

2 October 2017

Mr Alan Raine  
Acting Secretary  
Senate Standing Committees on Economics  
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Parliament House  
Canberra ACT 2600  
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Dear Mr Raine

Thank you for the opportunity to comment on the Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017.

We have concerns with the definition of 'independent' which potentially gives rise to anomalous outcomes whereby an (otherwise) independent director could unnecessarily lose their independence.

By way of background, UniSuper has eleven trustee directors, comprising three independent directors (including the independent Chair), four member representatives and four employer representatives. We believe it is important for boards to have the right mix of skills, talent and experience to deliver the right outcomes for members. Independent directors therefore have an important role to play. Our organisation and our members have benefited from the particular expertise we have on our board that might not have been possible under a traditional representative model. The independent directors on the UniSuper board have backgrounds as executives and directors of significant funds and wealth management businesses.

The definition of 'independent' in this Bill, however, would exclude any director who, among other things, is or was a director of:

- any related entity at any time in the preceding 3 years; or
- any entity that is or has been in a business relationship with the RSE licensee at any time in the preceding 3 years.

This may be logical in a situation where the RSE director was also a director of an upstream entity (i.e. an entity that owns or controls the RSE licensee), because the RSE director could have a conflict of interest in making decisions which, say, increase the dividends which can be paid by the RSE licensee to its owner or controller, at the expense of members of the fund.

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It may also be logical in some situations where the RSE director was also a director of an entity in a business relationship with the RSE licensee (e.g. a service provider to the RSE licensee) because the RSE director may have a conflict of interest in making decisions concerning the remuneration paid to that service provider, at the expense of members of the fund. For example, in the archetypal paradigm, if an RSE licensee pays administration fees or investment management fees to a service provider, those fees will be borne by the members of the fund and then paid to the service provider, which will ultimately benefit the shareholders of the service provider – hence the conflict of interest for the director.

However, there is a variant of that paradigm which should be noted – in effect, ‘mutual’ structures. Some RSE licensees which ostensibly have their own employees may, in actual fact, choose to structure their arrangements such that those employees are technically employed by a downstream entity which – critically - is wholly-owned by the RSE licensee on behalf of the superannuation fund. In these cases, the employees of the downstream entity may be made available to the RSE licensee pursuant to secondment arrangements or some other form of service agreement. Further, given the technical nature of the structure, it may be that the downstream entity has the same directors as the RSE licensee. The concern here is that directors of the RSE licensee who would otherwise be regarded as ‘independent’ could lose their independence because, technically, they are also on the board of a downstream entity which is in a business relationship with the RSE licensee. This ought to be no cause for concern because there is no conflict of interest in the particular circumstance which we are describing. When acting as a director of the downstream entity, the directors will be bound to act in the best interests of the sole shareholder of that downstream entity which, in practical terms, is the superannuation fund itself. Similarly, to the extent any payments might be made to the downstream entity, those payments ultimately benefit the superannuation fund and its members, for example, through any dividends which the superannuation fund and its members receive from the downstream entity.

There is another potential anomaly worth noting, bearing in mind that it is not uncommon for RSE licensees to have their own staff. The definition of ‘independent’ in the bill also excludes directors of any employer-sponsor with more than 500 employees. This provision would seem to mean that a RSE licensee could never have more than 500 employees in its own fund, because this would give rise to a circular outcome whereby no director of the RSE licensee could ever be independent. This seems to be an anomaly and an outworking of this could be that the definition of ‘independent’ indirectly forces RSE licensees to outsource a substantial part of their functions because only those functions which could be performed with fewer than 500 staff could ever be done internally. For similar reasons, it would also seem to preclude situations where downstream entities owned by the superannuation fund have more than 500 staff within the superannuation fund.

These anomalies would impact UniSuper because many of our business functions are performed in-house by UniSuper's employees – of which there are significantly more than 500 – all of whom are technically employed by a vehicle that is wholly-owned by the superannuation fund and which thereby allows us to minimise fees and costs and to return any profits to our superannuation fund members.

We are generally recognised as being one of the first, major superannuation funds to initiate its own move towards having one-third independent directors and it would be anomalous for those independent directors to lose their independent status due to an unnecessary quirk of the legislative drafting.

We also believe that clarification is required whether the limit on 500 employees includes only current employees or whether it also includes former employees who remain members of the relevant fund.

Thank you for the opportunity to provide comments on this Bill. Should you wish to discuss these comments, I can be contacted on 03 8831 6102.

Yours faithfully

A handwritten signature in black ink that reads "Kevin O'Sullivan". The signature is written in a cursive style with a large initial 'K' and a long, sweeping underline.

Kevin O'Sullivan  
Chief Executive Officer