

18<sup>th</sup> April, 2016

**ATTENTION:**

Superannuation Competitiveness and Efficiency  
Productivity Commission  
Locked Bag 2, Collins St East  
Melbourne VIC 8003

## Australian Government, Productivity Commission – Efficiency and Competiveness of the Superannuation System – Issues Paper/March 2016

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### 1. Assessment of the efficiency and competitiveness of the superannuation industry: development of criteria

As long-term researchers within the Australian superannuation industry, we wish to take this opportunity to provide feedback and comments to the Productivity Commission (the Commission) in relation to their task of developing criteria to assess whether and the extent to which the superannuation system is efficient and competitive and delivers the best outcomes for members and retirees.

The focus of our submission relates to our independent research findings over more than three decades in the Australian superannuation industry. We believe these findings will be of relevance to the Commission in their task of looking at the effect of government policy and regulation on the competitiveness and efficiency of the system including drawing on any relevant international experience.

### 2. The current paradox within the Australian superannuation industry

Our joint research,<sup>1</sup> which includes three surveys of Australia's superannuation fund trustees/licensees, as well as the widely reported views of fund executives<sup>2</sup> in addition to APRA's own surveys<sup>3</sup>, has focused on attempting to explain the widespread view that there is too much regulation in the superannuation

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<sup>1</sup> Taylor, Sue, Anthony Asher and Julie-Anne Tarr (2016), Sharpening regulation in the Australian superannuation industry to ensure compatibility of public and private objectives, 7<sup>th</sup> Annual Financial Markets and Corporate Governance Conference, Monash University, March <http://ssrn.com/abstract=2720157>.

<sup>2</sup> A. Butt, S. Donald, D. Foster, S. Thorp and G. Warren, 2014. 'The Superannuation System and its Regulation: Views from Fund Executives', Centre for International Finance and Regulation, WORKING PAPER NO. 030/2014 / PROJECT NO. SUP002, JULY 2014; AIST & BNP Paribas Securities Services, 2015, 'What will our industry look like in 2025?' Presentation at the CMSF 2015 Conference.

<sup>3</sup> APRA Stakeholder Survey, (2013), Report of overall findings, July, Australian Survey Research, at pp. 8-9).

industry. At the heart of this viewpoint is that the ongoing regulatory reform process has failed to achieve its intended public-interest outcomes. This has required yet more regulatory intervention to ‘fix’ the inefficient and ineffective system outcomes – an issue which is implicit in the rationale for the Commission’s current review process.

The key theme of our submission is that regardless of the public interest rationales for these interventions, the unresolved policy issues have led to low stakeholder satisfaction levels as to regulatory outcomes. In fact, the reverse can be argued to be the case, giving rise to a paradox of more regulation creating greater dissatisfaction as to outcomes. This paradox is clearly highlighted in the Commission’s 2011 Report ‘Identifying and Evaluating Regulation Reforms’ which stated that (Overview, at p. XI):

*... ‘Regulation has grown at an unprecedented pace in Australia over recent decades... [while] this regulatory accretion has brought economic, social and environmental benefits. ...it has also brought substantial costs. Some costs have been the unavoidable by product of pursuing legitimate policy objectives. But, a significant proportion has not. And in some cases the costs have exceeded the benefits. Moreover, regulations have not always been effective in addressing the objectives for which they were designed.’*

The Commission’s view has been confirmed by the Financial System Inquiry Final Report, 2014, which made 44 recommendations relating to the Australian financial system. The fundamental test was one of public interest: the interests of individuals, businesses, the economy, taxpayers and Government.<sup>4</sup> While the Inquiry found that the Australian financial system had many strong characteristics:

*‘...superannuation is not delivering retirement incomes efficiently...unfair consumer outcomes remain prevalent...and policy settings do not focus on the benefits of competition and innovation. As a result, the system is prone to calls for more regulation.’<sup>5</sup>*

Our explanation is that these flawed regulatory outcomes result, in important respects, from the failure of regulators to fulfil their obligations due to a large extent to subtle forms of capture by vested interests in the industry. While our research is ongoing, there is evidence within the superannuation industry that the regulatory reform process benefits the larger industry players and the compliance industry (which may include some of the regulators themselves).

An example of this capture activity (and as further detailed in the Appendix to this submission) relates to the Coalition’s amendments to the Labor Government’s original, public-interest-based Future of Financial Advice (FoFA) reforms. These Coalition reforms were designed to repeal the best interests’ duty, remove the opt-in requirement and relax the ban on commissions in a number of areas which

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4 Commonwealth of Australia (2014). Financial System Inquiry, Final Report, Executive Summary, November 2014, at p. xiii.

5 Commonwealth of Australia (2014). Financial System Inquiry, Final Report, Executive Summary, November 2014, at p. xiii.

were crucially important protective mechanisms in the original provisions. These original Labor initiated reforms were subject to extensive lobbying processes against them by the Financial Service Sector<sup>6</sup>.

As also detailed further in the Appendix to this submission, in the Future of Financial Advice Amendments, the 'Details-stage Regulation Impact Statement' prepared by the Department of the Treasury and submitted to the OBPR on the 19th March 2014, reported that:

*'...The key reforms...are estimated to produce average ongoing compliance cost savings of around \$190 million per year, as well as once-off implementation cost savings of around \$88 million...Overall, the measures were assessed as having a major impact on the broader economy and therefore given a B rating (on a scale of A to D) in relation to the level of analysis required.'*

The Regulatory Impact Statement (RIS) prepared by the Department of the Treasury, given that it related to an election commitment given by the Coalition Government to reduce regulatory burdens and costs in the Financial Services Sector, contained no alternative policy options. This incomplete RIS was then assessed as adequate by the OBPR.

However, the RIS does not quantify any benefit or costs for consumers. This information was available in the Rice Warner (RWA, 2013) Report which highlighted that the benefits of the original FoFA reforms were estimated to be \$6.8 billion, far exceeding the cost of \$2.4 billion over the next 15 years. As detailed in the 2014 Industry Super Australia Submission (at p. 13) to the *Exposure Draft: Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014*,<sup>7</sup> this saving is consistent with an estimate provided by Rainmaker Information of \$6.6 billion in annual commissions paid by super members and consumers of financial products per year prior to FoFA.<sup>8</sup> Modelling of the original, Labor-initiated, FoFA reforms also highlighted benefits in addition to the savings to super members and consumers of financial products. That is, RWA predicted that by 2027 the FoFA reforms would: boost Australians' savings under advice by \$144 billion; reduce the average cost of advice from \$2,046 (before the reforms) to \$1,163, and double the provision of financial advice from 893,000 pieces to 1.88 million pieces.

