

# CORPORATE SUPER ASSOCIATION

Mr Andre Moore  
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Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email to: [SPRsubmissions@treasury.gov.au](mailto:SPRsubmissions@treasury.gov.au)

30 May 2007

Dear Mr Moore

## **FINANCIAL SECTOR LEGISLATION AMENDMENT (SIMPLIFYING REGULATION & REVIEW) BILL 2007**

Thank you for involving the Corporate Super Association in consultation on this Bill. There is one matter on which we wish to make a formal representation. Our concerns are with the term “fit and proper” in proposed new section 121A of the SIS Act.

### **Trustee “fit and proper” evaluation of custodian or investment manager**

The issue from our view point is the expression “fit & proper”. This is a term which we believe to be coloured by the regulatory requirements applicable in the context of determining fitness and propriety of superannuation entity trustees. We are concerned by the possible implication that trustees would be obliged to use a regulator’s level of scrutiny on the proposed custodian or investment manager.

“Fit & proper” in relation to a trustee implies attributes including, but not limited to:

- (a) character, competence, diligence, experience, honesty, integrity and judgement; and
- (b) educational or technical qualifications, knowledge and skills relevant to the duties and responsibilities of an RSE licensee (SIS Reg 4.14(4)).

For a trustee to form an opinion that an external body meets these requirements, to the degree of rigour implied in relation to fitness and propriety in a trustee, would be impractical in the context of appointment of a custodian or investment manager. A trustee can come to an opinion that the body corporate of the investment manager or custodian is fit and proper based on due diligence of suitability. However, it is crucial to recognise that a trustee cannot be satisfied that the body corporate is “fit & proper” in terms similar to those applicable to a fund trustee, as a trustee is unable to audit the body corporate representing the custodian or investment manager to that level. APRA, on the other hand, has that level of investigative authority in relation to a trustee.

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## Alternative wording

We would have no problem with a revised clause that covers the same ground of conducting adequate due diligence but excludes the term “fit & proper”. We suggest that the concept of “adequate performance” included at s 121A(2) could usefully be included in 121A(1). For example, prior to the appointment of the custodian or investment manager, the trustees could be required to have obtained reasonable third party assurances that the body corporate would perform adequately in the proposed role.

We would suggest that s 121A could be worded to the effect that “the trustee or trustees of a superannuation entity must not appoint... unless after appropriate due diligence of the body corporate, the trustees have on reasonable belief formed the opinion that:

- the body corporate is adequately equipped to hold the appointment; and
- the body corporate is not a disqualified person”

We believe that this wording would better align to the APRA Cross Industry Circular No. 1 which does not use the term “fit & proper” but provides guidance on the appointment of custodian, and sets guidance for regular monitoring and review of its performance.

## Criteria for termination of a custodian or investment manager

The second half of proposed section 121A requires termination of appointment of a custodian or investment manager if the body corporate:

- (a) is not a fit and proper person to hold the appointment; or
- (b) is disqualified; or
- (c) has failed to perform adequately and properly the functions and duties of such an appointment under the SIS Act, the regulations or the *Financial Sector (Collection of Data) Act 2001*.

Again, we would prefer the “fit and proper” test to be replaced by a more appropriately worded requirement that indicates that the body corporate has not met the required standards on investigation by the trustee.

Please contact our Chief Executive Officer, Bruce McBain, on (03) 9620 5155, if you would like to discuss this matter further.

Yours sincerely



Elizabeth Goddard  
Research Officer