

21 September 2018

The Hon Kenneth Hayne AC QC  
Commissioner  
Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Dear Commissioner Hayne

**Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission)**

Thank you for the opportunity to provide a submission to the Royal Commission in relation to the policy questions set out in Counsel Assisting's Round Five Closing Submissions of 24 August 2018 (**Closing Submissions**).

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 43,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

Given our focus, the AICD has considered those policy proposals and questions raised in the Closing Submissions that are applicable to governance and boardroom practice across the superannuation sector.

**1. Executive summary**

- 1.1. The AICD strongly supports consideration being given to reform options aimed at improving governance in the superannuation sector. The evidence that has been presented of misconduct and governance practices in the industry is concerning, and builds on previous reports that have highlighted the need for change.<sup>1</sup>
- 1.2. It is important to acknowledge the strengths of our superannuation system, which is a pillar of our retirement income system and has contributed significantly to investment in the Australian economy and the nation's unprecedented period without a recession.<sup>2</sup> This makes it all the more important to strengthen the standards of governance that

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<sup>1</sup> Productivity Commission 2018, *Superannuation: Assessing Efficiency and Competitiveness, Draft Report – Overview* May 2018; ARPA letter to RSE Licensees *Board Governance Thematic Review* 17 May 2018.

<sup>2</sup> We note that the 2014 Financial System Inquiry Final Report stated that 'an efficient superannuation system is critical to help Australia meet the economic and fiscal challenges of an ageing population. The system has considerable strengths. It plays an important role in providing long-term funding for economic activity in Australia both directly and indirectly through funding financial institutions, and it contributed to the stability of the financial system and the economy during the global financial crisis' - Australian Government, Treasury, Financial System Inquiry, Financial System Inquiry Final Report, (November 2014), xviii.

apply to superannuation funds. It is essential that robust governance practices that support sound decision-making in the best interest of members are in place and operating effectively across the sector given:

- the importance of the superannuation system to all Australians, and to the Australian economy and society more broadly;
- the compulsory nature of the system (as well as preferential tax treatment which encourages voluntary contributions); and
- the lack of ordinary accountability measures available.

1.3. In summary, the AICD:

- supports a stronger focus on board composition, particularly in relation to directors' knowledge, skills and experience;
- supports the application of civil liability to breaches by the trustee and trustee directors of the duties to act in the best interests of members;
- supports targeted measures to improve the management of conflicts of interest in the industry, but has reservations about the extension of the 'best interests' obligation to parties other than the trustee and trustee directors; and
- supports measures to facilitate stronger enforcement including clearer delineation of the respective roles of APRA and ASIC.

1.4. Our comments in relation to questions 825.14, 825.19 (i) and (ii) and 825.25-27 are outlined below.

## **2. Discretion to appoint and remove directors**

Question 825.14: Is it appropriate for shareholders of RSE licensees to retain a broad discretion to appoint and remove directors? Or should there be an obligation imposed on shareholders to exercise such powers in the best interests of the members?

### **(a) Board composition**

2.1. The AICD has previously advocated for a stronger focus on board composition (including on trustee directors' mix of knowledge, skills and experience) on the basis that it would support better governance within the sector<sup>3</sup>. The fundamental criteria for director appointments should be the competency of the relevant director candidate and the extent to which they can contribute to the board and support robust decision-making in the best interests of members, including in light of the mix of skills and experiences already represented on the board.

<sup>3</sup> AICD Submission to Productivity Commission regarding the Draft Report on Superannuation: Assessing Efficiency and Competitiveness, <https://aicd.companydirectors.com.au/advocacy/policy/submission-to-productivity-commission-regarding-the-draft-report-on-superannuation>, 13 July 2018.