Thus, the focus on the costs to the financial services sector only within the RIS prepared by Treasury to support the Coalition's Amendments to the FoFA laws is inconsistent with the guidelines in the Best Practice Regulation Handbook. That is, the Options Stage RIS did not provide rigorous evidence based assessment of the proposals. The handbook states that: '...best practice regulation-making...must be effective in addressing an identified problem and be efficient in maximising the benefits to the community, taking account of the costs'.

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<sup>6</sup> Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, Bills Digest no. 11 2014–15, Position of major interest groups, accessed on the 13th January, 2016 at: [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1415a/15bd011](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd011)

<sup>7</sup> Industry Super Association, Exposure Draft: Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014. 19<sup>th</sup> February, 2014, accessed on 13<sup>th</sup> January from: [http://futureofadvice.treasury.gov.au/content/consultation/fofa\\_amendments/submissions/Industry\\_Super\\_Australia.pdf](http://futureofadvice.treasury.gov.au/content/consultation/fofa_amendments/submissions/Industry_Super_Australia.pdf)

<sup>8</sup> Rainmaker Information (2011) Commissions Revenue Report 2010, prepared for Industry Super Australia, August 2011

An additional example of the regulatory reform process benefitting the larger industry players and the compliance industry (which may include some of the regulators themselves), relates to the high cost of fees within the superannuation industry. For example, with 94% of all Australians as at 31<sup>st</sup> December, 2014, currently members of mandatory occupational superannuation schemes, both the OECD's 2013 'Pension Markets in Focus Report' and the 2014 and 2015 Reports of the Grattan Institute, bring into stark relief a major issue that is impacting negatively on the welfare of fund members. That is, a key component of the fund member cost burden is that Australian superannuation fees, and the expenses reported by funds, have consistently been higher than the OECD median expense ratio. While average fees have dropped slightly in 2013, at the current pace of decline, it would take approximately fifty (50) years before Australia attains the median expenses currently achieved by funded pension systems in OECD countries.<sup>9</sup> Acknowledging that these statistics may hide as much as they reveal, they justify the research that the Commission is undertaking.

### 3. The causes of the paradox: regulatory, corrosive and intellectual capture aided by complexity

As outlined in our research, the original private interest focus on industry-based capture which was designed to achieve 'rewards' such as barriers to entry, has been extensively reformulated by a community of scholars working within the Harvard Law School-based Tobin Project.<sup>10</sup> These scholars in turn developed the concept of 'corrosive capture' (Carpenter and Moss, *Preventing Regulatory Capture* at pp. 16-17) which needs to be distinguished from the original concepts of statutory and agency capture given that its primary focus is to:

*'dismantle regulation even in the absence of public support or a strong welfare rationale for doing so. [With]...corrosive capture occurring if organized firms render regulation less robust than intended in legislation or than what the public interest would recommend. By less robust we mean that the regulation is, in its formulation, application, or enforcement, rendered less stringent or less costly for regulated firms (again, relative to a world in which the public interest would be served by the regulation in question).'*

We have found extensive evidence, as detailed in Section Four of this submission and supported with further evidence in the Appendix, of substantial lobbying by the Financial Services Sector which has served to render legislative provisions 'less robust than intended in the legislation or than what the public interest would recommend'.

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9 Grattan Institute Report 2014, 'Super Sting – How to Stop Australians Paying Too Much for Superannuation', accessed on the 16th August, 2014 at: <http://grattan.edu.au/wp-content/uploads/2014/05/811-super-sting.pdf>, at p. 8.

10 The Tobin Project, 2014 Governments and Markets Research, Preventing Regulatory Capture: Special Interest Influence and How to Limit It, accessed on the 19th April, 2014 from <http://www.tobinproject.org/research-inquiry/government-markets/featured-inquiry-preventing-capture>. The Project has built an interdisciplinary network of over 350 leading scholars across 80 universities.

In addition to examples of corrosive capture within the Australian superannuation industry, we find a significant level of intellectual capture. As highlighted by UK academic John Kay, regulatory capture needs to be explained by more than self-interest<sup>11</sup>:

*'In the 1970s and 1980s, financial market regulation largely abandoned a system structured to limit conflicts of interest, which encouraged businesses to build reputations on their performance of specialist functions. The new approach was based on behavioural regulation, designed to combat inappropriate incentives by detailed prescriptive rules. The outcome is regulation that is at once extensive and intrusive, yet ineffective and largely captured by financial sector interests. Such capture is sometimes crudely corrupt, as in the US where politics is in thrall to Wall Street money. The European position is better described as intellectual capture. Regulators come to see the industry through the eyes of market participants rather than the end users they exist to serve, because market participants are the only source of the detailed information and expertise this type of regulation requires. This complexity has created a financial regulation industry – an army of compliance officers, regulators, consultants and advisers – with a vested interest in the regulation industry's expansion.'*

As suggested by Arthur Denzau and Douglass North,<sup>12</sup> regulators can also be subject to ideologies that make it difficult to consider alternative interpretations. Rojhat Avsar<sup>13</sup> argues that Alan Greenspan's approach to regulation before the financial crisis provides an example of how ideology governed actions – to the detriment of the world economy.

Working alongside these regulatory, corrosive and intellectual capture mechanisms which we believe have been extensively utilised within the Australian superannuation industry by vested interests, is the high degree of legislative complexity within the industry. Justice Steven Rares states that:<sup>14</sup>

*"...the policy choice of using prescriptive drafting that most Commonwealth legislation has reflected over the last two or three decades needs urgent reconsideration. It has really significant impacts on the whole community in terms of comprehensibility, compliance costs and, to use a political catch cry, access to justice.*

*Why is this so? ... First, attempts at codification involving many permutations on a theme are inevitably complex and likely to miss something, secondly, complexity can, and often is, a handmaiden of incomprehensibility, thirdly, the unravelling of complexity requires time and effort, fourthly, the more detailed and complex that legislation is, the harder it is for the ordinary person, including the scions of the business community, to grasp the point and comply, fifthly, complexity makes litigation more complex, lengthy and expensive for the parties and, sixthly, those factors create the need for the Courts to deal with more and more in judgments or summings up to juries leading to delay, the greater likelihood of appellate challenges and, of course, error. This last aspect has affected the conduct of litigation profoundly.'*

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<sup>11</sup>Refer to 'Finance needs stewards, not toll collectors', 22 July 2012, Financial Times, accessed on 17<sup>th</sup> January, 2016 at: <http://www.johnkay.com/2012/07/22/finance-needs-stewards-not-toll-collectors>.

