AIST submission

Response to Treasury Exposure Draft - Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012

May 2012

Australian Institute of Superannuation Trustees

Background

The Government has announced its decisions on key design aspects of its Stronger Super reforms. A key component of these reforms is the creation of a new simple, cost-effective default superannuation product called MySuper.

AIST had representation on each group set up by the Government to consult on each element of the Stronger Super reforms, having previously made submissions and representations to the Superannuation System Review. This included the MySuper group.

This proposed Bill is the third tranche of legislation implementing the Government's MySuper and governance reforms as part of Stronger Super. The first tranche of legislation was introduced to the Parliament on 3 November 2011 as the Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011 (the MySuper Core Provisions Bill). The second tranche of legislation was introduced to the Parliament on 16 February 2012 as the Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (the Trustee Obligations and Prudential Standards Bill). Both bills are presently before the House of Representatives and have been the subject of committee inquiries.

AIST is supportive of the Government's superannuation reform agenda, and is concerned to ensure that it is implemented in a practical, balanced and consistent way; fundamentally focused on delivering optimal retirement savings for all Australians. In part, AIST does this by testing legislative proposals for MySuper against the Government's core objectives of 'simplicity, transparency and comparability'.

In its submission on the first tranche of MySuper legislation, AIST strongly argued for the trustee duties relating to MySuper products to be defined at the earliest opportunity, and was pleased that this was addressed in the second tranche of the legislation.

AIST welcomes the opportunity to provide a submission on the exposure draft.

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.

Contact

Fiona Reynolds, CEO 03 8677 3800

David Haynes, Project Director 03 8677 3800

Executive summary

This submission identifies the key issues that should be further addressed in the third tranche of MySuper legislation before it is tabled in Parliament.

Overall, this tranche brings together most of the outstanding threads required for the creation of a MySuper framework. Importantly, it puts the greatest emphasis upon the generic MySuper product, and puts (generally) clear and tight conditions around alternate arrangements. Both the exposure draft and the draft APRA *Prudential Standard SPS 410 MySuper Transition* are at an iterative stage, and each document has evidently been designed to support the other.

The third tranche has brought MySuper closer to the original idea of simple, transparent, and comparable; and has limited the opportunity or attractiveness of alternate arrangements.

Some further measures along with the draft APRA prudential standard on MySuper Transition will have the effect on reducing the capacity and impact of funds transferring MySuper members to more expensive MySuper products (possibly without their knowledge or consent) and ERFs, but they will not eliminate the problem. The Government has committed to considering measures to address "flipping", and these require further development and discussion with industry.

While generally supportive of the measures in the proposed legislation, AIST recommends that amendments be made to address the following matters:

- Tightening of performance fee measures to ensure greater alignment.
- Allowing intrafund advice on moving from a fund's accumulation product to their retirement product.
- Allowing funds to provide general product advice to employers.
- Prohibiting higher fee payments to related parties than non-related parties.
- Allowing a cap on asset-based administration fees.
- Allowing self-insurance by government funds, and permitting "own occupation" insurance arrangements.
- Synchronised disclosure requirements for all superannuation products.
- Remuneration disclosure more closely aligned with Corporations Act requirements.
- Disclosure of portfolio holdings 90 days after each 30 June and 31 December.
- No penalties involving imprisonment, plus an initial 1 year grace period.
- Allowing defined benefit funds to be nominated as a default fund in awards.
- Including a duty for ERF trustees to reconnect their members with their other superannuation.

Body of submission

1.1 Chapter 1: Fees, costs and intrafund advice

1.1.1 "Conflicted remuneration"

Funds will be required to give a "no commission" undertaking under the proposed legislation, with this being reflected in the draft MySuper authorisation form released by APRA. The exposure draft is clear that the prohibition will operate on a wide basis, and includes a prohibition on commissions being paid on insurance.

The breadth of the prohibition should be better reflected in the explanatory memorandum. Paragraph 1.6 and 1.13 refer to "financial adviser" conflicts only, and this should be extended to avoid confusion.

