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The Success of Representative Governance on Superannuation Boards

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THE SUCCESS OF REPRESENTATIVE GOVERNANCE ON SUPERANNUATION BOARDS

A Report of the Centre for Workforce Futures for the McKell Institute

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EXECUTIVE SUMMARY

THE SUCCESS OF REPRESENTATIVE GOVERNANCE ON SUPERANNUATION BOARDS

This report examines the governance structures and performance of industry superannuation funds in comparison to other superannuation funds in the Australian and international market. In 2010 the *Super System Review* (Cooper Inquiry) recommended that industry superannuation funds alter the current representative board structure to appoint a proportion of independent directors to all industry superannuation funds. Through a comprehensive review of published research together with an analysis of statistical data on both for-profit and not-for-profit superannuation funds, this report examines the relationship between their governance structures and performance in order to evaluate the efficacy of the Cooper Inquiry recommendations.

The report concludes that evidence *does not* support the view that mandating independent directors on not-for-profit superanuation funds would improve fund performance. Instead, research and empirical data suggests strongly that the *representative* trustee governance structure of industry and other not-for-profit funds is actually the model that most closely satisfies the objectives of meeting the best interests of members and maximising retirement incomes for Australians.

The report demonstrates the following:

- Most superannuation in Australia is provided through trusts, and the common law and statutory law pertaining to trusts imposes higher standards of conduct on trustee directors than directors of other models of organisations;
- Academic research investigating whether having independent directors on corporate boards delivers improved performance in the form of higher returns is equivocal: but clearly, independence is not a *panacea* for corporate governance.
- The overriding challenge of corporate governance is to align the interests of the corporate board and management as closely as posssible to those of shareholders; representation is the most powerful mechanism for aligning the interests of boards and shareholders.
- WIth superannuation funds, the not-for-profit representative trustee model has outperformed its for-profit appointed trustee competitors on virtually every important criteria of superannuation performance over a long period.
- The representative governance model in superannuation has promoted higher levels of diversity amongst trustees, more effectively minimises conflicts and interest and generates higher net returns for fund members.

Our report raises the question: when a system is working better than the alternative, why tamper with it? Nonetheless in the pursuit of continuous improvement, we recommend that the following three strategies may contribute to improved performance for all superannuation funds:

- Increased competence of directors through training and experience;
- A renewed focus on a culture of ‘honesty’ in governance; and
- An emphasis on building robust risk management systems.

1 INTRODUCTION

This report presents the results of research on the relationship between fund performance and governance structures of superannuation funds in the Australian market. Those results are also presented in the context of existing Australian and international empirical evidence. The central concern of this report is with the governance and performance of default and balanced superannuation funds in Australia, where the vast bulk of fund members have their superannuation savings. The analysis is timely, given debate surrounding the Cooper Review's[1] (2010) recommendations that industry boards alter their current representative board structure in order to appoint independent directors and, more recently, the release of the Commonwealth Government's Discussion Paper[2] (2013) on regulation and governance of the superannuation system. It is also timely because of debate surrounding which funds and on what terms funds are permitted to have access to default fund status in company and industry wide industrial agreements and instruments. A key focus of this report is on whether recommendations made by the Cooper Inquiry in relation to board structure and composition would improve the performance and governance of industry superannuation funds.

1.1 *History and Coverage of Superannuation entitlements in Australia*

Superannuation is an industry that, along with the age pension and voluntary savings, forms the so-called 'three pillars' of Australia's retirement system. Accordingly, it is charged with contributing significantly to the retirement financing of working Australians and to the government's overall goals for improving social wellbeing more broadly.

Superannuation as a form of retirement savings has existed since before federation. Yet by 1974, when the Australian Bureau of Statistics conducted its first national survey of coverage, only 32% of the workforce was covered by superannuation, the majority of whom were in the public sector, and the remainder in company-specific plans. In 1976, the Hancock Inquiry which the Whitlam Labor government had established in 1973 recommended a partly contributory pension system with an earnings-related supplement. However, in 1979, the Fraser Coalition government rejected the Hancock recommendations. Nonetheless, from the late 1970s, superannuation started to become more widely available through industrial awards and agreements.

The history of institutionalised employee superannuation and Industry Super Funds dates from the mid-1980s, when, as part of its national wage claim under the Accord, the Australian Council of Trade Unions sought a three percent employer superannuation contribution to be paid into an industry fund. The government supported the claim, and in February 1986, the Commission decided that it would approve industrial agreements that provided for contributions of up to three percent to approved superannuation funds.

In the following years, superannuation coverage increased from 40% to 79% of employees. Yet, by 1991, nearly one-third of private sector employees did not have superannuation coverage. As well, enforcing compliance for award-based employees through the Industrial Relations Commission had proved difficult. In 1992 the Keating government introduced a Superannuation Guarantee, which required employers to make tax-deductible superannuation contributions on behalf of their employees at the rate of three percent of salary. Higher levels of contribution were phased in over the next decade, such that by 2002/3 employers' superannuation contributions had grown to nine percent of salary.

Until 2005, however, the superannuation guarantee legislation did not give employees an explicit choice of super fund. For employees covered by awards, the award generally nominated an industry fund. Otherwise, employers were free to pay the super into any fund

they chose. In 2005, legislation gave employees a choice of super fund and required trustees to transfer a member's accumulated benefits to another fund on request of the member. Since then legislative changes have made numerous modifications to the system including abolishing tax on lump sum payments paid to members over sixty, and introducing a co-contribution scheme, a government co-contribution matching rate and concessional contributions. Finally, in 2014, the MySuper scheme was introduced. This requires employers to make superannuation contributions to a MySuper accredited super scheme, unless employees choose alternative funds.

Public support for ‘super’ is overwhelming. A 2013 survey conducted by the Financial Services Council and ING Direct (FSC/ING) reported that 89 per cent of Australians support superannuation, and 83 per cent further supported increasing the compulsory contribution rate to 12 per cent.[3] The reason for this near-universal support is clear – Australians understand the necessity of having a decent income stream for their retirement, and superannuation provides a market-based means of wealth creation to reach this goal.[4]

1.2 *Regulation of superannuation*

The superannuation industry now has considerable funds under management, with total assets valued at $1.62 trillion at the end of the 2012/13 financial year, having increased by a sector average of 15.7 per cent during the year to 30 June 2013.[5] These savings are set to increase substantially in coming decades, with the 2010 Super System Review (‘Cooper Review’) estimating that these collective savings will be valued at $6.1 trillion by 2035.[6] Not surprisingly, the regulation and governance of this industry is attracting considerable government, industry and scholarly attention.

As we discuss later in the Report, some funds are owned by banks, insurance companies or other financial institutions and operate as profit-making entities (and are known as retail funds). Some are owned by individuals (self-managed superannuation funds or SMSFs). Others, in the not-for-profit sector, such as corporate, public sector and industry funds were created by mutual agreement between employer and employee bodies and established in the form of trusts to manage members' retirement savings. Most superannuation in Australia is provided through a trust structure. This trust structure is overlaid with substantial statutory regulation.

1.2.1 *Trust Structure and Duties*

The legal doctrine of trusts has existed for centuries within the common law. The regulation of trusts is established through trust law, trust deeds and federal, state and territory legislation. As superannuation funds operate with a trust structure, the duties and obligations of directors are different than under other models of organisation - 'trustees have generally been held to a higher standard of conduct than is required of corporate directors or parties to a contract'.[7] Governments have attempted to codify fiduciary obligations and the duties of trustee directors: each state and territory has its own trustee legislation and the national SIS Act also requires the governing rules of registrable superannuation entities to contain covenants which specify the duties of the trustee. In addition, because most superannuation trusts are corporate trustees, their directors are also regulated by the Corporations Act 2001 (Cth).

In addition, as Scott Donald notes trust law interacts not only with a complex regulatory environment and public expectations to produce what he terms a multi-layered conception of the trustee. As Donald suggests:

> There is a vast jurisprudence dedicated to outlining what is expected of those who bear the title of trustee or who owe fiduciary obligations. But the words also carry a deep meaning in

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> lay discourse. They imply a selfless, protective stance and carry a somewhat paternal (or perhaps avuncular) tenor… It is not unreasonable to suppose that the rhetoric surrounding trusteeship is one of the factors that inspire public confidence in the superannuation system as a whole.[8]

Under the Corporations Act 2001, directors are bound by the duties provided in sections 181-183, supplemented by disclosure duties in sections 191-196. These include such duties as the duty to act bona fide in the company's interests, to use powers for proper purposes, to avoid actual and potential conflicts of interest, and to use the care and diligence of a reasonable person subject to the business judgement rule.

Under state and territory trustee law, trustees are bound to act with prudence. Thus under the Trustee Act 1925 (NSW), for instance, a trustee must, in exercising a power of investment, 'exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons' (s14A).

The SIS Act imposes on Superannuation fund trustees stronger duties than these other statutory instruments in some respects. These are contained in the covenants that sections 52 and 52A of the SIS Act require the governing rules of the trust to include.

Thus superannuation trustees must:

- ensure that their fund is maintained *solely* for the provision of benefits to members (SIS Act, s62);
- must exercise their powers in the *best interest* of those members (s52);
- act *honestly* in all matters concerning the entity (s52(2)(a)); and
- conflicts must be resolved in favour of fund members, even if, for the trustee director, this duty comes into conflict with their obligations to any other person. (s52(2)(d))

In addition to the ordinary duties of trustees and directors, therefore, trustee directors of superannuation funds have an overarching duty to the fund's members. This is an additional level of responsibility which aims to ensure that the trustee director's decisions cannot be driven by the trustee entity, their nominating body or another's wishes.

1.2.2 *Statutory regulation*

As noted above, superannuation trustees are also regulated by corporations law, financial services law, state and territory trustee law and specific superannuation industry statutes. Since the mid-1980s there has been considerable legislative activity in terms of the specific regulation of superannuation funds, particularly at national level.

From 1987, the Occupational Superannuation Standards Act (Cth) (OSSA) prescribed operating standards for superannuation funds. Seven years later, the Superannuation Industry (Supervision) Act 1994 (Cth (the SIS Act) replaced OSSA. The SIS Act sets out the basic duties, responsibilities and powers of trustees and also requirements in relation to disclosure, reporting, the roles of auditors and actuaries, and the enforcement powers of the Insurance and Superannuation Commission (ISC). The SIS legislation has been amended repeatedly since 1994 to give effect to the Commonwealth Government's retirement policies.

Following a government inquiry into Australia's financial system in 1996-7, the Commonwealth government established the Australian Prudential Regulation Authority (APRA) to supervise the banking, insurance and superannuation sectors of the financial services industry, and accordingly also take over the functions of the ISC. The SIS provisions relating to disclosure and market conduct became the responsibility of the newly

established Australian Securities and Investment Commission (ASIC). Both APRA and ASIC also provide guidance on interpretation of relevant laws and guidelines to complement trustees' obligations which are to be read alongside relevant statutory regulations.

In 2001, the Commonwealth government released an Issues Paper, *Options for Improving the Safety of Superannuation.* Many of its recommendations were subsequently implemented through the Superannuation Safety Amendment Act 2004 (Cth). The key changes included a requirement that trustees of Superannuation funds be licensed by APRA, and that trusts meet a mandatory risk management framework and comply with new operating standards in relation to fitness, propriety, adequacy of resources and outsourcing.

1.2.3 *Recent interest in regulatory change*

On 29 May 2009, the national government announced a review into the governance, efficiency, structure and operation of Australia's superannuation system to be chaired by Jeremy Cooper. After the release of three preliminary papers, the Cooper Review published the final report in June 2010. The Review's terms of reference were that its work must be conducted around the concepts of the best interests of the member and the maximising of retirement incomes for Australians. While the Cooper Review made numerous recommendations for change to the superannuation system, it is the recommendations in relation to trustee governance in Chapter 2 of the Final Report that are most pertinent to this report.

In particular, the Cooper Review called for the appointment of a greater proportion of independent directors on the trust boards of superannuation funds. Specifically, the report recommended:

- the SIS Act should be amended so that if a trustee board does not have equal representation, the trustee must have a majority of 'non-associated' trustee directors (Rec 2.6);
- For those boards that have equal representation because their company constitutions or other binding arrangements so require, the SIS Act should be amended so that no less than one-third of the total number of member representative trustee-directors must be non-associated and no less than one-third of employer representative trustee-directors must be non-associated (Rec 2.7).

The Cooper Review defined a *non-associated trustee* as a trustee or director who:

> is free of connections to, or associations with, employer sponsors, the appointor (other than by reason of the appointment itself), entities related to the trustee, employer groups, unions, service providers and should not be current or former executives of the fund of a related entity.[9]

We discuss later in this report how this concept of a non-associated trustee is different than definitions of independence under the ASX Corporate Governance Principles and the SIS Act. The issues of equal representation and independence form a crucial part of our analysis.

In the superannuation industry, there is no statutory requirement that a certain proportion of directors be independent. The SIS Act requires that a corporate trustee for a standard employer-sponsored fund must consist of equal numbers of employer and member representatives, but is silent on independent directorships. Similarly, outside the superannuation industry, while the ASX recommends that a majority of the board of a listed entity should consist of independent directors, there is no legal requirement for this. APRA requires that boards of banking and insurance entities have a majority of independent

members and an independent chair. For managed investment schemes, the Corporations Act (2001) requires a compliance committee be established if less than half the directors are external (s601JB).

Significantly, however, the Australian Government Discussion Paper on the superannuation governance and regulation released in November 2013 maintains that the number of independent directors is a threshold issue. Suggesting that a prescribed minimum number of independent directors is the federal government's favoured response in seeking to introduce best practice governance, the Discussion paper has requested stakeholders to submit views on an appropriate proportion of independent directors for superannuation boards.[10]

1.3 *Organisation of this Report*

In order to examine whether the Cooper recommendations on board constitution would improve the performance of industry superannnuation funds, this report analyses models of governance and representation in the industry, and compares the governance and performance of industry funds with other models. While focusing on Australia's superannuation industry, the analysis also draws on international evidence and analysis on the governance and performance of superannuation and occupational pension funds. Finally, we also make recommendations for industry superannuation in light of this analysis. The structure of the report is as follows.

Section 2 identifies the key attributes of the Australian superannuation sector, including those that make it different from other financial markets, both in the way participants are engaged in the industry, and how it is structured and operates. We show that these distinguishing features inevitably mean that market governance (that is competition around price and performance) is not a strong mechanism, and that prospects for it becoming so are similarly weak. This means that internal fund governance (non-market, internal structures and processes that discipline the fund's management to act in the best interests of its members) is a much more critical area for ensuring fund members interests are advanced and protected.

Section 3 then analyses evidence of the impact of independence in research-based corporate and pension fund governance literature, and critiques claims that it can adequately address issues of diversity, trustee objectivity and conflicts of interest in the superannuation industry. Despite popular belief that a blanket provision of independent directors on superannuation trustee boards will strengthen the superannuation system, economic and legal theory does not support the claim that greater independence leads to improved fund performance. Importantly, the evidence in favour of increased independence is not only equivocal, but findings suggest that mandated independence risks either acting as a 'band aid' solution to the above issues if its definition is left too broad, or could result in a lack of available trustees if the definition is overly restrictive.

Instead, the most important characteristic feature of corporate governance is not independence, but representation. Representative governance (or what in the US has been termed 'corporate Jacksonianism') is seen widely as the most important way that corporate governance structures attempt to resolve the collective action problem of ensuring corporations act in the interests of diverse groups of shareholders/stakeholder.[11] By contrast, the main promise of independence is better protection of minority interests, with negligible impact on the overarching problem of ensuring organisations perform in the interests of all owners/beneficiaries.