<sup>12</sup> Arthur T. Denzau and Douglass C. North, 1993, 'Shared Mental Models: Ideologies and Institutions', Center for Politics and Economics, Claremont Graduate School and Center for the Study of Political Economy Washington University (St. Louis), accessed at: <http://ecsocman.hse.ru/data/957/750/1216/9309003.pdf> on the 16th January, 2016.

<sup>13</sup> Avsar, R.B., 2014. Just a little "froth": Tracing Greenspan's ideology. The Social Science Journal, 51(2), pp.309-315

<sup>14</sup> Rares, S., 2014, May. Competition, fairness and the courts. In Competition Law Conference, Sydney (Vol. 24).

In turn, a recent UK surveys of trustees<sup>15</sup> has confirmed that the problem is not limited to Australia with the UK Office of the Parliamentary Counsel, Cabinet Office (at p. 2)<sup>16</sup>, calling for an in depth analysis of the complexity that has been created. In the view of the Parliamentary Counsel:

*“...we should regard the current degree of difficulty with law as neither inevitable nor acceptable. We should be concerned about it for several reasons. Excessive complexity hinders economic activity, creating burdens for individuals, businesses and communities. It obstructs good government. It undermines the rule of law.”*

In summary, we believe that complexity of this sort, working together with regulatory, corrosive and intellectual capture mechanisms, has played an important role in the regulatory paradox existing within the Australian superannuation industry given that it benefits vested interests and acts as a screen for rent seekers.

#### 4. Regulatory impact analysis: a remedy

Given that the current objective of the Commission, as set out in its March 2016 Proposal Paper, is to develop criteria to assess the extent to which the superannuation system is efficient and competitive, our research clearly highlights that any revised regulatory model, in order to actually achieve its objectives, must factor in the rent seeking behaviour of vested interests within the superannuation industry/financial services sector.

We believe that that the remedy needed to ensure that the regulatory model developed by the Commission actually achieves its objectives rests with the proper implementation of the Regulatory Impact Analysis (RIA) framework that has ostensibly had bipartisan political support for some decades. In order to fully appreciate the critical importance of the RIA process within the Australian superannuation industry however the reality faced by fund members must be appreciated. That is, their mandatory, occupational superannuation payments are currently being paid into an extremely complex, publicly mandated, but privately controlled superannuation system. This point was acknowledged within the June 2010, Cooper-led, Labor Government’s ‘Super System Review: Final Report – Part One: Overview and Recommendations’ (CSSRR) (Para. 3.2.2), which highlighted that compulsory occupational superannuation payments were fully outsourced to a multitude of privately controlled schemes.

Within this context, our arguments go along the following lines – evidence and background for them can be found in related sections within the Appendix.

1. Government policy intentions have clearly been for a detailed RIA, however the currently applicable Australian Government Guide to Regulation (AGGR) (2014) in its implementation,

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<sup>15</sup> Trustees warn DC governance changes have not benefited members. Accessed on 25 January 2016 at: <http://www.professionalpensions.com/professional-pensions/news/2442379/trustees-warn-dc-governance-changes-have-not-benefitted-members#>

<sup>16</sup> UK Office of the Parliamentary Counsel, Cabinet Office. (2013), When laws become too complex accessed on the 12<sup>th</sup> March, 2016 at: <https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex>

offers a range of carve-outs, ‘weak-form’, potentially qualitative only, Regulation Impact Statements (RIS) and Ministerial exemptions. In addition, regulatory-based election promises have also been traditionally exempted from the RIA process.<sup>17</sup> As highlighted by the 2006 Banks Taskforce Report (at p. 18)<sup>18</sup>, ‘...RIA compliance has also tended to be lowest for the more significant or controversial regulations, where good process is most needed.’ Of great concern, and as highlighted in the OECD’s 2010 Review Report<sup>19</sup>, this low compliance level appears to be an orchestrated outcome given that:

*‘...a fully implemented, quantitative based RIA has the capacity to prevent rent seeking and promote the highest social benefits in regulation, thus generating many potential opponents. For example...Departments may have an incentive to evade the requirements of RIA either because of resource demands or because it precludes a favoured use of regulatory power (OECD 2010, at p. 45).’*

2. Within this context, the size and power of the financial services sector is significant. For example, in 2014, the 20 largest super funds in Australia controlled nearly 40% of all super money held in Australia<sup>20</sup> while the superannuation industry as a whole held 24% of total financial institutions assets, putting its share second only to that of banks.<sup>21</sup> In turn, Australia’s banking market is relatively concentrated by international standards with the share of banking assets owned by the four largest banks in Australia higher than equivalent shares in most other jurisdictions. As a result, the major banks’ share of total Authorised Deposit-taking Institutions (ADI) assets have increased from 65.4 per cent in September 2007 to 78.5 per cent in March 2014.<sup>22</sup> These statistics suggest that the financial services sector may have disproportionate influence on superannuation regulation to the point of potentially capturing both legislative and agency policy-making processes. This point is made by Adair Turner, previous head of the UK Financial Services Authority, when he highlights that the sector has the power:

*‘...to generate unnecessary demand for its own services...and attract to themselves unnecessarily high returns and create instability which harms the rest of society’<sup>23</sup>.*

3. There are a significant number of examples of exemptions, carve-outs and ‘weak’ RIS that have been applied to the superannuation legislative reforms. In the last decade, these have included the introduction of the Registrable Superannuation Entity (RSE) licensing regime, the APRA prudential standards and the Stronger Super reforms. However, the problem of low

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<sup>17</sup> As detailed by the Centre for International Economics, 10<sup>th</sup> May 2010, in their Submission to the Productivity Commission (PC) Review of Regulation Impact Analysis, at p. 7.

<sup>18</sup> The Taskforce on Reducing Regulatory Burdens on Business, Rethinking Regulation (January 2006) (Banks Taskforce Report), pp i and ii. <<http://www.regulationtaskforce.gov.au/finalreport>>.

<sup>19</sup> OECD, Government Capacity to Assure High-Quality Regulation in Australia (2010). <<http://www.oecd.org/dataoecd/63/59/44529857.pdf>>.

<sup>20</sup> SuperGuide (2014), accessed on the 5th October at <http://www.superguide.com.au/boost-your-superannuation/top-20-largest-super-funds>.