- 2.2. Board composition has been addressed consistently in various reviews of the superannuation system, including the Super System Review in 2009-2010, the Financial System Inquiry in 2013-2014 and the ongoing Productivity Commission review of the competitiveness and efficiency of the Australian superannuation system. A key debate has been the 'equal representation' model and whether independent directors should be mandated.
- 2.3. The AICD has previously supported independent directors, including in the context of consultation on the *Treasury Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 (Cth)* (which would, if passed, require that all RSE licensees have an independent chair and at least one-third independent directors), but has emphasised that independence, on its own, is not sufficient to promote good governance. Rather, the collective qualifications, education, experience and skill-set of a board play a critical role.
- 2.4. The AICD accepts that the issue of independent directors remains contentious. It should not, however, be contentious that directors need to possess the skills and experience required to be able to contribute effectively to the deliberations of the board. This is particularly heightened in the context of RSE licensee boards given the complexity of the superannuation system, the compulsory nature of superannuation and the impact that decisions can have on the retirement savings of Australians.
- 2.5. The AICD notes that there are already a number of separate existing requirements regarding board composition in place, including that:
- directors must be 'fit and proper' according to APRA Prudential Standard SPS 520<sup>4</sup>;
  - boards must have policies in place that achieve appropriate board skills, structure and composition in accordance with APRA Prudential Standard SPS 510<sup>5</sup>; and
  - boards must have a written policy which sets out requirements relating to the nomination, appointment and removal of directors that support appropriate board composition and renewal in accordance with APRA Prudential Standard SPS 510<sup>6</sup>.
- 2.6. However, the draft findings of the Productivity Commission in relation to superannuation governance in their draft report, *Superannuation: Assessing Efficiency and Competitiveness*<sup>7</sup> (**Draft Productivity Commission Report**), as well as the recent APRA review into the board governance of RSE Licensees<sup>8</sup> indicate the need for significant improvements with respect to governance in the sector.
- 2.7. In a recent submission in response to the Draft Productivity Commission Report, the AICD expressed the view that there is sufficient justification, given the governance

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<sup>4</sup> Australian Prudential Regulation Authority, *Prudential Standard SPS 520 – Fit and Proper* (28 June 2013) 1.

<sup>5</sup> Australian Prudential Regulation Authority, *Prudential Standard SPS 510 – Governance* (31 October 2016) 1.

<sup>6</sup> Australian Prudential Regulation Authority, *Prudential Standard SPS 510 – Governance* (31 October 2016) 1.

<sup>7</sup> Productivity Commission 2018, *Superannuation: Assessing Efficiency and Competitiveness, Draft Report – Overview* May 2018.

<sup>8</sup> ARPA letter to RSE Licensees *Board Governance Thematic Review* 17 May 2018.

issues that have come to light and the special nature of superannuation, to introduce more prescriptive governance requirements (for example, in APRA prudential standards) regarding annual board and director performance assessments; maintenance of a board skills matrix; and external third party evaluation of board, committee and director performance capability at least once every three years<sup>9</sup>. Each of these requirements are sound governance practices that support effective and high-performing boards.

- 2.8. The AICD also notes that under section 912A(1)(f) of the *Corporations Act 2001* (Cth) (**Corporations Act**), a financial services licensee must ensure that its representatives are adequately trained and competent to provide the relevant financial services. More active oversight of this obligation by ASIC may help in addressing the board composition issues identified.

**(b) Considerations in the context of trustee boards**

- 2.9. As a result of the process by which directors are usually appointed to the boards of RSE licensees, the AICD accepts that the incumbent board does not necessarily have the ability to influence director appointments or to press appointors to have regard to any board skills matrix that is maintained. In this regard, the AICD notes the statement in the Closing Submissions that 'some directors continue to be appointed to trustee boards on the basis of their affiliation with shareholder organisations and not necessarily on their ability to contribute to the board'<sup>10</sup>. In our view, this is deeply concerning.
- 2.10. As a result of this tension, we understand the policy rationale behind the proposal to require shareholders to act in the best interests of members when appointing directors. However, we are concerned that it could be problematic from a legal perspective for the reasons discussed in paragraph 2.11 below, and may not be an appropriate solution for the issue that has been identified (alternative options are detailed in paragraph 2.14 below).
- 2.11. Trustees and directors of trustees have both a statutory and a general law duty to perform all duties and exercise all powers in the best interests of members. The duty has been described in the context of the trustee as involving 'not just the pursuit of the best possible authorised end or outcome (as the trustee rationally conceives the matter) for the trust as a whole but also the observance of proper procedures and processes in decision-making'<sup>11</sup>. This is a duty that is properly assumed by the trustee and directors of the trustee who, as fiduciaries<sup>12</sup>, have the appropriate relationship to members of the

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<sup>9</sup> AICD Submission to Productivity Commission regarding the Draft Report on Superannuation: Assessing Efficiency and Competitiveness, <https://aicd.companydirectors.com.au/advocacy/policy/submission-to-productivity-commission-regarding-the-draft-report-on-superannuation>, 13 July 2018.

