INDEPENDENCE IN PRACTICE: SUPERANNUATION FUND GOVERNANCE THROUGH THE EYES OF FUND DIRECTORS

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This article reports on a series of interviews with superannuation fund directors that examine how director independence is framed, viewed and operationalised in the superannuation context. The interviews highlight the interaction between structural independence rules and other familiar governance issues, such as remuneration, nomination and board tenure arrangements. The role and potential for independence to address conflicts of interest, skills and diversity issues is also discussed. The paper concludes that independence reforms such as those envisaged in recent government proposals have the potential to deal with some of the governance shortfalls present in the various sectors of the superannuation system, but only if carefully drafted and appropriately buttressed with ancillary regulation.

I INTRODUCTION

Australia has in place a highly developed and sophisticated superannuation system. A key legacy of reforms in the 1990s has been that all employees must compulsorily save for their retirement using this system. The result is that Australia's superannuation funds now hold around $2.6 trillion under management[1] on behalf of over 13.5 million individual members.[2]

The significance of these superannuation funds to individuals and the economy means that the soundness of their governance arrangements is crucial. Such

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1 Australian Prudential Regulation Authority, 'Quarterly Superannuation Performance' (Publication, December 2017) 7.

2 Australian Bureau of Statistics, 'Household Income and Wealth, Australia, 2015–16' (Publication, No 6523.0, December 2017) table 15.1.

arrangements determine how the fund is 'directed and controlled'.[3] Fund governance has been subject to considerable scrutiny in recent years. A series of government inquiries and reports have made recommendations with a view to changing existing governance arrangements.[4] A draft report issued by the Productivity Commission expressed concerns about a 'number of governance practices that raise not inconsiderable doubts about whether funds always have the best interests of members at heart'.[5] These included a failure to merge, a failure to take a clear-eyed view of the skills and capabilities on the board and inadequate measures to address related party transactions.[6] A number of recommendations, and indeed a reform package initially introduced to Parliament in 2015, coalesced around a desire to increase the numbers of independent directors serving on superannuation fund boards.[7]

A focus on independence in governance is not new. Independence reforms have garnered considerable support in the listed company context for many years. Independence in this context can be seen as having a number of different aspects, but most critically, a capacity to exercise cognitive independence from improper influences.[8] In that context, corporate governance regulation has focused on adopting definitions of independence, recommending or mandating numbers of independent directors, and enhancing supporting infrastructure to assist them in performing their role.[9]

Twice in recent years the government has introduced legislation into Parliament that would require that one third of directors or trustees of all Australian

3 This definition is borrowed from that for corporate governance adopted in the Cadbury Report: Committee on the Financial Aspects of Corporate Governance and Gee & Co Ltd, 'The Financial Aspects of Corporate Governance' (Report, 1 December 1992) para 2.5.

4 Most prominently, the Cooper Review: Super System Review, 'Part One: Overview and Recommendations' (Report, July 2010); and the Murray Report: Financial System Inquiry, 'Final Report' (November 2014).

5 Productivity Commission, 'Superannuation: Assessing Efficiency and Competitiveness' (Draft Report, April 2018) 355.

6 Ibid.

7 Superannuation Legislation Amendment (Trustee Governance) Bill 2015 (Cth) cl 86.

8 For a full analysis of the various aspects of independence see Suzanne Le Mire and George Gilligan, 'Independence and Independent Company Directors' (2013) 13 *Journal of Corporate Law Studies* 443, 446–57; M Scott Donald and Suzanne Le Mire, 'Independence and the Governance of Australian Superannuation Funds' (2016) 31 *Australian Journal of Corporate Law* 80, 81–2. See also Neil Dunbar, 'The Role and Value of Independent Directors in Modern Australian Corporate Governance' (2012) 30 *Company and Securities Law Journal* 312, 315–18.

9 See, eg, Sandra Cavaco et al, 'Independent Directors: Less Informed but Better Selected than Affiliated Board Members?' (2017) 43 *Journal of Corporate Finance* 106 and sources cited therein. Notably in the United States ('US') the requirement for independent directors for investment companies preceded the equivalent requirement for corporations generally by almost 40 years, arising as it did from the passage of the *Investment Company Act* of 1940: Roberta S Karmel, 'Is the Independent Director Model Broken?' (2014) 37 *Seattle University Law Review* 775, 779–83. In Australia, the current definitions of independence are contained in the Australian Securities Exchange's ('ASX') Corporate Governance Principles and Recommendations: Australian Securities Exchange, *Corporate Governance Principles and Recommendations* (at 27 March 2014) ('*ASX Principles*'). There is also a plethora of international instruments that seek to define independence: see, eg, Financial Reporting Council, *The UK Corporate Governance Code* (at September 2014); New York Stock Exchange, *Listed Company Manual* (at 11 January 2013) s 303A.02.

Prudential Regulation Authority ('APRA') regulated superannuation funds meet a definition of independence, and that the boards of those funds have an independent chair.[10] A key driver of these proposals has been concern about the adequacy and appropriateness of the governance arrangements of not-for-profit 'industry' funds. This concern persists despite evidence of the strong investment performance overall of funds in this sector.[11]

These funds, described in the legislation as 'employer sponsored' funds to distinguish them from the 'retail' funds offered by financial institutions to the public are required to have 'equal representation' arrangements in place.[12] This means that the boards of the trustees of these superannuation funds must be made up of equal numbers of employer sponsor and member representatives, the latter usually nominated under the constitutive documents of the superannuation fund by trade unions. In contrast, most of the boards responsible for administering retail funds have a majority of non-executive directors. These directors satisfy the definition of independence found in the *Superannuation Governance Policy*[13] of the Financial Services Council ('FSC'), the industry association to which most of the organisations offering retail funds belong.

Although the policy rationale for independent directors on listed company boards is widely accepted, proposals for greater independence on superannuation fund boards have not been universally welcomed. In 2015, the Australian Labor Party argued 'that there is no clear and compelling evidence that the changes are warranted, and that there is widespread concern the definition of "independence" contained in the bill is ambiguous'.[14] Another opposition party, the Greens, was also unconvinced, asking if 'there [are] any warning signs going off? No-one has come and put any before us'.[15] Industry Super Australia ('ISA') and the Australian Institute of Superannuation Trustees ('AIST'), bodies aligned with the industry fund sector, commissioned a report from former Reserve Bank Governor, Bernie Fraser, to consider the proposed reforms.[16] The report concluded that mandated independence was not appropriate and that the equal representation model present in the industry fund sector was preferable.[17]

This article explores why independence matters currently and how it might change if reforms such as those proposed by the government were instituted. In order to answer this question, this article reports on the findings of qualitative

10 Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth); Superannuation Legislation Amendment (Trustee Governance) Bill 2015 (Cth).

11 Kevin Liu and Elizabeth Ooi, 'When Boards Use Related Parties: Outsourcing and Superannuation Fund Performance' [2018] *Accounting & Finance* (forthcoming), 2 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/acfi.12379>.

12 *Superannuation Industry (Supervision) Act 1993* (Cth) pt 9 ('*SIS Act*').

13 Financial Services Council, *FSC Standard No 20 Superannuation Governance Policy* (at March 2013) 9–10.

14 Senate Economics Legislation Committee, Parliament of Australia, *Superannuation Laws Amendment (Trustee Governance) Bill 2015 [Provisions]* (2015) 23.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 October 2015, 11834 (Adam Bandt).

16 Bernie Fraser, 'Board Governance of Not for Profit Superannuation Funds' (Review, 16 February 2017).

17 M Scott Donald, 'The World According to Bernie' (2017) 29 *Australian Superannuation Law Bulletin* 39, 41.

research directed towards discovering how independence currently affects the internal dynamics of the boards of superannuation fund trustees, and how that might change if measures such as those envisaged in the proposals were to be imposed. In addition, it considers how other aspects of governance, such as director nomination processes, tenure and remuneration, might buttress independence. In so doing, it considers the role of director independence in the context of superannuation fund governance and identifies its intersection with two key governance objectives: improved decision-making and legitimacy.

Part I briefly describes the superannuation system in terms of the types of superannuation funds and the ways in which they are governed. It also summarises the proposed reforms. This institutional context turns out to be crucial in both the form and function of independence. Part II describes the qualitative method of analysis employed and provides an overall demographic summary of the individuals interviewed. Part III reports the findings of the research, distilled into the following themes: views of independence, independent chairs, board nomination arrangements, tenure, board size, remuneration and board performance appraisals. Part IV contains a broader discussion of the merits of the rationale for independence in the superannuation fund context, including the government's current proposal for reform. It argues that the tangible worth of structural independence measures such as those proposed by the government is manifested only episodically, such as when the fund is considering a merger with another fund or the negotiation of a major outsourcing agreement. It also finds that the more intangible worth of independence in inspiring stakeholder confidence in the legitimacy of the delegated decision-making undertaken by superannuation fund trustees on behalf of members is somewhat problematic. In particular, it relies on stakeholders being sufficiently engaged with the fund to appreciate the role that independent directors might play. Empirical research reported elsewhere in recent years suggests that members do not have that level of engagement. The article concludes that governance mechanisms such as member elections and Annual General Meetings ('AGMs') may be one way to engender and focus engagement to overcome this problem and to revitalise the governance of these crucial social and economic institutions.

II THE SUPERANNUATION CONTEXT

The regulatory regime applied to Australia's superannuation system focuses heavily on the trustees responsible for administering the funds. These trustees are overwhelmingly corporations formed for that purpose.[18] From an operational perspective, they conform to one of five operating models:

18 Although in theory individuals can act as the trustees of a superannuation fund, only one fund is administered in this way, and it has less than $100 million in assets: Australian Prudential Regulatory Authority, 'Annual Superannuation Bulletin' (June 2017) 9.

1. Multi-employer not-for-profit funds ('not-for-profit funds');[19]
2. Retail funds ('retail funds');
3. Wholesale master funds ('master trusts');
4. Single employer hybrid funds ('hybrid funds');[20] and
5. Self-managed superannuation funds ('SMSFs').[21]

The fifth category, the SMSFs, is outside APRA's regulatory jurisdiction, and beyond the scope of this article.

There are currently two models of governance present across the four operating models relevant to this paper: an equal representation model that applies to the not-for-profit and hybrid operating models (1 and 4 above), and an executive model of governance that applies to the retail and master trust operating models (2 and 3 above). These governance models are currently required under the *SIS Act*. As Table 1 below shows, there are currently 82 equal representation boards[22] and 56 executive boards.

