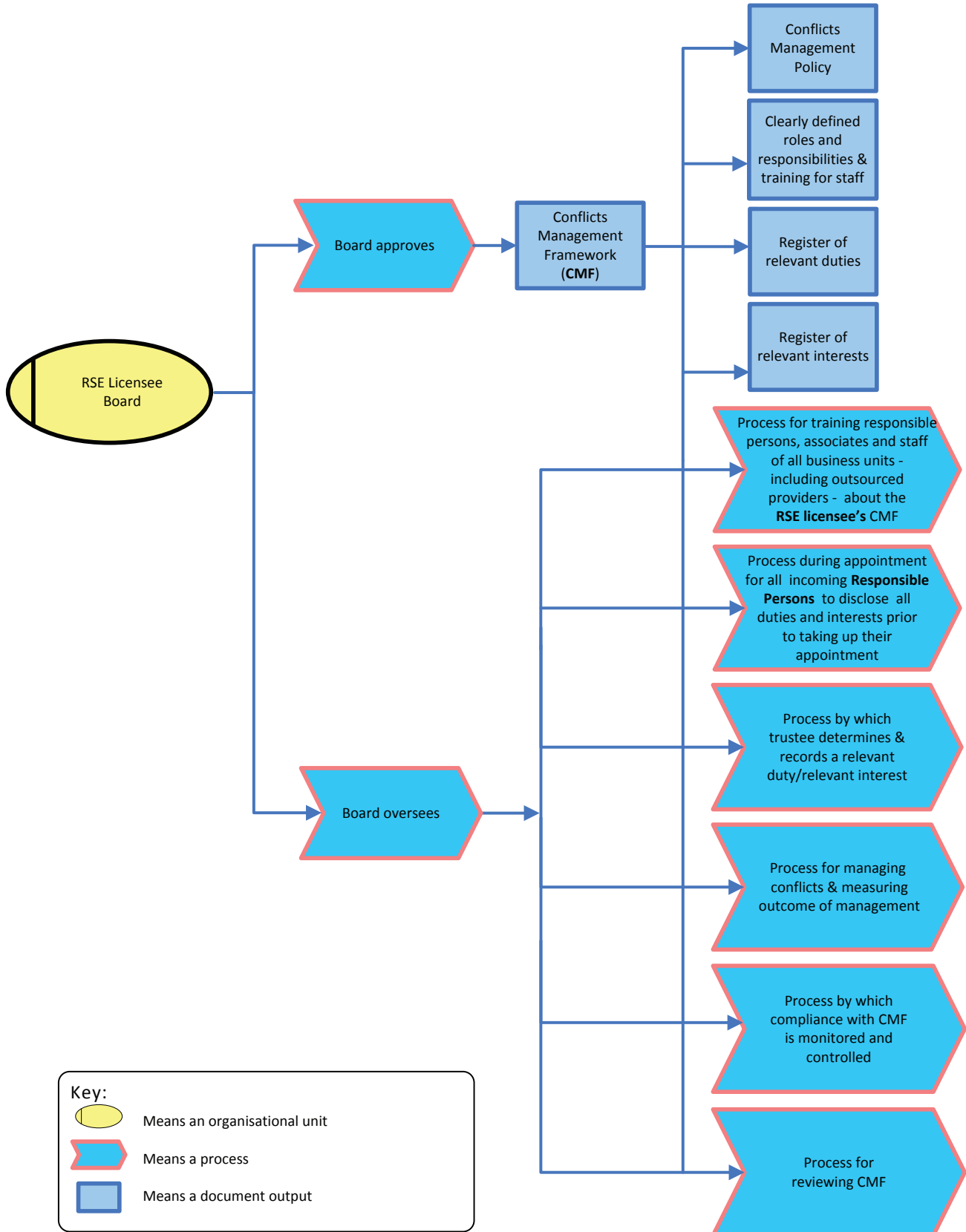
Section 55(3) of the **SIS Act** allows persons who suffer a loss or damage resulting from the contravention of a covenant by another person (a term with a meaning wider than **RSE Licensee** and director) to recover that loss or damage from that person. For a discussion about **RSE Licensee**/director liability that can arise, see **AIST Fact Sheet : Liability Under SIS**.