There are two basic models of superannuation fund governance in Australia - a *representative* trustee, not-for-profit model, and a not-for-profit, *appointed* trustee model. Section 4 demonstrates that these are not simply descriptive or statistical categories. They

represent two different fund types in terms of governance structures and behaviours. It is therefore reasonable and relevant to use these categories to examine the relationship between governance models and performance. We review the statistical evidence on fund performance and governance models, and conclude that the *representative* not-for-profit governance model has consistently and significantly outperformed its for-profit counterparts in generating higher returns for the benefit of fund members, and over a long period. The effects of the differential performance for the retirement living standards, and potential retirement age, of fund members are substantial.

There is considerable debate about the effectiveness of independence as a *panacea* for the problems of board governance in the corporate sector. We conclude that any reforms to superannuation governance problems should be based on the best available evidence, and this evidence suggests that the most important factors leading to strong performance are representative governance structures and processes.

Section 5 considers what can be done to improve governance in practice. This includes a discussion of several matters which scholarly and stakeholder research suggests have a substantial impact on super fund performance and yet have gained little traction in policy debates to date. These include the competence of directors, board cultures and insufficient attention to implementing robust risk management systems. But the open question for policy makers of this research is whether in a mandatory defined contribution system, in which so many risks are now borne by fund members themselves, any default (or what are being re-branded MySuper) superannuation funds should be able to gain access to member contributions without a representative governance structure in place. The section and the report concludes with recommendations for improvements in these areas.

2 SUPERANNUATION AND ITS UNIQUE CHALLENGES

With total assets valued at $1.62 trillion at the end of the 2012/13 financial year, Australia's superannuation industry is now the largest in the world. As we demonstrate below, this means that the government has effectively delegated a significant part of its retirement policy to industry, in a way analogous to a public-private partnership.

One direct consequence of recognising this fact is that the government has a much greater and more direct interest in the performance of the industry than it does in other areas of the market. In particular, Australia's mandatory contribution system means that superannuation is of more than just prudential interest to the Federal Government.

However, superannuation has a number of unique characteristics that set it apart from other areas of finance, creating distinct challenges when reform is sought.

2.1 An overview of superannuation governance systems

Corporate governance literature defines two complementary forms of governance mechanism:

- **Market (or external) governance:** The discipline exerted by market processes rewards better performing financial institutions or corporations and penalises poorer performers (such as by greater inward fund flows or more share purchases, improved share price, etc.); and
- **Non-market (or internal) governance:** The organisational structure and administration of a company or financial institution (including board and management structures) and how those delegated with the job of managing an organisation are supervised and held to account.[12]

This report outlines further the different forms of governance and their robustness in the superannuation industry in the following sub-section. For now, we wish to note also that there are two basic types of non-market governance structures in Australian superannuation: for-profit and not-for-profit

While funds are typically classified into four broad types: Retail, Corporate, Public Sector, and Industry,[13] two relatively distinct types of fund governance have evolved in the occupational superannuation industry, based on different business, distribution and representation models:

- **For-profit (appointed trustee) model:** Funds run and administered by financial institutions, which have a high sales and distribution component, where fund boards are made up of appointed trustee directors; and
- **Not-for-profit (representative governance) model:** Funds in which distribution is largely at or through the workplace, and with both member and employer representation on the fund board.

Retail funds are typically governed using an appointed trustee governance model, with Corporate, Public Sector, and Industry funds generally operating under representative governance structures.[14] Although many of the latter three fund types are non-public offer funds, available only to certain employees or individuals, a majority of Industry funds have entered the public offer competitive arena occupied by Retail funds. As of 2013 nearly 70 per cent of Industry funds are public offer funds,[15] placing the majority of Industry funds in direct

competition with their Retail counterparts for new members (as well as existing members within these funds) and their retirement savings.

2.2 The importance of internal governance for superannuation

In recent years superannuation fund regulatory policy has placed increased emphasis on market governance. In particular, fund regulation has attempted to ensure greater competitive discipline of private fund managers by freeing up restrictions on fund flows and increasing transparency around price and performance, allowing fund members to switch funds to different investment options and to different funds. The expectation here is that informed and active fund members will act to reward better performing funds or fund options and penalise poorer performers.

It is indeed central to the viability of any market-based system of fund governance that fund flows plays a strong disciplining role on fund manager performance. As Navone notes:

> …competition among funds to attract new capital is one of the most powerful tools available to solve the agency problem that arises between fund managers and investors.[16]

However, the question for Australia's regulatory framework is whether fund flows are performance-seeking enough to bridge the gap between the large and complex financial institutions managing the funds and the fund members, who since 1992 have been required to hand over a proportion of their incomes to funds and expect to have their funds managed wisely and in their best interests.[17]

Unfortunately, widespread public support for superannuation has not translated into widespread understanding by Australians of their retirement investments. A 2008 study found that 80 per cent of fund members felt they knew very little about their super,[18] while the FSC/ING survey found that a majority of Australians were confused by the superannuation system and were thus content to let their superannuation "look after itself".[19] Instead, most Australians are content to let others deal with their superannuation. Surveys have found that around 84 per cent of superannuation products obtained over the past five year were done so through an individual's employer,[20] while 74 per cent of Australians simply accepted their employer's default fund or recommendation, putting their super "out of sight, out of mind".[21]

The compulsory, universal nature of superannuation appears to be one reason most Australian fund members can be described as 'reluctant investors' (or more aptly perhaps 'conscripted investors'), if indeed they consider themselves as 'investors' at all. These characteristics mean that in many ways superannuation is akin to a public-private partnership for the delivery of part of the government's retirement policy. In a very real sense, the government effectively acts as a co-investor or partner in the superannuation industry, and has a direct interest in and responsibility for industry performance that it does not have in voluntary market sectors.

Members' disengagement with their superannuation funds may also be a consequence of a majority of Australians who, according to the ABS, lack the financial literacy skills necessary to manage their finances.[22] According to the Cooper Review, these deficiencies mean that many Australians struggle to understand job applications and payroll forms, leaving them unable to meet the demands of Australia's knowledge-based economy.[23] However, in a compulsory system substantial member disengagement may be fairly rational due to the system's complexity, confusing nature and long-term outcomes. From the evidence above, it appears that most fund members believe that compulsion equates to government assuming

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substantial responsibility for superintending the institutions that get access to their compulsory savings, and under what terms.

In such circumstances, superannuation cannot reasonably be viewed as a typical private market populated by rational and informed adults, a key assumption made by previous inquiries into the financial sector.[24] Such a challenge was recognised by the Cooper Review, which recommended that an approach of 'libertarian paternalism' be taken in response – namely, the creation of MySuper, a basic yet robust product system that attempts to meet the objective needs of inactive fund members.[25] There is, however, a case to be made that having made that recognition the Review did not go far enough in protecting the reluctant, conscripted superannuation participant. Although it set some general criteria for access to default status, the Review did not deal with issues of fund governance in any detailed way, instead leaving it to the market and greater transparency to discipline fund performance.

The Cooper Review and other empirical evidence makes clear that market governance in compulsory superannuation is unlikely to provide the sort of discipline on funds required to make the industry efficient in the near future. In the shadow of the poor record of and prospects for market governance, non-market governance mechanisms such as organisational structure, including the type and composition of boards that oversee superannuation funds, becomes increasingly important.

Accordingly, any reforms that are made to non-market governance mechanisms should be strongly grounded in evidence about the relationship between governance and performance. Although provision arguably should be made for fund members with the confidence and financial acumen needed to actively tailor their investments, the focus of any changes to the superannuation system must remain with the reluctant investors who form the vast majority of beneficiaries of the superannuation system. Indeed, as we have argued above, the government has a direct interest here because, in essence, superannuation funds are being contracted to deliver a significant part of government retirement policy.

3 EXPLORING BOARD INDEPENDENCE

This paper argues that the key governance problem in superannuation is ensuring the alignment of interests and outlook between a board and its fund members. Alignment rather than independence should be the overarching policy goal of any superannuation governance reforms.

3.1 Background: Corporate Boards and Independent Directors

In the sphere of corporate governance, board independence is recommended in most if not all jurisdictions as a suitable solution to the agency problem originally articulated in Berle and Mean's theory of separation of ownership and control in the modern corporation. There is a need to monitor corporate managers' behaviour to ensure that they act as faithful agents of the shareholder/owners of the corporation. "Board independence" implies that the composition of the board is sufficiently independent of management to be able to exercise independent oversight of management decisions and to ensure that they are consistent with shareholder interests. That management will have incentives to act in their own self-interest rather than that of shareholders is implied, and is consistent with the basic assumption of modern neoclassical economics, that all economic agents are individual utility maximisers.

Lawrence and Stapledon agree with these observations on the purpose of board independence for corporations:

> It appears that those who advocate an increase in the proportion of independent directors on company boards are implicitly, if not explicitly, suggesting that such a development would bring about a net reduction in agency costs. [26]

Tricker lists a number of arguments that are put forward for appointing independent directors. These include suggestions that they provide public accountability and credibility, provide a counterweight to managerial power, bring a diversity of skills and experience and wider networks, and provide new perspectives and access to relevant external information.[27]

For Urtiaga and Saez, independent directors are expected to also protect the interests of minority shareholders and act as an agent of the regulator inside the board.[28] These authors report that the International Organisation of Securities Commissions (IOSCO)'s statements on board independence preclude allowing non-executive board members with current or former personal or economic links with the company or its executives, due to the risk of them being unable to act with full independence from management.[29] IOSCO argues that independent non-executive board members bring two critically important aspects to corporate governance: independent judgement and protection for minority shareholders.[30]

As an example of the inclusion of board independence with corporate governance codes and recommendations in the Australian setting, Principle 2 of the ASX Corporate Governance Council's Principles of Good Corporate Governance 2014 (released on 27 March 2014) states that the board of a listed entity should have a board of an appropriate size, composition, skills and commitment to enable it to discharge its duties effectively.

ASX Corporate Governance Council's Principles of Good Corporate Governance 2014
Principle 2 - Structure the board to add value • **Recommendation 2.1:** The board of a listed entity should: (a) have a nomination committee which: (1) has at least three members, a majority of whom are independent directors; and (2) is chaired by an independent director, and disclose: (3) the charter of the committee; (4) the members of the committee; and (5) as at the end of each reporting period, the number of times the committee met throughout the period and the individual attendances of the members at those meetings; or (b) if it does not have a nomination committee, disclose that fact and the processes it employs to address board succession issues and to ensure that the board has the appropriate balance of skills, knowledge, experience, independence and diversity to enable it to discharge its duties and responsibilities effectively. • **Recommendation 2.2**: A listed entity should have and disclose a board skills matrix setting out the mix of skills and diversity that the board currently has or is looking to achieve in its membership. • **Recommendation 2.3**: A listed entity should disclose: (a) the names of the directors considered by the board to be independent directors; (b) if a director has an interest, position, association or relationship of the type described in Box 2.3 but the board is of the opinion that it does not compromise the independence of the director, the nature of the interest, position, association or relationship in question and an explanation of why the board is of that opinion; and (c) the length of service of each director.. • **Recommendation 2.4**: A majority of the board of a listed entity should be independent directors. • **Recommendation 2.5**: The chair of the board of a listed entity should be an independent director and, in particular, should not be the same person as the CEO of the entity. • **Recommendation 2.6:** A listed entity should have a program for inducting new directors and provide appropriate professional development opportunities for directors to develop and maintain the skills and knowledge needed to perform their role as directors effectively.

As board independence has been operationalised in recent corporate governance recommendations and codes, it is applied not only to the overall composition of the board, but also to the interests, experience and expertise of individual directors. It has been extended to mean not only independence from management, but also representation of the diversity of shareholders, or more broadly, corporate stakeholders. Whether such recommendations and codes deliver a solution to the agency problem is an empirical question, the answer to which will vary depending on the individual corporate circumstances.

There is a body of academic research that has investigated whether having independent directors on corporate boards delivers improved performance in the form of higher returns. Understandably, the results of such research are equivocal. Board independence is not aimed at improved performance in terms of higher returns to shareholders, but rather the prevention of systematic underperformance due to managers optimising their own utility rather than their shareholders. Further, any attempt to measure the link between a governance system and corporate performance needs firstly to control for all of the other factors that affect performance, from factors that are more or less under management control, such as employees, suppliers and operational processes, to those that are not at all under their control, such as the state of the economy, competition in the industry, changing consumer tastes, the weather, and the news!

3.2 Governance of Superannuation and Independent Boards

The approach applied to corporate governance has been also applied to superannuation in Australia. In a recent discussion paper on superannuation governance from Australian Treasury, it is contended that independent directors will increase board diversity and reduce material conflicts of interest, ultimately maximising benefits to members in the future.[31] Assistant Treasurer Senator Arthur Sinodinos has claimed that increased levels of board independence will 'empower' fund members.[32]

However, the applicability of the corporate model to the financial sector, and to superannuation in particular, has been questioned.

Given the stronger regulation of trustee directors under common law and statutory law than that applying to ordinary directors, requirements for independence of individual directors, or boards as a whole, should be less necessary for superannuation trustee directors than for corporate directors.

The SIS Act defines an 'independent trustee' in a similar manner to the ASX Corporate Governance Principles, stipulating that a director cannot be a fund member, an employer-sponsor or affiliated with one, nor acting in the interests of a trade union or employee/employer-sponsor.[33] These definitions are in line with international standards, which define an independent director as an individual who is free of material conflicts of interest, particularly conflicts concerning management, that impact upon their ability to make decisions.[34]

3.3 The shortcomings of independence in governance

As discussed earlier, the regulation and practice of corporate governance places a high value on independence. However, academic literature paints a more complex and ambiguous picture, with research suggesting that having a greater number of independent directors on company boards does not guarantee the outcomes attributed to independent directors. This section looks more closely at the arguments against independence in governance.

Implementing mandated independence guidelines creates a structural test to guide the selection of directors. However, independent *status* (i.e. classified as such under statute or a code of practice) does not guarantee non-conflicted *outcomes* (i.e. the actual ability of a board to exercise objective judgement in the best interests of its principals).[35] Although independent outcomes may be easier for individuals who do not hold material conflicts of interest, it must be emphasised that this does not mean that individuals who do have such conflicts cannot exercise objective, independent judgement.[36] According to Wheeler, "[h]istory tells us unequivocally that the presence of independent directors neither guarantees good financial performance, nor freedom from scandal.[37]

A number of observers have criticised the use of structural tests to encourage independence, noting that such confidence in the ability of independence to deliver more critical thinking and informed discussion is misaligned with the psychological literature.[38] Others contend that structural barriers alone do not prevent negative influences from arising and are unlikely to create the necessary conditions for more substantive independence.[39] Some, such as Clarke and Dean, reject the notion of independence entirely, arguing that by itself the concept is 'virtually useless [and] operationally bankrupt':

> It is useless because it doesn't faithfully describe or reinforce how essential it is that both directors and auditors in going about their tasks are extremely well informed, and operationally bankrupt because it is, at best, functional only as a reactive rather than proactive tool, and of dubious benefit in any event.[40]

Independence is, in their view, used much too often to improve the *appearance* of integrity on company boards or auditors rather than reducing conflicted decision making in *reality*. In fact, the authors warn that focusing excessively on appearances is likely to give investors unwarranted confidence and a false sense of security, increasing the shock when companies continue to fall into disrepute or insolvency.[41]

This is consistent with the view also supported in the fund management sector that independent directors may have a potentially counterproductive outcome. Haslem has argued that there is little evidence that independent directors have changed fund fiduciary behaviour, and that instead the consequence of the gap between reality and promise has been the creation of "cover for [the] self-interested behaviour of fund advisors."[42]

Furthermore, as noted earlier and detailed in Section 3.3.1, the empirical research paints a much more complex picture, with existing corporate governance research providing mixed evidence for claims of better performance. One clear conclusion from the empirical evidence is that independence is not a *panacea* for corporate governance, and indeed, may not even be the most important policy reform to pursue.