Table 1: Breakdown of Superannuation System by Governance Model[23]

	Number of Trustees	Number of Funds	Total Assets under Management ($ billion)	Number of Member Accounts ('000)
By Board Structure				
Equal representation required by legislation	45	43	477.8	3676
Equal representation required by governing rules	37	38	546.8	10 516
Non-equal representation	56	128	590.8	12 378
Total	138	209	1615.4	26 571

19 These are commonly called 'industry funds', but that terminology implies an association with a union-led movement that is not always present, so the more neutral 'not-for-profit' terminology is preferred here.

20 Most of the corporate and public sector funds still operating independently administer both defined contribution and defined benefit schemes, hence their description as 'hybrid'. The hybridity complicates their governance because it means that in certain circumstances the employer may retain a formal role in the governance of the fund, for instance, by having certain powers under the trust deed reserved to it. Although such hybridity is not unknown in not-for-profit funds and master trusts, it occurs there on a much smaller scale.

21 This classification reorganises slightly APRA's five-way classification of funds to permit a focus on the governance differences of most relevance in the current context: Australian Prudential Regulatory Authority, 'Segmentation of Superannuation Entities' (Report, February 2015) 2.

22 The distinction in Table 1 between those funds with equal representation 'required by legislation' and those 'required by governing rules' reflects the fact that funds designated public offer under s 18 of the *SIS Act* can elect either to have an equal representation board or an independent trustee, which is a defined term in s 10 of the *SIS Act*. That election is commonly given effect by provisions in the governing rules. Employer-sponsored funds that are not public offer are required to have equal member and employee representation on their boards.

23 APRA, 'Annual Superannuation Bulletin', above n 18, 9.

There is currently no requirement for the boards of superannuation funds to contain independent directors, although there is provision in the *SIS Act* for the appointment of an independent director to equal representation boards should that board so desire.[24] Boards which are not required to have equal representation do not face regulatory constraints on the number of independents and may in fact contain a majority of non-executive and non-affiliated directors, designations which are in some way analogous to independent directors in this context. The total number of each category of director is shown in Table 2 below.

Table 2: Number of Directors, by Type[25]

	June 2014	June 2015	June 2016	June 2017
Number of Directorships by Representation				
Member representative	382	360	338	336
Employer representative	395	357	334	315
Independent director	62	57	66	69
Executive director	81	64	61	50
Non-executive director	185	192	181	187
Non-affiliated director	73	70	79	77
Total	1178	1093	1063	1034

This means that as at June 2017, there were 651 'representative' directors, 50 'executive' directors and 333 'independent' directors in the system. This does not account for the 70 directors sitting on more than one board, who may be representative in one context and independent in another (for instance). It is notable also that the number of almost all types of directors fell over the period (over which period the number of trustee boards also fell, from 169 to 138).

This situation may change in the near future. In late 2015, the government introduced the Superannuation Legislation Amendment (Trustee Governance) Bill 2015 (Cth) into Parliament to eliminate the legislative requirement for equal representation and introduce a requirement that all superannuation fund boards be composed of at least one-third individuals who would satisfy a bespoke definition of 'independence'. It did not pass through the Senate and lapsed when Parliament was prorogued in April 2016. However, the independence measures it contained were reintroduced into the Senate in substantially the same form in September 2017 in the Superannuation Legislation Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth) ('Bill'). This new Bill was referred to the Senate Economics Legislation Committee, which recommended (albeit with a powerfully worded dissenting recommendation from Opposition senators on the Committee) that it be passed. The Bill has yet to be reintroduced but the proposals remain government policy.[26]

24 *SIS Act 1993* (Cth) s 89(2).
25 Excel version available at: Australian Prudential Regulatory Authority, *Annual Superannuation Bulletin* <http://www.gtm.apra.gov.au/Super/Publications/Pages/annual-superannuation-publication.aspx>.
26 Phillip Coorey, 'White Flag on Union Super', *Australian Financial Review* (Sydney), 28 August 2018, 1.

The Bill takes a structural approach to defining independence. Specifically, it repeals the requirement for standard employer-sponsored funds to have equal representation of employer and employee representatives on the board and replaces it (in proposed section 87) with a requirement that at least one-third of the directors satisfy a bespoke definition of independence. That definition nominates specific relationships (with employers, unions, service providers and the like) that would preclude the director from being regarded as independent for the purpose of this calculation.[27] The Bill also amends the *SIS Act* to require (in proposed section 86) that the chair be elected from amongst the independent directors. There is no attempt to address other approaches to independence. In particular, it is notable that a cohort of one-third independent directors does not have the power to carry decisions, although those directors may have considerable sway individually or collectively in circumstances where the employee and employer representatives are entrenched on opposing sides of a particular decision.

III METHODOLOGY AND SAMPLE

A Design of the Study

Despite the significance and magnitude of Australian superannuation funds and an ongoing process of reform to their governance arrangements, there is a dearth of empirical evidence about the way governance works in the superannuation sector.[28] This article makes a contribution to the existing, modest literature by reporting on a qualitative study. The study is founded upon a set of semi-structured interviews. As the aim of this article is to explore the ways independence is currently operationalised in the superannuation sector, and relevant data is unavailable in the public sphere, gathering empirical data directly from market participants is an obvious method.

As Tuckett notes, interviews can be particularly useful in areas where there is potential uncertainty because they allow the interviewer to sense ambiguity and respond with follow up questions.[29] The interview format also has two other distinct advantages in this context. The controversy about superannuation fund governance has been politically charged, and it was anticipated that participants would be sensitive about the potential for their identities to be revealed or their

27 Explanatory Memorandum, Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth) [2.2]. The Bill also amends the *SIS Act* to empower APRA to deem individuals independent or not in certain circumstances (proposed ss 88, 89): Superannuation Legislation Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth) sch 1 pt 1.

28 Some notable exceptions in the published academic literature are Liu and Ooi, above n 11; Monica GS Tan and Marie-Anne Cam, 'Does Governance Structure Influence Pension Fund Fees and Costs? An Examination of Australian Not-for-Profit Superannuation Funds' (2015) 40 *Australian Journal of Management* 114; Karen L Benson, Marion Hutchinson and Ashwin Sriram, 'Governance in the Australian Superannuation Industry' (2011) 99 *Journal of Business Ethics* 183. A complete review of the literature can be found in Donald and Le Mire, above n 8.

29 David Tuckett, 'Financial Markets Are Markets in Stories: Some Possible Advantages of Using Interviews to Supplement Existing Economic Data Sources' (2012) 36 *Journal of Economic Dynamics & Control* 1077, 1078.

responses to be misinterpreted. The interview allowed the interviewers to explain the anonymity and confidentiality protocols adopted in the study and to build rapport with the participants.

B Selection of Interviewees

This article draws on data collected in 10 semi-structured interviews held with directors of superannuation funds.[30] Of the 20 persons approached for interview, 10 consented to being interviewed. This is a reasonably high consent rate, particularly in view of the fact that the study took place in the context of controversy about the nature and rationale of reform of governance requirements. The interviews commenced in November 2015 after the Bill had been introduced to Parliament for the first time. The Bill failed to pass the Senate during the interview period. As a consequence, superannuation fund governance was rarely out of the headlines, and views on both sides of the debate were regularly aired in the public sphere.

Those who consented to be interviewed may have been prompted by the prominence of the issue and interested in thinking further about the way independence reforms could or would work in the context of superannuation governance. It might also mean that they were more likely to have a considered or even concluded view. It is possible that those who did not consent saw the issue as 'too hot to handle'. We believe that the nature of the reliance placed on the comments made by participants in the analysis below means that those possible biases in the interview sample do not unduly undermine the results reported, but caution should nevertheless be exercised in assuming that the views expressed are in some way representative of the views of the actual population of trustee directors.

C Data Collection

Both researchers jointly conducted all interviews. The interviews took place in person, except for one that was conducted by teleconference and one with only one researcher present and the other joining the interview by telephone. The interviews took around an hour to complete.

Interviews followed an Interview Guide closely.[31] Interviewees did not see this Interview Guide. All interviews covered the issues raised in the questions in the Interview Guide at some point.

The interview questions initially focused on contextual detail about the funds, and the characteristics and experience of the director. Questions then explored the participants' views of independence and how it worked in practice. Subsequent questions focused on several areas that could potentially affect the way independence might work, such as director tenure and remuneration. Towards the

30 Appropriate ethical approval was sought and received from the Human Research Ethics Committee (HREC) of the University of Adelaide and this approval was registered with the UNSW Ethics Committee. Potential participants were approached and advised of the nature of the study in line with the ethical protocols agreed with the HREC.

31 The Interview Guide appears as Appendix A below.

end of the interview, participants were prompted to supplement the questions by raising any issues they had thought would be discussed. As such, the interview provided opportunities for participants to raise topics not directly raised by the interviewers that they thought were relevant to the discussion of independence. A number of participants used this opportunity to expand on their thinking around independence.

D Recording and Analysis of Interviews

In all cases the persons interviewed consented to being recorded. Each recording was transcribed verbatim, and the accuracy of the transcripts was checked with the participants.

All the data was sorted according to topics that correspond to the areas discussed below, that is, independence, independent chairs, nomination processes, tenure and remuneration, to allow systematic comparison of the views of the different participants. One researcher undertook this coding. The result was then checked and verified by the other researcher. The richness of the responses is preserved through the use of direct quotations, but some minor editing has taken place in the extracts reported below to remove the hesitations and repetitions inherent in conversational speech.

E Sample

We conducted 10 interviews over the period of 11 November 2015 to 8 February 2016. Some of the interviewees served on the board of more than one trustee company[32] ('multiple directorships'). In some cases, we interviewed more than one member from a board and in some cases a single trustee board served more than one superannuation fund ('multiple trusteeships'). As a result, there is not a one-to-one correspondence between interviewees and the number of funds. The 10 interviews spanned 14 trustee companies serving 22 distinct superannuation funds. This is reported in Table 3 below, along with a summary of the composition and demographics of the sample. Notably, the occurrence of multiple directorships and multiple trusteeships extended the length of some interviews, but was helpful in ensuring a broad coverage of different types of funds. It also improves the anonymisation of the interviewees and the boards they represent.