1.6 Obligations Map

The following Obligations Map sets out the breadth of sources from which obligations in relation to the management of **Conflicts** arise.



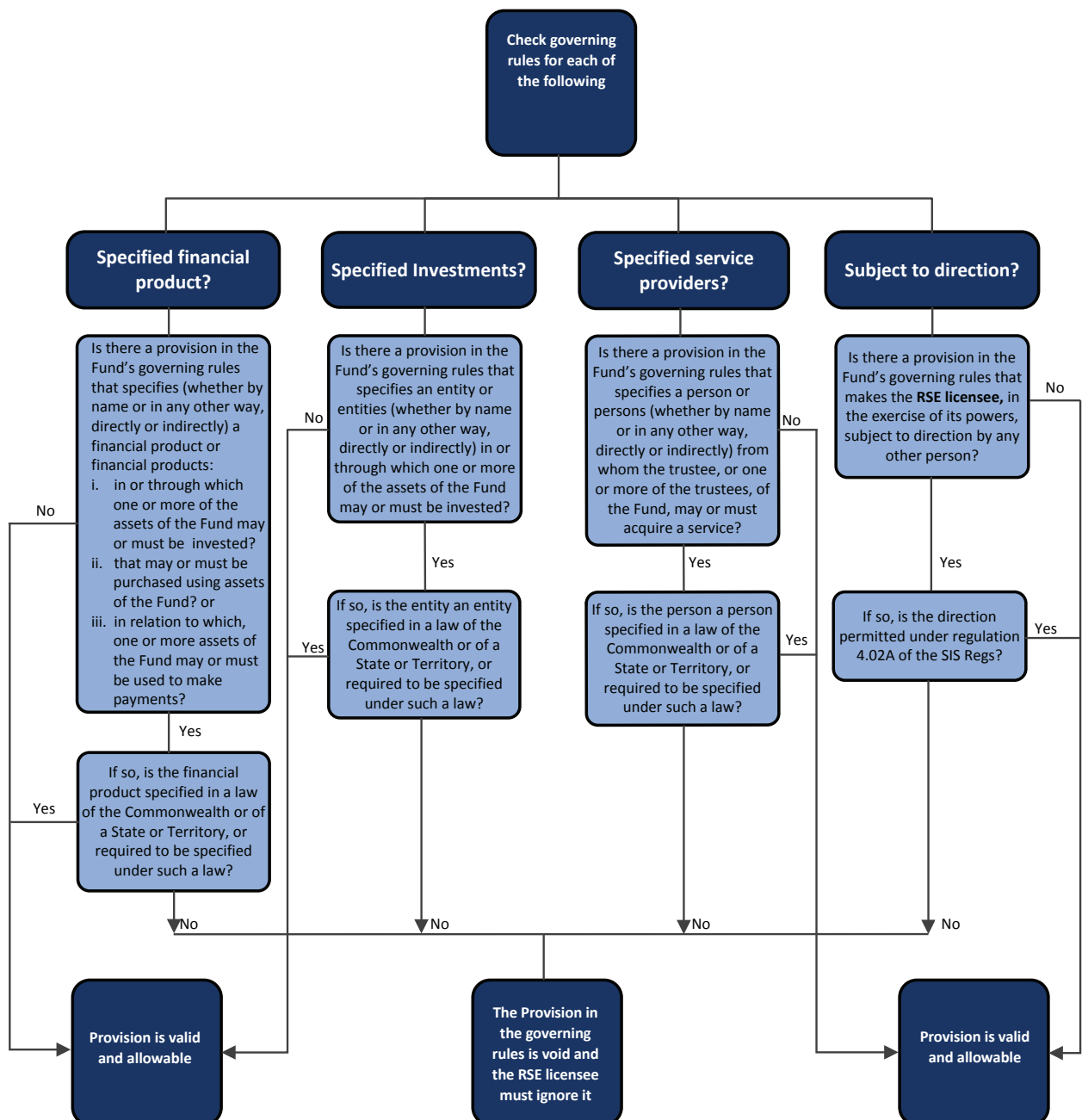
1.7 Implementation Flowchart



2. Conflicts Management Framework

In developing its **Framework**, AIST notes that the **RSE licensee** would need to review the governing rules of each of its funds for provisions rendered void by the SIS Act. Under section 58(2), the **RSE licensee** must not be subject to direction by any other persons in the exercise of its powers (with noted exceptions). Section 58A declares void certain provisions in a fund’s governing rules which intend to compel the **RSE licensee** to engage a specified service provider, to use a specified investment vehicle, or to use a specified financial product or products. These are circumstances which can give rise to **Conflicts** which are to be avoided under SPS 521.

2.1 Review of governing rules decision tree



2.2 Develop a Conflicts Management Framework

The following checklist will assist the **trustee** in assessing whether its **Framework** complies with the minimum requirements in SPS 521 and with the guidance provided in SPG 521.

This checklist provides a valuable tool for the **RSE licensee** to apply in developing its **Framework**. It should be noted however that even if a positive response to all questions listed below is provided, the **RSE licensee** must be confident that it can demonstrate that it has adopted a holistic approach to its consideration of a **Conflict** that will deliver sound prudential outcomes for the benefit of **Beneficiaries**.

BOARD SIGN OFF	YES/NO
<p>(a) Is the Board satisfied that the totality of systems, structures, policies, processes, controls and people in the Framework have, prior to implementation of the Framework, been sufficiently tested and reviewed so as to provide it with reasonable assurance that all Conflicts are being clearly identified, avoided or prudently managed?</p> <p> Whilst the term ‘reasonable assurance’ is not defined, APRA has advised that RSE licensees should expect APRA supervisors to discuss with them the extent to which they have sought to assure themselves on this point and why the RSE licensee considers it appropriate not to seek further assurance.</p>	