3.3.1 Conflicting results over the value of independent directors in corporate governance

International research on 296 financial firms in 30 countries found that those with more independent directors experienced the worst returns in the 2007-8 financial crisis.[43]

Following mandatory changes in the composition of United States company boards under the *Sarbanes-Oxley Act*, a 2013 study found that companies with majority independent directors increased their turnover of poorly performing CEOs, leading to improved firm performance.[44]

In contrast, a study into the 2003 change to the ASX's listing rules requiring boards to adopt a majority of independent directors or "if not, why not", concluded that companies with a majority of independent directors were *less* likely to replace poorly performing CEOs, and in addition were more likely to demand higher remuneration fees for decreased firm performance.[45] Ultimately, these consequences of independence resulted in an estimated loss of $69 billion between 2003 and 2011.[46]

Further compounding these mixed results, a 2012 study of all Australian publicly listed companies found that as the numbers of independent directors on a board increase, the company performance measured by both accounting and market-based measures diminishes.[47] Nevertheless, the study's conclusion was that *some* independence could provide greater levels of oversight,[48] making it even more unclear whether independence is valuable, and how much so if answered in the affirmative.

Finally, on the basis of their research on 969 companies in Australia between 2003 and 2011, Fischer and Swan criticised the ASX requirements that a majority of directors on listed company boards be 'independent' arguing that:

> Independent directors by definition have either no prior experience with the firm, or at least no recent experience. Moreover many are professional directors with no specific knowledge or background in the industry and their part-time nature means that acquisition of such information is difficult and is never likely to be comparable to that of full-time executives. Quite simply, they are not as good, and shareholders suffer as a result'. [49]

Such contradictory conclusions mean that the goal, which the federal government's Discussion Paper recently announced, of creating a stable and efficient superannuation system that best serves members' interests may not be achieved as a result of increased numbers of independent directors on superannuation boards. Indeed, a 2006 review of

research on the relationship between chair or board independence in the US mutual fund industry, undertaken by the Office of Economic Analysis of the Securities and Exchange Commission reached the following conclusion:

> …there is no consistent evidence that chair or board independence is associated with lower fees and/or higher returns for fund shareholders in the cross section[50].

It bears noting that the US mutual fund industry is many ways an analogue to the retail fund management industry in Australia.

Ultimately, it appears that although independence may bring benefits to *some* boards lacking diversity or appropriate separation from management or company interests, the main effect of such a response is to create an *illusion* of independence. There is little indication that such perceptions in any way reflect the reality of boards, and as such independence alone is unlikely to materially address the dual challenges of diversity and conflict of interest that boards must manage.

Indeed, we suggest that there are two very simple reasons why increasing the number of independent directors may not in and of itself resolve the problems of corporate governance. As mentioned above, the two key ways corporate governance attempts to discipline boards are market governance (the purchase and sale of company stock), and representative board governance. The purpose of increased independence is to bring a disinterested objectivity to the board, countering the potential dominance of insiders (whether a majority or not) who may not act in the best interests of *all* shareholders and facilitating the resolution of conflicts. However, the overriding challenge of corporate governance is to align the interests of the corporate board and management more generally, as closely as possible to those of the shareholders.

The central way corporate boards attempt to achieve such an alignment in internal governance processes is via representation, with board members elected by shareholders. Representation is without doubt the most powerful mechanism within corporate governance for aligning the interests of boards and shareholders, because having shareholders on the board helps to bring the interests of shareholders directly into the boardroom. While there are recognised problems with representative models (including representative political models) or the protection of minority interests, representation is seen as critical to giving the majority of citizens, shareholders or fund members a voice.

3.4 An inability to find 'non-associated' trustees

Although the Cooper Review's non-associated trustee definition attempts to address the problems of independence that occur when the threshold is set too low, the need to be free of many current or former connections to the fund and other related parties means that there will be an extremely high threshold for directors to satisfy. Indeed, some observers have raised doubts that this broad definition can even be satisfied by most potential appointees currently available to join superannuation boards.[51]

Exacerbating this issue is evidence suggesting a pre-existing lack of appointees that satisfy even the less stringent independence definitions.

A study of 122 ASX200 companies between 2004 and 2007 found that only 10.2 per cent of non-executive directors appointed in 2006-07 were 'new' directors, while existing board members running for re-election received, on average, a 96.2 per cent vote in their favour.[52] Meanwhile, a 2005 APRA Discussion Paper noted concerns by a number of submissions of an inability to find new directors, and that doing so would come at the expense of knowledge

and experience.[53] The issues faced by ASX companies indicate some of the potential limitations of relying on a policy of independence to solve the problems of governance in the superannuation industry.

Ultimately, this report contends, the importance currently ascribed to independence in non-market governance is not reflective of the equivocal research into its ostensible benefits. It should be noted that some individual superannuation funds nevertheless contend that increased independence may be necessary for other reasons, one example being a means of expanding the pool of potential appointees for trustee boards where funds face difficulties recruiting from existing representative organisations.

Although we accept that reforming the SIS Act so that funds, for such purposes and at their discretion, can more easily appoint independent directors on their boards, we reiterate that any governance policy outcome arising from this Report should be one that improves the alignment between the board and fund members, rather than mandated independence requirements.

4 FUND GOVERNANCE – STRUCTURES, PRACTICES, PERFORMANCE

This section analyses data on the fund governance and performance of Australia's superannuation system and the relationships between them. It establishes that the descriptive categories of representative not-for-profit and appointed for-profit trustee fund types predict different fund governance structures and practices, and are therefore sensible categories for interrogating their influence on fund performance.

The results support existing research which has consistently found that representative trustee governance imparts a significant positive impact on performance, compared with appointed trustee funds. The representative governance model is not a perfect system. For example, the Cooper Review suggested that the model may be vulnerable to the perception that individual trustees are answerable to or dictated to by the organisation that appointed them.[54] However, the representational model remains diverse in appointment methods, the numbers of trustees and areas of governance. Remarkably despite this diversity of representation, the common outcome of representation seems to be a closer alignment of trustees' and members' interests.

Thus, this report contends that, in spite of some shortcomings, representation is actually the model that most closely satisfies the objectives of meeting the best interests of members and maximising retirement incomes for Australians. As we show below, the evidence for this claim is strong - the not-for-profit representative trustee model has outperformed its for-profit appointed trustee competitors on virtually every important criteria of superannuation performance over a long period. Although there may be scope for further improvement of the representative governance model, it promotes higher levels of diversity among trustees, more effectively minimises conflicts of interest and, importantly, has continually outperformed the for-profit model over the past decade, generating higher net returns for fund members.

In order to support this claim, we now review the evidence on the relationship between the two main governance models and some of the performance objectives. This evidence is derived primarily from 2013 data supplied by the respected superannuation research and ratings firm Rainmaker Information, and from a governance survey undertaken by APRA.

4.1 Ability to minimise conflicts of interest and act in members' best interests

As the Cooper Review, and the federal government's 2013 Discussion Paper, have noted, a key concern of corporate governance research and policy is attempting to maximise the alignment of agents charged with managing other people's money and those who invest or deposit that money in trust. To put it another way, the objective of corporate governance is to minimise the potential and actual conflicts of interest between investors and the corporate managers of that money. This principle applies equally to fund governance.

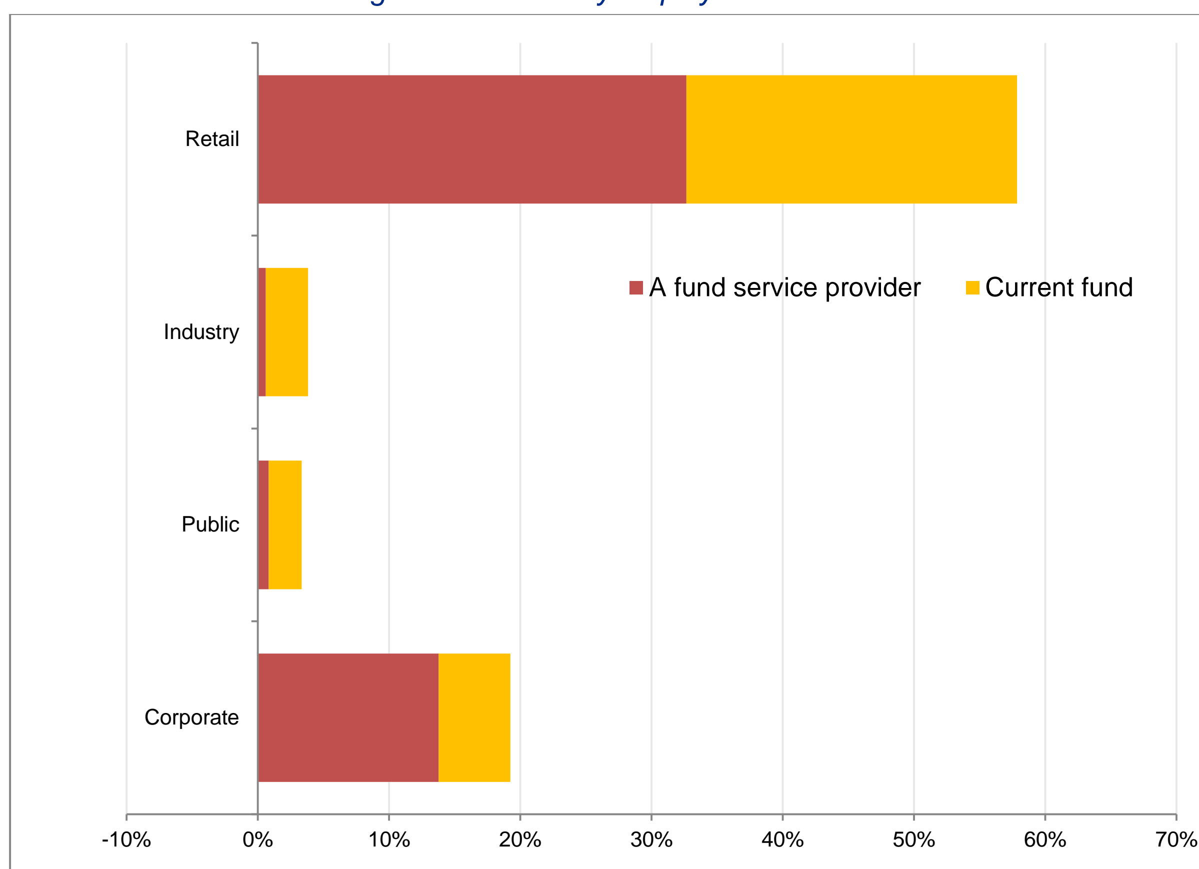
In the words of John Bogle, former CEO of the Vanguard Group, managing conflict "is a matter of fiduciary principle, as no man can serve two masters."[55] What Bogle means here is that a crucial issue for fund governance is that trustees have only one responsibility – to act in the best interests of fund members. John Bogle has been a long-term critic of US mutual funds which he feels are conflicted between selling products to maximise the fees and profits of the financial institution running the fund, and delivering the best returns to the fund member/investor. He feels that too many mutual funds deliver for the shareholders, not for their fund members. Nevertheless, minimising and managing conflicts of interest will almost certainly be a permanent challenge for corporate and fund governance policymakers.[56] Accordingly, the modern response to this issue is to structure governance processes to

minimise conflict as much as possible, and then use disclosure to appropriately manage such issues that remain.

One of the current problems in examining fund governance is that we have few statistics and studies that enable us compare funds. The next part of this section presents results from an APRA survey of trustee structures and behaviours, which to the authors' knowledge is the most comprehensive survey currently available[57].

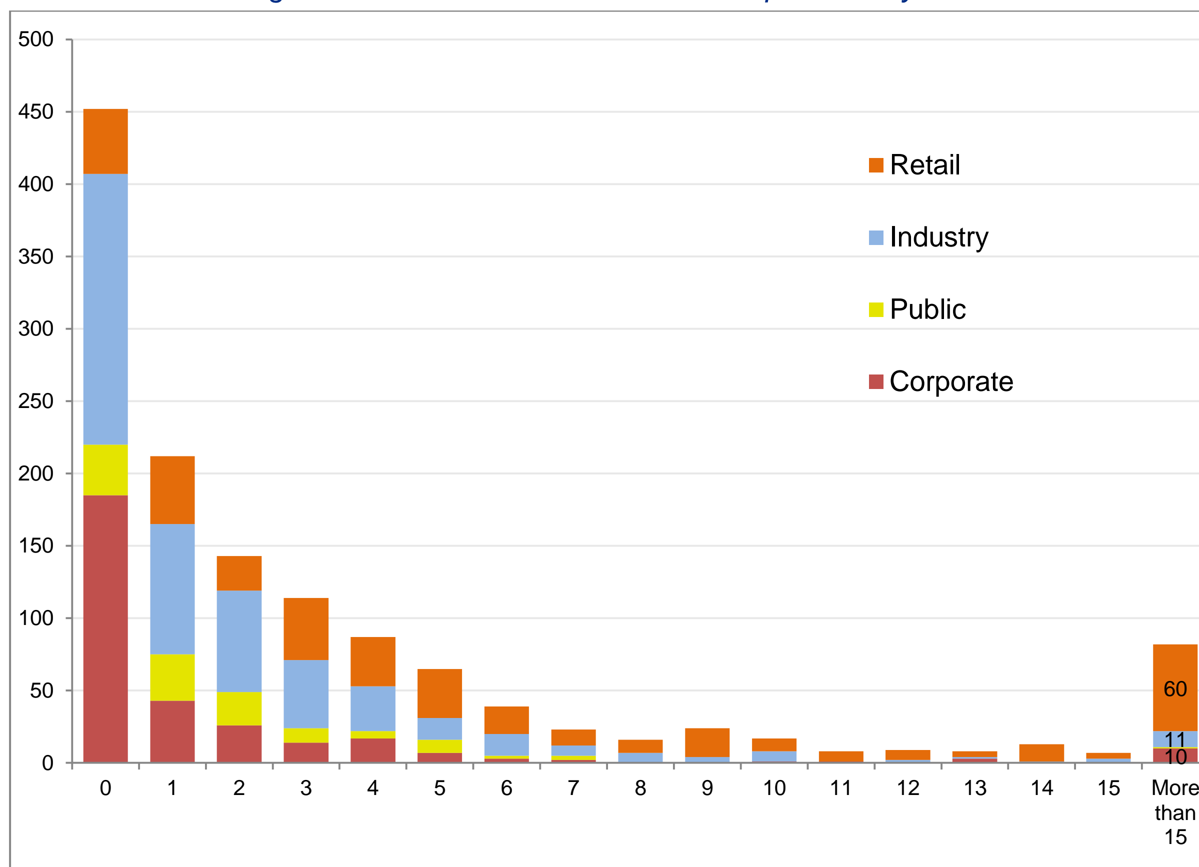
As Figure 4.1.1 shows, there is a significant difference in the structure of trust boards in terms of the primary employer of the trustee. Less than 5 per cent of trustees in public sector and industry funds are employed by the fund or a fund service provider, whereas in retail funds the employment relationship rises to almost 60 per cent of trustees. Figure 4.1.1 shows that 57.8 per cent of Retail directors, or almost three out of every five, are employed by one of these two types of organisations, compared to 3.3 per cent of Public Sector fund directors and 3.8 per cent of Industry fund directors. Corporate funds, with 19.2 per cent of their directors employed by the fund or fund service provider, are three times less likely than Retail funds to suffer from this potential conflict of interest.

Figure 4.1.1 Primary employer of director



Another indicator of differences in fund governance patterns concerns the number of other fund trustee/directorships held. Fig 4.1.2. shows that the majority of directors of not-for-profit funds hold relatively few additional trusteeships outside the fund to which they are a trustee. In particular, directors of industry and corporate funds are over four times more likely than Retail funds to hold **no additional** directorships at all. Conversely, compared to industry and corporate funds, retail fund directors are six times more likely to hold more than 15 directorships.