Table 3 shows that all sectors of the APRA-regulated superannuation system were represented by at least one interviewee. There was also a reasonable spread of fund sizes, from less than $1 billion to over $20 billion. In total the funds represented over $320 billion in assets, or approximately 25 per cent of the APRA-regulated superannuation system, and approximately 7.3 million member

32 APRA-regulated superannuation funds are termed 'Registrable Superannuation Entities' ('RSE') in the legislation despite the fact that the trust itself is not a separate legal entity. The trustee of an RSE is termed the 'RSE Licensee' because they are required under the *SIS Act* to operate under a specific licence granted by APRA: *SIS Act* pt 2A. The terms 'trustee' and 'fund' are employed in this article as they would be more familiar to most readers.

accounts.[33] Four of the interviewees served as Chair on at least one of their boards. Five interviewees had legal qualifications. There were representatives from each of the three main director types: employee representatives, employer representatives and independent directors. There was an even split 5:5 by gender. Interviewees came from four out of the eight states and territories in Australia. Other details of the sample have been suppressed in the interests of ensuring the anonymity of the individuals interviewed.

Table 3: Demographic Summary of Interviewees[34]

	Total	Not-for-profit	Retail	Master Trust	Hybrid	Large (>$10 billion)	Medium ($2–10 billion)	Small (<$2 billion)
Number of funds	22	6	7	3	5	8	11	3
Number of interviewees	10	7	3	1	4	5	6	2
Total assets under management ($ billion)	320							
Total members	Approx. 7.3 million							

F Limitations of Study and Issues for Further Research

This study is on a small scale. Although we have covered directors of a diversity of fund types and funds of variable scale, we cannot assume that our findings are universally applicable to the superannuation system as a whole. In particular, there are a number of reasons why we might expect our sample to include participants who are particularly interested in independence and governance.

First, as the email sent to potential interviewees about the study explicitly labelled it to be a study about independence, those who agreed to be interviewed were more likely to be those who were already interested in, and specifically concerned about independence. As we noted above, this could have biased the sample towards those with stronger views than the overall population of directors, and discouraged some who perceived their views to be unpopular or controversial. On the other hand, it did ensure that the interviewees were prepared for the general

33 The total asset and total member numbers have been rounded to ensure the identities of the funds could not be reverse engineered from these statistics.

34 Authors' calculations based on APRA data: Australian Prudential Regulatory Authority, 'Quarterly Superannuation Performance' (Publication, September 2015). Note the data in this table is reported as at the date of the interview, and has not been updated, as some of the funds and trustees may have merged or otherwise changed in the intervening period.

line of questioning and did not feel 'ambushed' when asked about issues currently being actively debated in the political arena.

Second, the persons interviewed were all very senior, with positions that carry significant liability and responsibility. They were, therefore, likely to be highly sensitive to the management of their own reputations and those of their funds and may (even unintentionally) have wanted to make sure their responses cast themselves and their funds in a positive light.

Third, the controversy about superannuation governance regulation provided an important backdrop to this study. That might have created some sensitivity as to what interviewees were willing to reveal about their funds, even with the guarantees provided about anonymity and confidentiality.

Finally, our interviews focused explicitly on independence. No doubt if we had asked different questions (or if the researchers had not been scholars interested in the independence debate) we would have tapped into different aspects of the governance of the funds in question. Our article focuses on one thread of the story, that of independence. It is clear, however, that governance outcomes are a product of many factors and exploring the ways that a number of these factors together contribute to the governance of superannuation funds could supplement the data and findings offered in this article. These are matters for future research.

Despite these qualifications, we are confident that this study provides valuable information about actual governance practices in the superannuation sector, an area that is almost entirely opaque.[35] It provides insight into the complex ways that independence can contribute to the work of superannuation fund boards and how it might be supported or undermined by the other aspects of fund governance. It also offers information relevant to a topical and complex debate that has hitherto largely been conducted without recourse to current and relevant qualitative data.

IV THE INTERVIEW FINDINGS

The analysis in this part explores the interview data. It is organised into five topics related to the issue of independence.

A Independence

The interviews were conducted in a political environment in which the issue of independence on superannuation fund boards was very much alive and controversial. Contemporary media coverage of the debate highlights that the underlying rationales animating arguments on either side are not always fully articulated.[36] This is not unique to the current superannuation context. Regulation and governance theorists have for some time noted the way in which independence

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35 One exception to this is Adam Butt et al, 'Design of MySuper Default Funds: Influences and Outcomes' (2017) 57 *Accounting & Finance* 47. Notably there are strong resonances in both projects around the dedication of directors to the interests of members.

36 See, eg, Sally Patten, 'Further Guidelines Needed on Superannuation Board Independence' *Australian Financial Review* (online), 12 July 2015 <https://www.afr.com/business/banking-and-finance/financial-services/further-guidance-needed-on-superannuation-board-independence-20150710-gi9pi0>.

is fetishised by regulators and policy-makers alike.[37] Indeed the regulation of independence often relies on an incomplete model that prioritises structural independence, defined according to a list of relationships thought to be inconsistent with independence.[38] More nuanced regulation that incorporates other approaches to independence, such as the capacity, status and power approaches, rarely emerge. Moreover, independence is often seen as a means of achieving ancillary objectives[39] such as addressing conflicts,[40] enhancing board expertise,[41] increasing demographic diversity,[42] broadening board horizons[43] and intensifying accountability[44] within the board. There are undoubtedly contexts in which each of these benefits can accrue from independence on boards. However, it is crucial to identify which of the benefits might be relevant to the context under consideration in order that the measures introduced to pursue them might be targeted more precisely.[45]

The Explanatory Memorandum makes it clear that director skills and accountability have been key themes in the rhetoric surrounding the Bill. It states that the 'reform is important because independent directors bring different skills and expertise and they can hold other directors accountable for their conduct, particularly in relation to conflicts of interest'.[46] It goes on to posit that the reform will bring superannuation fund governance into line with the standards applicable to ASX listed entitles and other financial services firms.[47] Finally, it cites support from the two major reviews of the superannuation industry, quoting one of those as finding that it is 'more important for directors to be independent, skilled and accountable than representative'.[48]

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37 See, eg, Usha Rodrigues, 'The Fetishization of Independence' (2008) 33 *Journal of Corporation Law* 447; Sally Wheeler, 'Independent Directors and Corporate Governance' (2012) 27 *Australian Journal of Corporate Law* 168.

38 For a discussion of the four approaches to independence see Le Mire and Gilligan, above n 8, 450–7.

39 Ibid 448.

40 Rodrigues, above n 37, 447.

41 Suzanne Le Mire, 'Independent Directors: Partnering Expertise with Independence' (2016) 16 *Journal of Corporate Law Studies* 1, 1.

42 Erica Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?' (2007) 86 *Oregon Law Review* 373, 376. See also Corporations and Markets Advisory Committee, 'Diversity on Boards of Directors' (Report, March 2009) 19 (stating that increased diversity enhances independence).

43 Winfried Ruigrok, Simon I Peck and Hansueli Keller, 'Board Characteristics and Involvement in Strategic Decision Making: Evidence from Swiss Companies' (2006) 43 *Journal of Management Studies* 1201, 1221.

44 Charles M Elson, 'Enron and the Necessity of the Objective Proximate Monitor' (2004) 89 *Cornell Law Review* 496, 497.

45 See generally Rodrigues, above n 37.

46 Explanatory Memorandum, Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth) [1.6]. See also Sally Patten, 'Case for Super Trustee Independence Is Clear: AICD', *Australian Financial Review* (online), 6 December 2017 <https://www.afr.com/personal-finance/superannuation-and-smsfs/case-for-super-trustee-independence-is-clear-aicd-20171205-gzz77z>.

47 Explanatory Memorandum, Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth) [1.8].

48 Ibid [1.10], quoting Financial System Inquiry, above n 4, 135.

1 The Value of Independence

Interviewees were asked directly whether board independence was important to the operation of their fund.

A number of participants saw the push for independence as a way of improving the capability and quality of those on the board:

> My big issue is that … this so-called issue of independence is actually not the issue. The issue is the ability to access skills when a board needs it and whether or not they're independent is just not the issue for me. But if this gives us the ability, well then maybe that will fix the problem … So maybe this legislation will assist us to get a win. We need to, you know, be able to say we need a digital expert or whatever, and Joe Blow you've got to go.
>
> It's not independence, it's skills. It's the ability to get skills … so called independence this thing is actually masking what is the real problem, the ability to get skills. And I think if, I think if you did the one-third, one-third, one-third that would probably sort a lot of it out quite frankly. … I'm all for having a majority of independent directors. But independent only because they have the right skills for the job.

At the same time independent directors commonly identified their skills as a key reason for their appointment. Illustrative is the comment of one director:

> Well actually the main thing I do bring is skills, and I don't think that should be underestimated.

More specifically interviewees saw independent directors as contributing two main types of expertise:

> The value of independence is expertise in superannuation and governance.
>
> We've got good people around the table, particularly the independents who have knowledge and skills, not only in super, but in governance as well.

This was corroborated by independent board members describing situations where they were brought on to a board for a specific reason related to governance:

> Unbeknownst to me at the point of joining the Board, the idea was for me to be a counter to [a difficult director].
>
> I have tried to bring more rigour and discipline to the Board in the nominating and interviewing process.

The experience of those with independent directors on their board was apparently positive, and delivered benefits beyond skills. For example, interviewees noted:

> having people from outside the related party means, sort of, 'I bring you news of the outside world'. Because when you are dealing with just executives or people who have been on [the board] for a while, and to say, 'Well this is how other people are doing it', or 'Why do you do it that way?' … So I think outside people increase the chances of independent ideas.
>
> Independence really counts when there is a conflict of interest between the shareholder and the members. And it counts when the organisation has to make a corporation-defining decision. That's when it really counts, and often you don't really encounter those situations except perhaps in a merger.

Mandating independence is not the only way in which concerns about the skills of directors could be addressed. Both the Australian Securities and Investments Commission ('ASIC') and APRA currently have the power, through the Australian

Financial Services ('AFS') and Registrable Superannuation Entity ('RSE') licensing regimes, to consider the level and types of skills required on the board of each licensee, given the circumstances of that licensee's current and planned operations.[49] Indeed, APRA has recently indicated in a thematic review of RSE licensee board governance that few boards consider 'the optimal composition that is appropriate for the board as a whole, taking into account their strategic plan and the skills, capabilities and experience needed to effectively execute the plan'[50] and recommended that this be addressed.[51]

One theme that emerged strongly from the interviews was that many participants associated independence with the capacity to exercise cognitive independence and appeared to be pessimistic about the value of the structural approach.