<sup>21</sup> KPMG (2015), SuperTrends: The Trends Facing Australia’s Superannuation Industry, KPMG, at p. 4.

<sup>22</sup> Financial System Inquiry Interim Report. 2014. Chapter Two, Competition, Banking Sector.

<sup>23</sup> Turner, A (2009) Mansion house speech

[http://www.fsa.gov.uk/library/communication/speeches/2009/0922\\_at.shtml](http://www.fsa.gov.uk/library/communication/speeches/2009/0922_at.shtml)

compliance levels in terms of the RIA process can be traced back to the failure to generate either an appropriate RIS for the fundamental building block of Australia's current, superannuation system and that is the 1993 enactment of the *Superannuation Industry (Supervision) Act* or ensure a timely post-implementation review process.

In summary then, a critically important point to note is that a significant proportion of the regulatory reforms introduced in Australia over the last three decades, have not been required to undergo serious, cost/benefit scrutiny. The weak-form RIS implementation process that has characterised the regulatory reforms within the superannuation industry has therefore been unable, in its formulation, application, or enforcement, to genuinely serve the public interest. For example, the frequent use of 'special cases', that is, Ministerial exemptions, election promises and carve outs and non-quantitative or 'costs-to industry' only focused RIS processes have failed to prevent the passage of legislative reforms that are designed to transfer wealth from fund members to the Financial Services Sector in the form of, for example, excess fees and commissions.

## 5. Recommendations to more closely align RIA principles with practices

As highlighted in the Commission's 2012 Report (at p. 195),<sup>24</sup> there is a:

*'...large gap that exists between principle and practice...[Thus]...improving RIS quality is unlikely to be achieved by simply providing more detailed guidance material or further strengthening analytical requirements. Based on the evidence examined, such an approach would likely only further widen the gap between principle and practice. In view of this, other approaches are needed.'*

Our research within the superannuation industry supports this belief. For example, the Coalition Government's 2001 Issues Paper entitled 'Options for Improving the Safety of Superannuation' provided a detailed public interest rationale for the passage of the licensing, legislative enactments. Within this document, it is argued that legislative intervention was necessary given that '...superannuation is essentially a managed investment with special characteristics that collectively place an onus on Government to ensure proper governance frameworks.'<sup>25</sup> These special characteristics included: compulsion; restricted member access to their investments until retirement; limited choice and portability; and a range of information asymmetries related to superannuation investment risk.

In introducing the key licensing regime associated with this 'Safer Superannuation' rationale in 2004, the OBPR, however, exempted these legislative reforms from any form of RIS or from any post-implementation review process. Thus, the Federal Government in Australia failed to fulfil its own public interest objectives by not enforcing a detailed, quantitative analysis in relation to its regulatory reforms within the superannuation industry. Internationally, this is inconsistent with the current emphasis and

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<sup>24</sup> Productivity Commission 2012, *Regulatory Impact Analysis: Benchmarking*, Research Report, Canberra.  
<sup>25</sup> Commonwealth of Australia 2001, 'Options for Improving the Safety of Superannuation', Canberra.



direction of the OECD's Guiding Principles,<sup>26</sup> to which Australia is a signatory, and which prioritise transparency and accountability in policy making.

Important mechanisms to more effectively blunt the force of capture are:

- 1: for both political parties and the OBPR to more clearly understand the nature of the industry within which the RIS are being prepared;
- 2: for the legislature to more clearly elaborate the critically important RIS threshold concepts such as 'minor or machinery in nature' and 'does not substantially alter existing arrangements'; and
- 3: to significantly restrict the carve-out and exemption provisions that are included within the Australian Government Guide to Regulation (AGGR) (2014).

We recommend that such changes take into account the 2012 Independent Review Report's<sup>27</sup> recommendation (at p. 18) that where a prima facie case for regulatory reform has been established, a range of feasible policy options need to be identified and their relative merits rigorously assessed. This should include assessing the costs and benefits of regulatory alternatives, including quantifying compliance costs and undertaking risk assessments.

In addition, as highlighted by the Productivity Commission's 2012 Report (at p. 236)<sup>28</sup>, of critical importance is that:

*'...RIS documents should not be delivered to the door of executive government to inform decisions and then disappear. RIA processes are less about giving a single answer, and more about framing problems, scoping solutions and uncovering unintended consequences of proposed regulatory measures. A RIS should not fade from the scene once a regulatory decision enters parliament, but should remain an important reference point in political negotiations in the parliament before final decisions are taken. In short, RIA processes should not only better inform executive government decisions; they should also better inform the decisions of Australian parliaments.'*

Thank you for your time in reading this submission.

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<sup>26</sup> OECD (2005), Guiding Principles for Regulatory Governance and Performance, Paris.

<sup>27</sup> Borthwick, D. and Milliner, R. 2012, Independent Review of the Australian Government's Regulatory Impact Analysis Process, April.

<sup>28</sup> Productivity Commission 2012, Regulatory Impact Analysis: Benchmarking, Research Report, Canberra.

## APPENDIX

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### 1. Government Intentions: 2014 OBPR Guidelines and Potential Regulatory Capture Mechanisms

As detailed in our current research findings<sup>29</sup> and as set out in the updated Australian Government Guide to Regulation (AGGR) (2014, at p.4), the Government has a new, clear approach to regulation which focuses on reducing the regulatory burden by cutting existing red tape and limiting the flow of new regulation. As a result, every policy proposal designed to introduce or abolish regulation must now be accompanied by an Australian Government Regulation Impact Statement, or RIS. This RIS must be developed early in the policy making process as a tool designed to encourage rigour, innovation and better policy outcomes from the beginning. In turn, the Office of Best Practice Regulation (OBPR) has been delegated the role of promoting the Federal Government's objective of effective and efficient legislation and regulations.

#### The Importance of the Regulatory Impact Statement (RIS)

The RIS process has been mandatory for all Cabinet submissions and applies to every government agency including: government departments; statutory authorities; boards (even if it has statutory independence); and public entities operating under the Public Governance, Performance and Accountability Act 2013. The 2014 AGGR also highlights (p. 9) that even if a decision is not going to Cabinet, a RIS is still required where the policy proposal is likely to have a measurable impact on business, community organisations or individuals. This includes new regulations, amendments to existing regulations and, in some cases, sunsetted regulations being remade.