The exposure draft appears to extend the prohibition of conflicted remuneration on insurance payments to include brokerage on group life insurance arrangements. While the payment for group life insurance can be structured in various, apparently similar ways, AIST supports this outcome as it is consistent with a clear and unambiguous prohibition on conflicted remuneration.

Overall, the "no commissions" outcome and the way in which it is being implemented are strongly supported by AIST.

There was an error in paragraph 1.2 of the explanatory memorandum, where it was incorrectly noted that RSE licensees needed to design MySuper products so that they included commission payments, but this appears to have been corrected on an updated version of the explanatory memorandum on the Treasury website.

1.1.2 Performance-based fees

The five criteria in the legislation are a useful distillation of the eleven criteria suggested by the Cooper Review. The criteria do seem to encourage alignment between fee bases and members' interests while being relatively simple and principles-based.

It is noted that where a fund has agreed to a performance-based fee, and where any of the investment is in a MySuper product, then the new criteria will apply to the whole of the mandate.

Each of the criteria has merit, although the details of some criteria require clarification (the numbering below corresponds to each of the five criteria):

1. An investment manager is required to put their fees at risk, in comparison with the fee structure that would otherwise apply. In other words, a performance fee cannot be put on top of an existing fee.

However, these criteria might not be available in all cases, such as when an investment manager has only ever offered fees on a performance basis. The legislation should both recognise that this will not be unusual (and hence not an absolute criteria), and also guard against contrived arrangements.

Where an investment manager does not have an alternate fee structure for a particular investment product, it is recommended the exposure draft be amended to require an investment manager to demonstrate that their fee structure meets this criteria by reference to other investment products comprised of similar assets, but without a performance fee.

2. As the measurement period for performance fees should be appropriate to the characteristics of the investment, the explanatory memorandum notes that bonds could be measured over a shorter period and infrastructure over a longer period. This is appropriate.

   However, the explanatory memorandum should note that longer measurement periods are more in alignment with the long-term nature of super. The requirement to have 10 year rolling net return targets provides a better measure of performance over a market cycle.

   The exposure draft should explicitly require a measurement period of three years, while noting that longer measurement periods are appropriate for some asset classes. Where a MySuper product was created from a renamed default option, the performance of the previous option should be deemed as part of a longer reporting period.

3. AIST agrees that performance fees should only be based on comparisons with similar investments with similar levels of risk.

4. AIST supports the criteria requiring performance fees to be determined on an after-tax and after-fees basis.

   However, the explanatory memorandum should note that there are unresolved issues about choosing the appropriate methodology, and indicate that the Government will be addressing this issue over a specified period, in consultation with the industry.

   The proposed legislation itself recognises the equivocation about the measurement of after-tax returns, as after tax returns are only required “where possible” (proposed in ss 29VC(6)). In order to ensure that the unresolved issues about after-tax measurement are addressed, the words “where possible” should be removed. If this does not occur, it is likely that these issues will not be resolved.

5. Performance fees must include disincentives for poor performance. While clawback provisions and high water mark provisions are noted in the explanatory memorandum (and supported), a fund’s ability to terminate a mandate at short notice may qualify as a disincentive, unless this is explicitly excluded. AIST seeks such exclusion in order to ensure

that other disincentives, including quantitative disincentives, are developed and put in place.

AIST recommends that the performance fee criteria be amended to require:

- ***all investment managers using performance fees be required to show how they have put their fees at risk;***
- ***a minimum performance measurement period of three years; and***
- ***publication of after-tax (as well as after-fee) performance in all cases***

Some may argue that the criteria will reduce the range of investment opportunities available for funds, but it is noted the legislation allows a fund the ability to show that other bases (including non-compliant performance fees) "promote the financial interests of members" and are thus available. However, it is also noted that a non-compliant basis for performance fees cannot be used where another manager offers access to the same assets, and can meet the performance fee criteria.

AIST is concerned that this exemption is not abused, or contributes to an uneven playing field. The example foreshadowed in paragraph 1.38 of the explanatory memorandum for "particular assets sold through international markets" should only be available on an exceptional circumstances basis. The explanatory memorandum should note that APRA will monitor the operation of this exclusion to ensure that it is operating in a balanced manner, consistent with the intention of the legislation.

