

# EXPOSURE DRAFT

EXPOSURE DRAFT

1  
2  
3  
4  
5  
6  
7  
8

Inserts for  
**Superannuation Legislation Amendment  
(Governance) Bill 2015: Governance  
arrangements for APRA regulated  
superannuation funds**

---

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Schedule #	1 July 2016.	1 July 2016
2.		
3.		

---

# EXPOSURE DRAFT

---

## Schedule #—Governance arrangements for regulated superannuation funds

### Part 1—Main amendments

#### *Superannuation Industry (Supervision) Act 1993*

#### # Part 9

Repeal the Part, substitute:

## Part 9—Governance arrangements for regulated superannuation funds

### 86 RSE licensee must have independent directors etc. or trustees

- (1) If an RSE licensee of a registrable superannuation entity that is a regulated superannuation fund is a body corporate:
  - (a) at least one third of the RSE licensee's directors must be independent from the RSE licensee; and
  - (b) the chair of the RSE licensee's board of directors must be independent from the RSE licensee; and
  - (c) any appointment or removal of a director of the RSE licensee who is independent from the RSE licensee must comply with any requirements of the prudential standards relating to the appointment or removal of independent directors and trustees.
- (2) If an RSE licensee of a registrable superannuation entity that is a regulated superannuation fund is a group of individual trustees:
  - (a) at least one third of the trustees must be independent from the RSE licensee; and
  - (b) any appointment or removal of such a trustee who is independent from the RSE licensee must comply with any requirements of the prudential standards relating to the appointment or removal of independent directors and trustees.

# EXPOSURE DRAFT

---

## 1 87 Meaning of *independent* from an RSE licensee

- 2 (1) A person is *independent* from an RSE licensee if the person:
- 3 (a) does not have, and is not directly associated with a person
- 4 who has, a substantial holding (within the meaning of the
- 5 *Corporations Act 2001*) in the RSE licensee, or in another
- 6 entity that is a member of the same group as the RSE
- 7 licensee; and
- 8 (b) does not have a material relationship with, and is not
- 9 employed by an entity that has a material relationship with:
- 10 (i) if the RSE licensee is a body corporate—the RSE
- 11 licensee; or
- 12 (ii) if the RSE licensee is a group of individual trustees—
- 13 any of the trustees; and
- 14 (c) has not at any time in the last 3 years been an executive
- 15 officer or director of a body corporate that has, or has at any
- 16 time in the last 3 years, had a material relationship with:
- 17 (i) if the RSE licensee is a body corporate—the RSE
- 18 licensee; or
- 19 (ii) if the RSE licensee is a group of individual trustees—
- 20 any of the trustees.
- 21 (2) However, the person is not *independent* from the RSE licensee if
- 22 the person does not meet any requirements of the prudential
- 23 standards relating to whether a person is independent from an RSE
- 24 licensee.
- 25 (3) Despite subsections (1) and (2):
- 26 (a) a person is *independent* from an RSE licensee if APRA so
- 27 determines under section 88; and
- 28 (b) a person is not *independent* from an RSE licensee if APRA
- 29 so determines under section 90.
- 30 (4) Without limiting subsection (2) of this section, a prudential
- 31 standard determined under section 34C may specify any one or
- 32 more of the following:
- 33 (a) circumstances in which a person is, for the purposes of
- 34 paragraph (1)(a), directly associated with another person;
- 35 (b) circumstances in which another entity is, for the purposes of
- 36 paragraph (1)(a), a member of the same group as an RSE
- 37 licensee;

# EXPOSURE DRAFT

- 
- 1 (c) what constitutes, for the purposes of paragraphs (1)(b) and  
2 (c), a material relationship with an RSE licensee or an  
3 individual trustee.

## 4 **88 Determination that a person is *independent* from an RSE licensee**

- 5 (1) APRA may determine that a person is *independent* from an RSE  
6 licensee if APRA is reasonably satisfied that the person is likely to  
7 be able to exercise independent judgement in performing the role  
8 of:  
9 (a) if the RSE licensee is a body corporate—a director of the  
10 licensee; or  
11 (b) if the RSE licensee is a group of individual trustees—one of  
12 those trustees.
- 13 (2) APRA may make the determination on application by the RSE  
14 licensee or on its own initiative.
- 15 (3) APRA must:  
16 (a) if it makes a determination under this section in relation to  
17 the person—give the RSE licensee written notice of the  
18 determination; or  
19 (b) if it refuses an application under section 89 to make such a  
20 determination—give the RSE licensee written notice of:  
21 (i) its decision to refuse the application; and  
22 (ii) the reasons for that refusal.
- 23 (4) A determination under this section:  
24 (a) takes effect on the day it is made; and  
25 (b) ceases to have effect if APRA makes a determination under  
26 section 90 that the person is not independent from the RSE  
27 licensee.