Figure 4.1.2 Number of other directorships currently held

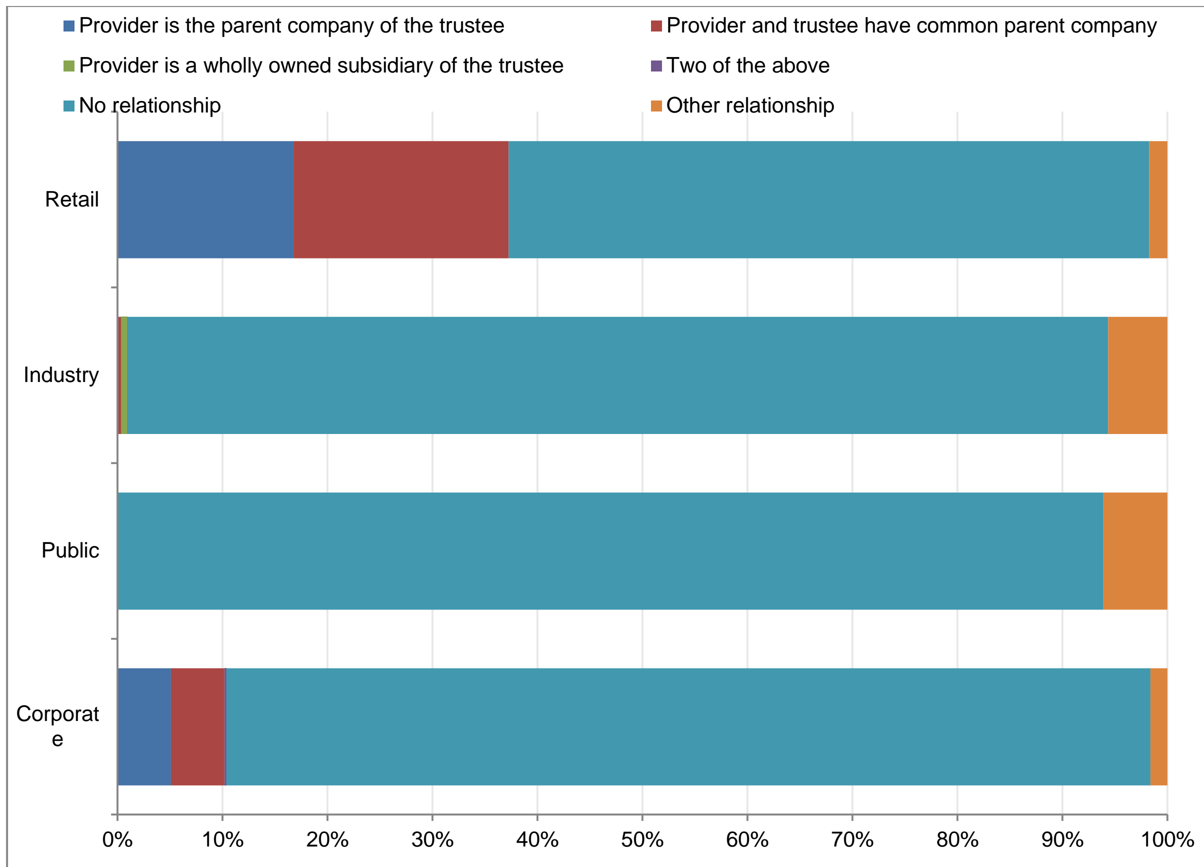


The issue of potentially conflicted relations between trustees and the organisations running or providing services to the fund (ie links that might affect governance) has a number of potential dimensions. Figure 4.1.3 shows that over a third of retail funds' service providers are either the trustees' parent company or share a common parent company, compared with 0.3 per cent of industry funds' service providers.

One possible way of minimising potential structural conflicts of interest is to ensure trustees have their own superannuation savings in the fund – to have what North Americans term 'skin in the game'. Although not a cure-all for the problem of conflict, the understanding that a trustee-directors' retirement savings will be affected by the strategic decisions they make is thought to more likely to temper potentially conflicted decision-making.

There is indeed empirical evidence that skin in the game does predict better performance. For instance, Macquarie Equities recently reported its findings on the performance of the boards of Australia's top 100 companies over five years from 2008 to 2013. It found that companies whose directors held stock had better shareholder returns and return on equity. The return on equity was 13.7 percent higher and relative share price was eight percent higher.[58] Also, supporting the argument that 'skin in the game matters' is research by Cremers et al (2009) at the Yale Institute of Finance on the performance of mutual funds which found that funds without substantial personal investment of the directors significantly underperform. [59]

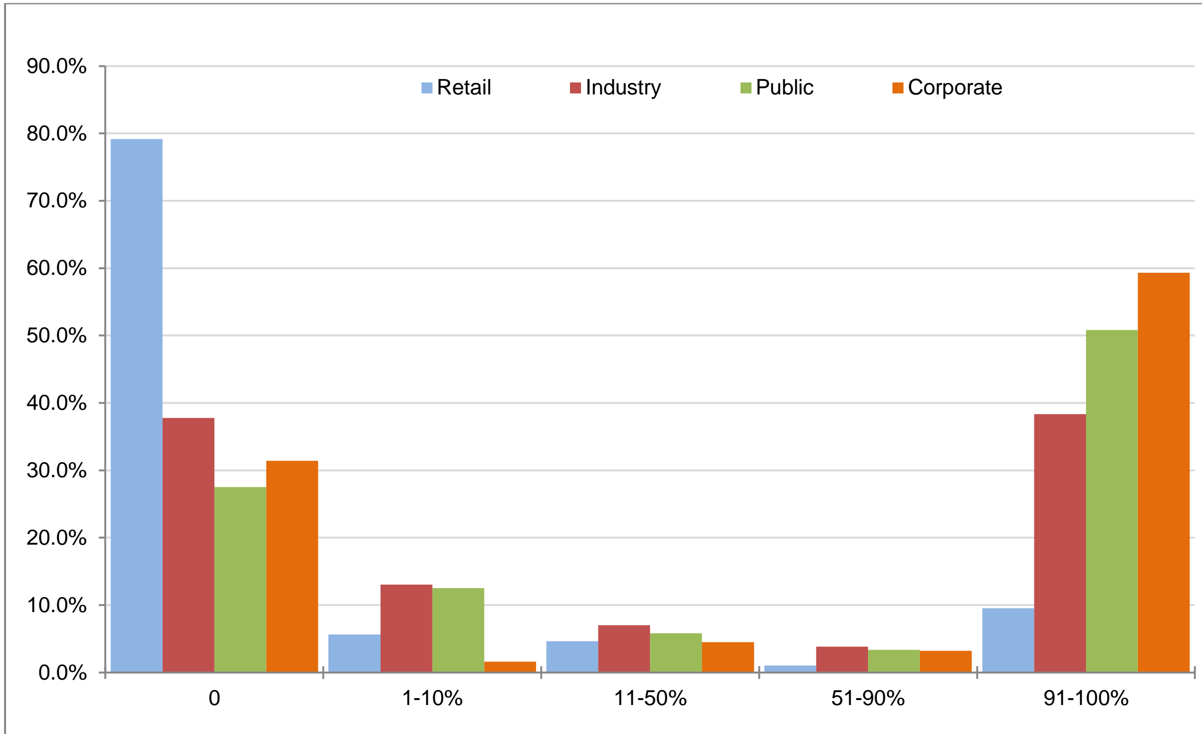
Figure 4.1.3 Service provider relationship to fund



As Figure 4.1.4 shows, representative governance trustees are substantially more likely to be invested in the fund they manage than appointed trustee directors. Notably, almost 80 per cent of retail directors invest none of their superannuation contributions in the funds they manage, compared to between 28-38 per cent for not-for-profit trustees. In contrast, between 36-58 per cent of not-for-profit trustees invest *all* their superannuation in the funds they run, compared to 9 per cent of Retail funds. The absence of appointed trustee director's having substantial skin in the game seems therefore to exert a reinforcing rather than a moderating effect on the problem of conflict of interest between their employers and the fund members.

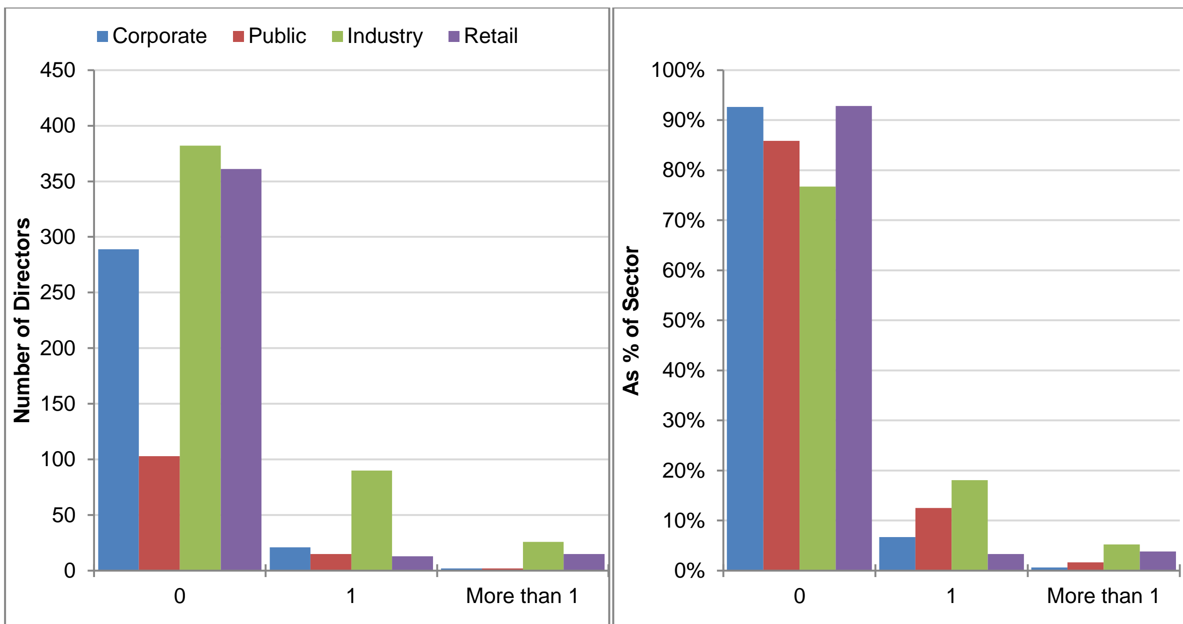
THE McKell Institute

Figure 4.1.4 Percentage of directors invested in fund they manage



From Figure 4.1.5, we can also see that there is a significant difference in the probability that family members of trustees are invested in the fund. The logic here is that one would expect that having your own and other family members' retirement savings in a fund would provide considerable motivation to a trustee in ensuring the fund operates in members' best interests.

Figure 4.1.5 Number of family members also invested in this fund



Another set of attributes about fund governance go to the practices and behaviours of fund boards. Figures 4.1.6 and 4.1.7 present estimates of estimates of director/trustee hours spent per year on fund matters. They show that fund governance-type seems to predict quite different estimates of average hours spent in total and outside of board meetings. Here we are simply establishing that we can see quite distinct structures and patterns of behaviour which form around fund governance types.

Figure 4.1.6 Average number of director hours spent per fund per year

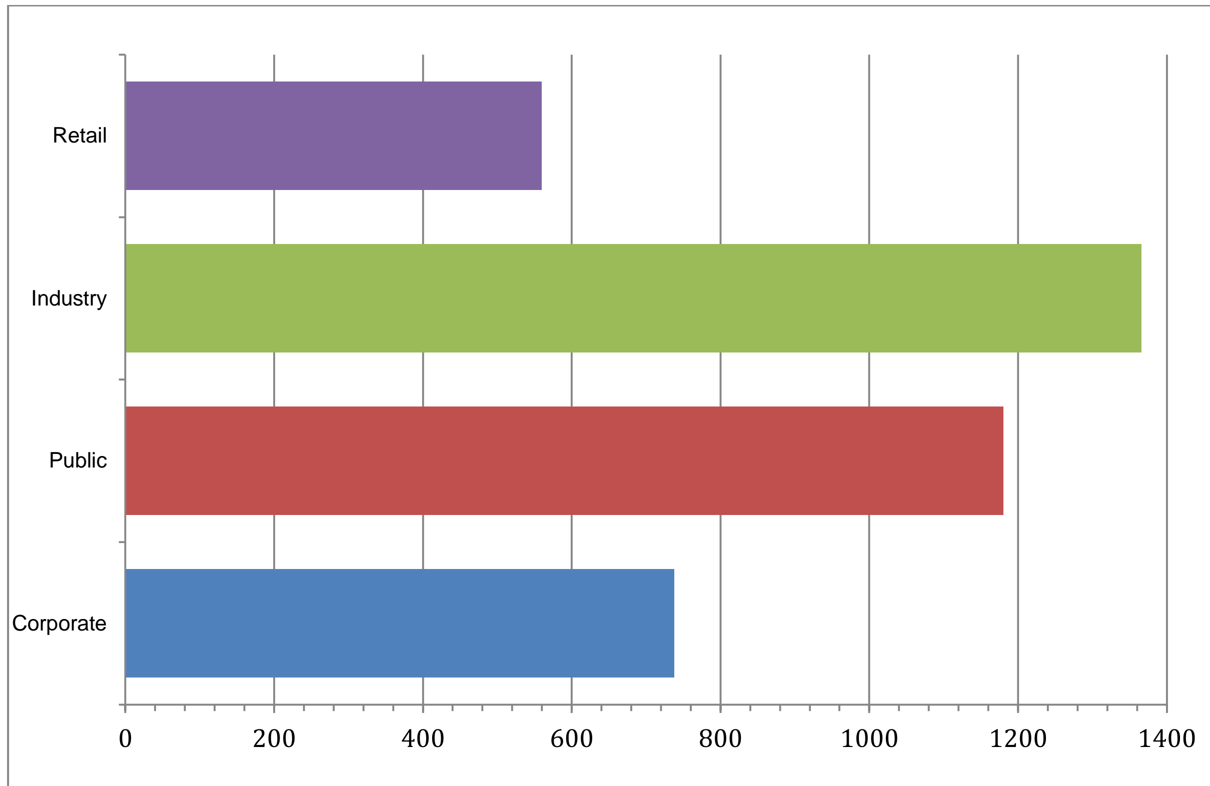
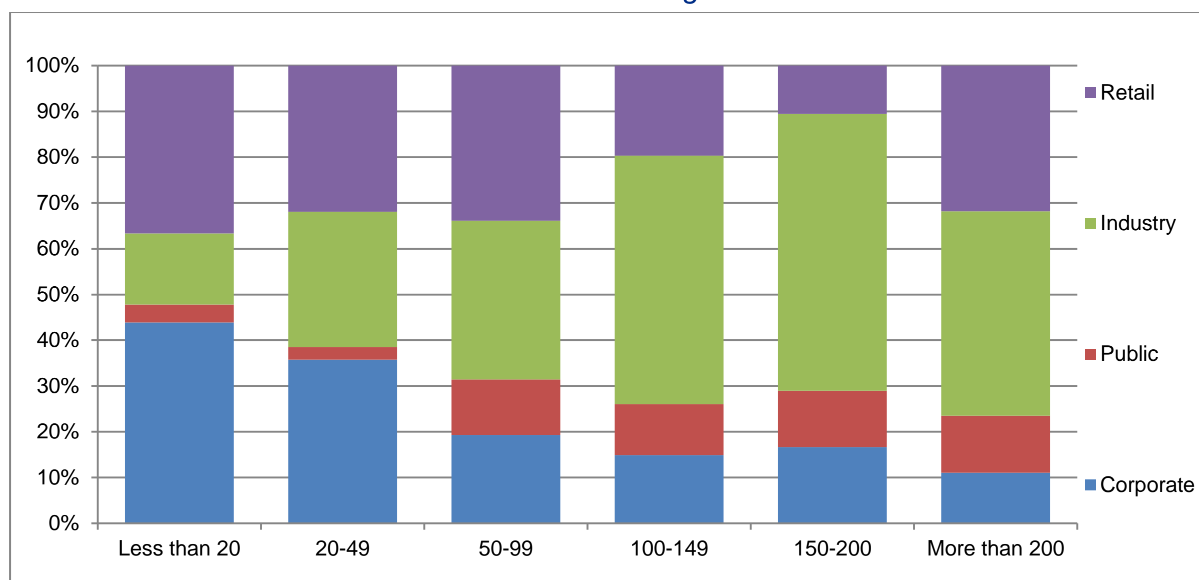


Figure 4.1.7 Number of hours spent by Trustee/Director per year on fund matters outside board meetings



This section has presented evidence that there are several grounds for thinking that *prima facie* there are different ways conflicts of interest are structured and managed in different fund governance structures in superannuation. However, it must be emphasised that the myriad relationships that superannuation trustees and directors may manage while sitting on fund boards do not necessarily automatically give rise to actual conflict of interest. As argued by respondents to the Cooper Review, the majority of trustees understand the need to represent all members of a fund rather than a single stakeholder or class of fund member.[60]

Although managing conflict of interest will continue to be a challenge for all funds, the evidence shows that for representative governance not-for-profit directors have more diverse backgrounds, hold fewer additional directorships, have less direct relationships to the fund or related service providers, invest more of their retirement savings and time in the fund they represent. Such actions indicate a different ability to manage existing conflict of interest and act in the interest of the fund's members than those trustee/directors in appointed for-profit counterparts. Below we use these differences as the basis of a test of whether they seem to translate into different fund performance.