Many investment management agreements have an open-ended term, and so the limitation of these requirements to agreements executed after 1 July 2013 mean that there will be a long tail of arrangements that do not meet the criteria.

AIST does not support limiting the introduction of these criteria to arrangements entered into after 1 July 2013, without any further requirement for implementation.

AIST proposes that performance fee requirements should be phased in for existing contracts over three years to ensure implementation of these measures within a reasonable and finite period, whilst minimising disruption to investment markets and any disadvantage to members resulting from a required transition from one manager to another to meet criteria. This could be done by requiring the regular (generally annual) review of investment managers to include the phase-out of non-compliant performance fees over the transition period.

AIST recommends that the performance fee criteria become mandatory for all MySuper related investment management agreements by 1 July 2016.

1.1.3 Intrafund advice

1.1.3.1 Scope

The intrafund advice provisions are principally about the rule under which advice can be charged across the whole of a fund's membership, and less about the nature of the advice.

However, the scope for providing intrafund advice in the exposure draft is different and less than that identified by Minister Shorten in his announcement of 8 December 2011 on intrafund advice. AIST seeks that the exposure draft be amended to give effect to the Government's policy position on intrafund advice.

In particular, the Minister's prohibition on providing switching advice as intrafund advice was qualified "*to the extent the advice relates to moving the member from an accumulation product into a retirement product offered by the same registrable superannuation entity*". Subsection 99F(2) of the exposure draft should be amended to incorporate this exemption.

AIST recommends that advice about moving from an accumulation product into a retirement product offered by the same registrable superannuation entity be allowable as intrafund advice.

1.1.3.2 Provision of general advice to employers

The prohibition on subsidising the cost of providing advice to employers needs to be clarified. On the face of it, the prohibition appears to cover all financial product advice, and would stop funds from employing staff who provide assistance to employers (e.g., Business Development Managers and Employer Services Managers).

The provision of general financial product advice to employers is a reasonable activity undertaken by super funds, and should be allowable. Furthermore, this prohibition could result in funds being unable to maintain Policy Committees (as defined by the SIS Act), or at least not be able to resource them.

AIST recommends that the provision be clarified to ensure that funds will be able to provide a generalised support service that is equally accessible and promoted to all employers making contributions to the fund.

S766B of the Corporations Act defines financial product advice which includes general and personal advice. The Act provides in ss766B(6) and (7) that a response to a request for information regarding cost returns is not necessarily advice nor a recommendation.

There should be an amendment to the proposed s99D in the General Fee Rules that states that "The provision of general advice to employers to assist them meet their obligations found in the SG Act is not financial product advice that would contravene s99D." or words to that effect. AIST suggests that this would be a more acceptable option than amending s766B.

AIST recommends that super funds be permitted to use their resources to provide general financial product advice to employers.

1.1.4 General fee rules

Under the MySuper rules, allowable fee types are dollar-based, asset-based and hybrid, with tiered structures not permitted. Dollar-based fees can favour high account balance members, while asset based fees can favour low account balance members. A cap on asset-based administration fees can provide a balance between the two.

AIST recommends that specific allowance should be provided for a cap on asset-based administration fees, where the cap is demonstrably set at a level that is at or beyond the reasonable administration costs for a capped account. The absence of a cap could result in some members paying lower administration fees for essentially the same product in Choice product than in a MySuper product. Furthermore, there should be an overriding member's best interest test applied to fee structures to ensure that there is a fair and reasonable allocation of fees across members of a fund.

AIST recommends that a cap on asset-based administration fees be permitted under the general fee rules.

AIST is also concerned to ensure that there be a clear and simple to administer requirement for all fees payable to a related party for services be on the same basis as fees that would be paid to non-related parties for the same services.

Specifically, paying higher fees to related parties should be expressly prohibited. The payment of higher fees for no justifiable purpose results in the siphoning-off of benefits from members. This requirement could be included in either the exposure draft or in an APRA prudential standard on outsourcing.