## 28 **89 Applying for a determination that a person is *independent* from 29 an RSE licensee**

- 30 (1) An RSE licensee may apply to APRA, in writing, for a  
31 determination under section 88 that a particular person is  
32 independent from the RSE licensee.
- 33 (2) APRA may give to the applicant a notice requesting the applicant  
34 to give APRA, in writing, specified information relating to the  
35 application.
-

# EXPOSURE DRAFT

---

Note: A failure to give the requested information delays the time within which APRA must decide the application: see paragraph (3)(b).

- 1  
2
- 3 (3) APRA must decide the application:  
4 (a) within 60 days after receiving it; or  
5 (b) if the applicant was requested to provide information under  
6 subsection (2)—within 60 days after receiving from the  
7 applicant all of the information the applicant was requested to  
8 provide under that subsection;  
9 unless APRA extends the period for deciding the application under  
10 subsection (4).
- 11 (4) If APRA thinks that it will take longer than 60 days to decide the  
12 application, APRA may extend the period for deciding it by up to  
13 60 days if APRA informs the applicant of the extension:  
14 (a) in writing; and  
15 (b) within the period in which it would otherwise be required to  
16 decide the application under subsection (3).
- 17 (5) If APRA extends the period for deciding the application, it must  
18 decide the application within the extended period.
- 19 (6) If APRA has not decided the application by the end of the period  
20 by which APRA is required to decide it, APRA is taken to have  
21 decided, at the end of the last day of that period, to refuse the  
22 application.

## 23 **90 Determination that a person is not *independent* from an RSE** 24 **licensee**

- 25 (1) APRA may determine that a person is not *independent* from an  
26 RSE licensee if APRA is satisfied that the person is unlikely to be  
27 able to exercise independent judgement in performing the role of:  
28 (a) if the RSE licensee is a body corporate—a director of the  
29 licensee; or  
30 (b) if the RSE licensee is a group of individual trustees—one of  
31 those trustees.
- 32 (2) APRA may specify in the determination a period for which the  
33 determination has effect.
- 34 (3) A determination under this section takes effect on the day it is  
35 made.

# EXPOSURE DRAFT

- 
- 1 (4) A determination under this section ceases to have effect:  
2 (a) if, under subsection (2), a period is specified in the  
3 determination—when that period ends (unless it ends sooner  
4 under paragraph (b)); or  
5 (b) if APRA makes a determination under section 88 that the  
6 person is independent from the RSE licensee.
- 7 (5) If, under subsection (2), a period is specified in the determination,  
8 the person is not taken to be independent merely because the  
9 period has ended.

## 10 91 Effect of vacancies

- 11 For the purposes of the application of section 86 to an RSE  
12 licensee, if:  
13 (a) a vacancy occurs in the membership of a group of trustees or  
14 of the board of a corporate trustee; and  
15 (b) immediately before the vacancy occurred, the RSE licensee  
16 complied with that section; and  
17 (c) the vacancy is filled within 90 days after it occurred; and  
18 (d) immediately after the vacancy is filled, the RSE licensee  
19 complies with that section;  
20 the RSE licensee is taken to have complied with that section at all  
21 times during the period of the vacancy.

## 22 92 Directions to comply with this Part

- 23 (1) APRA may direct an RSE licensee of a registrable superannuation  
24 entity that is a regulated superannuation fund to comply with this  
25 Part if:  
26 (a) the RSE licensee has contravened this Part on one or more  
27 occasions; and  
28 (b) APRA is satisfied that the seriousness or frequency, or both,  
29 of the contraventions warrants the giving of the direction.
- 30 (2) A direction under this section must be accompanied by, or included  
31 in the same document as, a statement giving the reasons for the  
32 direction.
- 33 (3) APRA may revoke a direction under this section if APRA is  
34 satisfied that the RSE licensee is, and is likely to continue to be,  
35 substantially in compliance with this Part.

# EXPOSURE DRAFT

---

1 (4) An RSE licensee must not, without reasonable excuse, contravene  
2 a direction under this section.

3 Penalty: 100 penalty units.

4 (5) Subsection (4) is an offence of strict liability.

5 Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of  
6 criminal responsibility.

7 Note 2: For strict liability, see section 6.1 of the *Criminal Code*.

## 8 **93 Consequences of non-compliance with this Part**

9 (1) It is not an offence to contravene this Part (other than  
10 subsection 92(4)), and a contravention of this Part does not result  
11 in the invalidity of a transaction.

12 (2) However, a contravention of this Part may result in a fund being  
13 directed under section 63 not to accept any contributions made to  
14 the fund by an employer-sponsor (see subsection 63(6)).

## 15 **94 This Part does not apply if acting trustee appointed under** 16 **Part 17**

17 This Part does not apply to an RSE licensee if the RSE licensee has  
18 an acting trustee appointed under Part 17.

## 19 **95 This Part overrides trust deeds etc.**

20 Despite any provision of a trust deed or other rules according to  
21 which a regulated superannuation fund is administered, a person  
22 does not contravene the trust deed or rules by complying with any  
23 requirement that this Part imposes on the person.