Another dominant theme is the association between independence and skills. This represents a departure from the academic literature about other financial institution boards that posits that independent directors diluted the expertise present on these boards in the lead up to the Global Financial Crisis of 2007–08.[52] It is, however, consistent with the recommendation by Clark and Urwin in 2010 that mandating an independent chair can provide an opportunity to enhance board skills.[53] In the superannuation context it is most likely a reflection of concerns in some quarters that the equal representation model results in the appointment of individuals as directors whose vocational or professional skills are not relevant to the task of administering a large-scale superannuation fund. Hence, for many of those supportive of independence in the superannuation governance context, independence is essentially a Trojan horse enabling boards to raise the level of skills of board members. Others recognise that these directors can potentially also contribute a fresh perspective and enable boards to manage conflicts better.

B Independent Chairs

In the listed company space, the role of the independent chair is seen as an important counter balance to the power of the CEO. As a consequence, the ASX Principles recommend that, '[t]he chair of the board of a listed entity should be an independent director and, in particular, should not be the same person as the CEO of the entity'.[54] According to the commentary, '[h]aving an independent chair can contribute to a culture of openness and constructive challenge that allows for a

49 Australian Securities and Investments Commission, 'Licensing: Meeting the General Obligations' (Regulatory Guide No 104, July 2015) 22; Australian Prudential Regulatory Authority, *Prudential Standard SPS 520: Fit and Proper*, 28 June 2013, cl 18.

50 Letter from Helen Rowell, APRA Deputy Chairman, to all RSE Licensees, 17 May 2018, 1 <https://www.apra.gov.au/sites/default/files/BGTR_letter%2520to%2520industry_20180516.pdf>.

51 Ibid 4.

52 Allan C Hutchinson, 'Hurly-Berle – Corporate Governance, Commercial Profits, and Democratic Deficits' (2011) 34 *Seattle University Law Review* 1219. For a summary of the broader academic discussion see Wolf-Georg Ringe, 'Independent Directors: After the Crisis' (2013) 14 *European Business Organization Law Review* 401.

53 Gordon L Clark and Roger Urwin, 'Innovative Models of Pension Fund Governance in the Context of the Global Financial Crisis' (2010) 15 *Pensions: An International Journal* 62, 75.

54 ASX Principles, 18.

diversity of views to be considered by the board'.[55] In superannuation governance regulation there has been a less wholehearted embrace of the independent chair. This may reflect the different context. In superannuation funds; a thinner management structure may mean the CEO is less likely to have a power base equivalent to that of a listed company CEO.

Currently under the *SIS Act*, one independent director on equal representation funds is permitted.[56] APRA has also indicated that chairs of the fund can also chair remuneration and audit committees if they qualify as independent under the *SIS Act* and are the only independent director.[57] The Bill did propose that the chair of the fund be chosen from amongst the one third of the board that were independent directors.[58] The Explanatory Memorandum to the Bill did not provide a separate justification of an independent chair, as opposed to independence generally. This may indicate that the independent chair is seen as a way of reinforcing the good governance norms that are being associated with independent members.

A variety of views of the virtue or otherwise of having an independent chair was reflected in the evaluations offered, as indicated in the following comments:

> it is helpful to have an independent chair who has no axes to grind because he or she is not beholden to any election other than the eight people that he or she is chairing.
>
> I think that if you are only going to have one independent, having it as the chair is probably a good idea. I don't think it's essential but it's preferable … if you are actually talking about things like major changes in strategic direction or mergers, those are usually driven by the chair.

Good practice in the listed company sector would suggest that board chairs are chosen by board members, from amongst their number, with succession planning for the role being undertaken by the nominations committee.[59] This is intended to ensure that the chair has the confidence of the board and is selected for their skills. Interview participants were asked how their board selected a chair, and whether they thought having an independent chair was important. Chair selection processes varied across the sample. Some had independent chairs brought in from outside by a nominating body. Others reported that their chair was selected by the board itself from amongst the existing independent directors, or the non-independent directors. Some funds adopted a process of rotating the chair. One participant considered these options in the following way:

> The whole idea of a rotating chair I find ridiculous … I think the best arrangement is that the Board elect the chair, because then it's who they see as the best chair, and the chair then regularly refreshes that authority so, you know, 'are you still happy with me?' I do that every year on my Boards … Second best is that you are appointed by somebody such as the government. Worst is that everyone gets a turn or, you know, it shifts between a couple because it's not based on merit.

55 Ibid.

56 *SIS Act 1993* (Cth) s 89(2).

57 Australian Prudential Regulatory Authority, Prudential Standard SPS 510: Governance, [40].

58 Superannuation Legislation Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth) sch 1 item 1 (proposed s 86).

59 ASX Principles, 17.

C Board Nomination Arrangements

The processes by which directors are nominated to a superannuation fund board are often quite different from those observed in analogous institutional settings, such as corporations or public sector bodies. There are in fact diverse processes by which directors are appointed to the boards of superannuation fund trustees. As indicated in Table 2, the overwhelming majority of board members on superannuation fund boards are nominees of either the parent company (in the case of a retail fund), an employer organisation or a trade union. The process by which the nomination is transformed into formal appointment to the board then depends on the constitution of the trustee company, but in practice the person nominated is typically appointed without further review or interference.[60]

Once they are appointed to the board, nominated directors are subject to the same duties to exercise their powers and perform their duties in the best interests of the members as any other board member. This can cause tension on occasions when a nominating body seeks to influence the director to act in accord with their wishes.[61]

> People do mix up and I've seen it elsewhere, mix up who votes you onto the Board and therefore how you get through the door and what you do then when you're sitting at the table and you go and separate out those two functions. You do not represent the people who voted you to be on the Board at the Board table, you represent the members.

The polarising partisanship that this structure implies appears to be merely a latent threat in many funds. The overwhelming impression, confirming the findings of Newitt's earlier unpublished study of director attitudes in the not-for-profit superannuation sector,[62] was that interviewees felt their boards were functioning cohesively. Further, even if there were differences in the past, board members today recognised their paramount duty to act in the best interests of all members and not their nominator, or the cohort of members to which that nominator may relate. Typical of this sentiment were the following statements:

> So in the sense of a harmonious Board, thankfully, every nominee director has left behind his or her nominator's views when he is on the Board. I did have some initial concerns at one point that that may not be the case. But in the interviewing process of the [names a union] and the [names an employer sponsor] nominees, it was made

60 This is the case notwithstanding that superannuation *Prudential Standard SPS 510: Governance* requires all boards to have a policy and process to address 'the process by which a candidate will be nominated for a vacant Board position': Australian Prudential Regulatory Authority, *Prudential Standard SPS 510: Governance*, 31 October 2016, cl 23 ('*Prudential Standard SPS 510*'). With respect, this quasi-statutory requirement creates a false impression because the legal nomination and appointment processes articulated in the fund's governing rules will apply irrespective of any Board-determined policy or process and a prudent Board would have no alternative but to reflect those legal requirements in their policy and procedures.

61 For a recent example of a special purpose fund established to administer co-investment by superannuation trustees, see Adele Ferguson, 'The Heads Keep Rolling in the Murky World of Super', *The Age* (online), 15 May 2018 <https://www.theage.com.au/business/companies/the-heads-keep-rolling-in-the-murky-world-of-super-20180515-p4zfh7.html>.

62 Shey Newitt, 'What Drives Superannuation Trustee Board Performance?' (Paper presented at AIST Superannuation Fund Governance Conference, Melbourne, 5 May 2009). The complex psychological and sociological factors at play in board dynamics are considered in detail in Wheeler, above n 37, 181–6.

> clear by the then Chairman that 'you leave outside the board room door any historic or nominator biases in respect of where you've come from'; we are there for only one purpose, which is to look after the members. And we have always got acknowledgment from the nominee that that is the case and thankfully that has been, that's the way it has worked out.
>
> My view is that independence is a state of mind, not a function of how you got there. There is an independence of thinking that people bring a commitment to doing the right thing, whether it's in their best interests or not, by acting as a genuine fiduciary and vowed to distinguish yourself from what might be something that provides a benefit one way or another and structural independence in the way defined may assist in that but I don't – in some Funds I can see it would be valuable – for our Fund I don't. I think the current people have a pretty clear understanding of that.

There were also some who saw benefits in the representative model providing a different perspective:

> It is, I think, healthy to have, to be grounded in people on the Board who are actually coming from your membership. The nature of … the employer representative side is that we still are fairly actively engaged with the employers and knowing what's going on in [names the industry] and our market. So from both sides, we … are kept fairly closely grounded to what our constituency is thinking.
>
> On some Boards where everyone's independent you don't know who the worker is. Well I do. I see them every day.
>
> Having the representation from unions and employer groups absolutely strengthens the board and I think that if the board had no trade union involvement … that it would make us a much lesser board because the unions are very focussed on the experience of all of the members, particularly the low-balance members … the unions they keep us grounded in terms of thinking about the human side of the experience for our members.
>
> This is not about warring tribes. It's not about black and white. It's actually about getting the best people to run what we know are complex, sophisticated organisations. It's not a game for enthusiastic amateurs.

It was also clear that for a number of the funds, board nomination processes presented a challenge. In general, the difficulties were framed around a lack of ability to recruit board members with the necessary expertise. One chair described a nomination process in these terms:

> One day I came into the office with a letter from a particular Union telling me that their representative director was retiring, no notice, no nothing, kaboom, and that they would tell me who they would be appointing. So I wrote a letter saying that thank you, we're very sorry to lose X and that the skills that we need on the board are A, B and C, whatever they were at the time. The next week I got a letter, very quickly because, of course, no fee was being paid, a letter saying thank you, Y is going to be appointed and Y was … [a known connection] of X. Now I'm sorry – how about that as an example for something that's not right.

Several interviewees described the uncertainty around the process:

> It is a mysterious process that unions handle and I was very fortunate that [a union affiliated person] prevailed upon [his or her] union to appoint me and I have no visibility of how the Unions themselves, presumably it's their governing executive or whatever, makes a decision about who gets appointed.
>
> [It is] [p]retty dark, mysterious.
>
> I think it's based more on meeting the political needs of the nominating bodies handing out … the roles and in particular, say for example with the Unions,

> obviously since the Union is taking a share of the salary, they have only ever nominated the trade unionists, you know, professional trade union, people who work as trade unionists.
>
> But ideally that would happen where people aren't selected because of, for want of a better word, their politics: just selected by the nominating body because this person is needed and we think they're the right person, you know. But inevitably, then you're going to get, I'm not saying it happens on [names a fund], but you know, let's pick a friend.