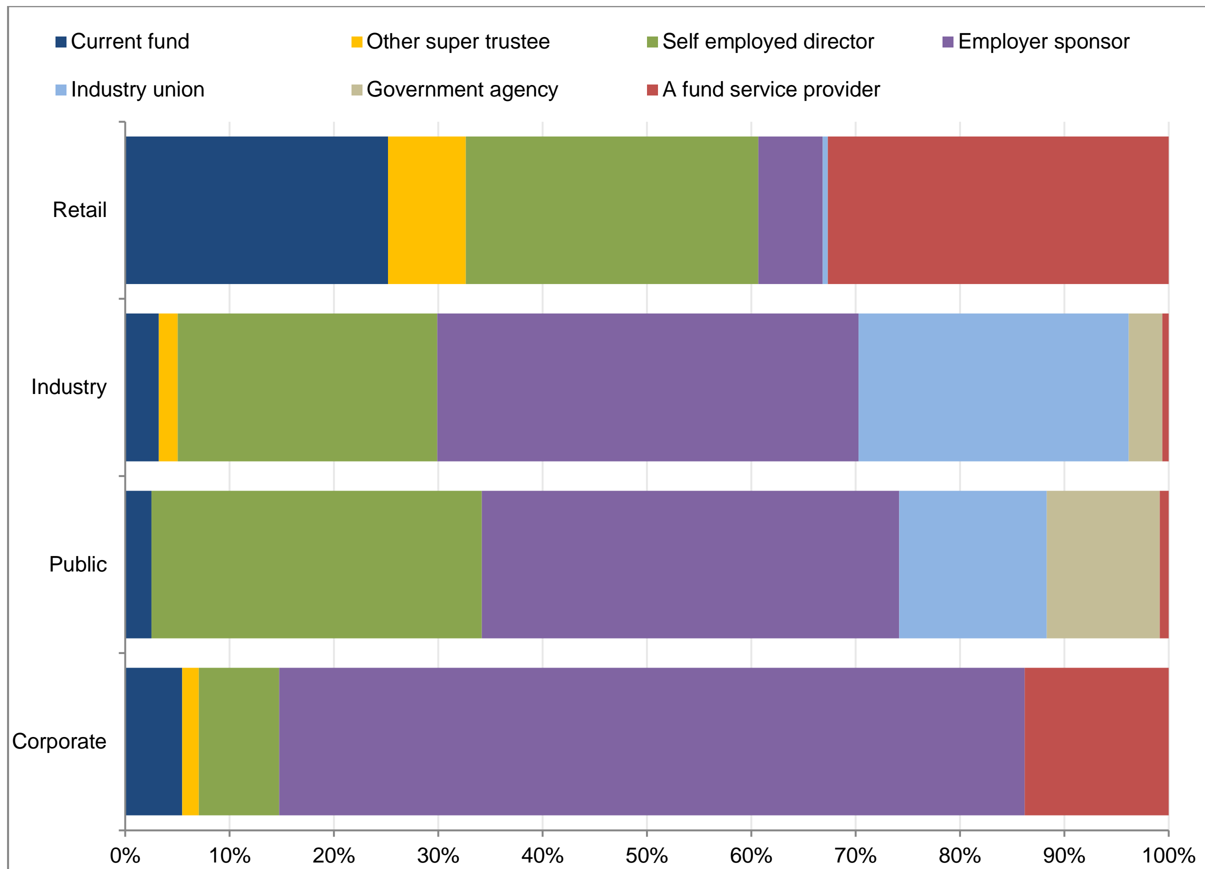
4.2 Levels of diversity

Diversity is increasingly acknowledged as important to effective governance by a wide range of sources. The common argument in its favour is that diversity helps reduce the possibility of myopic 'group-think' that limits the ability of boards to make effective strategic decisions in face of a host of competing and conflicting priorities.

Although this paper does not suggest that existing levels of diversity within the superannuation sector are ideal and cannot or should not be improved, the evidence demonstrates that, compared to retail funds, industry, public sector and corporate superannuation boards have higher levels of diversity. Greater diversity seems strongly associated with the structure of the representation model.

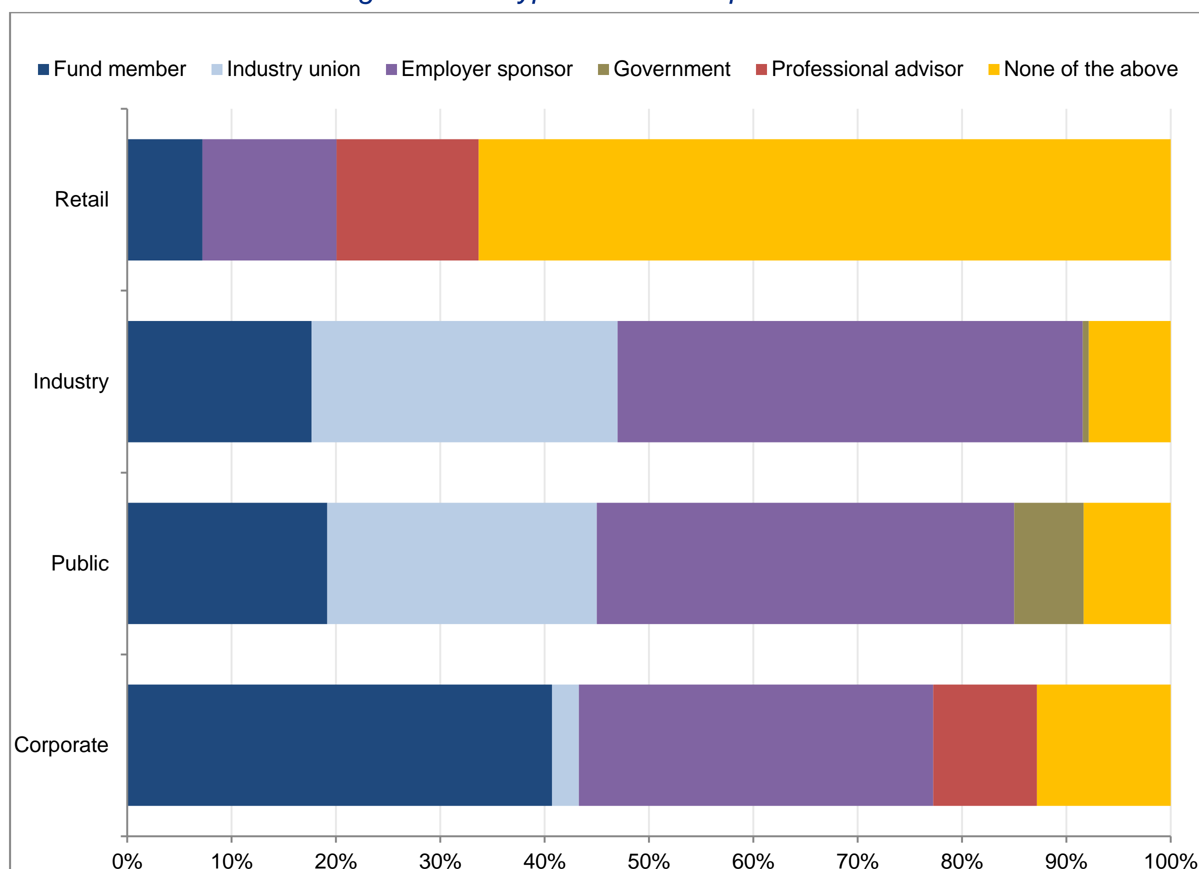
As shown by Fig 4.1.1 below, a majority of Retail directors are employed either by the current fund (25.2 per cent) or the fund's service provider (32.6 per cent), with only a small proportion of directors representing other defined interest groups. In contrast, not-for-profit fund trustees—Industry and Public Sector types in particular—tend to have more widely dispersed sources, notably from employer groups and industry unions.

Figure 4.2.1 Employer of trustees/directors on superannuation boards



A similar finding occurs when reviewing the various types of board representation (Fig 4.2.2) and it is evident that the pools from which representative governance funds are able to draw their trustees provides greater diversity to their boards compared to the appointed trustee retail funds.

Figure 4.2.2 Types of board representation



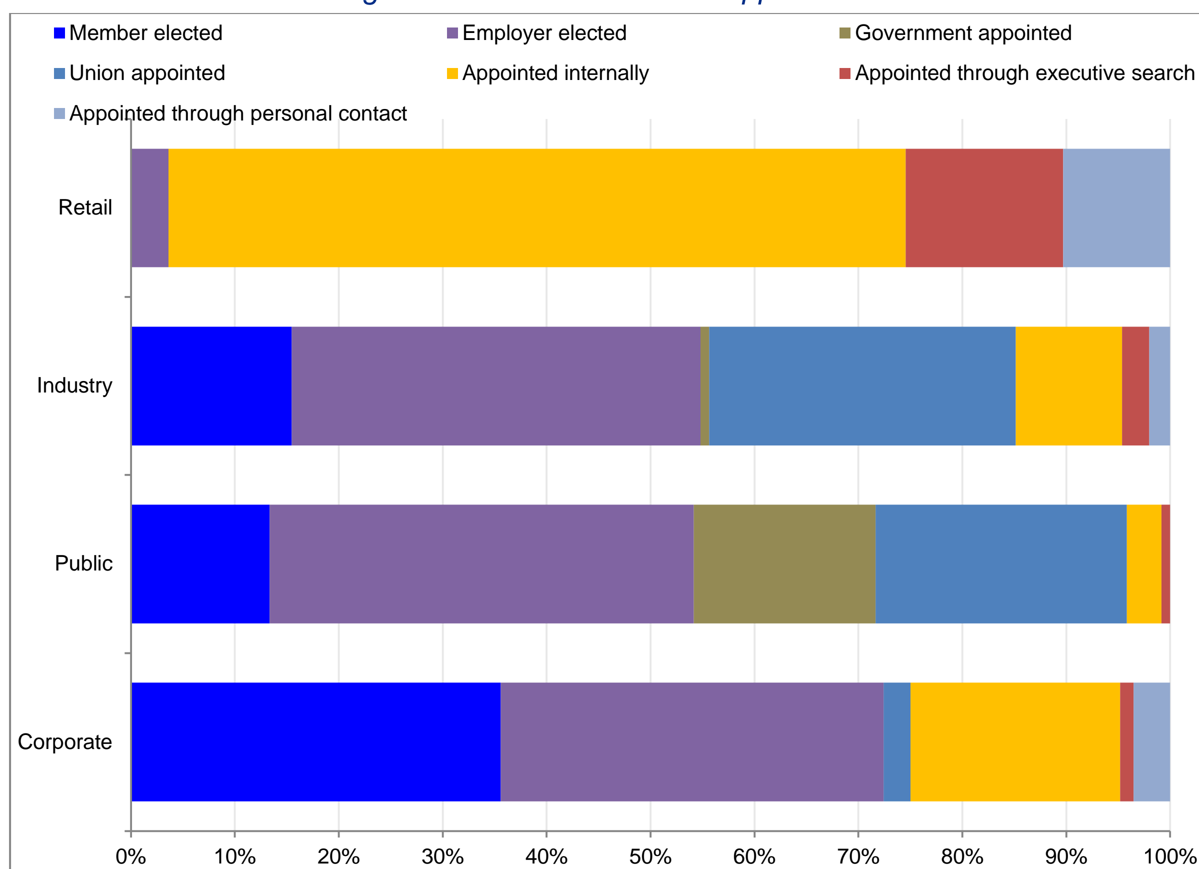
Importantly, directors of not-for-profit funds tend to be appointed from sources external to the fund significantly more often than for-profit funds, which overwhelmingly appoint directors from internal sources (Fig 4.2.3).

It does not necessarily follow from this observation that appointed for-profit funds should alter their governance systems to emulate their representative trustee counterparts, or that individual not-for-profit funds must be prohibited from appointing independent directors according to individual fund discretion. As stated in section 3, there may be other reasons for independence that justify a fund attempting to recruit more independent trustees, and overly prescriptive laws and regulations against independence may prove as problematic as laws and regulations for mandated independence.

However, if the absence of diversity and representation are factors that can be shown to be associated with significantly poorer performance, then some remedy may be required within retail fund governance.

It seems hard to contest the claim that the ability of not-for-profit funds to appoint trustees from more diverse backgrounds stems directly from their representative governance model, which limits excessive appointment of individuals from one particular group of ‘insiders’ and prescribes minimum numbers of appointees from different backgrounds. Accordingly, using independence to minimise potential conflicts of interest is likely to result in little meaningful improvement in this regard.

Figure 4.2.3 Method of board appointment



4.3 Governance and performance – the evidence

Diversity, minimising conflicts of interest (both potential and actual) and policies for ensuring that fund trustee-directors act in the best interests of their members count for little should members' retirement savings be invested poorly. In fact, the overarching aim of these attributes is to maximise the performance of the fund for members, with the core performance metric being the long-term net returns for members. In maximising performance, the fund aims not only at providing ample finances for each individual's retirement, but to also allows this important pillar of Australia's retirement system to remain viable in the long-term.

As explained in Section 2, superannuation is a complex sector, with issues of member compulsion, fund and asset size, fees and a quasi-public-private industry structure all contributing in some fashion to long-term performance. As such, many of the corporate governance concepts proposed as means of improving superannuation governance—independence being the primary example in this Report—are not guaranteed to translate into better industry performance, even if one disregards the contested nature of many of these concepts in other settings.

Despite these caveats, the available evidence does show clear causal relationship between not-for-profit representative governance funds, and higher levels of returns for members. Many types of empirical testing has been undertaken on superannuation performance in Australia, some using raw returns, others attempting to see if adjusting for risk would change the results of the simple compounding tests. Both raw and risk-adjusted research supports

the proposition that the two governance models produce significantly different performance outcomes.