To be assessed as adequate by the OBPR, a RIS must have a degree of detail and depth of analysis that is commensurate with the magnitude of the problem and the size of the potential impact of the proposal. Subject to this principle, the criteria which will be used by the OBPR to assess whether a RIS contains an adequate level of information and analysis include the requirements that the RIS should identify a range of alternative options including, as appropriate, non-regulatory, self-regulatory and co-regulatory options.

#### Special Cases and Carve-outs

The only exceptions to these rules, which are set out on pp. 56-58 of the 2014 AGGR, are designated 'special cases' which include:

##### 1: *Prime Minister's Exemptions*

The Prime Minister can exempt a government entity from the need to complete a RIS when: there are truly urgent and unforeseen events requiring a decision before an adequate regulatory impact assessment can be undertaken; and where there is a matter of Budget or other sensitivity and the

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<sup>29</sup> Taylor, Sue, Anthony Asher and Julie-Anne Tarr (2016), Sharpening regulation in the Australian superannuation industry to ensure compatibility of public and private objectives, 7th Annual Financial Markets and Corporate Governance Conference, Monash University, March <http://ssrn.com/abstract=2720157>.

development of a RIS could compromise confidentiality and cause unintended market effects or lead to speculative behaviour which would not be in the national interest. Where the Prime Minister grants an exemption, the agency will not be deemed as non-compliant with the RIS requirements.<sup>30</sup>

## 2: *Election commitments*

A RIS covering matters which were the subject of an election commitment will not be required to consider a range of policy options. Only the specific election commitment need be the subject of regulatory impact assessment and in this situation, the focus should be on the commitment and the manner in which the commitment should be implemented.

## 3: *Carve-outs*

A carve-out is a standing agreement between the OBPR and a department, removing the need for a preliminary assessment to be sent to the OBPR for minor or recurrent certain types of regulatory reforms. Examples of acceptable carve outs include: routine indexation that uses a well-established formula, such as the Consumer Price Index (CPI); routine indexation of aged care subsidies in line with increases in the CPI; and regularly updating of the listing and price of medicines available under the Pharmaceutical Benefits Scheme.

### Post-Implementation Review Process

An additional central pillar of ensuring transparency in regulatory practice by the Federal Government and its agencies is the post-implementation review (PIR). As highlighted in the OBPR's Post-Implementation Reviews Guidance Note (2014, p. 1),<sup>31</sup> all Australian Government agencies must undertake a PIR for all regulatory changes that have major impacts on the economy. PIRs must also be prepared when regulation has been introduced, removed, or significantly changed without a regulation impact statement (RIS). This may be because an adequate RIS was not prepared for the final decision, or because the Prime Minister granted an exemption from the RIS requirements.

## 2: The Relevance of the Size and Power of the Financial Services Sector to the Achievement of RIA Process Objectives

Our prior research<sup>32</sup> has highlighted the regulatory compliance burdens that currently exist within the superannuation industry in Australia which have resulted from the particular, partisan approaches that were originally adopted by both the Labor (Hawke/Keating) and Coalition (Howard) Governments

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<sup>30</sup> Where a Prime Minister's exemption is granted, agencies are still required to quantify the cost of the regulation and identify offsets and provide those costings to OBPR within three months of the decision. Once costings are agreed they should be sent to the relevant portfolio Minister and the Prime Minister. The OBPR will also publish the costing information on the OBPR's website together with the fact that a Prime Minister's exemption was granted.

<sup>31</sup> Australian Government, Office of the Prime Minister and Cabinet, Office of Best Practice Regulation, Post-Implementation Reviews Guidance Note, 2014; accessed on the 10<sup>th</sup> November, 2014 at: [https://www.dpmc.gov.au/sites/default/files/publications/017\\_Post-implementation\\_reviews\\_0.pdf](https://www.dpmc.gov.au/sites/default/files/publications/017_Post-implementation_reviews_0.pdf)

<sup>32</sup> For example, refer to Taylor, Sue and Anthony Asher (2013) "Regulatory Capture and Overload in the Australian Superannuation Industry over the Last Decade: Trustees' Views and a Cost/Benefit Analysis" Presented to the 21st Annual Colloquium of Superannuation Researchers, Sydney, July.

throughout the last three decades in particular, as they instigated the largest legislative expansion in Australia's history.<sup>33</sup> These regulatory reforms transformed Australia's occupational superannuation which, until 1980, had played only a peripheral role in securing retirement savings for the workforce at large with less than 40% of all employees at this time contributing to superannuation schemes with the key plank of retirement incomes policies of both political parties resting on the universal (but means-tested) old-age pension. By the time the twenty-first century began, however, 91% of all Australian employees and 81% of all workers at this time were covered by superannuation.

By the end of the June 2014 quarter<sup>34</sup>, superannuation assets totalled \$1.8 trillion covering 94% of all Australians. This current pool of funds is equivalent to approximately 113% of Australia's annual GDP, significantly higher than the weighted OECD average of 86%<sup>35</sup>, and 120% of the Australian share market capitalisation, where superannuation funds are the dominant investors holding some half the value of all listed shares.<sup>36</sup> To place these figures in perspective, in 2014, Australia experienced the highest growth rate in pension (superannuation) assets in the world, and, at \$2 trillion as at the 30th June, 2015, Australia's superannuation system, in absolute terms, is the third largest private pension fund market in the world<sup>37</sup> behind the United States and the United Kingdom<sup>38</sup>.

As at June, 2013, an estimated 40.1% of these superannuation assets were under management by investment managers making the Australian managed fund industry the fourth largest in the world.<sup>39</sup> In 2013-14, IBISWorld forecasts that this industry will generate revenue of \$12.7 billion from an estimated \$703.2 billion in superannuation assets under management. This represents revenue growth of 15.1% from the previous year.<sup>40</sup>

As John Brogden, the Chief Executive of the Investment and Financial Services Association, the main lobby group in the financial services industry, has highlighted, financial services is the largest single sector of the Australian economy which invests \$1.9 trillion on behalf of working Australians.<sup>41</sup> In 2013, this sector accounted for '... more than ten per cent of the total value added, up from five per cent in the mid 'eighties, and closer to two per cent in the years immediately following World War Two... [and] is also large relative to many other countries such as the United States, Canada, the Euro area and

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<sup>33</sup> Berg, C. 2008. 'The Growth of Australia's Regulatory State', Institute of Public Affairs, Melbourne, Australia, at p. 15.

<sup>34</sup> APRA (2014), Insight Issue One, at p. 6

<sup>35</sup> OECD (2015), Pension Funds in Figures, OECD Report, May at p. 1.