This is not to suggest that all boards were completely powerless. A number of participants described processes whereby they (or their Chair) tried to influence the nominations. These efforts appeared to meet with mixed success:

> Well the problem is, you can discuss it all you like, but it's up to the [nominating body] to make that election. Most people would look at the ability of that person to make a contribution which is the most important bit.
>
> We want to sort of pre-empt that happening by educating the appointers, 'and this is what we're looking for and bring us in earlier, and we know you have the power but we can help, and, if you have entrusted this Board with $[X]bn, we really need this additional skill, and we don't have [it], it's not a huge organisation.
>
> I think that now there is a kind of theoretical power to reject a nomination, based on not meeting Fit and Proper, but that would involve all hell breaking loose.
>
> The company has never appointed a candidate without effectively giving me a right of veto. So I interview the person, say 'yay' or 'nay'. But the starting point for the discussion would be skills gaps and needs, etcetera.

In the listed company sector, the requirement that public company directors be subject to election by the members is formalised in legislation.[63] This is intended to reflect the shareholders' ownership interest in the company, and to increase the pressure on the directors to advance the interests of the company as a whole. However, member disengagement from the AGM and proxy arrangements can be seen as undermining director elections as an accountability mechanism.

In the superannuation sector, the involvement of members in elections is a feature of some funds. The election of directors by the membership did not garner much enthusiasm from one interviewee:

> In perhaps extreme cases you get – 'oh I don't like him'; 'why don't you like him?', 'oh I don't like the colour of his tie or dress she's wearing'. And … you get a lot of those things. That's hardly an informed and expert view as to the reasons why a candidate is rejected. The issue of cost is significant. In the context of the return to the members as a whole, to give them the right to vote, I can't see it as being justified. In our case, and so coming back to one of the challenges of our Fund, but I think also for the Industry generally in relation to engagement, I think about, [a high percentage] of our Fund members are in the default option, so only x per cent have exercised investment choice, … if they haven't been engaged to make a decision about their investments – that's first and foremost – how hard is it going to get them to be engaged in selecting a new Board member?

On the other hand, an appointment nomination process that includes member elections may promote the accountability of the board and improve transparency. Both can be expected to inspire legitimacy, which, as is noted below, is a crucial

63 *Corporations Act 2001* (Cth) ss 201G (a replaceable rule), 203D.

attribute of a publicly-mandated system, such as Australia's superannuation system.

Whatever arrangements are put in place, it seems common sense that director elections ought to be carefully crafted to ensure that they do not become a costly exercise that prioritises politically active candidates with limited skills or narrow agendas. Arrangements to address the cost concerns include the use of virtual meetings and online voting. Fears that political activists could hijack the election process could be countered by advance vetting of all nominations by the board to ensure that candidates meet an enhanced 'fit and proper' test taking into account their individual skills, while ensuring that the board as a whole can demonstrate an appropriate mix of skills and experience (as recommended below). Despite these challenges, a robust director election arrangement has appeal as a way of enhancing director accountability, legitimacy and transparency.

The idea of director elections may seem counter-intuitive to those who see imposing structural independence as a way to improve the skills available to the board. As one interviewee, serving on the board of a fund that has elections for the member representatives noted:

> Our greatest challenge is that we have little control effectively over half of the Board, the member elected ones … So we're then left with the … [s]ponsor appointees having to meet all those requirements, fill all the gaps we need, try to accommodate all the things you're trying to do on the Board. And … amongst four people it's hard.

Equally, however, why should the burden of contributing specialist skills fall solely to the independent directors? It seems unrealistic to rely on even one third of the board to provide all of the necessary skills. As one interviewee put it:

> You can't just sit back and sort of say well all these people are doing the heavy lifting and these people are sort of a liability. They've either got to contribute, or something's got to give.

D Tenure

Issues related to director tenure have been widely canvassed in the academic literature related to listed companies[64] and in corporate governance generally.[65] There is not as yet equivalent academic work on the issue in respect of the Australian superannuation system. For the most part, therefore, industry commentators and regulators have relied on recommendations drawn from the broader literature on board tenure when considering the issue in the superannuation system.

Three issues recurred in the interviews. The first was the length that some directors had served on boards and the arguments for and against board renewal protocols. The second was the security of tenure. The third was the size of the board.

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64 See, eg, Ying Dou, Sidharth Sahgal, and Emma Jincheng Zhang, 'Should Independent Directors Have Term Limits? The Role of Experience in Corporate Governance' (2015) 44 *Financial Management* 583.

65 See, eg, Nikos Vafeas, 'Length of Board Tenure and Outside Director Independence' (2003) 30 *Journal of Business Finance & Accounting* 1043.

1 Board Renewal Protocols

For the most part the research in other economic sectors suggests that enforcing limited terms on boards is a way to 'refresh' the board such that decision-making does not stagnate around shared mental frames and data sets. Consistent with this, several interviewees explained:

> I mean you need fresh eyes, you need rejuvenation, I think, with it all.
>
> What I have observed within organisations is that the longer people have been there in any role, the more they believe the accepted wisdom and they don't challenge. What independence brings is an ability to question the obvious, ask the questions that aren't asked by people who have been there because 'well that's the way we've always done things here' or, you know, 'that's a no-go topic, I can't ask that', and so it is an objectivity, and a perspective. I've seen that happen in many, many situations.

On the other hand, there is evidence that the presence of at least some long-standing directors can improve board decision-making, especially because of the counterweight it provides to the power provided to the CEO by the information asymmetry enjoyed by management in a corporation.[66]

APRA clearly recognises that superannuation boards can become stale if the composition of the board does not change over time.[67] APRA's *Prudential Standard SPS 510: Governance* specifically requires that superannuation boards have a formal policy on Board renewal. The Prudential Standard notes that this policy must provide details of how the Board intends to renew itself in order to ensure it remains open to new ideas and independent thinking, while retaining adequate expertise.[68]

In addition, the Prudential Standard has, since October 2016, expressly required boards to set a maximum tenure limit for all directors.[69] Notwithstanding this requirement, the comparatively recent development of the superannuation sector means that there remain on some boards individuals who were present at, and perhaps active participants in, the creation of many of the funds. These individuals may have served upwards of 20 years or more on the board. In 2015 Helen Rowell, Deputy Chair of APRA, observed that '[c]urrently, over 20 per cent of RSE licensee directors have more than 10 years of tenure (over 25 per cent for industry and corporate funds) and a significant number of RSE licensees have directors with more than 20 years (and in some cases more than 30 years) of tenure'.[70] She went on to note that:

> In contrast, in the broader corporate community, only seven per cent of independent directors have tenure longer than 12 years and only three per cent have tenure longer than 15 years. … This is of particular interest and concern to APRA when many

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66 But see Dou, Sahgal and Zhang, above n 64.

67 Rowell, above n 50.

68 *Prudential Standard SPS 510*.

69 Ibid cl 23.

70 Helen Rowell, 'Governing Superannuation in 2015 and Beyond: Facts, Fallacies and the Future' (Speech delivered at the AIST Governance Ideas Exchange Forum, Melbourne, 20 October 2015) <https://www.apra.gov.au/media-centre/speeches/governing-superannuation-2015-and-beyond-facts-fallacies-and-future>.

> board renewal policies that we see – in the superannuation and other industries – put in place maximum tenure periods of three terms, or around 10 years.[71]

Consistent with the requirement of the Prudential Standard, all the interviewees in our sample reported that their fund had a policy on board renewal and consistent with Ms Rowell's observations, many noted that the boards on which they served had board members who had exceeded the policy, including some of the interviewees themselves. There was, however, a sense from the interviews that such departures from policy were progressively being addressed as directors' formal terms were expiring.[72]

Several others' comments demonstrated that boards actively manage tenure issues:

> [One] Director had reached 10 years, and had been reappointed twice for an extra year. But we thought we needed to get fresh ideas onto the Board so, with heavy heart and great reluctance, we didn't extend [his or her] term.
>
> Our position on tenure is if you're not performing we'll get rid of you, rather than dumping people who are quality.

The process of board renewal can however be difficult. Some noted that there were lingering problems with shifting long-standing directors:

> It seems to be quite difficult to get people to give up their jobs as Board members.
>
> There's another bloke from [a merged fund board] … he's been there for an awfully bloody long time, and he's arguing like crazy at the moment. He desperately wants to stay on, so there's a bit of argy-bargy going on at the moment as to, you know, when you took your tenure from sort of thing.
>
> Well, we had one, and it was made very clear to the sponsoring organisation that that member had overstayed their welcome, and that another member, another appointee, would be preferred. … [Interviewer: And did that work?] Absolutely it worked. Blindsided them. They were very surprised. But we got a much better Board member.

One board chair argued that the incentives for nominated board members to resist stepping down were more powerful than they might be for independent board members.

> To be on the Board of a $[X] billion super fund gives you status … if you've been running a small business and you are on the Board you get status. And you get income … I read somewhere that the average, the median super fund trustee salary is about $57 000. Now, I think that the average salary … is about, you know, 70 grand or something. So I mean, … it's a massive increase to your day job, and it's not insignificant … and thirdly, there's that as the trustee you do get treated extremely well … I guess the fourth thing is that it's incredibly interesting. Because if your day job doesn't involve you know, working in finance or markets or whatever, having a really kind of meaty interesting discussion about what markets are doing and what's happening with the Russian economy or what interest rates are going to do. It's incredibly interesting.

While some of these incentives may play out for independent members as well, this interviewee felt that independent board members were more likely to have

71 Ibid.

72 But cf APRA's thematic review, which suggests that in some circumstances at least there is 'a tension [between the actions of some boards and] the spirit and intent of the prudential framework': Rowell, above n 50.

multiple roles of this kind, or status, salary, insights into the financial world and benefits such that they would not place undue dependence on retention of a particular board role.

It is possible that the passage of time will see the phenomenon illustrated by APRA's findings of lengthy board service ebb away, and no further regulatory measures are required. In that case boards will face a greater challenge to maintain institutional memory, experience and (perhaps) expertise. One participant saw the risk of loss of corporate knowledge as a problem:

> With a lot of industry super boards, you get a lot of churn, you know, with short terms and people coming and going, and for the first year they've got no idea what anyone's talking about. So that's just a waste of time.
>
> It's been valuable, having that political history, the corporate history, the political history of how that works.
>
> That is very difficult, because we've got a couple of long standing directors who are very good directors, and I'd be sad to see them go.