AIST recommends a prohibition on paying higher fees to related parties than non-related parties.

A lifecycle investment option is allowable under MySuper, provided (amongst other things) that the same investment fee is charged to all members choosing this option. Allowing differential pricing would, on the one hand, remove a pillar on the comparability of investment fees, while on the other hand, it would remove the cross-subsidisation of younger members by older members that results from a fixed fee structure. It is also unclear the basis upon which the investment returns of lifecycle options will be reported to APRA.

1.1.5 Administration fee discounts

The proposed legislation requires that administrative fee discounts must relate to actual administrative efficiencies to prevent cross subsidisation. This is a position strongly advocated by AIST, and will reduce the capacity of funds to transfer members to more expensive MySuper products, that is, "flipping".

The provisions in the exposure draft will need to be supported by the disclosure of these arrangements and associated fees to APRA, and the capacity of APRA to be able to satisfy itself as to the relationship between the discount and administrative efficiencies.

AIST recommends that the explanatory memorandum foreshadow that guidelines will be produced on the required relationship between administration fee discounts and actual administrative efficiencies.

1.2 Chapter 2: Insurance

Minimum levels of insurance are not prescribed in the proposed legislation, as agreed in the Stronger Super consultations. AIST expects that APRA will apply a reasonableness test for minimum levels, and this should be noted in the explanatory memorandum.

The ability to have compulsory insurance where funds cannot otherwise obtain insurance (or obtain at a reasonable price) is allowed, as advocated by AIST. The explanatory memorandum should give a detailed example of this (e.g., workers in a high-risk industry).

Self-insurance (other than for existing defined benefit funds) is to be prohibited. The exemption of defined benefit is one that was strongly advocated by AIST.

However, AIST advocates an additional exemption – for all public sector funds (not just for exempt schemes and defined benefit schemes). This is on the grounds that public sector schemes are effectively underwritten by a government and have provided cost-effective insurance for their members with little or no self-insurance risk.

It is noted that the prohibition on self-insurance does not prevent a fund from making an insurance payment in circumstances where the fund's insurer has declined a claim, in whole or in part. However, out of an abundance of caution, the explanatory memorandum should clarify that this is the case on the basis that the payment is subject to a materiality test.

"Own occupation" insurance is to be prohibited to the extent that it is inconsistent with conditions of release. While this is not a position supported by AIST, tax rulings on deductibility and strong governmental resistance to altering conditions of release have made the maintenance of own occupation arrangements increasingly difficult.

Notwithstanding this, AIST continues to argue that insurance on this basis provides a real benefit to members, and that conditions of release should be amended to allow the release of benefits to members paid out under own occupation policies.

In the event that the Government persists with this prohibition, AIST recommends that existing policies providing own occupation cover be allowed to continue for as long as a super funds obtains insurance cover from their existing insurer providing this cover.

AIST recommends that:

- ***self-insurance be permitted for super funds where it is underwritten by a government: and***
- ***that "own occupation" insurance policies be permitted within superannuation.***

1.3 Chapter 3: Collection and disclosure of information

AIST is particularly concerned about the structure and operation of the penalty regime in relation to each section of this chapter, and so has addressed these concerns collectively after the specific comments on each section.

1.3.1 Standardised methodology for disclosure of fund information

Overall, there will be a greatly increased disclosure regime with greater specificity upon requirements.

The proposed Standardised Risk Measure that will be incorporated into disclosure requirements and the product dashboard is deficient and should not be set in concrete by this exposure draft and associated measures. The proposed FSC/ASFA measure uses volatility as a proxy for risk, does not measure other forms of risk, and does not measure severity of market risk. These limitations are recognised by the proposers of this measure.

If time constraints limit the capacity to include any other risk measure into the metrics displayed on the product dashboard, the Standardised Risk Measure should only be implemented on an interim basis, and the explanatory memorandum should clearly identify a process and a timetable (of not more than 18 months from 1 July 2013) for implementing a more fit-for-purpose risk measure.

APRA's increased data collection, particularly look-through measures, is supported.