<sup>36</sup> Australian Securities Exchange (ASX) (2014), Historical market statistics, ASX, Sydney, accessed on the 5th October at [http://fsi.gov.au/publications/interim-report/03-funding/superannuation/#P408\\_85520](http://fsi.gov.au/publications/interim-report/03-funding/superannuation/#P408_85520).

<sup>37</sup> It should be noted that this fact is a result of unique Australian circumstances, particularly the availability of generous tax concessions and the freedom to invest through self-managed funds. A higher proportion of the funds management industry is therefore included within the superannuation system, where Australia's position in the fund's management industry is a more realistic tenth as highlighted by Towers Watson in: 'The 500 largest asset managers', Accessed on 25th January 2016 at <https://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2015/11/The-worlds-500-largest-asset-managers-year-end-2014>.

<sup>38</sup> KPMG (2015), SuperTrends: The Trends Facing Australia's Superannuation Industry, KPMG, at p. 4.

<sup>39</sup> Superannuation Funds Management Services in Australia: Market Research Report, October 2013, IBISWorld, accessed on the 23rd December, 2013 at <http://www.ibisworld.com.au/industry/default.aspx?indid=1890>.

<sup>40</sup> Superannuation Funds Management Services in Australia: Market Research Report, October 2013, IBISWorld, accessed on the 23rd December, 2013 at <http://www.ibisworld.com.au/industry/default.aspx?indid=1890>

<sup>41</sup> Financial Services Council (2013), 2013-14 Federal Budget Submission, at p. 3.

Japan.’<sup>42</sup> The Australian Bureau of Statistics data on Australia’s National Accounts, released in June 2013, also highlighted that the Finance and Insurance Sector has been growing at well over double the pace of the rest of the economy since deregulation.<sup>43</sup>

The size and power of the Financial Services Sector is, then, a key factor that needs to be taken into account in any review of the RIA process related to the superannuation industry. This is particularly the case given that a RIA process is expected to provide relevant information to decision makers and stakeholders about the expected consequences of proposed superannuation-based regulation. By providing a ‘...better informed, objective, evidentiary basis for making regulations, RIA seeks to ensure that the policy development process consistently delivers regulations (or other policy solutions) that provide the greatest benefit to the community, relative to the overall costs imposed (Productivity Commission 2012, p. 3).’ This public interest-based objective can be placed at significant risk from potentially conflicting, private interests in the form of legislative, agency and corrosive capture<sup>44</sup>, mechanisms utilised by the financial services sector in Australia which is seeking to protect/control the government mandated, but privately controlled, trillion dollar, superannuation asset base.

As highlighted by Novak<sup>45</sup>:

*‘...there is simply no older theme in the Western legal and political tradition than the one highlighted by capture. In Plato’s Republic, Socrates noted that “our aim in founding the State was not the disproportionate happiness of any one class, but the greatest happiness of the whole.” And he bemoaned “the corruption of society” whereby “the guardians of the laws and of the government are only seemingly and not real guardians” who “turn the State upside down” and ultimately destroy it. Aristotle’s Politics also decried the corrupting effects of private interest and private vice on the commonwealth noting that “the true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one, the few, or the many, are perversions.’*

The concept of corrosive capture is particularly relevant in terms of the RIA process currently operating within the superannuation industry given that and as detailed by Carpenter (2013, p.3)<sup>46</sup>:

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42 Rodney Maddock (2013), Is the Australian financial sector too big?, , Monash University and Victoria, University, at p. 3. <http://www.australiancentre.com.au/sites/default/files/NewsDocs/D1P1%20-%20Is%20the%20financial%20sector%20too%20big%20%20RMaddock.pdf>

43, Australia’s Financial Sector Continues to Dominate the Economy’, article, September, 2013, MacroBusiness, <http://macrobusiness.com.au/2013/09/australia-on-fire-once-again>.

<sup>44</sup> D. Carpenter (2013), ‘Detecting and Measuring Capture’, in D Carpenter & D. Moss (eds.) (2013), Preventing Regulatory Capture: Special Interest Influence and How to Limit it’, The Tobin Project, Harvard Law School, Cambridge University Press; and D. Carpenter (2013), ‘Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation’, in D Carpenter & D. Moss (eds.) (2013), Preventing Regulatory Capture: Special Interest Influence and How to Limit it’, The Tobin Project, Harvard Law School, Cambridge University Press. Daniel Carpenter is the Free Professor of Government, Harvard University.

<sup>45</sup> W. Novak (2013), ‘A Revisionist History of Regulatory Capture’, in D Carpenter & D. Moss (eds.) (2013), Preventing Regulatory Capture: Special Interest Influence and How to Limit it’, The Tobin Project, Harvard Law School, Cambridge University Press, at p. 3. Novak’s quote refers to comments in: Plato, The Republic: The Complete and Unabridged Jowett Translation (New York, 1991), Book IV, 129-130, and Aristotle, The Politics and The Constitution of Athens (Cambridge, 1996), Book III, 71

*'...special interests and regulated industries can shape policies in different ways, and they can push policies in several directions. The Stiglerian account of capture predicts that captured regulation will be stronger in the sense of more rigid and less permeable entry barriers to the market. If the industry is using regulation to form a cartel and restrict supply and/or entry, then captured regulation will be more effective for these aims to the extent that it is more effective in terms of achieving its stated aims, that is, to the extent that the entry barriers are strong. If physicians seek to limit the supply of their services and thereby raise their pay, then licensing needs to present higher hurdles to qualification and entry for prospective doctors. Corrosive capture, on the other hand, occurs if clearly organized firms push the regulatory process in a "weaker" direction.'*

In this case, the interests of the Financial Services Sector are best served by a 'weakly' applied RIA process which facilitates the introduction of industry desired legislation without scrutiny, such as the 2004 Registrable Superannuation Entity (licensing) reforms and the 2012 APRA-based Prudential Standards. These regulatory reforms simultaneously generated significant barriers to entry and survival through increasing compliance costs which benefit the larger, existing retail funds within the industry. These issues will be elaborated with particular examples in the following section.

### **3: Weak form Regulatory Impact Statement (RIS) and Post-Implementation Review (PIR) Processes Undertaken**

#### *Introduction*

On the one hand, and given the above discussion in relation to the Australian RIS process, its ability to act as a potential gatekeeper/remedy to 'blunt' the forces of regulatory capture from a *policy* perspective is clear. RIS can be used as a means to provide governments with a tool that enables the more effective control of specialised agencies, to which important government tasks must be delegated (OECD 2015), but without the need for the centre of government to acquire the same level of specialised knowledge as their agents (Posner, 2001).