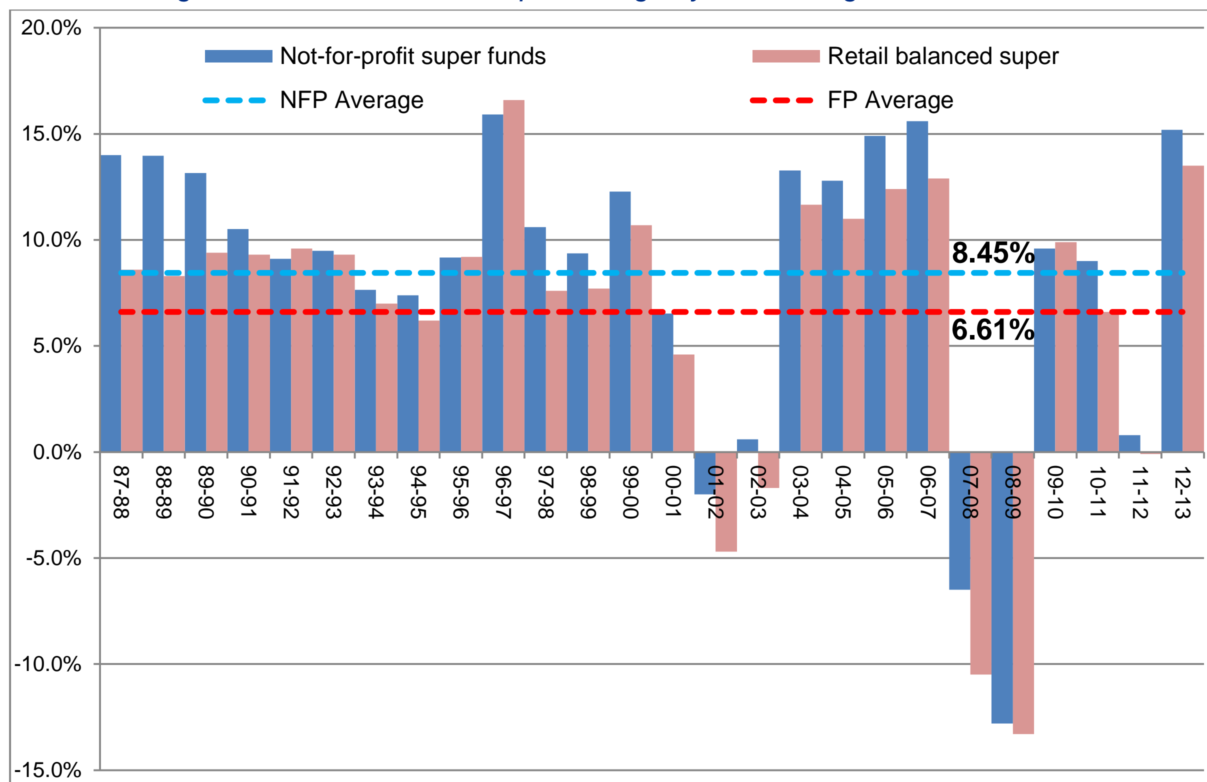
Previous research has broadly concluded that, compared to for-profit performance, not-for-profit superannuation funds (i.e. Corporate, Industry and Public Sector) have consistently generated higher returns for their members, up to 2.4 per cent per annum higher on a risk-adjusted basis.[61] Industry Super Australia recently affirmed this finding, concluding that had all superannuation funds returned the not-for-profit funds' 5.7 per cent long-term annual average, Australian retirement savings would be $88 billion higher than it currently stands.[62]

The most recent rate of return (ROR) data from APRA indicates the superior performance of not-for-profit funds, such that between 2003-04 and 2012-13, not-for-profit funds have outperformed their for-profit counterparts between 0.5 and 3.2 per cent in every year.

In order to bring this previous research together and provide a more pragmatic illustration of the importance of strong performance, this paper analyses actual crediting rate data from Rainmaker International for balanced and default funds between 1987-88 and 2012-13, and provides two scenarios to illustrate the long-term effects of fund performance of not-for-profit and for-profit funds.

Figure 4.3.1 presents the Rainmaker annual crediting rate data by fund type 1987/8 to 2012/3. It shows that across that time period, but in upswings and downturns in asset markets, not-for-profit funds have outperformed the for profit funds. Across that 25 year period the difference in average returns is about 1.84% per year.

Figure 4.3.1 Rates of return percentage by market segment 1988-2013



In order to test for time specific nature of the returns, Figures 4.3.2 and 4.2.3 attempt to decompose the returns across the entire period. Figure 4.3.2 shows that in the first half od the period when average returns for both fund types were quite high, NFP funds out-performed by about 1.8% per annum. In the second half of the period, when average returns for both funds was lower, the difference between fund types actually increased slightly to about 1.9 percent per annum. Across both halves of the period not-for profit funds outperformed.

Figure 4.3.2 Sector Performance Averages from 1987 – 1999, 2000 – 2013 & 1987-2013

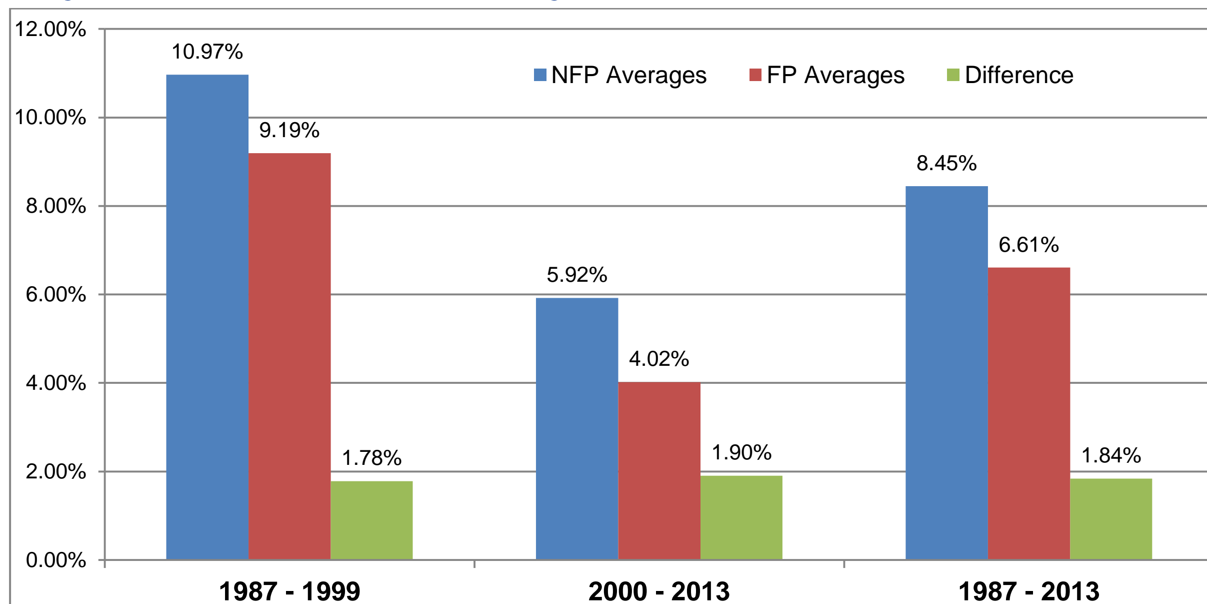
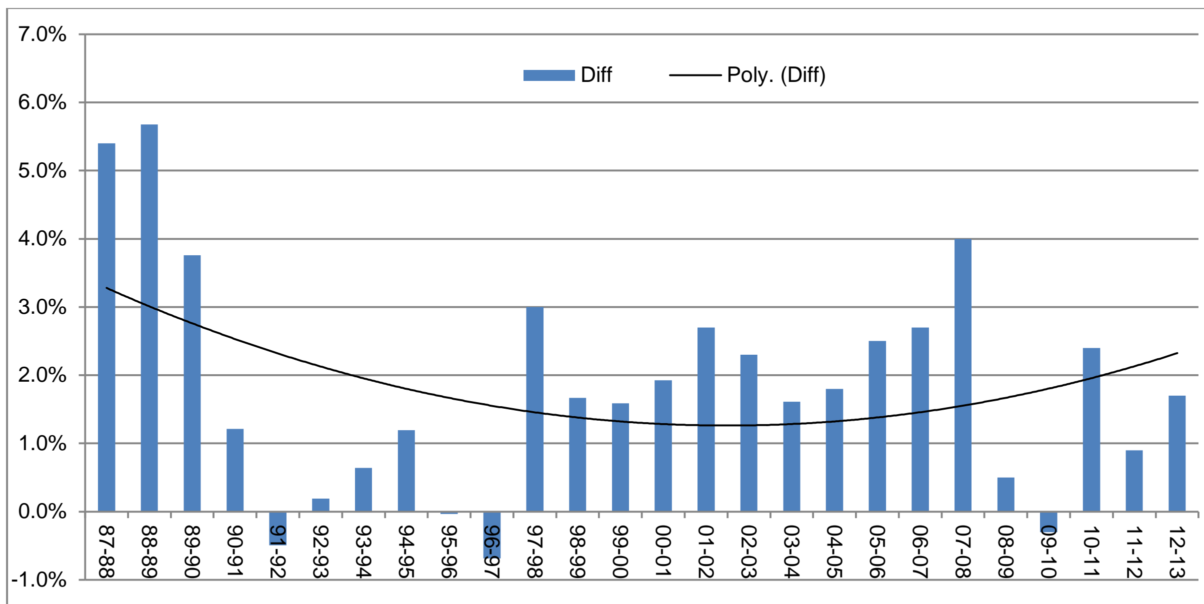


Figure 4.3.3 shows the annual differences in fund returns and a smoothed trend line of those differences across the sample period. Here again we see a reinforcement of that consistent outperformance.

Figure 4.3.3 Performance Difference – NFP v FP Superannuation Funds, yearly difference and fitted trend line



However, a question emerges about how these performance differences translate into retirement savings. In the next step we established two scenarios and the results of different returns performance are presented in the next series of charts

The first two graphs (Figures 4.3.4 and 4.3.5) present the results of Scenario 1 which uses the Rainmaker fund performance data and assumes an initial $1000 investment in a fund at the beginning of the 1987-88 financial year, with only the fund type crediting rate added annually and compounded. It shows that the compounded effect of the crediting rate difference here can be seen as the difference in the final amounts accumulated between for profit ($4967.63) and not for profit funds ($7774.01). The difference in accumulated amount is $2806.36, so that over the twenty five years of not-for-profit funds accumulated 36% more than their for profit counterparts.

This scenario is representative of an individual who no longer contributes to their superannuation and relies solely on the fund's performance for wealth growth. It also highlights the effect of the compounded effect of the fund return differential.

The second scenario (illustrated in Figures 4.3.6 and 4.3.7) also begins with an initial $1000 investment, but an additional $1000 per annum is also contributed to the balance. As per Figures 4.3.4 and 4.3.5, the crediting rate is then added and compounded annually. It shows that over the 25 year period of the Rainmaker fund crediting rate data, this scenario would see the difference in crediting rate result in a not for profit member saving accumulating $76,444.02 while the for profit fund member would have accumulated $57981.75. The difference amounts to $18462.27 or 24% more for a not for profit fund member compared to a for profit member.

These two scenarios act as proxies for two basic types of fund member – Scenario 1 depicts retired individuals who no longer contribute to their funds, while Scenario 2 depicts working individuals still in the accumulation phase of their superannuation life-cycle and therefore continuing to make superannuation contributions.

As shown in both graphs below, not-for-profit balanced/default funds have consistently and significantly outperformed for-profit funds during the 26-year sample period.

Figure 4.3.4 ***Scenario 1****: Initial investment of $1000 in 1987, Annual crediting rates compounded, balanced & default funds - 1988 to 2013*

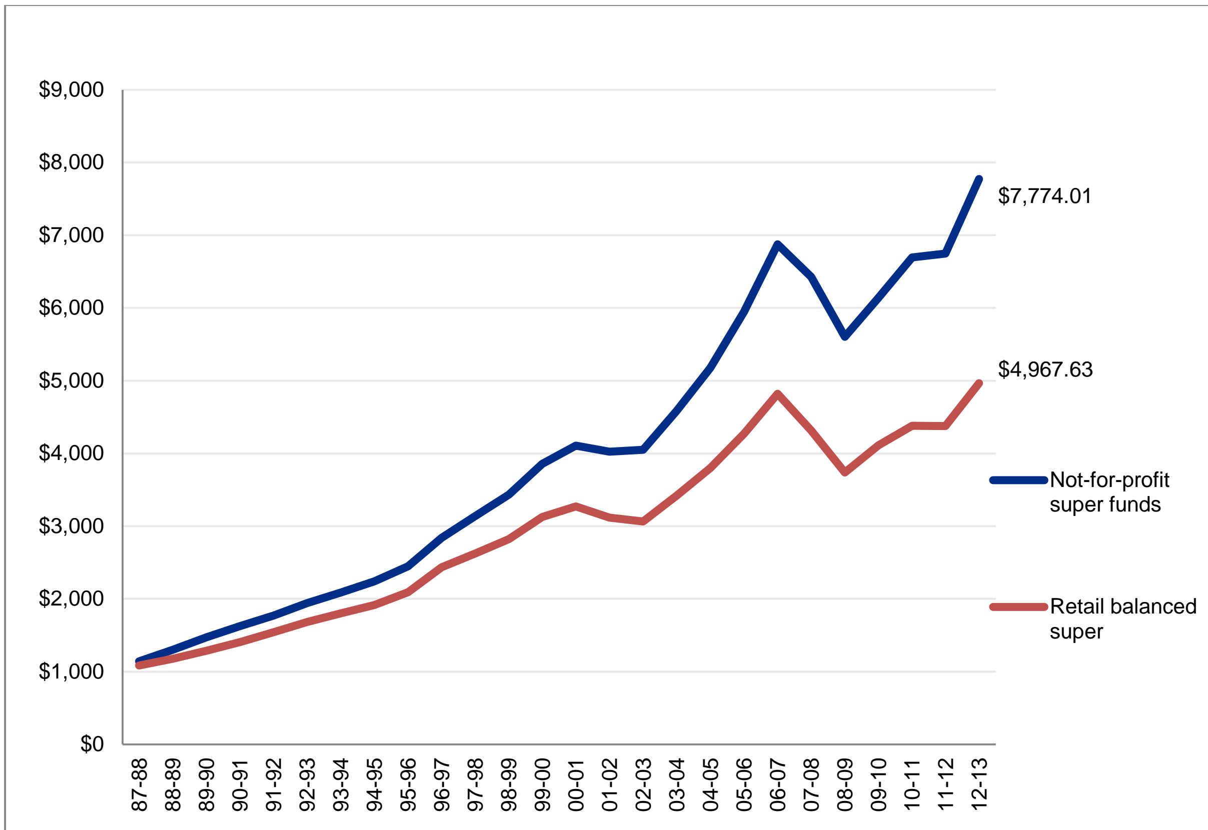


Figure 4.3.5 ***Scenario 1****: Initial investment of $1000 in 1987, Annual crediting rates compounded, balanced & default funds - 1988 to 2013 Differences in Dollar Amount and Percent*