The explanatory memorandum should be amended to clarify that publication on a "product by product" basis includes not only large employer MySuper products but also for white-label products where there may be different administration fee structures in place.

The publication requirements should also be extended to include accrued default amounts that are not transferred to an RSE's MySuper product at or near the time MySuper authorisation is obtained. Large numbers of accounts may be in this category until 1 July 2017, and so disclosure of information about them is in the public interest.

AIST supports the disclosure of MySuper comparisons on a product dashboard (especially publication of MySuper net returns based on information provided to APRA). The timetable for implementation of the product dashboard should be the same for all MySuper products (i.e., not delayed for some). This should be promoted as an important feature of the MySuper regime at a time when there will be enhanced public interest in the reformed super system.

In order for funds to be able to meet this deadline, and be compliant from 1 July, it is critically important that regulations and other guidelines on the detail and format for product dashboards be issued in both draft and then final form very soon after the passage of this legislation.

Similarly, proposed subsection 1017BA(2) and (3) should require publication of rolling 10 year net investment returns and return targets, including periods preceding the implementation of the MySuper regime. In instances, where the MySuper product is effectively a renaming of an existing default investment option, the returns and targets for that option should be the basis of the published information. In other cases, it should be on such other proxy basis that may be approved by APRA.

In addition, the same subsection should also specify that the average amounts of fees should be published on both a percentage and a dollar basis.

AIST recommends that:

- ***separate disclosure be required for all Choice products, MySuper products (including white-label and large employer and other products holding accrued default amounts;***
- ***disclosure requirements apply to all products from the same date (1 July 2013);***
- ***average fees be disclosed on a percentage and dollar basis; and***
- ***the FSC/ASFA Standardised Risk Measure should not be enshrined in law.***

1.3.2 Remuneration disclosure

Disclosure is required for each director and other executive officers of the RSE, with the explanatory memorandum noting that the details of these arrangements will be modelled on the existing requirements under the Corporations Act for listed companies.

However, this statement is possibly not internally consistent, and should be modified to provide consistency. The SIS Act defines executive officer, in relation to a body corporate as "*a person, by whatever name called and whether or not a director of the body, who is concerned, or takes part, in the management of the body*". In contrast, the Corporation Act requires disclosure of remuneration for "key management personnel", being those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly.

AIST recommends that the remuneration requirements in the exposure draft be amended to bring it in alignment with the requirements of the Corporations Act, in particular by the requirement of remuneration for key management personnel.

The explanatory memorandum should also be expanded to foreshadow a requirement to specify disclosing information on how the remuneration is generated (e.g., base salary, bonuses and incentives, and apportionment of salaries from a parent company) and the proportion of each component.

The subsequent regulations should require funds to disclose trustee and executive officer remuneration on their website and in their annual report. Directors' disclosure should provide information on:

- Remuneration in full, including how the remuneration is generated, whether that be through meeting attendance, chairing responsibility, committee fees or apportionment of salaries from a parent company.
- How much each component is and whom it is paid to.
- Disclosure of remuneration payments made in relation to any boards a director may sit on as a representative of the superannuation fund.
- Board and committee meeting attendance of directors
- Details of each director, including name, who they are appointed by and how, experience, number of years on the board.
- Whether their remuneration is paid directly to them or to another organisation, and where not paid from the trust, how the director is remunerated
- Where an individual is paid to be on a fund committee, but is not a director, the committee member's remuneration should be disclosed as should details of attendance at the committee meetings.

The disclosure should also be on a look through basis (e.g., disclosure should not be clouded through management service agreements), and so the provision should be amended to cover "remuneration for *services to* the trustee" as well as remuneration *from* the trust.

AIST recommends that remuneration disclosure be supplemented by a range of other meaningful information about directors, key management personnel, and the basis of their remuneration and appointment in order to further improve transparency and governance in the superannuation industry.

1.3.3 Portfolio holdings

Disclosure within 60 days of 30 June and 31 December will not necessarily be sufficient to protect confidential, business-sensitive information, or for funds to be able to completely and accurately report on portfolio holdings.