However, noting the potential for CBA to be mis-used as detailed in Part Two of our cited 2016 article in relation to the American financial services sector reforms, it is important to also analyse the existing RIS *implementation* processes in order to identify any threats to the RIS process within the Australian superannuation industry. In order to achieve this objective, the RIS processes implemented for: the Superannuation Industry (Supervision) Act 1993 which provides the fundamental legislative basis for the Australia superannuation industry; the 2004 RSE Licensing reforms; the introduction in 2013 of the APRA-based Prudential Standards; and the enactment of the My Super reforms in 2010 will be examined.

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

The absence of any available data on any form of RIS that was been conducted on the key legislative reforms introduced as part of the Superannuation Industry (Supervision) Act 1993. In addition, while a

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<sup>46</sup> Daniel Carpenter (2013), 'Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation in in D Carpenter & D. Moss (eds.) (2013), Preventing Regulatory Capture: Special Interest Influence and How to Limit it', The Tobin Project, Harvard Law School, Cambridge University Press, at pp. 2-3.

national program of review and reform of existing legislation was commenced in 1996 and which was required to be completed by 31 December 2000, the review of superannuation related legislation such as the SIS Act conducted by the Productivity Commission (PC)<sup>47</sup>, did not take place until 2001. This represented an eight-year delay in any form of post-implementation review process. Further, the Federal Government did not respond to the PC's 2001 review comments, for example, to amend the SIS Act with a view to removing unnecessary restriction of competition and to reduce compliance costs, until 2003 – a further two-year delay in the post-implementation review process.

### *Registrable Superannuation Entity Licensing*

As set out in the Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations (2004), No. 113:

*'...The Office of Regulation Review has advised that a Regulation Impact Statement (RIS) is not required for the proposed Regulations, as the measures contained in the proposed Regulations have either been adequately addressed in the RIS for the SIS Act or are of a minor or machinery of government nature.'*

Thus, the carve-out provisions as previously highlighted were utilised to introduce the licensing regime without a specific RIS being undertaken. In addition, given the wording of the exemption stated above, the carve-out provisions also allowed the licensing regime to be exempted from any form of post-implementation review. This treatment of the RSE licensing regime reforms as minor or machinery or as having been adequately addressed within the original RIS related to the introduction of the SIS legislative enactments stands in stark contrast to the statistical reality of the actual impacts of RSE licensing. That is, and as detailed in the Introduction, licensing contributed significantly to the 91 per cent reduction in superannuation funds from 2001 to 2013 as previously discussed and had the potential to 'force well run funds to exit and reduce the diversity within the industry.'

The nature of the RSE licensing process regulatory reforms and their potential impacts also stand in stark contrast to the nature and characteristics of the acceptable carve outs provided by the OBPR which include, as previously highlighted: routine indexation that uses a well-established formula, such as the Consumer Price Index (CPI); routine indexation of aged care subsidies in line with increases in the CPI; and regularly updating of the listing and price of medicines available under the Pharmaceutical Benefits Scheme.

### *Prudential Standards*

APRA (2012: 17) prepared a RIS for this suite of eleven prudential standards, stating that:

*'...the introduction of prudential standards for superannuation is aimed at improving the governance standards of a relative minority of RSE licensees. The standards of governance and compliance demonstrated by RSE licensees have improved significantly over the past few years, but there is still some capacity to make incremental improvements within many RSE licensee business operations. There are also a small number of RSE licensees that do not currently have in place governance arrangements that APRA considers to be good practice. APRA's view is that the requirements of the 11 prudential standards will allow APRA to establish and enforce standards within superannuation entities it regulates*

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<sup>47</sup> Productivity Commission, 2001, 'Review of the Superannuation Industry (Supervision) Act 1993 and Certain Other Similar Legislation: Inquiry Report', Report No 18, 10<sup>th</sup> November.

that will support the management of risks which are ultimately borne by superannuation fund members.’

After emphasising that the prudential standards were designed to ‘reign in’ a small number of funds that did not have ‘good practice’ governance arrangements in place, in preparing the RIS, APRA felt unable to complete any quantitative analysis for either the costs or benefits associated with the implementation and operation of the standards. This absence of a clear cost/benefit impact existed in spite of APRA acknowledging that the implementation costs by RSE licensees of the prudential standards requirements would ultimately be borne by members of RSEs in the form of higher fees and/or lower investment returns. From APRA’s perspective (APRA 2012: 9): ‘...overall, it is not clear how large this cost will be because the Stronger Super reforms are creating an environment with more transparency and comparability of fees and costs, and this competition may lower fees...for this reason, the costs of implementing the prudential standards are not quantified in this RIS.’

In terms of benefits for RSE licensees from the introduction of prudential standards, APRA (2012: 7-8) claimed that ‘...prudential standards provide greater clarity of how the requirements of the SIS Act and SIS Regulations can be met and requirements in prudential standards can be set in a way that is flexible and principles-based which provides freedom for RSE licensees to interpret the requirements in line with the size and complexity of their business operations.’ APRA has also stated (2012: 10) that the prudential standards will be reviewed ‘...after their implementation and on an ongoing basis to ensure they continue to reflect good practice and remain relevant and effective, for both APRA’s prudential supervision purposes and for regulated institutions.’

### *Stronger Super Reforms*

In addition to the weak-form implementation of RIS related to both the RSE and APRA Prudential Standards, a RIS was prepared by the Treasury for the My Super reforms in 2010 and was assessed as adequate by the OBPR. However, within this RIS process, the Prime Minister granted exemptions from the requirements for regulatory impact analysis in relation to the ability of funds to offer tailored MySuper products to employees with more than 500 employees, and extension to the date by which trustees will be required to have transferred the balance of existing default funds into MySuper products.<sup>48</sup>

### *Coalition Amendments to the FoFA Laws*

The Coalition amendments to the Labor Government’s original, public-interest-based FoFA reforms, were designed to repeal the best interests’ duty, remove the opt-in requirement and relax the ban on commissions in a number of areas.