<p>(b) Is the Board satisfied that the Framework is appropriate to the size, business mix and complexity of the RSE licensee’s business operations?</p>	
<p>(c) Is the Board satisfied that the processes of the Framework are sufficient to ensure that the Board can clearly demonstrate that the actions that it has taken in response to a potential or actual Conflict are prudent and defensible?</p>	
<p>(d) Is the Board satisfied that the Framework includes a Conflicts Management Policy which complies with the Conflicts Covenants and contains the detail required by SPS 521 (refer to section 3 of this Toolkit)?</p>	
<p>(e) Is the Framework approved and signed off by the Board?</p>	
SYSTEMS	YES/NO
<p>(f) Does the Framework have a system for documenting how the RSE licensee determines whether any of the duties or interests of the RSE licensee, associates of the RSE licensee or Responsible Persons of the RSE licensee conflict with any of the duties or interests of the Beneficiaries?</p>	
<p>(g) Is the system part of the RSE licensee’s Policy?</p>	
PEOPLE	YES/NO
<p>(h) Does the Framework include clearly defined roles, responsibilities and resources for the implementation of the Framework and the oversight of Conflicts management?</p>	
<p>(i) Does the Framework have induction and training procedures to inform the RSE licensee’s Responsible Persons and employees of:</p> <p>i. the need to identify all potential Conflicts?</p>	

ii. the circumstances that might give rise to a **Conflict**?

iii. the content and purpose of the **Framework**? and

iv. where applicable, their **Conflicts** management obligations?

(j) Does the **Framework** have procedures to ensure all relevant business units are made aware of, and have processes and controls for monitoring compliance with, the **Framework**?