Obtaining reports on some asset classes (eg, property and infrastructure) take longer than others, and normal delay in obtain reports on more complicated assets shouldn't expose a fund to prosecution.

AIST supports disclosure within 90 days of these dates (noting that this still less than the total time recommended by the Cooper Review). We understand that ASIC has been preparing guidelines on the reporting of holdings, and that these will prescribe a 90 day requirement.

Disclosure of "look-through" (i.e., assets derived from assets) provisions is supported, provided there is a consistently applied methodology.

The explanatory memorandum notes that regulations can prescribe the format of disclosure. This should be prescribed in ASIC guidance rather than regulations in order to promote a more iterative and better disclosure outcome.

AIST recommends disclosure of portfolio holdings 90 days of each 30 June and 31 December, with details prescribed in ASIC guidance rather than regulation.

1.3.4 Penalty regime

Each section on product dashboard, portfolio holdings disclosure and the obligation to provide information to trustee for disclosure has three or four separate offences. These include both offences and strict liability offences, with many in the former category having no available defences. The offences include failure to publish; knowingly publishing defective information; publishing defective information whether knowingly or not.

Attached to this submission is Appendix 1: a table detailing the penalty provisions in the exposure draft.

The penalties set out in schedule 3 (p 36) all have an element of possible incarceration. AIST submits that this is not this is not necessary or appropriate.

AIST recommends that financial penalties be provided for all offences but that terms of imprisonment not be provided.

Not keeping a product dashboard accurate and up-to-date will be a strict liability offence (as it is for Product Disclosure Statements). The proposed legislation is not prescriptive about what constitutes up-to-date, and does not indicate how long trustees have from the receipt of information to the time it is published on the dashboard.

AIST recommends that the explanatory memorandum (and subsequent APRA documentation) provide guidance for trustees around "up-to-date" requirements, with recognition that there will be different up-to-date requirements for different parts of the dashboard.

While the penalty regime is similar to that applying to the publication of Product Disclosure Statements, the cumulative and continual nature of the disclosure arrangements mean that super funds are in a new and enhanced disclosure regime.

While super funds will be implementing the new disclosure arrangements in good faith, they are nonetheless reasonably concerned about the penalty regime, especially about the possibility of committing an offence in the year following the penalty regime becoming operative.

AIST recommends that the exposure draft explicitly provide for a grace period of 12 months from the operative dates before offence provisions are applied.

Schedule 3, item 12 of the exposure draft proposes offences relating to the obligations to publish product dashboards (s.1021NA), superannuation investment information (s.1021NB) and providing information relating to the assets of RSEs (s.1021NC). It appears that a different approach to the

headings and sub-headings was employed in s.1021NC, and, for clarity, these headings should be brought into alignment.

AIST recommends that the headings and subheadings in subsections relating to offences be aligned with each other.

1.4 Chapter 4: Modern awards and enterprise agreements

AIST supports the *general requirement* that only MySuper products (with exemptions for defined benefit and exempt public sector funds) can be nominated in modern awards.

However, the provisions requiring enterprise agreements to nominate a MySuper product, a defined benefit fund or an exempt public sector fund as the default fund (other than the exemptions in subsection 12A(1) and 32C(6), will require corporate super funds to seek a MySuper authorisation.

The proposed amendment of the Fair Work Act to allow an enterprise agreement to nominate a defined benefit fund or an exempt public sector scheme – as well as a MySuper product – are supported. However, the Fair Work Act should be similarly amended to allow a modern award to nominate a defined benefit fund – as well as a MySuper product or an exempt public sector scheme.

Numerous defined benefit funds are listed in awards, including modern awards, and their ongoing position within the award framework is an important element in the superannuation system. An example of this is the tertiary industry fund, UniSuper, which contains a significant defined benefit division. UniSuper is listed as a default fund in the *Higher Education Industry – Academic Staff – Award 2010* and the *Higher Education Industry – General Staff – Award 2010*. Both of these awards cover numerous academic institutions. Another example covering multiple employers is the *Local Government Industry Award 2010* which nominates Local Super, Vision Super, LGSP (WA), and LGsuper as default funds.