There are also likely to be cultural and power shifts that result. The longer-serving directors on not-for-profit superannuation funds, in particular, represent a generation for whom superannuation was an industrial relations issue as well as a personal financial issue.[73] In many cases newer directors come from the superannuation sector itself, and hence have a more technical orientation. It is also likely that boards with maximum renewable terms up to six or nine years (which were the prevalent limits in the Funds interviewed for this research) will encounter situations in which senior management executives will have tenure longer than the longest serving member of the board. This will change the power dynamics on the board towards something closer to that seen on corporate boards in other sectors, in which the information asymmetry in favour of management becomes a very real issue for the board to manage. It may even see CEOs assume greater power within the organisation as a result of that asymmetry.

2 *Security of Tenure*

Almost all of the directors interviewed for this study reported that their place on the board could be terminated at the unqualified and unfettered discretion of the party appointing them. This appears to be the case in both the retail and industry fund context. Particularly pertinently in the context of independence, the power to terminate independent directors who are appointed by the board is vested in the board itself.

A number of interviewees specifically noted that such termination could be 'without cause'. It seems likely that this was also the case for a number of other interviewees even though they did not describe their situation in precisely that way.

> During the term … my employment can be terminated at will by the Board for no cause. So every four years there is an official review of my appointment. But the Board could also wake up tomorrow, you know, and sack me.

73 See generally Bernard Mees and Cathy Brigden, Workers' Capital: Industry Funds and the Fight for Universal Superannuation in Australia (Allen & Unwin, 2017).

In addition, there are verified reports of directors having had their nomination terminated without notice for failing to represent the interests of the nominating body.[74] Setting aside the likely illegality of such interference in the governance of a superannuation fund,[75] it is clear that such a phenomenon represents a challenge to the reality of independent, member-oriented decision-making on superannuation fund boards beyond the individual directly affected. Our interviews confirmed that other board members across all sectors of the superannuation system will have taken notice of events such as these and considered their own position. Just as important, reports of the events in the press are highly corrosive of the trust that members have in the probity of the decision-making undertaken on their behalf. These developments and possibilities materially undermine the legitimacy of the system.

The lack of security of tenure is particularly salient with respect to independent directors. Their ability to exercise an effective discipline on the conduct of other board members and on the board as a whole cannot fail to be undermined if they risk being terminated for opposing other board members, or for actively prosecuting matters which other board members find uncomfortable. On the other hand, they must remain accountable to members if their disciplining role is to be effective, so the minimum tenure cannot be set too long.

3 Board Size

The question of board size is contentious. Lipton and Lorsch have argued that '[w]hen a board has more than 10 members, it becomes more difficult for them all to express their ideas and opinions in the limited time available'.[76] Similarly Jensen argued that '[w]hen boards get beyond seven or eight people they are less likely to function effectively and are easier for the CEO to control'.[77] Some evidence from the listed company sector suggests that oversized boards are negatively correlated with financial performance.[78] Other studies, however, suggest that the impact of board size is complex and its effect will vary depending on the demands on the board and the contributions made by the directors.[79]

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74 Harvey Grennan, 'Local Government Super Softens Stance on Excluded Activities', *Sydney Morning Herald* (online), 27 October 2014 <https://www.smh.com.au/national/nsw/local-government-super-softens-stance-on-excluded-activities-20141027-11ce4l.html>.

75 There is a strong argument that a nominating body acting in this way would be regarded as a 'shadow director' under the *Corporations Act 2001* (Cth) s 9 (definition of 'director'), which in turn would see them subject to the covenant in s 52A(2)(c) of the *SIS Act* requiring directors of a corporate trustee to exercise their powers and perform their duties in the best interests of members.

76 Martin Lipton and Jay W Lorsch, 'A Modest Proposal for Improved Corporate Governance' (1992) 48 *Business Lawyer* 59, 65.

77 Michael C Jensen, 'The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems' (1993) 48 *Journal of Finance* 831, 865.

78 See, eg, Mercedes Rodríguez-Fernández, 'Company Financial Performance: Does Board Size Matter? Case of the EUROSTOXX50 Index' (2015) 15(2) *Cuadernos de Gestión* 15; Theodore Eisenberg, Stefan Sundgren and Martin T Wells, 'Larger Board Size and Decreasing Firm Value in Small Firms' (1998) 48 *Journal of Financial Economics* 35.

79 Jeffrey L Coles, Naveen D Daniel and Lalitha Naveen, 'Boards: Does One Size Fit All?' (2008) 87 *Journal of Financial Economics* 329; Khaled Elsayed, 'Board Size and Corporate Performance: The Missing Role of Board Leadership Structure' (2011) 15 *Journal of Management & Governance* 415.

Board size was described as a concern by a number of participants. For some participants this concern eclipsed independence:

> So I would say nine is pretty good, bearing in mind manageability and regulatory burden and fits in with that a third, a third, a third model. But you see that's what I think the debate should be about – what is the appropriate size?
>
> It's supposed to be the golden chalice that you get a majority of independents saying, 'whoa, oh, oh'. You know, 'performance will improve'. It's just such nonsense and there is a higher correlation – I would reckon there would be a higher correlation on the size of the Board and performance, you know – there would be a negative correlation with [greater] size.

This issue particularly came to the fore in the context of superannuation fund mergers, when the amalgamated fund inherited the board membership of each of the component funds with none of the relevant nominating bodies wishing to reduce their representation on the board.[80]

> So then you had one Fund which had 18 board members, I think. That's the way they dealt with that … You know, that was just absurd.

There is insufficient evidence from the interviews to support a specific board size for superannuation boards. The size of the board should be arrived at with reference to the need to have a board that works effectively and contains appropriate expertise and commitment. An excessively large board risks incorporating free-riders, who do not contribute except to the costs associated with the board. A board that is too small may be vulnerable to unplanned turnover. It may also lack expertise and impose too great a burden on its members.

E Remuneration

As with listed company boards, most superannuation funds today offer remuneration to board members.[81] In listed companies there has been a regulatory push for greater transparency by requiring companies to report on their remuneration.[82] In addition, accountability mechanisms have been created through the shareholder 'two strikes' arrangement, which can result in a vote to spill the board if at least 25 per cent of votes cast are against approval of the remuneration report in consecutive AGMs.[83] While there has been an effort to increase transparency about the amount of remuneration, there is still a degree of opacity about to whom the remuneration is paid, and accountability is less developed in the superannuation context.

Our interviews identified a variety of approaches to remuneration. These included (in some cases) a different rate for the Chair, a different rate for independent directors, and additional remuneration for membership of Board Committees. Some directors demonstrated a heightened awareness of the fee

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80 Sally Rose, 'APRA Takes Aim at Directors', *Australian Financial Review* (Sydney), 6 April 2016, 3; Michael McKenna, 'The Secret Ties that Bind', *The Australian* (Canberra), 14 August 2017, 11.

81 Australian Prudential Regulatory Authority, 'Annual Fund-Level Superannuation Statistics June 2018' (Spreadsheet, December 2018) Table 1, reporting SRF600, item 2(7) <https://www.apra.gov.au/publications/annual-fund-level-superannuation-statistics>.

82 *Corporations Act 2001* (Cth) s 300A.

83 Ibid pt 2G.2 div 9.

differentials across the boards on which they served, but others were noticeably less aware. Few directors regarded either the methodology applied to determine remuneration, or the actual levels awarded, as having caused issues in the past. Several noted that the fees paid to member representatives on their boards represented a significant source of remuneration for those individuals given the levels of remuneration they received from their 'day job'.

> So there's a big gap in the remuneration of those people and so from time to time some of them have put the view, 'well we're being paid at really different rates for what we do and hear as directors, and that's not fair'. And the view has also been put, there's a degree of obligation and liability that you adopt being a Director, and that should be compensated.

For one board member with significant expertise and experience, the remuneration enables him or her to take on the position:

> I'd be really challenged to allocate the amount of time if I didn't get the premium that I do and then that's a real challenge for all Industry Funds is to attract the right people you have to pay. But then there's this assertion … that the $50 000 that gets paid to Union members was a corrupt payment. Right, so there's this really nasty complexion applied to the fees of industry funds which makes it challenging to pay people enough to get the right skill-base, and there's a lot of liability involved, [more] than normal Director liability.

Similarly another explained:

> We actually initially had reimbursement. That became problematic because we had some people that were self-employed … So they were losing their consulting fee for the day rather than a wage. But then others were retired. So we moved to a director's fee model … and it's up to the individual to determine whether they get it or the employer gets it.

In many cases these individuals do not, in fact, receive the remuneration themselves.[84] There has been recurring media attention in recent times identifying that in some cases the bodies responsible for nominating directors to the board (usually employer organisations and trade unions) received the directors' fees.[85] This practice was confirmed by some of the interviewees in our sample. Interestingly a number of participants did not know whether this was happening, suggesting a high level of opacity around board remuneration arrangements even with respect to fellow board members, let alone members. On being asked if board members kept their fees, one person responded:

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84 Similar sorts of pressures have been identified in both the United Kingdom ('UK') and Canada. See Gordon Clark, 'Expertise and Representation in Financial Institutions: UK Legislation on Pension Fund Governance and US Regulation of the Mutual Fund Industry' (2007) 2 *Twenty-First Century Society* 1; Ronald B Davis, 'Balancing Competence and Representation: Trustees and Fiduciaries in the Era of Financial Engineering' (2011) 33 *Comparative Labor Law & Policy Journal* 49.

85 Sally Patten, 'CFMEU Collects $12 Million from Super Funds', *Australian Financial Review* (online), 5 November 2017 <https://www.afr.com/personal-finance/superannuation-and-smsfs/cfmeu-collects-12-million-from-super-funds-20171102-gzdquh>; Elizabeth Colman, 'Board Fees for Unionists Cost Super Funds $5.4m', *The Australian* (online), 13 December 2015 <https://www.theaustralian.com.au/national-affairs/industrial-relations/board-fees-for-unionists-cost-super-funds-54m/news-story/1f2974ca678570bd928aa8c83ac31779>; Ean Higgins and Ewin Hannan, 'Employer Representatives More Likely to Pocket Super Board Fees', *The Australian* (online), 8 December 2014 <https://www.theaustralian.com.au/national-affairs/industrial-relations/employer-representatives-more-likely-to-pocket-super-board-fees/news-story/3c94cea28baab85193ae10109eb639eb>.

> I know the independents do and they deserve it but I'm not aware of what the others do. I haven't, I've never asked.

Where fees were being channelled to sponsoring bodies, it was typically justified on the basis that the nominating body paid the individual's salary and was being compensated for the loss of that individual's time. With respect, that justification is weak. In principle, the level of fees paid to a director reflects not the time spent, but the skills and knowledge brought to the task, and the risk and accountability that attends such a responsible role. The exacting quality of care, skill and diligence expected of directors in the *SIS Act* is not calibrated to reflect the quantum of the financial compensation received by the individual.