(k) Does the **Framework** have an appointment process requiring and enabling all incoming **Responsible Persons** to disclose all duties and interests prior to the person taking up their appointment?

PROCESSES – ASSESSMENT OF RELEVANCE OF DUTIES AND INTERESTS

YES/NO

(l) In circumstances where a director of an **RSE licensee** is nominated or appointed by a nominating body or appointer, does the **Framework** include a process to ensure that such a director is made aware of:


i. the possibility of a **Conflict** between the interests of **Beneficiaries** and the interests of the nominating or appointing body? and

ii. the need to disclose **Relevant duties** and **Relevant interests** and avoid, if not manage, any resulting actual or perceived **Conflicts**?

(m) Does the **Framework** include a process of assessment that outlines how the **RSE licensee** determines whether a duty or interest of its **Responsible Persons**, Associates and employees is a **Relevant duty** or **Relevant interest** through:

i. a process and criteria for identifying:

a. duties of the **RSE licensee**, any **Associate**  of the **RSE licensee** and each of the **RSE licensee's Responsible Persons**, to **Beneficiaries** or any other person?

b. interests of the **RSE licensee**, any **Associate**  of the **RSE licensee** and each of the **RSE licensee's Responsible Persons**, which includes any interest, gift, emolument or benefit, whether pecuniary or non-pecuniary, directly or indirectly held? and

c. whether each duty or interest is a **Relevant duty** or **Relevant interest**?

ii. a statement of how the **RSE licensee** determines whether to apply the process of assessment to its consultants, contractors and employees of other entities, in particular **RSE Auditors** or **RSE Actuaries**?

(n) In line with APRA's expectations, do the criteria used in the above process of assessment include consideration of the following:

i. the nature of the duty or interest, including whether it is a one-off occurrence or whether it has an ongoing, recurring or cumulative nature?

ii. the extent to which the role giving rise to the duty could influence the duties owed by the **RSE licensee**, or a **Responsible Person** of the **RSE licensee**, to **Beneficiaries**? and

- iii. details of the dollar amount where the **RSE licensee** applies a dollar amount for the purposes of assessing the relevance of interests? and
 - ⚠️ APRA encourages a prudent approach to setting a dollar amount, including consideration of appropriate limits for different circumstances or for different types or categories of interests, including whether to implement limits based on one-off events as well as the cumulative amount arising from a series of low-value amounts.
 - ⚠️ APRA encourages a pragmatic approach when assessing the interests of an **Associate**, suggesting one may only be considered to be a **Relevant duty** or **Relevant interest** where it would be treated as exceptional under the **Associate's own Conflicts Management Policy** or approach.

- iv. where an **RSE Actuary** acts for the **RSE licensee** as well as an employer sponsor, whether there is a possibility of a potential or actual **Conflict** arising and the appropriateness of the **RSE Actuary** continuing to act for both?
 - ⚠️ The **RSE Actuary** will have a duty to both the **RSE licensee** and the employer sponsor. In these circumstances, APRA expects that the **RSE licensee** would pay particular attention to the possibility of a Conflict. If the **RSE Actuary** continues to act for both parties, the **RSE licensee** should consider what actions it would take to manage any potential or actual **Conflicts**, including considering the actuary's approach to conflicts management.

PROCESSES – MANAGEMENT OF REGISTERS

YES/NO

- (o) Does the **Framework** contain a register of **Relevant duties** that is developed and structured in a way that best reflects the structure and complexity of the **RSE licensee's business operations**?
- (p) Does the **Framework** contain a process for keeping the register of **Relevant duties** up to date?
- (q) Does the **Framework** contain a register of **Relevant interests** that is developed and structured in a way that best reflects the structure and complexity of the **RSE licensee's business operations**?
- (r) Does the **Framework** contain a process for keeping the register of **Relevant interests** up to date?