It is further noted that enterprise house awards are yet to go through the award modernisation process and that these also often nominate defined benefit funds are the default fund. This is a situation that should be allowed to continue as they operate efficiently to manage the superannuation benefits of the workers covered by these awards.

AIST recommends that a modern award (as well as an enterprise agreement) be permitted to nominate a defined benefit fund as a default fund without the requirement to offer a MySuper product.

Another area where confusion may arise is in circumstances where a superannuation contribution made, pursuant to an enterprise bargaining agreement, is deemed to have been made in compliance with the choice of fund requirements (paragraph 4.34 of the explanatory memorandum). The explanatory memorandum should clarify that while such a contribution does not *have to be* made to a MySuper product, it could nonetheless be made into a MySuper product.

1.5 Chapter 5: Defined benefit members

The provisions are designed to allow defined benefit funds, including hybrid funds, to continue to operate on existing bases (i.e., accepting SG contributions) without having to offer a MySuper product. The provisions define 'defined benefit funds' on a broad basis (with regulations to clarify where necessary). Overall, the measures recognise the different position of defined benefit funds in superannuation system.

It is noted subsequent legislation will need to clarify relationship between defined benefit funds and account consolidation measures.

1.6 Chapter 6: Transition to MySuper

AIST notes and supports the indemnity provided to the trustees of super funds in transferring accrued default amounts to a MySuper product.

AIST also appreciated the clarification given in paragraph 6.12 of the explanatory memorandum about the identification of amounts to be transferred to a MySuper product. This provides significant assistance to super funds for the preparation and implementation of the transfer.

AIST disagrees with the assertion in paragraph 6.17 that a transitional period extending to 1 July 2017 is necessary to "*allow RSE licensees to prepare for and manage the transfer of accrued default amounts from existing superannuation arrangements to the new MySuper environment*."

The comment is disingenuous and wrong, and inconsistent with the draft APRA Prudential Standard on MySuper Transition. The draft standard anticipates and encourages the early transfer of accrued default balances to a MySuper product. Whatever its purpose, the transition period is far too long to have this purpose, and the statement should be deleted.

The meaning of paragraph 6.41 of the explanatory memorandum is not clear, and requires clarification. In particular, the comment that "*the effect of consolidation would not be to cancel insurance as premiums and coverage would cease when a member leaves*" is confusing. The insurance of a member leaving a fund as result of consolidation does appear to have their insurance cancelled as a result of the consolidation.

1.7 Chapter 7: Eligible Rollover Funds

While the measures in the exposure draft raise ERF trustee obligations to MySuper levels, and variously imply a responsibility to "reconnect amounts with members", this has not been made explicit in the proposed legislation. Given the specific role of ERFs as temporary repositories for lost super monies, the requirement to have a "reconnecting" role should be made explicit.

There have been numerous previous superannuation reforms that were expected to reduce the incidence of lost super accounts. These include the increasing ability to use Tax File Numbers within superannuation, Choice of Fund, Simpler Super and the transfer of lost, inactive accounts of

less than $200 to the ATO. Notwithstanding this, the value of benefits reported on the Lost Monies Register has increased to $20 billion.

While the forthcoming SuperStream account consolidation measures may reduce unnecessary account proliferation and numbers of lost super accounts, this is not guaranteed – nor is the legislation to give effect to these measures.

AIST recommends that the exposure draft require the trustees of Eligible Rollover Funds to have the explicit obligation to reconnect benefits in their fund with the active accounts of their members.

The proposed legislation does not address member protection rules either for ERFs or other superannuation funds. AIST seeks clarification that the forthcoming legislation on inter fund account consolidation clarify that member protection requirements will be abolished in parallel with the first stage of inter fund auto-consolidation.