<sup>10</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Module 5: Superannuation Closing Submissions, 185-186.

<sup>11</sup> G W Thomas 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2 *Journal of Equity* 177, 202.

<sup>12</sup> The statutory covenants in section 52A of the SIS Act impose obligations of care and loyalty on trustee company directors personally in relation to the management of the fund.

trust and a close understanding of the trust deed, and are privy to the necessary information flows to satisfy this duty. Shareholders are not in the same position. They are not fiduciaries and do not receive the necessary reports or other information about the fund and its members to be able to effectively discharge a 'best interests' duty.

- 2.12. In addition, it would likely give rise to difficult questions in relation to enforcement. For example, would members and/or trustees have a right of action against shareholders (or other nominating bodies)? Would shareholders be subject to civil liability for breach?
- 2.13. Further, if the desired objective is to ensure that directors who are appointed to boards are appropriately skilled and competent, with the ability to contribute to and support effective decision making, it is not clear to us that such a reform would achieve this. Enforcement and oversight of the obligation may be difficult, and it would not necessarily change the way that directors are appointed in practice or how conflicts are managed.

**(c) Alternative options in relation to director appointments**

- 2.14. The AICD would support further consideration being given to the legal and enforcement issues outlined above, as well as alternative options. Such options could include, for example:
- more objective criteria in APRA Prudential Standard SPS 520 and related guidance in relation to the competence, qualifications, knowledge and skills of a nominee (in order to strengthen the fit and proper assessment)<sup>13</sup>;
  - increased regulator involvement in and oversight of director appointments – for example, in the form of additional disclosure to the regulator regarding nominees (for example, with respect to their skills and competence), and a preparedness on the part of the regulator to take action if it has concerns about fitness and propriety;
  - strengthening regulatory standards to set an expectation (or even create a positive obligation) that *appointors* will satisfy themselves that the relevant nominee has skills and experience relevant to the role of the trustee, taking into account any guidance from the board (such as a board skills matrix);
  - embedding a right of veto in *the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act)* that would allow the Board to 'veto' nominees for reasons other than legislative or regulatory compliance issues (for example, because they do not strengthen board skills in areas identified by the board skills matrix), subject to appropriate disclosures to the regulator; and
  - introducing an accreditation process that applies to trustee director roles and requiring directors to participate in ongoing professional development relevant to the role and obligations of the trustee and trustee directors.

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<sup>13</sup> See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Module 5: Superannuation Closing Submissions, 193.

### **3. Managing conflicts**

Question 825.19 (i) and (ii): Would it be preferable to extend the obligation to act in the best interests of members of a super fund so that (a) contravention of the obligation attracts a civil penalty and (b) the obligation (and civil penalty for breach) extends to shareholders of trustees and any related bodies corporate of the trustee in respect of any conduct that will affect the interests of members of the fund? Are there any unforeseen consequences that would make it undesirable to strengthen the SIS Act in this way?

#### **(a) The need for reform**

- 3.1. The AICD notes that the Closing Submissions contain a number of allegations regarding conflicts of interests, failures to act in the best interests of members and lack of insight at a senior level into non-compliant cultures.
- 3.2. We acknowledge that the relevant matters would need to be litigated in court before any civil or criminal liability is found, and that the relevant parties have, in their most recent submissions, sought to rebut some or all of the allegations made against them. However, the AICD considers the evidence heard during the superannuation hearings strengthens the case for reform, noting that concerns around governance in the sector are not new<sup>14</sup>.

#### **(b) Imposition of civil liability**

- 3.3. The AICD notes that, at present, RSE licensee directors are not subject to civil penalties in relation to their duties under section 52A of the SIS Act (unlike directors who are subject to the directors' duties contained in the Corporations Act, including directors of responsible entities of managed investment schemes).
- 3.4. The AICD's view is that it would be appropriate to introduce a properly crafted penalty regime for RSE licensee directors, as well as RSE licensees.
- 3.5. We note that in response to consultation on the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017 (Cth)*, the AICD supported the Government's broad objective of introducing a penalty regime for RSE licensee directors that aligns with the penalty regime applying to directors of responsible entities of managed investment schemes, subject to ensuring that its interaction with the existing system in the SIS Act for holding directors accountable is appropriately addressed<sup>15</sup>.