Another common explanation is that allowing individuals to retain the remuneration will provide the individuals with a powerful interest to seek continued service, and to resist fund mergers where their roles might become redundant. Again, with respect, the logic is weaker than it might appear at first blush because precisely the same incentives would seem to be present for independent directors.

There is another aspect to this phenomenon relevant to the quality of governance. The profits from the receipt of director fees, considerable though they may sound in aggregate, are unlikely to be material to most nominating bodies. There are some exceptions to this general rule:

> I think there has to be a break between the way we are, in effect, funding Unions. I just do not think it is right … I have my suspicions that with the [X union] we would be one of their biggest forms of revenue. And it's not right. … The reason I say it's not right is that it's not going to ensure that you vote yourself out of existence is it, if that's in the best interest of members.

Questioned about the practice of remuneration flowing to nominating bodies one participant said:

> I'm, well, personally I think it's strange. I just, I think that it is overly, I don't know, I think it's difficult for the person to be really independent if they don't keep the salary.

It is worth recalling that in general, the fees received by nominating bodies from this source will be dwarfed by the marketing, sponsorship and other amounts commonly paid by funds to those nominating bodies. However, the practice of fees being passed to the nominating bodies is consistent with a theme present in other parts of our interviews: that the nominating body regards the board position as something that it, rather than the director, owns. This perspective may be further encouraged where the nominating body is also a shareholder in the trustee company,[86] making the situation analogous to the appointment of directors by shareholders in a listed company environment. Care should however be taken in relying too heavily on that analogy. The shareholder in a listed company has had to commit capital to acquire the right to participate in the election of directors. That right responds to the fact that that capital, once used to purchase the shares, is now at risk in the hands of the directors. There is no such commitment of capital, nor

86 APRA reports that this is the case for 27 out of the 138 RSE Licensees as at 30 June 2017: APRA, above n 18, 9.

acceptance of risk, by the nominating bodies in the superannuation context. Both the capital and the financial risk are the members'.

A further difficulty may be posed by the possibility that the nominated board member retains a strong allegiance to the nominating body. For one chair there were issues with the views of nominated board members being conditioned by their roots:

> I do see a lot of what I call the union line being taken on particular topics. Really it's just not the way a business needs to go.

This all suggests that there is a case to be made that the retention of director fees by nominating organisations gives the wrong impression to members, could encourage those organisations to misconceive the obligations of the directors they nominate, and has the potential at the margin to distort directors' allegiances and ought to be banned. If it is felt in a particular situation that it is inappropriate for an individual to receive remuneration for their role as a director, the monies that would otherwise be paid as remuneration could be used to defray costs of the trustee that would otherwise be reimbursed from the assets of the fund, so that the amounts would accrue to the benefit of members.[87]

V DISCUSSION

The superannuation system is deeply embedded in the economic and social fabric of Australia. It is wide-reaching and it is massive. It is, to borrow a phrase overused in recent times, genuinely 'too big to fail'. Policymakers and regulators recognise this, but face a considerable challenge: the system design is one of distributed decision-making. Responsibility for decision-making in the system resides in the boards of the superannuation funds, both intermediated and self-managed, over whom the forces of economic competition exercise little or no discipline.[88]

How, then, to ensure that the interests of members, and by extension the interests of the country, are pursued appropriately? Traditional 'command and control' modalities of regulation[89] will not be effective; the system is too dispersed and adaptive to be amenable to such an approach. Regulating the governance of key institutions in the system in order to create decision environments conducive to prudent, member-oriented decision-making has been the preferred answer over the past two decades.

Cognitive independence is a crucial part of this vision. That vision requires that decision-makers are free to exercise their judgment in what they believe to be the best interests of the members they serve, undistracted and unconstrained by competing influences. The legally-constructed office of trustee is the archetype of this loyal, diligent, careful and prudent agent. Reinforced with the normative force

87 The conceptually simpler process of simply returning the money to the fund directly is impeded by the rules around the types of monies that complying superannuation funds are able to accept.

88 Super System Review, above n 4, 7.

89 Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 1999) 35.

of fiduciary rhetoric, the rules of equity, which prohibit the exploitation of conflicts and require care, diligence and prudence, are directed to a large extent towards ensuring the cognitive independence of those who act as trustees. The covenants injected into the governing rules of all superannuation funds by the *SIS Act* entrench this vision into the governance arrangements of the funds themselves.

Structural measures, such as those imposed by the equal representation rules in Part 9 of the *SIS Act* and those envisaged in the Bill seek to reinforce the rules requiring cognitive independence. They implicitly signal Parliament's belief that the rules of equity, which on their face guarantee absolutely a range of qualities of decision-making (including but not limited to cognitive independence), are ineffective without formal regulatory intervention to entrench, elaborate and enforce those qualities.[90] To be clear, the structural measures cannot guarantee actual cognitive independence. They can however contribute towards the creation of an environment in which loyal, unfettered decision-making can occur. Crucially, their existence may also signal independence and inspire confidence in those dependent on the system that those qualities of decision-making are being applied to the management of their affairs. That is, they may contribute to the perceived legitimacy of the system. This contribution may be especially salient in light of the unique position of the superannuation system at the intersection of Australia's social, economic and financial realms. The coercion implicit in mandating near-universal participation in the superannuation system can be mitigated by the imposition of an institutional design that not only delivers efficient and fair outcomes to members but is expected to do so by its stakeholders.

This need for legitimacy is arguably especially pressing today. As recent surveys show, the community's trust in the legitimacy, fairness and efficiency of financial institutions and markets is at a low ebb.[91] The current Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[92] can be expected to corrode community confidence and trust further.[93] Institutions that are perceived to connect effectively with, and be accountable to, their stakeholders are less likely to be adversely affected by this general disaffection.

How might the independence measures in the Bill contribute to this? In his landmark analysis, Suchman identifies three types of legitimacy: pragmatic, moral and cognitive legitimacy.[94] Pragmatic legitimacy is granted by those closely affected by the activities of the organization as a result of the exchanges,

90 The genesis of the original s 52 covenants in the *SIS Act* is described in detail in *Re VBN and Australian Prudential Regulation Authority* (2006) 92 ALD 259, 354–63 [306]–[328] (Deputy President Forgie and Senior Member Pascoe).

91 See, eg, Edelman Trust Barometer 2017: Deidre H Campbell, *2017 Trust in Financial Services* (21 March 2017) Edelman <https://www.edelman.com/post/accelerating-trust-in-financial-services>.

92 Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (28 September 2018) <https://financialservices.royalcommission.gov.au/Pages/default.aspx>.

93 'Not So Super', *The Economist* (London), 18 August 2018, 59.

94 Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571, 577.

influences, and temperament[95] demonstrated by the organisation to these constituencies. It involves interaction with these audiences,[96] and convincing them of the benefits conferred on them by the organisation.[97] Only if the reforms of the Bill actually modify the behaviour of superannuation fund boards in ways that deliver benefits to members will they inspire this type of legitimacy. One example of a change that might inspire pragmatic legitimacy would be a quantum shift in institutional transparency that could flow from the presence and influence of the independent directors, including perhaps more visible contestation of normatively charged decisions, such as how to respond to the threat of climate change.[98] Funds that stick to the current highly scripted and paternalistic style of most superannuation disclosures are unlikely to be able to engender this type of legitimacy. Director elections would be another example of a change that might signal to members a greater determination to inspire trust and legitimacy. Finally, enhanced investment returns or lower costs due to better decision-making could establish pragmatic legitimacy.

Moral legitimacy is constructed by measuring the actions, structures, processes, and leaders of the organisation against normative ideas and societal standards. Efforts by organisations to meet corporate governance codes of best practice can be seen as indicating compliance with societal norms. Most superannuation fund trustees already publicly subscribe to a number of these, including the FSC and AIST's governance codes,[99] the Insurance in Superannuation Voluntary Code of Practice[100] and, in some cases, thematic affiliations such as the United Nations-supported Principles for Responsible Investment.[101] Paradoxically, in this area, the rhetoric of independence embedded in the Bill may deliver legitimacy to the superannuation system and its participants, even if the impact of the reforms on actual decision-making within funds is more equivocal or slower to accrue. That said, the responsiveness of public confidence to independence standards will decline in the long term if it is not nourished by credible evidence that these standards actually improve the decision-making process.

95 Suchman describes this as the 'dispositional attributes' attributed to the organisation when viewed by its audience as having the characteristics of an individual: ibid 578.

96 David Seidl, Paul Sanderson and John Roberts, 'Applying the "Comply-or-Explain" Principle: Discursive Legitimacy Tactics with Regard to Codes of Corporate Governance' (2013) 17 *Journal of Management & Governance* 791, 795.

97 Jackie Johnson and M J Holub, 'Questioning Organizational Legitimacy: The Case of US Expatriates' (2003) 47 *Journal of Business Ethics* 269, 272.

98 See, eg, Julien Vincent, 'It's Time Super Funds Came Clean', *Sydney Morning Herald* (Sydney), 2 August 2018, 21.

99 Financial Services Council, *FSC Standard 20: Superannuation Governance Policy* (at March 2013); Australian Institute of Superannuation Trustees, *Governance Code* (at 2017).

100 This government encouraged initiative is jointly owned and administered by the Association of Superannuation Funds of Australia ('ASFA'), AIST and FSC: Association of Superannuation Funds of Australia, Australia Institute of Superannuation Trustees and Financial Services Council, *Insurance in Superannuation Voluntary Code of Practice* (at 1 July 2018).

101 Principles for Responsible Investment, *About the PRI* <https://www.unpri.org/about-the-pri/about-the-pri/322.article>.

The third category is cognitive legitimacy. Cognitive legitimacy involves providing a comprehensible account of the organisation's activity. The industry fund movement has harnessed this potential very effectively over the past 25 years. The equal representation structure of industry fund boards has been embedded seamlessly within the overarching 'profit-for-members' mantra that is central to that sector's public branding, notwithstanding the implicit assumption of employer-employee conflict that underpins it.[102] Equal representation is comprehensible to members and the broader public precisely because it legitimises union involvement in the governance of the funds by situating that involvement in a historical narrative that sees universal superannuation as the product of concerted union advocacy to ensure that workers were not left behind when the welfare state of the middle decades of the 20th century became unsustainable.