2 Appendix 1: Penalty provisions in Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012

Section	Type of offence	Nature of offence	Defences	Penalty
1021NA Corporations Act	Failure by trustee to publish dashboard	Offence	None	100 penalty units; 2 years jail
	Trustee knowingly publishes defective dashboard: not up-to-date	Offence	None	200 penalty units; 5 years jail
	Trustee knowingly publishes defective dashboard: misleading and deceptive	Offence	None	200 penalty units; 5 years jail
	Trustee knowingly publishes defective dashboard: omission	Offence	Trustee took reasonable steps to ensure there would not be an omission; or, the information was omitted because it was not up-to-date and trustee took reasonable steps to obtain up-to-date information; or, the information was omitted because it would have been misleading or deceptive and trustee took reasonable steps to obtain information that would not have been misleading or deceptive.	200 penalty units; 5 years jail
	Trustee known or unknowingly publishes defective dashboard: not up-to-date	Strict liability offence	Trustee took reasonable steps to ensure was up-to-date	100 penalty units; 2 years jail
	Trustee known or	Strict liability	Trustee took reasonable steps to	100 penalty units;

	unknowingly publishes defective dashboard: misleading and deceptive	offence	ensure would not be misleading or deceptive	2 years jail
	Trustee known or unknowingly publishes defective dashboard: omission	Strict liability offence	Trustee took reasonable steps to ensure there would not be an omission; or, the information was omitted because it was not up-to-date and trustee took reasonable steps to obtain up-to-date information; or, the information was omitted because it would have been misleading or deceptive and trustee took reasonable steps to obtain information that would not have been misleading or deceptive.	100 penalty units; 2 years jail
1021NB Corporations Act	Failure by trustee to publish portfolio holdings	Offence	Information would have been published but for the person required to provide the information to the trustee did not provide the information as required; or, the trustee was unable to obtain the information after taking reasonable steps.	100 penalty units; 2 years jail
	Trustee knowingly publishes defective portfolio holdings: misleading and deceptive	Offence	None	200 penalty units; 5 years jail
	Trustee knowingly publishes defective portfolio holdings: omission	Offence	Trustee took reasonable steps to ensure that there would be no omission; or, there was an omission because the person required to provide the information to the trustee did not provide the information as required to the trustee was unable to obtain the information after taking reasonable steps; or,	200 penalty units; 5 years jail

			the information was omitted because it would have been misleading or deceptive and the trustee took reasonable steps to obtain information that would not have been misleading or deceptive.	
	Trustee known or unknowingly publishes defective portfolio holdings: misleading and deceptive	Strict liability offence	Trustee took reasonable steps to ensure that the information published would not be misleading or deceptive.	100 penalty units; 2 years jail
	Trustee known or unknowingly publishes defective portfolio holdings: omission	Strict liability offence	Trustee took reasonable steps to ensure that there would be no omission; or, there was an omission because the person required to provide the information to the trustee did not provide the information as required to the trustee was unable to obtain the information after taking reasonable steps; or, the information was omitted because it would have been misleading or deceptive and the trustee took reasonable steps to obtain information that would not have been misleading or deceptive.	100 penalty units; 2 years jail
1021NC Corporations Act	Failure by third party to notify the trustee	Offence	None	100 penalty units; 2 years jail
	Failure by third party to provide information to the trustee	Offence	None	100 penalty units; 2 years jail
	Third party knowingly provides defective information to trustee: misleading	Offence	None	200 penalty units; 5 years jail

	and deceptive			
	Third party knowingly provides defective information to trustee: omission	Offence	The person took reasonable steps to avoid the omission; or, the information was omitted because it would have been misleading or deceptive and the person took reasonable steps to obtain information that would not be misleading or deceptive.	200 penalty units; 5 years jail
	Third party provides defective information to trustee: misleading and deceptive	Strict Liability offence	The person took reasonable steps to ensure that the information would not be misleading or deceptive.	100 penalty units; 2 years jail
	Third party provides defective information to trustee: omission	Strict liability offence	The person took reasonable steps to avoid the omission; or, the information was omitted because it would have been misleading or deceptive and the person took reasonable steps to obtain information that would not be misleading or deceptive.	100 penalty units; 2 years jail
29QB SIS Act	Failure by trustee to disclose remuneration	Strict liability offence	None	50 penalty units