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<sup>14</sup> Productivity Commission 2018, *Superannuation: Assessing Efficiency and Competitiveness, Draft Report – Overview* May 2018; ARPA letter to RSE Licensees *Board Governance Thematic Review* 17 May 2018.

<sup>15</sup> AICD submission on the exposure draft titled *Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017 (Cth)*, and associated explanatory material,

**(c) Extension of the obligation to act in the best interests of members**

- 3.6. The AICD would support a close examination of the existing laws governing trustee and trustee director duties to assess whether there has been a failure of the legal framework, or a failure of compliance and enforcement. In our view, an additional layer of law should only be considered to the extent the existing legislation is deficient.
- 3.7. In this regard, we note that the SIS Act sets out rules about the content of the governing rules of superannuation entities, and contain covenants to be (or taken to be) included in the governing rules of a regulated superannuation fund that bind, respectively, the trustee and its directors.
- 3.8. The covenants that apply to the trustee under section 52 of the SIS Act include:
- (a) to act honestly;
  - (b) to exercise the same degree of care, skill and diligence as a prudent superannuation trustee would exercise;
  - (c) to perform its duties and exercise its powers in the best interests of the beneficiaries;
  - (d) where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:
    - i. to give priority to the duties to and interests of the beneficiaries; and
    - ii. to ensure that the duties to the beneficiaries are met despite the conflict; and
    - iii. to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
    - iv. to comply with the prudential standards in relation to conflicts.

There are similar covenants under section 52A of the SIS Act that apply to directors of trustees.

- 3.9. We also note that there are already clear standards relating to conflict management arrangements in place, including APRA Prudential Standard SPS 521 – Conflicts of Interest and APRA Prudential Standard SPS 231 – Outsourcing.
- 3.10. Given the serious governance issues ventilated during the Round 5 hearings and the concerns about pervasive conflicts of interest, particularly in the context of corporate trustees within for-profit corporate groups, we understand the rationale behind the proposal to extend the obligation (and relevant civil penalty) to act in the best interests of fund members to shareholders of trustees and any related bodies corporate in respect of any conduct that will affect the interests of fund members.

3.11. However, in addition to the concerns outlined in section 2 above, the AICD has concerns that extending the obligation in such a way could:

- dilute accountability rather than strengthen or reinforce it, by distracting focus away from those who bear the primary obligation – the trustee and its directors. Accountability should be clear and enforced against the trustee and trustee directors;
- create additional complexity, and confusion regarding roles and responsibilities (particularly recognising that it could be expected that most conduct will not solely affect the interests of members of a particular fund. For example, in the case of a shareholder of a trustee, its conduct could affect its own shareholders, or the interests of members of multiple superannuation funds);
- create unreasonable expectations on shareholders who do not necessarily have the same specific skills, insights or capability as directors of trustees, or access to the information they need to discharge the duty effectively; and
- undermine the role of the trustee board, which is ultimately responsible for the sound and prudent management of trustee's business operations and should be the final decision-maker when it comes to board-level matters regarding the relevant fund.

3.12. Accordingly, the AICD is unconvinced that such an extension is an appropriate solution as it could create unintended consequences, without necessarily improving outcomes for fund members. We would support further consideration being given to these issues.

**(d) Alternative measures to strengthen governance and accountability**

3.13. We would also support consideration of alternative measures to strengthen governance and accountability. For example:

- increased transparency and reporting requirements, particularly on the steps trustee directors are taking to satisfy themselves that they are acting in the best interests of members;
- a more targeted role for the regulator in reviewing trustee decision-making processes, including regular review of board papers and minutes with a focus on conflict management, or guidelines in relation to a holistic framework for decision-making processes (noting that there are already a number of requirements across APRA Prudential Standards in relation to governance frameworks or policies)<sup>16</sup>; and
- guidelines around appropriate information flows to the trustee board, including greater clarity around the utility and purpose of an independent and well-resourced Office of the Trustee function which is used by some corporate trustees in for-profit corporate groups. Given the day-to-day business of the trustee in this context is typically outsourced to service providers, trustee boards can benefit from having

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<sup>16</sup> For example - Australian Prudential Regulation Authority, *Prudential Standard SPS 220 – Risk Management* (15 November 2012); Australian Prudential Regulation Authority, *Prudential Standard SPS 521 – Conflicts of Interest* (15 November 2012).



access to a dedicated resource that can receive direction from the board and provide continuity, oversee service providers and assist with information flows.