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<sup>48</sup> Stronger Super reforms – Regulation Impact Statement and Prime Minister’s exemption – Treasury: accessed on the 12<sup>th</sup> November, 2015 at:

<http://ris.dpmc.gov.au/2011/10/17/stronger-super-reforms-%E2%80%93-regulation-impact-statement-and-prime-minister%E2%80%99s-exemption-%E2%80%93-treasury/>



In the Future of Financial Advice Amendments, the ‘Details-stage Regulation Impact Statement’ prepared by the Department of the Treasury and submitted to the OBPR on the 19<sup>th</sup> March 2014, reported that:<sup>49</sup>

*‘...The key reforms...are estimated to produce average ongoing compliance cost savings of around \$190 million per year,<sup>50</sup> as well as once-off implementation cost savings of around \$88 million...Overall, the measures were assessed as having a major impact on the broader economy and therefore given a B rating (on a scale of A to D) in relation to the level of analysis required.’*

The RIS prepared by the Department of the Treasury, given that it related to an election commitment given by the Coalition Government to reduce regulatory burdens and costs in the FSS, contained no alternative policy options. This incomplete RIS was then assessed as adequate by the OBPR.

However, the RIS does not quantify any benefit or costs for consumers. This information was also available in the Rice Warner (RWA, 2013) Report which identified that the benefits to consumers were more than twice that of the cost to industry over the next 15 years. In total, the benefits of the original FoFA reforms were estimated to be \$6.8 billion, far exceeding the cost of \$2.4 billion over the next 15 years. This saving is consistent with another estimate of \$6.6 billion in annual commissions paid by super members and consumers of financial products per year prior to FoFA.<sup>51</sup> Modelling of the FoFA reforms also highlighted benefits in addition to the savings to super members and consumers of financial products. That is, RWA predicted that by 2027 the FoFA reforms would: boost Australians’ savings under advice by \$144 billion; reduce the average cost of advice from \$2,046 (before the reforms) to \$1,163, and double the provision of financial advice from 893,000 pieces to 1.88 million pieces.

Thus the cost-based only RIS prepared by Treasury to support the Coalition’s Amendments to the FoFA laws is inconsistent with the guidelines in the Best Practice Regulation Handbook. That is, the Options Stage RIS does not provide rigorous evidence based assessment of the proposals. The handbook states that: ‘...best practice regulation-making...must be effective in addressing an identified problem and be efficient in maximising the benefits to the community, taking account of the costs’.

### Summary - Independent Review Findings

It does seem that the RIS process has not been wholeheartedly adopted. As summarised by Daniel Weight in 2012 in his article ‘Government’s approach to policy development criticised in formal

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<sup>49</sup> Details of RIS accessed on the 18<sup>th</sup> January from: <http://ris.dpmc.gov.au/2014/03/19/future-of-financial-advice-amendments-details-stage-regulation-impact-statement-department-of-the-treasury/>

<sup>50</sup> This estimate of industry saving is consistent with the previously published annual savings of \$187.5 million per year estimated by Rice Warner Actuaries (RWA).

<sup>51</sup> Treasury (2013) Future of Financial Advice Amendments – Options-stage Regulation Impact Statement, Commonwealth of Australia; See Appendix B in Rice Warner (2013) The financial advice industry post FoFA, prepared for Industry Super Australia, July 2013; Rainmaker Information (2011) Commissions Revenue Report 2010, prepared for Industry Super Australia, August 2011; Rice Warner Actuaries, Transformation of the Financial Advice Industry, March 2010

review<sup>52</sup>, on the 11<sup>th</sup> October 2012, the Government released the Independent Review of the Australian Government's Regulatory Impact Analysis Process (the Review) and its preliminary response. The Review provided a broad overview of the Government's current policy development processes. Conducted by Mr David Borthwick AO PSM and Mr Robert Milliner, the findings were extremely critical of many aspects of the Government's policy development processes, including the public service, ministers, and adherence to Cabinet processes. For example, the Review found that there was 'considerable dissatisfaction and frustration with the RIS process by all parties: business and the not-for-profit sector, agencies and ministers and/or their offices.'

The major criticisms highlighted included the fact that there had been 31 Prime Minister's exemptions from the RIS process under the Rudd/Gillard Governments. This meant that many major policy decisions, for example, '...the introduction of the Fair Work Act, the establishment of the National Broadband Network and the banning of the 'super trawler' from Australian waters, had not been subject to scrutiny'. Of concern, the Review Panel highlighted that it had not been in a position to examine the reasons why particular Prime Ministerial exemptions had been sought or granted, however, '...the reason appears to have more to do with it being expedient to decisions that the Government wanted to make'.<sup>53</sup>

Of great concern then with the RIS processes actually implemented for the RSE Reforms, the APRA-based Prudential Standards, the exemptions granted to some aspects of the Stronger Super Reforms, and in relation to the Amendments to the FoFA laws, is their inability to meet the stated objective for RIS. That is, as set out in the Business Council of Australia's (BCOA, 2012: 2) statement:

*'...governments come to power with an objective to improve the wellbeing of Australians and to set policies they consider to be in the national interest. They have to make difficult choices about how they tax, regulate and spend or invest funds on behalf of taxpayers in order to deliver economic, social and environmental outcomes that will improve the lives of citizens. Evidence is crucial to good government policy outcomes because it helps policymakers work out which policy options are likely to achieve the best results.'*

This lack of detailed quantitative, economic-based analysis then fails to force the disclosure of any extraction of rents from fund members that may occur within the regulatory structure being proposed. In turn, the weak-form implementation of RIS both in the superannuation industry and throughout the broader Australian government regulatory processes generally, provides an example of the concept of 'corrosive capture' (Carpenter and Moss, at pp. 16-17) as previously outlined which is designed to '...dismantle regulation even in the absence of public support or a strong welfare rationale for doing so.'

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<sup>52</sup> Daniel Weight, 2012, 'Government's approach to policy development criticised in formal review', accessed on 14<sup>th</sup> November at: [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2012/October/Governments\\_approach\\_to\\_policy\\_development\\_criticised\\_in\\_formal\\_review](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2012/October/Governments_approach_to_policy_development_criticised_in_formal_review)

<sup>53</sup> Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, Bills Digest no. 11 2014–15, Coalition Government actions on FOFA, accessed on the 13th January, 2016 at: [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1415a/15bd011](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd011)

A critically important point to note then is that a significant proportion of the pro-producer, regulatory reforms introduced in Australia over the last three decades, have not been required to undergo serious, cost/benefit scrutiny. The weak-form RIS implementation process that has characterised the regulatory reforms within the superannuation industry is unable, in its formulation, application, or enforcement, to genuinely serve the public interest. For example, the frequent use of 'special cases', that is, Ministerial exemptions, election promises and carve outs and non-quantitative RIS processes have failed to prevent the passage of legislative reforms that are designed to transfer wealth from fund members to the FSS in the form of, for example, excess fees and commissions.