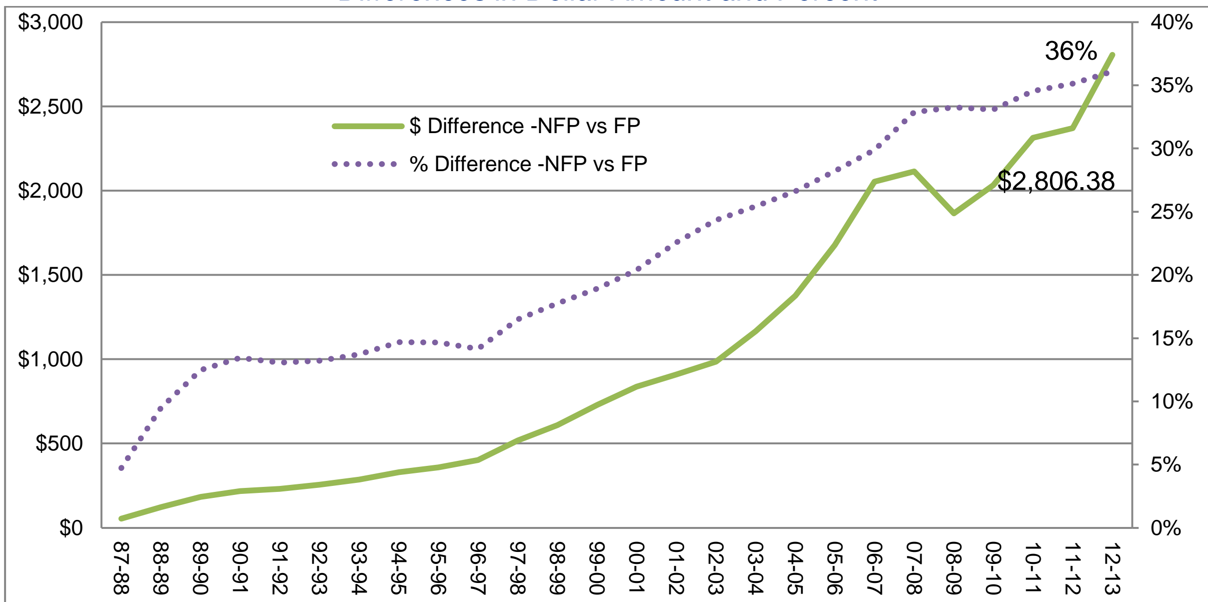


Figure 4.3.6 ***Scenario 2****: Initial investment of $1000 in 1987 plus additional $1000 per annum,*
Annual crediting rates compounded, balanced & default funds - 1988 to 2013

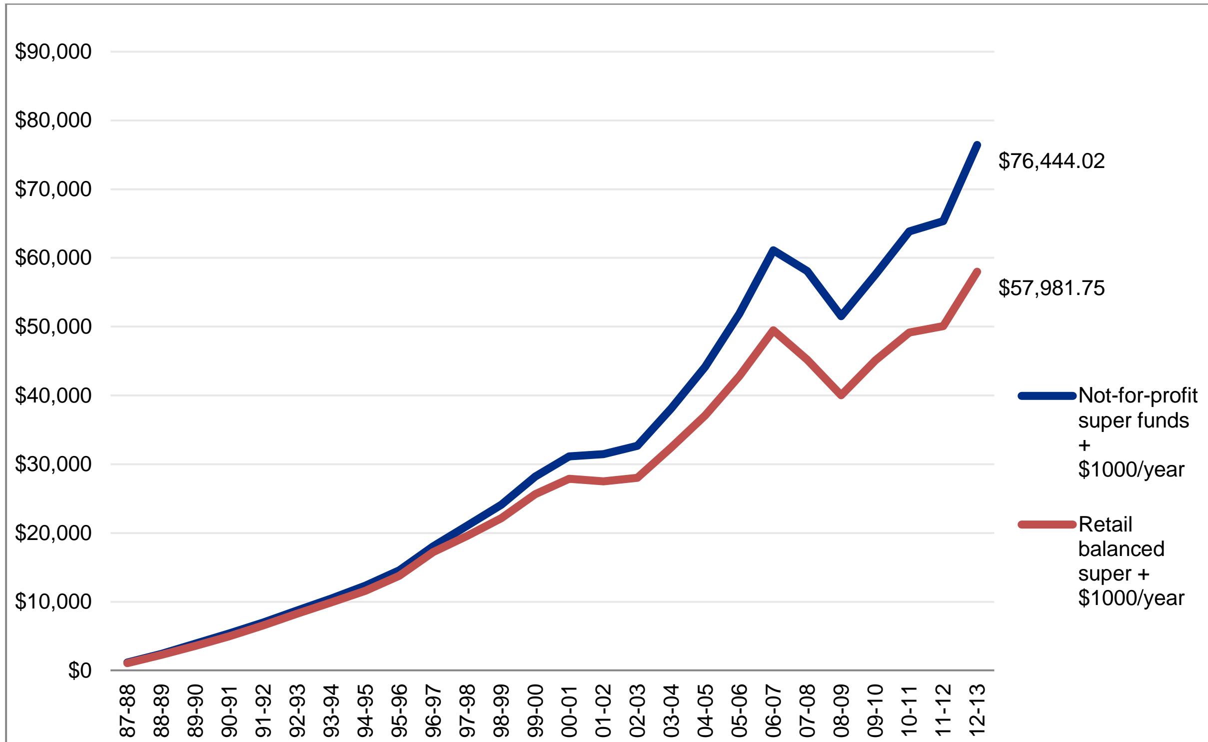
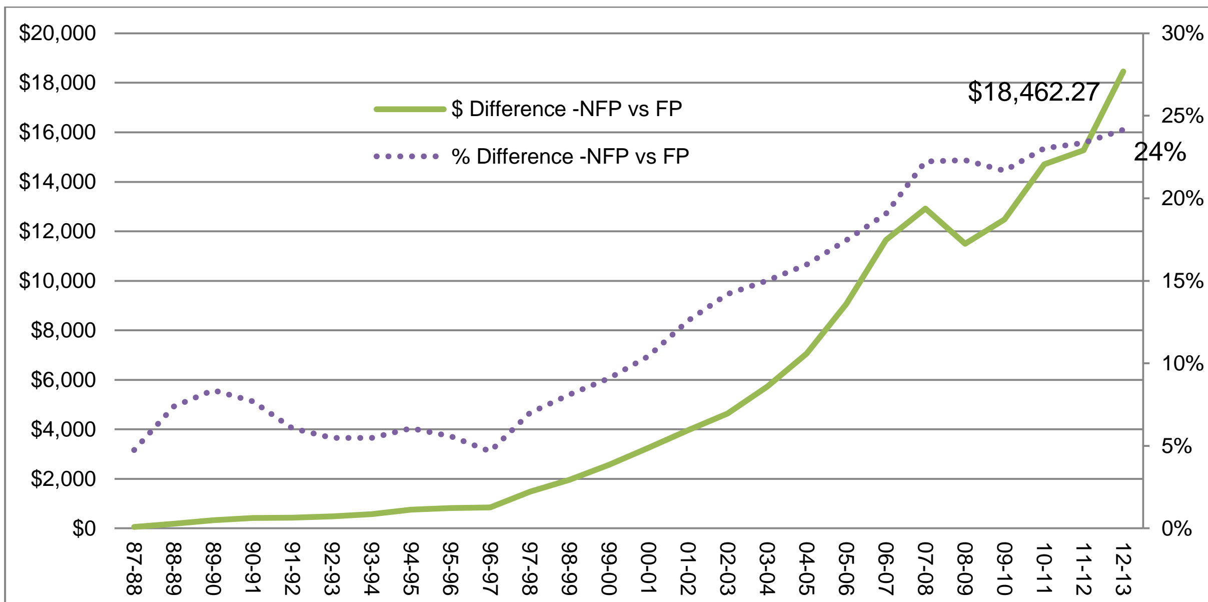


Figure 4.3.7 ***Scenario 2****: Initial investment of $1000 in 1987 plus additional $1000 per annum,*
Annual crediting rates compounded, balanced & default funds - 1988 to 2013
Differences in Dollar Amount and Percent



Another way to illustrate the difference in performance between fund types is to ask how much longer a fund member would have to work, wait and contribute in a lower performing fund type in order to reach the amount of the better performing fund. There is currently a lot of debate about the retirement age with some people suggesting that superannuation fund members will not have enough to retire on by the time they are 65 or 67.

Figure 4.3.8 illustrates the Scenario 1 in terms of time difference and Figure 4.3.9 illustrates the time effects of Scenario 2.

In Scenario 1 a member in a not for profit fund would reach for profit final amount 8 years earlier. In Scenario 2 a member of a not for profit fund would reach the for profit final total 6 years earlier.

In other words, if the benchmark for retirement savings is set at the for profit performance standard, a not for profit fund member would reach that benchmark between 6 and 8 years earlier.

Figure 4.3.8 ***Scenario 1:*** *Initial $1000 lump sum plus crediting rates compounded, 1987-2013*

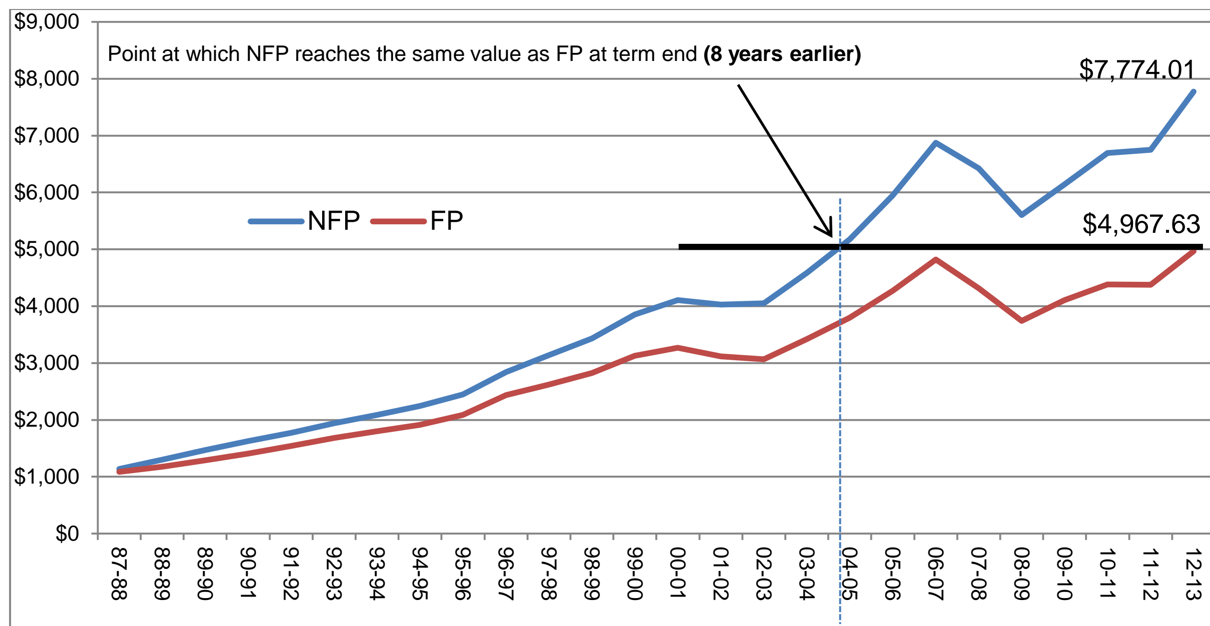
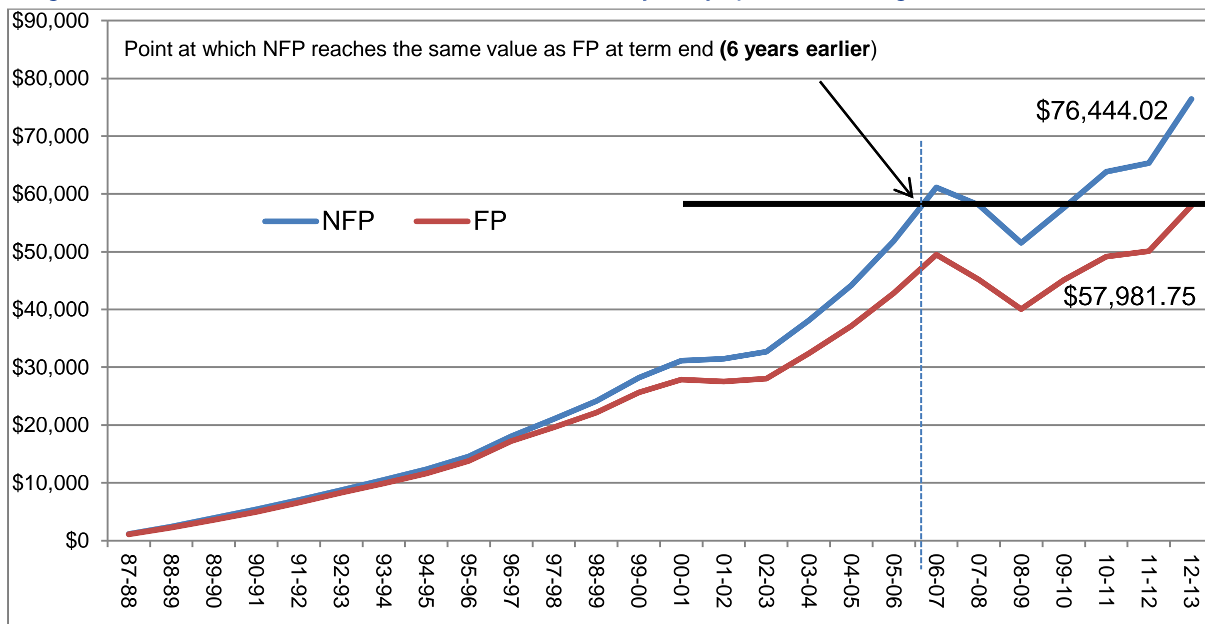


Figure 4.3.9 ***Scenario 2:*** *Initial $1000 + $1000 yearly plus crediting rates from 1987-2013*



We should stress, that this scenario relies on actual crediting rate data over a 26-year time period. This period was chosen for the simple reason that this was the longest credible data available. However, a typical working life will be much longer than this, and in order to illustrate the effect of such a performance difference over a typical working life, we used Scenarios 1 and 2 again, but this time over a 50 year time period, using the average crediting rate for each fund type from the Rainmaker 26 year actuals.

Essentially, the compounded effects of outperformance over an even longer period magnify the scale of the existing difference, and make even starker the effect of that outperformance on retirement living standards.

Figures 4.3.10 and 4.3.1 illustrate these scenarios. They show that the additional time period magnifies both the dollar and time differences that are produced by the outperformance of not-for-profit funds over for-profit counterparts.

It may be contended that the greater diversity of investment options offered by many for-profit funds demonstrate that the for-profit model can bring greater returns to the members who actively choose such investment options. Such an assertion disregards the fact that the vast majority of Australian superannuation fund members are 'reluctant investors', either uninterested in managing their 'super' or lacking the financial literacy skills necessary to properly understand performance and act to reward better performing funds. This structural fact was the reason for the introduction of MySuper. While some fund members undoubtedly will switch, most fund members are not interested or skilled enough to manage their superannuation.

Ultimately, the implications drawn from the data presented in this report support the results from the empirical literature on the relationship between governance and performance. We contend that there is a strong and sustained association between the representative governance model and enhanced performance.