# EXPOSURE DRAFT

---

1 **Part 2—Other amendments**

2 *Superannuation Industry (Supervision) Act 1993*

3 **# Section 4 (table item dealing with Part No. 9)**

4 Insert:

9 governance arrangements for regulated superannuation funds

5 **# Subsection 10(1) (definition of *employer representative*)**

6 Repeal the definition.

7 **# Subsection 10(1)**

8 Insert:

9 *independent* from an RSE licensee has the meaning given by  
10 sections 87, 88 and 90.

11 **# Subsection 10(1)**

12 Repeal the following definitions:

- 13 (a) definition of *independent director*;
- 14 (b) definition of *independent trustee*;
- 15 (c) definition of *member representative*;
- 16 (d) definition of *policy committee*.

17 **# Subsection 10(1) (paragraphs (m) to (nc) of the definition of**  
18 ***reviewable decision*)**

19 Repeal the paragraphs, substitute:

- 20 (m) a decision of APRA refusing to make a determination under  
21 section 88 that a person is independent from an RSE licensee;  
22 or
- 23 (n) a decision of APRA to make a determination under  
24 section 90 that a person is not independent from an RSE  
25 licensee; or

26 **# Subsection 10(2)**

27 Repeal the subsection.

---



# EXPOSURE DRAFT

---

## **# Subsection 29C(6) (note)**

Repeal the note, substitute:

Note: Part 9 has requirements for at least one third of directors to be independent.

## **# Subsection 29C(7) (note)**

Repeal the note, substitute:

Note: Part 9 has requirements for at least one third of trustees to be independent.

## **# Subsection 29EA(4)**

Repeal the subsection.

## **# Subsection 63(6) (heading)**

Repeal the heading, substitute:

*Contravention of rules relating to independence of directors and trustees*

## **# Subsection 63(6)**

Omit “equal representation”, substitute “independence of directors and trustees”.

## **# Subsections 63(7B) to (7D)**

Repeal the subsections.

## **# Subsection 63(8)**

Omit “or (7B)”.

## **# Sections 107 and 108**

Repeal the sections.

## **# Subparagraphs 117(5)(b)(i) and (ii)**

Repeal the subparagraphs, substitute:

- (i) if the fund has a single corporate trustee—the directors of the trustee have, by resolution, declared their intention to pay the amount out of the fund to the employer-sponsor;

# EXPOSURE DRAFT

---

1 (ii) if the fund has a group of individual trustees—the  
2 trustees have, by resolution, declared their intention to  
3 pay the amount out of the fund to the employer-sponsor;

4 **# Subsection 117(9)**

5 Repeal the subsection.

6 **# Paragraphs 223A(1)(f) and (g)**

7 Repeal the paragraphs.

8 **# Subsection 312(1) (subparagraph (a)(iv) of the definition of**  
9 ***procedural irregularity*)**

10 Repeal the subparagraph.

11 **# Subsection 327(1) (paragraph (d) of the definition of**  
12 ***modifiable provision*)**

13 Repeal the paragraph.

# EXPOSURE DRAFT

---

## 1 **Part 3—Application provisions**

### 2 **# The transition period**

3 In this Part:

4 *transition period* means the period:

- 5 (a) beginning on 1 July 2016; and
- 6 (b) ending on the third anniversary of the day on which this Act  
7 receives the Royal Assent.

### 8 **# Pre-existing RSE licensees transitioning to the new regime**

9 The amendments made by this Schedule do not apply, until after the  
10 transition period, to an RSE licensee that was in existence immediately  
11 before 1 July 2016 if the licensee complies with:

- 12 (a) any requirements of the prudential standards relating to the  
13 transition of RSE licensees to compliance with Part 9 of the  
14 *Superannuation Industry (Supervision) Act 1993* as amended  
15 by this Act; and
- 16 (b) if the RSE licensee was, immediately before 1 July 2016, a  
17 standard employer-sponsored fund—any requirements of that  
18 Part 9, as in force immediately before 1 July 2016, to the  
19 extent that they did not cover matters dealt with by the  
20 requirements referred to in paragraph (a).

### 21 **# Pre-existing RSE licensees ceasing to operate before 1 July** 22 **2019**

- 23 (1) The amendments made by this Schedule do not apply to an RSE  
24 licensee that was in existence immediately before 1 July 2016 if the  
25 RSE licensee notifies APRA, in writing, that it will cease operating  
26 before the end of the transition period.
- 27 (2) However, if an RSE licensee that has so notified APRA does not cease  
28 operating before the end of the transition period, the amendments made  
29 by this Schedule are taken to have applied to the RSE licensee on and  
30 from 1 July 2016.