The Bill implicitly challenges that justification, suggesting that members' interests are not adequately represented by the employee representatives in an equal representation structure or by the financial institution's nominees in the case of a retail fund. It could potentially also reinforce the growing public perception, fuelled by the Royal Commission, that the governance of Australia's for-profit financial institutions has privileged shareholder interests over customer interests.[103] Viewed from this perspective, it is likely that the rhetoric of independence may actually undermine the cognitive legitimacy of superannuation fund trustees by suggesting that the confidence inspired historically by the narratives of union stewardship and bank professionalism was naïve and hence misplaced and that formal safeguards (ie, the Bill) are in fact required to secure cognitive independence in superannuation fund governance. By disrupting those narratives, the Bill may in fact undermine rather than reinforce the legitimacy of the superannuation system in the eyes of the public.

Finally, there is a key question about what combination of modalities of regulation will be most effective in achieving the goal of cognitive independence. Are legislative measures requiring structural independence the optimal solution? The analysis in this article is designed in part to contribute to answering that question. The interviews found convincing evidence that members on the boards of different types of superannuation fund exercise cognitive independence much of the time. It also found concrete examples where that ideal was not achieved, often around issues such as fund mergers and transactions into which the interests of a third party, such as a nominating body or a related corporate entity, intrude.

This inspires the tentative conclusion that the value of structural independence measures may fluctuate over time. They may be irrelevant for much of the business of the board, for instance when it is deriving an appropriate investment strategy pursuant to the covenant in section 52(6) of the *SIS Act* or approving disclosure

102 Indeed, there was some controversy within the labour movement when the industry funds were originally set up as to whether employers should be represented on their boards. The pragmatic argument that employers needed a stake in the system ultimately prevailed: Mees and Brigden, above n 73, 126.

103 James Frost, 'Hayne Royal Commission Hearings Leave Retail Super Fund Industry in Tatters', *Australian Financial Review* (online), 17 August 2018 <https://www.afr.com/business/banking-and-finance/financial-services/hayne-royal-commission-hearings-leave-retail-super-fund-industry-reputation-in-tatters-20180816-h1436b>.

documents to go to members. However, they may come into their own when more existential types of issues confront that board. Indeed, it was telling that the interviews uncovered a phenomenon, previously identified and commented upon both by O'Barr and Conley[104] and by Butt et al,[105] that the historical trajectory of the fund as an institution provides 'creation myths', frameworks and norms that powerfully influence the beliefs, structure and conduct that constitute the institution. Board structures in the not-for-profit funds, in particular, were repeatedly described as the consequence of the provenance of the fund, of past fund mergers or of particular governance crises affecting the fund. The challenge this poses for regulation of the sector is that it is precisely at these seminal points in a fund's history that cognitive independence on the part of the board and its members is most crucial.

This finding suggests that dedicated legislative intervention may indeed be required to reform governance practices in the superannuation system. Organic change is likely to be slow, especially in the absence of traditional forms of economic competition. It is also likely to be haphazard, changing only if and when circumstances coalesce into a suitable catalyst. There is, of course, a danger in attempting to design 'one-size-fits-all' regulation, unless such regulation is directed towards establishing and enforcing minimum standards, such as speed limits or professional qualifications. For the most part governance regulation is not of this type. On the other hand, the public has a legitimate interest in ensuring that the administration of the system is effected in a skilful, efficient, fair and proper manner. One conclusion inspired by the analysis in this article is that legislative reform, if carefully designed, could cut through the inertia that would inevitably otherwise slow organic adoption of new governance arrangements.

Recognition that legislative intervention may be required is not the same thing as arguing that all reforms need to be introduced by statute. Modern regulatory regimes increasingly rely on multiple levels and modes of regulation. This is especially true in the domain of financial regulation.[106] Multi-valent regulatory regimes,[107] in which different levels and types of rules are paired with different modes of regulatory activity, are increasingly common in this domain. They respond to the adaptive nature of financial systems by hugely complicating the brute application of the so-called 'compliance calculus'.[108] The proposal that

104 William M O'Barr and John M Conley, *Fortune and Folly: The Wealth and Power of Institutional Investing* (Business One Irwin, 1992).

105 Butt et al, above n 35, 79.

106 Michael A Adams, Angus Young and Marina Nehme, 'Preliminary Review of Over-regulation in Australian Financial Services' (2006) 20 *Australian Journal of Corporate Law* 1; Ronald Sackville, 'Duties of Superannuation Trustees: From Equity to Statute' in M Scott Donald and Lisa Butler Beatty (eds), *The Evolving Role of Trust in Superannuation* (Federation Press, 2017) 308.

107 A multi-valent regulatory regime is one in which a specific phenomenon is addressed from a variety of directions simultaneously, for instance by state-imposed rules (eg, statutes) applied to an entity, by state-imposed rules applied to individuals within the entity, by voluntary agreements (whether contractual or as a consequence of association membership) and 'soft law' measures such as guidelines and regulatory oversight: M Scott Donald, 'Regulating for Fiduciary Qualities of Conduct' (2013) 7 *Journal of Equity* 142, 159.

108 The 'compliance calculus' is a cost-benefit analysis of a course of aberrant conduct that incorporates the potential rewards, the likely costs, the probability of being caught and the costs of being caught: Gary S

APRA use its power to determine Prudential Standards to provide principles, rules and standards that elaborate and buttress the formal legislative provisions has some appeal here, so long as the matters sought to be addressed in those instruments fall within the definition of 'prudential matters' by which that power is circumscribed under the *SIS Act*. The initiative of the FSC in imposing structural independence measures on its members may also assist. Notably, though, industry-initiated forms of self-regulation are vulnerable to lack of coverage (as not all organisations and individuals are members), to window-dressing (for instance by relying on bespoke and self-interested definitions of 'independence') and to shortcomings in enforceability (for instance by the offending entity relinquishing membership).[109] Relevant also is the distinctive regulatory strategy employed by APRA in this sector. APRA's willingness to employ informal means of influence,[110] such as public and private consultation, means that some of the substance of the regulatory regime, at least, is unobservable to outsiders. This can assist in resolving issues efficaciously, but also raises questions of regulatory accountability, consistency and transparency. Careful consideration therefore needs to be given to the role that each of these sources of constraint on conduct (formal and informal; state-imposed and self-regulatory) ought to play in the overall regulatory architecture.

VI CONCLUDING COMMENTS

Superannuation fund governance has been under the spotlight in Australia repeatedly in the past eight years. In that time, a series of government reports has inspired a succession of legislative and regulatory initiatives directed towards reforming the structure and conduct of the trustees responsible for the administration of the system. The majority of these have been designed to improve the expertise and accountability of the trustees and their directors who are the key decision-makers, and the efficiency and transparency of the system. Reforms imposing structural independence measures on superannuation fund trustee boards have been recommended on each occasion, and in recent years the government has initiated legislative programmes to bring them about, so far without success.

This article reports the findings of a qualitative study aimed to identify directors' thoughts about the way that independence is framed, viewed and operationalised in the superannuation context. It highlights the interaction between structural independence rules such as those contained in the Bill and other familiar governance issues, such as remuneration, nomination, board appraisal and board

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Becker, 'Crime and Punishment: An Economic Approach (1968) 76 *Journal of Political Economy* 169, 170. All other things being equal, a rational (but not ethical) decision-maker would likely pursue conduct that is expected to generate high rewards with little chance of discovery, or small sanctions, but would not pursue conduct in which the potential for reward is outweighed by the chance of discovery or by heavy sanctions (or both). The suggestion here is that imposing regulation on multiple sites (entity, board and individual) and multiple dimensions (financial and reputational for instance) vastly complicates the calculation: ibid 167.

109 See Donald and Le Mire, above n 8.

110 Australian Prudential Regulatory Authority, *Supervision Blueprint* (January 2010) <http://www.gtm.apra.gov.au/AboutAPRA/Publications/Pages/Supervision-Blueprint.aspx>.

tenure arrangements, as well as the panoply of rationales offered for independence. Taken as a whole, and allowing for the embeddedness and hence agendas of the participants, the interviews highlight that structural independence is at best a means to an end. Independence may require buttressing from other governance reforms, such as remuneration, nomination and tenure arrangements in the sector. The analysis also suggests that, if carefully implemented, director independence has the ability to improve the decision-making capabilities of superannuation fund boards. It identifies that the value of structural independence measures may be greatest during periods of existential stress for the superannuation fund or when outside interests threaten to intrude on trustee decision-making. Finally, the analysis suggests that independence measures such as those proposed by the government have the capacity to enhance the legitimacy of the system in the eyes of its participants.

APPENDIX A: INTERVIEW GUIDE – INDEPENDENT DIRECTORS ON SUPERANNUATION FUND BOARDS

A Opening (5 minutes)

About this interview:

- Our broad aim is to understand how the government's planned introduction of a requirement that the trustees of all APRA-regulated superannuation funds have a board containing a minimum of one-third 'independent' directors might affect the structure and operation of the fund you serve.
- This interview will be structured into four main parts:
    1. Gather some background information;
    2. Hear an account of the way your board currently operates and is structured;
    3. Collect your views on how your board might adapt in response to the government's current policy proposal;
    4. Hear any other issues you think we should consider.

Checks to perform:

1. Consent form?
2. Permission to record interview and take notes?
3. Observe right to opt out of involvement or cease recording at any time
4. Any questions?

B Background Information (10 minutes)

1. First, we have done some preliminary research into your fund and the structure of your board based on publically available information. Can you tell us if the summary provided is accurate, and help us fill in any gaps?
2. Can we also ask about:
    - Your industry sector – how do you view yourself?
    - Your member base – any distinguishing features for your fund?

C Account of Board structure (20 minutes)

1. Please tell us how board members are appointed.
2. Please tell us how board members are remunerated.
3. How long do board appointments last?
4. How did you come to be appointed to the board?
5. What do you bring to the board?
6. (If relevant) How did the independent member(s) of the board come to be appointed?

7. Has having an independent on the board had an impact?

D The Future (20 minutes)

1. What difference would the governments proposal, if legislated, have on your board?
2. How do you anticipate independent directors will be appointed to your board?
3. What do you believe are the risks from adding independents to your board?
4. What do you believe are the opportunities from adding independents to your board?
5. Does your board currently conduct board effectiveness reviews?
6. What information do you believe should be included in disclosures to members about the structure and operation of the board?
7. Any other comments?

E Other Issues and Wrap-up (5 minutes)

1. What are the biggest issues confronting your fund at the moment?
2. Any other important items that we have overlooked?
3. Would you mind being contacted if we any follow-up questions?
4. Can we send a copy of the transcript, and then our write-up, for your comments?
    - This would help to ensure that our account and interpretations are correct.
5. Thank you again!