#### **4. Deterrence and the role of the regulators**

Questions 825.25-27: What can be done to encourage the regulators to act promptly on misconduct or potential misconduct? Is the present allocation of regulatory roles appropriate to achieve specific and general deterrence from misconduct? Given that what we are fundamentally concerned with is conduct that in subtle but ongoing ways negatively affects the retirement outcomes of consumers are either of the regulators best placed to carry the responsibility to protect consumers should the balance between them be restructured or significantly altered?

##### **(a) The need for strong, effective and proactive enforcement**

- 4.1. The AICD supports strong, effective, and proactive enforcement of existing laws by all regulators.
- 4.2. Close regulatory oversight is particularly important in the context of superannuation, given the compulsory nature of Australia's superannuation system and the lack of standard accountability measures found in corporations, such as member voting rights, annual general meetings and, in the case of listed entities, continuous disclosure obligations.
- 4.3. More proactive enforcement action would be a powerful deterrent to misconduct, and regulators need to be appropriately resourced, focused and qualified to take it. The AICD acknowledges that it is at least arguable that, to date, regulatory action has been insufficient to address concerns in the superannuation sector<sup>17</sup>.

##### **(b) Observations on the 'twin peaks' model of regulation versus the single regulator model**

- 4.4. The AICD notes that the 'twin peaks' model of financial regulation was introduced post the Wallis Inquiry in 1997, and that the strengths of the model may in part have contributed to Australia being able to withstand the worst of the Global Financial Crisis<sup>18</sup>. The model reflects the distinction between securities and conduct regulation, and prudential regulation, allowing for a different approach between the regulators to reflect their different objectives - ie, in the case of APRA, promoting financial system stability, and, in the case of ASIC, promoting the confident and informed participation of consumers and investors in the financial system.<sup>19</sup>

<sup>17</sup> See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Module 5: Superannuation Closing Submissions, 187 and 194-195.

<sup>18</sup> Andrew Schmulow, 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 151. The 2014 Financial System Inquiry was broadly supportive of the current jurisdictional arrangements and recommended against any changes to the Twin Peaks model - Australian Government, Treasury, Financial System Inquiry, *Financial System Inquiry Final Report*, (November 2014), 234.

<sup>19</sup> The distinction between the roles of the regulators was addressed by the International Monetary Fund in a 2012 report as follows: 'In practice, ASIC's approach to the supervision of entities that fall under its sole responsibility is

- 4.5. We acknowledge that the twin peaks model has the potential to give rise to issues in relation to regulatory overlap and consequential problems in relation to mandate and accountability (particularly if the roles of the regulators are unclear or communication between them is deficient), and it is important to review the operation of the model from time to time to ensure it remains fit for purpose<sup>20</sup>. This notwithstanding, the issues that have arisen are unlikely to be unsolvable and could be addressed by providing clarity in relation to the objectives and responsibilities of each regulator and promoting proactive co-ordination and communication<sup>21</sup>.
- 4.6. That said, there are some significant advantages to a single regulator model, including clear accountability and a more targeted, singular focus. However, it would lead to the dismantling of the regulatory architecture which has served Australia well in the past, including by conflating prudential and conduct regulation<sup>22</sup>. It would also require significant additional resourcing and funding, and may not necessarily reduce complexity. For example, it disregards the point that many of the issues highlighted at the Royal Commission occurred at the intersection of the superannuation system with banking and insurance.
- 4.7. Accordingly, the AICD supports:
- a clearer articulation of the roles of ASIC and APRA in relation to superannuation to clarify respective mandates and eliminate any unnecessary overlap. In particular, we consider that it would be useful to identify one regulator as the primary 'conduct' regulator and set expectations as to what that involves<sup>23</sup>;

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different from APRA's. APRA's mandate as the prudential regulator is to ensure that under all reasonable circumstances, financial promises made by prudentially regulated entities are met within a stable, efficient and competitive financial system... By contrast, ASIC's role is understood to be that of a conduct regulator, which means that it must ensure compliance with statutory obligations and other regulatory standards': International Monetary Fund (IMF), 'Australia: IOSCO Objectives and Principles of Securities Regulation – Detailed Assessment of Implementation' (IMF Country Report No. 12/31, November 2012) 41.