PROCESSES – MANAGEMENT OF CONFLICTS AND MEASUREMENT OF OUTCOMES

YES/NO


- (s) Does the **Framework** include a process for determining an appropriate control strategy for managing a **Conflict**, for documenting those controls, and for implementing those management controls in the **RSE licensee's business operations**?
- (t) Does the **Framework** include a process to measure the outcomes of the management of the **Conflict** against the duties owed to and the interests of the **Beneficiaries** including providing the **RSE licensee** with the means to form a conclusion that the interests of the **Beneficiaries** have not been adversely affected by the **Conflict**?


PROCESSES – MONITORING AND REVIEW

YES/NO


- (u) Does the **Framework** have processes and controls for monitoring compliance with each component of the **Framework**?
- (v) Does the **Framework** include a review process to ensure the **Framework** remains appropriate, effective and adequate?

- (w) Does the review process have regard to the size, business mix and complexity of the **RSE licensee's business operations** and any subsequent changes to these factors?
- (x) Does the review process have regard to the extent of any changes to the external environment in which the **RSE licensee** operates?
- (y) Does the review process, at a minimum, consider:
- i. whether all **Relevant duties** and all **Relevant interests** have been identified and are being addressed in accordance with the **Framework**?
 - ii. the level of compliance with the **Framework**, including reporting on the registers of **Relevant duties** and **Relevant interests**? and
 - iii. any non-compliance with the **Framework**, including steps taken to return to, and improve, ongoing compliance?
- (z) Does the review process provide for:
- i. an annual review of the **Framework** by the **RSE licensee**?

 APRA expects that this annual review will cover ongoing monitoring of processes and controls focused on potential and actual **Conflicts** as well as broader compliance with the **Framework** across the entirety of its **business operations**. If the annual review is undertaken by a person with a role in the implementation of the **Framework**, the prudent **RSE licensee** should consider appropriate steps to ensure the review is objective.
 - ii. a report of the results of the review to the Board?

 The outcomes of the review may be used to assist the future development or enhancement of the **Framework**.
 - iii. a review of the **Framework**, at least every three years, by an operationally independent, appropriately trained and competent person?

DISCLOSURE
YES/NO

- (aa) In accordance with section 29QB(1)(b) and (1A) of the **SIS Act** and regulation 2.38 of the **SIS Regs**, does the **Framework** provide for the register of **Relevant interests**, the register of **Relevant duties** and a summary of the **Conflicts Management Policy** to be disclosed on the fund's website and kept up to date at all times?
-  Section 29QB requires this information to be publicly available on the **RSE licensee's** website and kept up to date at all times. The meaning of "up to date" is clarified by section 29QB(1A) which was inserted into the SIS Act by ASIC Class Order CO 14/509 . It requires that:
- the summary of the **Conflicts Management Policy** be published on the website within 20 business days of commencement of the policy or of any change; and
 - the registers of **Relevant interests** and **Relevant duties** be published within 20 business days of each of 30 June, 30 September, 31 December and 31 March each year.

If the answer is "NO" to any of the questions in the checklist above, the **RSE licensee** should reconsider the issue and address the requirements necessary so as to satisfy itself that it can provide a positive response to the issue.

2.3 Who are the RSE licensee’s Beneficiaries?

The **Conflicts Covenants** deal primarily with a conflict between the duties of the trustee to beneficiaries and the duties of the trustee to other persons or entities. The provision also includes conflicts between the interests of beneficiaries and the interests of the trustee and any associated person of the trustee. In the case of such conflicts, the covenant requires the trustee to give priority to the duties and interests of beneficiaries over the duties and interests of other persons or entities, to ensure that the duties to beneficiaries are met and that the interests of beneficiaries are not adversely affected by any conflict.

The **Conflicts Covenants** are aimed at ensuring the protection of the rights and interests of “beneficiaries”. In section 10 of the **SIS Act**, “beneficiary” means “a person . . . who has a beneficial interest in the fund . . . and includes, in relation to a superannuation fund, a member of the fund . . .”