Figure 4.3.10 ***Scenario 1:*** *Initial $1000 lump sum over 50 years using average crediting rates from 1987-2013*

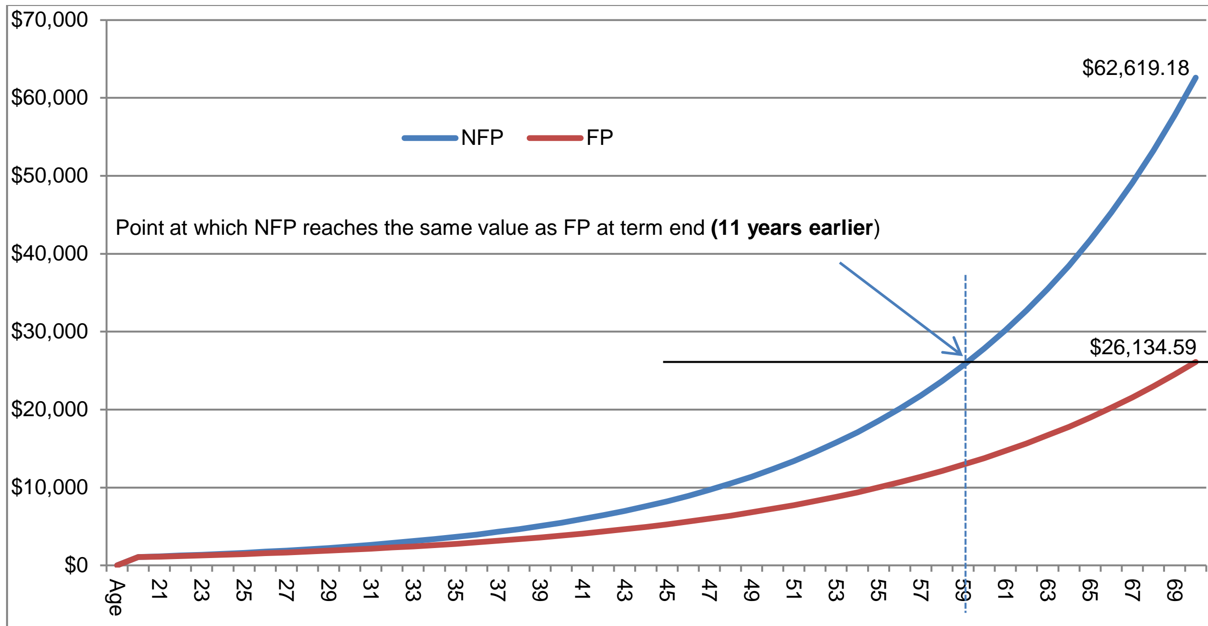
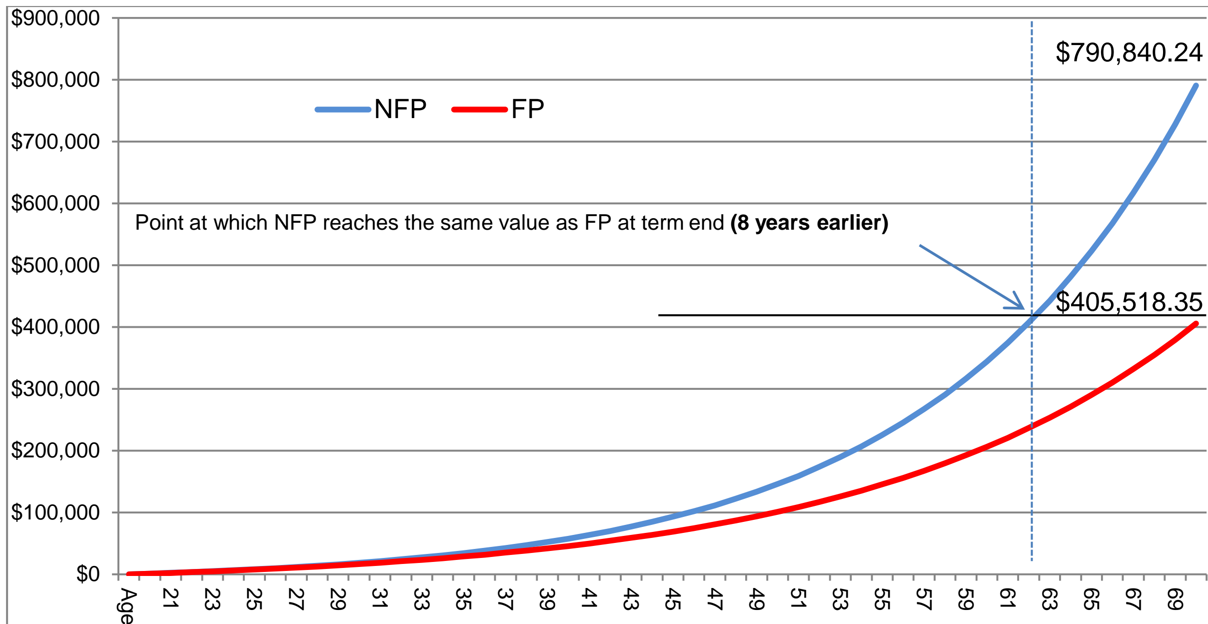


Figure 4.3.11 ***Scenario 2:*** *Initial $1000 plus additional $1000 per annum over 50 years using average crediting rates from 1987-2013*



5 WHAT CAN BE DONE TO IMPROVE GOVERNANCE IN PRACTICE? ALTERNATIVES TO INDEPENDENCE

The foregoing discussion demonstrates that, not only will the appointment of independent directors to the boards of superannuation funds fail to improve performance of not-for-profit funds, it is highly likely to reduce their performance. This raises the question: when a system is working better than the alternative why tamper with it? Indeed, if one system has so consistently outperformed another, why don't we focus attention on the underperformer?

Nonetheless, with the objective of continuous improvement, there are strategies which research suggests could contribute substantially to improved performance of all forms of superannuation fund, some of which involve regulatory initiatives and others good management practice. These include increasing the competence of directors through training and experience, renewing the focus on board culture, and focusing on development of robust risk management systems. We examine each of these recommendations in turn below.

5.1.Increase competence through training and experience

A shift in policy focus from independence towards competence has been occurring in corporate governance in the last ten years. For instance, in the United Kingdom, following the global financial crisis, the 2009 Walker Review held the following for improving corporate governance:

> The most critical need is for an environment in which effective challenge of the executive is expected and achieved in the boardroom before decisions are taken on major risk and strategic issues. For this to be achieved will require close attention to board composition to ensure the right mix of both financial industry capability and critical perspective from high-level experience in other major business. It will also require a materially increased time commitment from the [non-executive director] group on the board overall for which **a combination of financial industry experience and independence of mind will be much more relevant than a combination of lesser experience and formal independence**.[63] [emphasis added]

Le Mire and Gilligan have noted that this highlights the importance of expertise over satisfaction of the formal independence criteria.[64] Importantly, another study concluded that the number of independent directors was not as important as how 'active' the independent directors are on the board.[65] According to Wheeler:

> Independent directors must be able to display an awareness of how business works and be able to assimilate quickly information about how the particular business works. They need to be able to understand the dynamics between individual executive directors and those between executive directors and their own non-executive group. They need to understand how individual strategic decisions will impact on share price and how strategy is formulated within the organisation and then packaged to those outside the organisation. … These requirements raise the question of whether industry specific knowledge is something that needs to be weighed against structural independence and favoured over it.[66]

The clear lesson from these views is that independence means little unless directors have appropriate experience to perform their duties. This means that greater effort must be made to improve training of trustees on superannuation fund boards, and better promotion of 'active' learning in order to gain practical experience for the benefit of members.

Based on a study of 400 people involved in the superannuation industry in 2007 and industry representatives from 22 funds, the Institute of Chartered Accountants/Deloittes, reported a

large interest in qualifications-based training for participants. At that time, the study noted that most training in the industry was optional, and that the most common form of compulsory training was bespoke, and organised specifically for particular boards. The study reported that 49 percent of surveyed funds offered tailored training, which included between 5-20 hours each year.[67]

In 2010, The OECD identified that two areas needing improvement in corporate governance including ensuring appropriate board skills and experience and promoting competence on boards. [68]

Awareness of this has been growing in recent years. As the Australian Institute of Superannuation Trustees recently observed:

> the fundamental criteria in respect to the suitability and competence of any trustee director should lie in their skills and knowledge, their commitment and dedication to a process of continuous learning and a deep understanding of the members, the membership demographics and the members' needs.[69]

In Australia, a range of industry bodies have expanded their member services into training and development, providing both custom-made and general courses to build directors' and trustee directors' skills. These include the Australian Institute of Superannuation Trustees, Australian Institute of Company Directors, and Financial Services Council. Training in directors' duties and responsibilities, skills and knowledge pertaining to investment, risk, and financial management generally should be a part of onboarding, as well a commitment to continuous learning as required. Evaluating the outcomes of such training would provide useful data for current debates on governance.

5.2. Renewed focus on culture of 'honesty'

As Clarke and Dean argued, the 'fuzzy notion' of independence has clouded the core concept lying at the heart of governance reform – honesty.[70] This simple concept is ultimately what any governance reforms should aim to achieve, whereby directors act in good faith for the benefit of members, and are open and transparent about decisions that may result in a conflict of interest. This requires the building of a governance culture with a strong ethical foundation, one which promotes a healthy management culture throughout the superannuation fund.

Independence is a means to the end of promoting greater competency and accountability on company boards, with greater ability to install directors with the talent and diversity necessary to adjust to the ceaseless change inherent in both domestic and global economies. Honesty—supported by strong enforcement—places both the strengths and weaknesses of a board out in the open, forcing companies which suffer from shortcomings to reform and improve in the long run.

However, simply labelling a particular individual 'independent' does not encourage practical changes that improve governance. Such a cosmetic change might give the market confidence that a board has sufficient diversity and transparency that could improve performance, but simply stating that a person is independent does not in any way change their behaviour. In short, independence may *contribute* to honesty in governance, but it cannot do so alone, and if such a path is taken then there is a risk that complacency will occur, at least until the next big company declares insolvency. As the AIST and Industry Funds Forum argued in 2012, trustee directors need to develop and support cultures which foster accountability, integrity, transparency, effective disclosure and communication. [71]

5.3. Robust risk management systems

While the Cooper Review and the federal government's recent Discussion Paper are silent on risk management, other commentators on superannuation fund governance note the importance of trustee directors pursuing comprehensive risk management policies and practices. Directors are operating in increasingly complex legal and financial environments and failure to attend to risks can lead not only to extensive liability, but also disastrous consequences for fund members.

In his study of banks and the global financial crisis, Hopt observes that many risks had been neglected, underestimate or, particularly in the case of systemic risks, not understood or taken into consideration at all.[72] In 2006, the word 'risk' did not appear in one of the eight principles of good corporate governance of banks published by the Basel Committee, which is the primary global standard-setter for prudential regulation of banks, but by 2010, 'risk' was mentioned in nine of its now fourteen principles. Hopt cautions that risk can never be eliminated, particularly as it is a core part of the business of financial institutions. However, as Clare said in relation to superannuation funds, 'avoidance of some risks brings about avoidance of substantial potential benefits as well'.[73] Thus, the objective should be to know, understand and manage those risks.[74]

For superannuation funds, this involves establishing a robust risk management strategy and plan, implementing internal controls to operationalise the strategy, and evaluating the effectiveness of the strategy and internal controls. Under the registrable superannuation funds (RSE) licensing scheme, registrable funds are already subject to an APRA standard to have in place a risk management framework which includes systems for identifying, assessing, managing, mitigating and monitoring material risks that may affect its ability to meet its obligations to beneficiaries.[75] Research indicates that while most funds now have comprehensive risk management plans, strategic risks may still be overlooked and boards may not understand completely risk management principles or ensure satisfactory outcomes. [76]

Clare has argued that in terms of the traditional risks associated with superannuation funds - investment risks, operational risks, and even systemic risks, regulatory requirements in Australia, for the most part, have been effective. However, superannuation funds are less effective in dealing with some other risks. Among these, Clare includes:

> the financial risks of longevity in retirement, the adequacy of retirement income more generally, reputational risks for superannuation funds (including in regard to non-core features or operations of funds, and the possible risks of climate change and emissions trading arrangements. Political and regulatory risks can also be challenging for a regulated entity to deal with, as in some instances regulation is the problem rather than the answer.[77]

These are emerging issues - which come under the umbrella of sustainability issues - that will become more challenging in the future and require considerable strategic consideration. Some industry organisations, such as the AIST/IFF have noted the need for superannuation funds to consider environmental, social and corporate governance risks of their own operational activities as well as their own investment processes. [78] The silence on this topic in recent government discussion represents a missed opportunity.

Reflecting on risks in superannuation and returning to the topic at hand, Besley and Pratt consider the different risk allocations between defined contribution and defined benefit plans, and the governance implications of these different risk allocations. In defined contribution plans greater risk is borne by the fund member. They also note that pension fund contracts (between members and the fund) tend to be incomplete (because it is difficult for fund

members to completely bind fund managers to deliver exactly on any promise). They note that in such a world of incomplete fund contracting in defined contribution funds it is necessary for the fund member to be more vigilant, and they must rely more on trustees to ensure that the fund operates in their interests (compared to a defined benefit fund). In this sort of situation, which closely approximates Australia's compulsory superannuation system, they claim that the key agent for vigilance are fund trustees. And they recommend that the sort of trustee required to exercise such vigilance is what they term the "caring layman driven by a stake in the fund".[79]

6. CONCLUSION

This Report has argued the internal (non-market) governance of superannuation funds in Australia is a reform area likely to have a substantial impact upon the long-term performance of the superannuation sector.

This is because of the sector's unique attributes – namely, a majority of fund members characterised as 'conscripted' or 'reluctant' investors, who do not have the interest or financial acumen necessary for market governance to play a significant role. These constraints on the role of market governance are exacerbated in an industry that typically competes for funds under management and market share rather than performance and price.

However, we demonstrated that increasing the proportion of independent trustee-directors is unlikely to bring about increased levels of diversity, lower levels of potential and actual conflicts of interest, and improved fund performance for the benefit of members. Conversely, introducing non-associated trustee-directors as per the Cooper Review's recommendations is likely to exacerbate existing issues surrounding a lack of suitable trustees.

We found that the representative trustee governance structure has produced significantly better returns for fund members over a long period, compared to appointed trustee governance funds. We showed that the effect of this better performance can be measured in terms of a larger pool of superannuation savings on which to retire, or in terms of the number of years extra a person in a retail fund would have to work to attain the savings amount of a representative trustee fund. In both cases, the differences are stark.

The representative governance model is not a perfect system by any measure, and this applies in politics, corporate of fund governance. It is just that it is better than any other system that has so far been devised. For example, the Cooper Review noted that the model does not necessarily achieve its original purpose of ensuring both employee and employers in a single-employer defined fund were given legitimate opportunity to operate a fund, and also suggested that the model may be vulnerable to the perception that individual trustees are answerable to or dictated to by the organisation that appointed them.[80] However, the representative model remains diverse in appointment methods, the numbers of trustees and areas of governance. Remarkably, despite the diversity of forms of representation across the representative governance funds, the common outcome of representation seems to be a closer alignment of trustees' and members' interests.

This report contends that, in spite of some shortcomings, representation is actually the model that most closely satisfies the objectives of meeting the best interests of members and maximising retirement incomes for Australians. The evidence for this claim is strong – the not-for-profit representative trustee model has outperformed its for-profit appointed trustee competitors on virtually every important criteria of superannuation performance over a long period. Although there may be scope for further improvement of the representative governance model, it promotes higher levels of diversity amongst trustees, more effectively

minimises conflicts of interest, and, importantly, has continually outperformed the for-profit model over the past decade, generating higher net returns for fund members.

Instead of implementing reforms based on the promise (which in turn is based on an uncertain premise) that independence leads to benefits for funds and members alike, this paper argues that the existing not-for-profit representative governance model already promotes higher levels of diversity and more effectively minimises conflicts of interest in comparison to the for-profit governance model.

While representative governance may not be the only factor allowing not-for-profit funds to perform better than their for-profit counterparts, the success of this governance model nevertheless indicates that mandated independence is unnecessary to give fund members appropriate levels of retirement income. Alternatively, increasing levels of director competence, renewing the focus on honesty, and implementing more robust risk management systems would positively benefit governance of superannuation funds.

Indeed, if there is one lesson that can be learned from an evidence-based approach to superannuation governance, it is not the role of independent directors to protect minority shareholders. Rather, the lesson is that representative governance is a decisive factor in closely aligning the interests of those who are charged with managing funds with the majority of fund members. This raises the policy question that provided the title for this report, should any fund that wishes to secure access to the mandatory default superannuation savings of Australian workers not have to demonstrate it has a representative governance structure?

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Note

The opinions in this report are those of the authors and do not necessarily represent the views of the McKell Institute's members, affiliates, individual board members or research committee members. Any remaining errors or omissions are the responsibility of the authors.

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