<sup>20</sup> We refer to the overview of regulatory responsibility and the areas of potential overlap outlined in P Hanrahan 'Legal framework governing aspects of the Australian superannuation system', Background paper 25 for the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Sydney, July 2018 at 18-22.

<sup>21</sup> Andrew Godwin and Professor Ian Ramsay noted the following in a Centre for International Finance and Regulation research paper: 'Two features stand out as being of critical importance to the effective operation of the [twin peaks] model. The first is clarity in terms of the responsibilities and objectives of each regulator, which requires a clear demarcation between the roles of the regulators and the minimisation of regulatory overlap. The second, which is related to the first, is a framework of co-ordination that encourages both regulators to share information proactively and to cooperate in the performance of their supervisory and enforcement functions: A Godwin and I Ramsay, CIFR Research Working Paper Series, 'Twin Peaks – The Legal and Regulatory Anatomy of Australia's System of Financial Regulation', August 2015, 42-43.

<sup>22</sup> The Wallis Inquiry noted that the 'ideal regulatory scheme [required] a balance between preventing market failure and allowing financial markets to perform efficiently the functions for which they were designed': Financial System Inquiry, 'Overview – The Financial System: Towards 2010', (Commonwealth of Australia, 1997), 14. We also note that the 'twin peaks' model is favoured by the Basel Committee, the IMF, G20 and the World Bank and that it has been adopted by a number of other countries (the UK, New Zealand and South Africa): Andrew Schmulow, 'Financial regulation: Is Australia's 'twin peaks' model a successful export?', <https://www.lowyinstitute.org/the-interpretor/financial-regulation-australias-twin-peaks-model-successful-export>, 1 March 2016.

<sup>23</sup> In terms of identifying one regulator as the primary conduct regulator, it would seem logical, given their respective mandates, that it be ASIC. We note the reference in the Closing Submissions to the comment from Mr Peter Kell, ASIC Deputy Chairman, that it would be desirable to clarify how and where you would expect conduct regulation to be most appropriately housed (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Module 5: Superannuation Closing Submissions, 195).

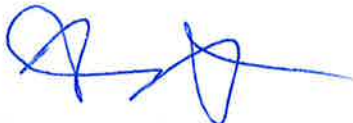
- periodic independent assessment of the performance of the regulators (noting that while mechanisms such as Senate Estimate hearings provide parliamentary oversight of regulators, they cannot be a substitute for a comprehensive independent review)<sup>24</sup>;
- a review of regulator powers as they relate to superannuation to ensure they are sufficient and appropriate<sup>25</sup>; and
- increased funds to the regulators to allow for additional resourcing to support appropriately targeted and strategic enforcement<sup>26</sup>.

4.8. Through enforcement of the law and holding companies and directors to account, regulators play a critical role in Australia's overall corporate governance framework. Regulators possess a range of tools to encourage compliance with the law and promote good practice. We recognise that there is a spectrum of enforcement activity including, where appropriate, the pursuit of civil and/or criminal proceedings against corporations and individuals. It will be a matter for the relevant regulator to exercise judgment in determining what is the appropriate course of action in any given circumstance, noting that there may be competing regulatory objectives both at an individual entity and system-wide level.

## **5. Contacts**

5.1. We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Sally Linwood, Senior Policy Adviser, on (02) 8248 2718 or [slinwood@aicd.com.au](mailto:slinwood@aicd.com.au), or Christian Gergis, Head of Policy, on (02) 8248 2708 or [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au).

Yours sincerely,



**ANGUS ARMOUR**

**Managing Director & Chief Executive Officer**

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<sup>24</sup> We note that the 2014 Financial System Inquiry recommended the establishment of a new Financial Regulator Assessment Board to review the performance of Australia's financial sector regulators annually - Australian Government, Treasury, Financial System Inquiry, Financial System Inquiry Final Report, (November 2014), 239.

<sup>25</sup> We note the reference in the Closing Submissions to the comment from Mr Peter Kell, ASIC Deputy Chairman, that if ASIC were to have a greater role as conduct regulator of RSE licensees, it would require expanded powers to match (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Module 5: Superannuation Closing Submissions, 195).

<sup>26</sup> Resourcing is a critical issue, noting that the 2015 capability review of ASIC comments on the significant increase in ASIC's mandate over time, including in light of the enactment of new legislation and amendments to existing acts: Fit for the future: A capability review of the Australian Securities and Investments Commission, A Report to Government, December 2015.