The term “beneficial interest” is not defined.

It is AIST’s view that a beneficiary under the SIS Act will generally include the following people:

- Members of the fund prior to their retirement;
- Pensioner members of the fund, generally where a member has retired and is in receipt of a pension payment from the fund;
- A reversionary pensioner to whom a pension reverts after the death of the pensioner member;
- Non-member spouses for whom the trustee has created a new interest in relation to a payment split under division 7A of the SIS Act;
- A person to whom the trustee has decided, pursuant to the exercise of a discretion, to pay a superannuation death benefit (that is from the time when the discretion is exercised);
- Persons nominated under a valid binding death benefit nomination to receive a superannuation death benefit from the time of a member’s death;
- On winding up of the fund where the trustee has determined that the fund is in surplus, the employer sponsor who by the terms of the trust deed is entitled to the surplus.

AIST is also of the view that the following will generally not be included as a beneficiary:

- A person nominated under a binding death benefit nomination to receive a death benefit prior to the member’s death (the member may revoke the nomination or it may lapse);
- On the winding up of a fund an employer sponsor who may be entitled to a surplus on the winding up of the fund cannot be a beneficiary prior to the winding up of the fund.

It will also be necessary to determine from the provisions of the fund’s trust deed whether any other particular categories of person may have a proprietary interest in the fund and can also be included within the term beneficiary.


For a more detailed discussion of the term, see AIST Fact Sheet : Who is a Beneficiary for the purpose of SIS?

3. Conflicts Management Policy

The **RSE licensee** must develop a **Conflict Management Policy (Policy)** which complies with section 52(2)(d) and section 52A(2)(d) of the SIS Act and, in addition, includes the specific components outlined in SPS 521. The following checklist will assist the **RSE licensee** with developing a **Policy**.

This checklist provides a valuable tool for the RSE licensee to apply in developing its **Policy**. It should be noted however that even if a positive response to all questions listed below is provided, the **RSE licensee** must be confident that it could demonstrate that it has adopted a holistic approach to its consideration of a Conflict that will deliver sound prudential outcomes for the benefit of Beneficiaries.

3.1 Develop a Conflicts Management Policy

COMPONENT	YES/NO
(a) Does the Policy document who is covered by the policy?	
(b) Does the Policy , at a minimum, include processes and controls for:	
i. identifying and monitoring all potential and actual Conflicts ?	
ii. identifying when a Conflict should be avoided or managed and avoiding it where required to do so?	
iii. ensuring that any Conflicts are managed in accordance with the requirements to give priority to the duties to, and interests of, beneficiaries in section 52(2)(d) and 52A(2)(d) of the SIS Act ?  For instance, APRA notes that it expects that a director, with a Relevant duty or Relevant interest that conflicts with the duty to or interest of the beneficiaries, and that relates to a matter that is being considered at a directors' meeting, would not ordinarily be present while the matter is being considered at the meeting or otherwise vote on the matter.	
iv. ensuring that appropriate action is taken in the event of a Conflict arising (including ongoing evaluation of management of the Conflict , provision for escalation or alternative action, or avoidance of the Conflict if required)?	
v. developing and maintaining the registers of Relevant interests and of Relevant duties ?	
vi. recording the details of all Conflicts identified and the action(s) taken to avoid or manage the Conflict in the minutes of the Board, board committee or other relevant meetings?	
(c) In accordance with APRA's expectations, in considering the appropriate action to be taken in the event of a Conflict , does the Policy consider:	
i. the Conflicts Covenants where an RSE licensee or Responsible Person is considering a particular course of action and is affected by a Conflict ?	
ii. whether the Conflict is so acute or pervasive that the RSE licensee has no option but to take steps to avoid the Conflict ? and	
iii. whether the conflicted person should relinquish their duty to another person, dispose of the interest or cease their role with the RSE licensee ?	

COMPONENT	YES/NO
<p>(d) Does the Policy have a provision for the retention or otherwise of gifts and hospitality above a certain value including the cumulative amount arising from a series of low-value amounts?</p> <p>⚠️ The Policy ought to have a provision requiring that gifts above a certain value are required to be returned.</p>	
<p>(e) Does the Policy include a process for undertaking regular and thorough enquiries to identify all Conflicts arising from:</p> <ul style="list-style-type: none"> i. the RSE licensee’s relationship; ii. or the relationship of a Responsible Person or employee; <p>with an existing or prospective service provider or adviser including those Conflicts that have the potential to affect the service provider’s performance in respect of the obligations undertaken for the RSE licensee’s business operations?</p>	
<p>(f) Do such enquiries take place:</p> <ul style="list-style-type: none"> i. when establishing the relationship? and ii. on a regular basis, no less frequently than annually? 	
<p>(g) In accordance with APRA’s expectations, does the Policy demonstrate consideration of:</p> <ul style="list-style-type: none"> i. the relationship between the register of Relevant interests and other gifts or interests policies that apply to all employees within the RSE licensee’s business operations? ii. the processes for reporting additional Relevant duties and Relevant interests that may not have been disclosed according to the Policy? 	

If the answer is “NO” to any of the questions in the checklist above, the **RSE licensee** should reconsider the issue and address the requirements necessary so as to satisfy itself that it can provide a positive response to the issue.

4. Dictionary

Associate has the meaning given to it in Division 2 of Part 1.2 of the **Corporations Act**, as amended by section 12 of the **SIS Act**, and includes a corporate trustee's directors, secretary, related body corporates and directors and secretaries of related bodies corporate.

Beneficiaries means those persons whom the **RSE licensee** has determined are its **Beneficiaries** for the purposes of managing **Conflicts** including prioritising the interests of these **Beneficiaries**. As discussed in section 2.3, the meaning will encompass the section 10 **SIS Act** definition.

Conflict means a conflict:

- (a) between the duties owed by an **RSE licensee**, or a **Responsible Person** of an **RSE licensee**, to **Beneficiaries** and the duties owed by them to any other person or entity;
- (b) between the interests of **Beneficiaries** and the duties owed by an **RSE licensee**, or a **Responsible Person** of the **RSE licensee**, to any other person or entity;
- (c) between an interest of an **RSE licensee**, an **Associate** of an **RSE licensee** or a **Responsible Person** or an employee of an **RSE licensee**, and the **RSE licensee's** duties to **Beneficiaries**; and
- (d) between an interest of an **RSE licensee**, an **Associate** of an **RSE licensee** or a **Responsible Person** or an employee of an **RSE licensee** and the interests of **Beneficiaries**.

Conflicts Covenants means the covenants that are included in the governing rules of a registrable superannuation entity as set out in s52(2)(d) and s52A(2)(d) of the **SIS Act**, requiring the trustee and its directors to give appropriate priority to the duties to and the interests of the **Beneficiaries**, to ensure the interests of the **Beneficiaries** are not adversely affected in the management of **Conflicts** of duty or interest, and to ensure the duties to the **Beneficiaries** are met despite those **Conflicts**. The wording of the covenants is as follows:

s52(2)(d) For the trustee, where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:

- (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and*
- (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and*
- (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and*
- (iv) to comply with the prudential standards in relation to conflicts;*

s52A(2)(d) For each director of the corporate trustee, where there is a conflict between the duties of the director to the beneficiaries, or the interests of the beneficiaries, and the duties of the director to any other person or the interests of the director, the corporate trustee or an associate of the director or corporate trustee:

- (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and*
- (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and*
- (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and*
- (iv) to comply with the prudential standards in relation to conflicts.*

Conflicts Management Framework or **Framework** means the totality of all the systems (including record management systems), structures, policies, processes, controls and people the **RSE licensee** has put in place in order to identify, assess, regulate, manage and monitor all **Conflicts** of interest and duty.

Conflicts Management Policy or **Policy** means the policy as described in paragraph 18 of SPS 521 which will generally require the **RSE licensee** to identify all **Conflicts** of interest, to avoid those identified if possible and to manage them if it is not possible to avoid them and is considered further in section 3 of this Toolkit.


Corporations Act means *Corporations Act 2001*.

Registrable superannuation entity (RSE) means:

- (a) a regulated superannuation fund; or
- (b) an approved deposit fund; or
- (c) a pooled superannuation trust;

but not a self-managed superannuation fund.

Related body corporate has the meaning in accordance with s 50 of the **Corporations Act**.

Relevant duty means any duty owed by the **RSE licensee**, or a **Responsible Person** of the **RSE licensee**, to **Beneficiaries** or to any other person that the **RSE licensee** has determined to be relevant in accordance with paragraph 16 of SPS 521 because it is a duty that might reasonably be considered to have the potential to have a significant impact on the capacity of the **RSE licensee**, the associate of the **RSE licensee** or the **Responsible Person** with the **Relevant duty**, to act in a manner that is consistent with the best interests of **Beneficiaries**.  An **RSE licensee** may determine that a duty or interest held by a person other than a **Responsible Person** is relevant to the capacity of that person to undertake their role in a manner that is consistent with the interests of **Beneficiaries**. Where this is the case, APRA expects the **Framework** would cover those duties and interests.

Relevant interest means any interest, gift, emolument or benefit, whether pecuniary or non-pecuniary, directly or indirectly held by the **RSE licensee**, the associate of the **RSE licensee** or the **Responsible Person** of the **RSE licensee** that the **RSE licensee** has determined to be relevant in accordance with paragraph 16 of SPS 521 because it is an interest that might reasonably be considered to have the potential to have a significant impact on the capacity of the **RSE licensee**, the associate of the **RSE licensee** or the **Responsible Person** holding the relevant interest, to act in a manner that is consistent with the best interests of **Beneficiaries**.

Responsible Person means as defined in SPS 520 Fit and Proper and further considered in **AIST's Fit and Proper Toolkit**.

RSE Actuary means as defined in section 10(1) of the SIS Act.

RSE Auditor means as defined in section 10(1) of the SIS Act.

RSE licensee means an entity that holds an RSE licence granted under s29D of the SIS Act. It is used interchangeably in this Toolkit with **trustee**.

RSE licensee's business operations means, as defined in SPS 521, all activities as an **RSE licensee** (including the activities of each **RSE** of which it is the licensee), and all other activities of the **RSE licensee** to the extent that they are relevant to, or may impact on, its activities as an **RSE licensee**.

SIS Act means the *Superannuation Industry (Supervision) Act 1993*. Provisions relevant to Prudential Standard SPS 521 and this Toolkit are section 29QB and Part 6, sections 51 – 60A, particularly:

- (a) the **Conflicts Covenants** in subsections 52(2)(d) and 52A(2)(d); and
- (b) the prescriptive prohibitions for governing rules in section 58 and section 58A.

SIS Regs means the *Superannuation Industry (Supervision) Regulations 1994*. Provisions relevant to Prudential Standard SPS 521 and this Toolkit are:

- (a) regulation 2.38 and
- (b) regulation 4.02A.

Prepared by:



AUSTRALIAN INSTITUTE OF SUPERANNUATION TRUSTEES

Ground Floor, 215 Spring Street, Melbourne VIC 3000

www.aist.asn.au



MILLS OAKLEY LAWYERS

Melbourne

Level 6, 530 Collins Street, Melbourne VIC 3000

Sydney

Level 12, 400 George Street, Sydney NSW 2000

Brisbane

Level 14, 145 Ann Street, Brisbane QLD 4000

www.millsoakley.com.au