5 October 2016

Highton, 3216

Ms Angela MacRae

Commissioner

Productivity Commission

Locked Bag 2, Collins St East
Melbourne VIC 8003,

Dear Commissioner

Re: Efficiency and Competiveness of the Superannuation System – Default Superannuation Funds

I note that the ***Productivity Commission*** is calling for submissions for the next stage of this inquiry.

The Treasurer, the Hon Scott Morisson MP, has pursuant to Parts 2, 3 and 4 of the *Productivity Commission Act 1998*, requested that the Productivity Commission conduct: a study to develop criteria to assess the efficiency and competitiveness of the superannuation system; and an inquiry to develop alternative models for a formal competitive process for allocating default fund members to products.

The High Court of Australian in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36; (2010) 242 CLR 254 ruled at [35]:

> "The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the Supervision Act") and regulations made under it, imposed quite rigorous regulatory standards."

Further to my **Submission #1** lodged on the 3 October 2016 please find attached a graphical supplement to this submission.

My proposed recommendations for the ***Productivity Commission*** to allow the major banks to participate as default superannuation fund providers are as follows:

Recommendation #1

If the **Commonwealth Bank** or the **National Australia Bank** wish to participate as default superannuation fund provides then these banks should apply to ***APRA*** to have the RSE licence of the banks' existing "***profit-for-members***" funds (or staff funds) amended to "***public offer funds***" so the employees of other companies can enjoy the high returns being achieved by these funds.

Recommendation #2

If the existing "***profit-for-members***" fund operated by the **ANZ** bank and **Westpac** have consistently provided returns to members of 5.8% p.a. or greater and have more than $2 billion in assets then the same recommendation as **Recommendation #1** applies.

Yours Sincerely

Phillip Sweeney

Productivity Commission – Submission #1
Graphical Supplement

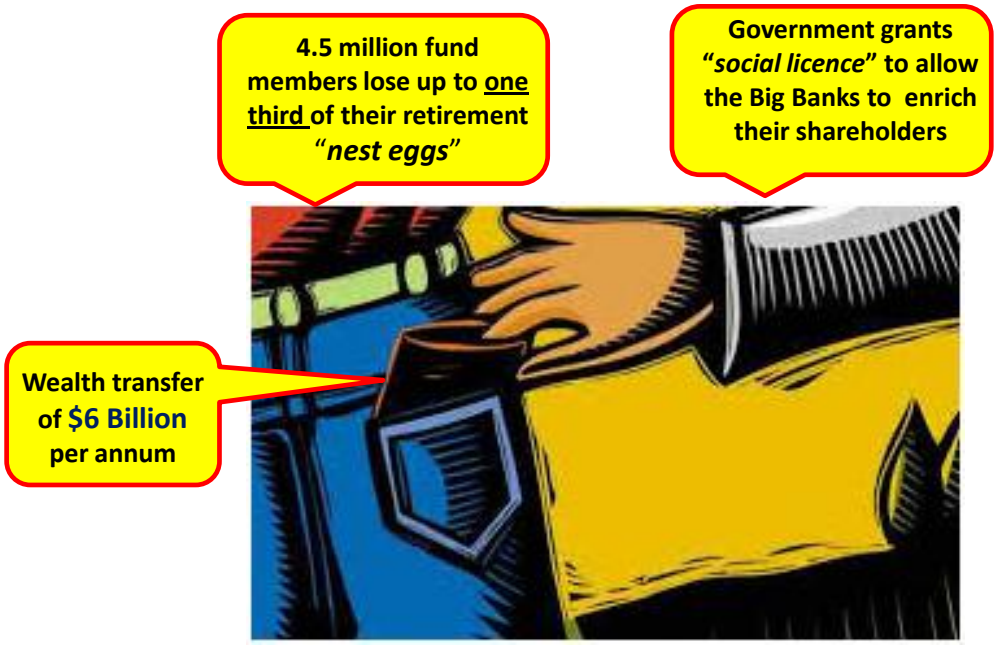
Key Default Fund Selection Criteria

Now an important question for the ***Productivity Commission*** to consider is the following:

> "Does the Productivity Commission believe that the banks' so called "*Retail*" Superannuation funds {or "*profit-for-shareholders*" funds} are operated lawfully and in the ***best interests*** of the fund members?"

Clearly any recommendation for a process dealing with the selection of default superannuation funds in a COMPULSORY superannuation system must insure a "*filter*" is in place to exclude any funds being selected that are operated in breach of the general laws of trusts or any statutory provisions.

Bank "*Profit-for-Shareholders*" Super Funds



A number of filters were proposed in **Submission #1** for the short listing of funds that might qualify for selection as default superannuation funds {**Appendix A**}.

The basis of traditional banking is for the bank to take in deposits and to then make loans, whist bearing the risk that some of the loans may not be repaid in full. The bank makes a profit for its endeavours in many such contractual arrangements.

Superannuation funds on the other hand are based on the laws of trusts, where a trustee is the archetype "*fiduciary*". The trustee's status as a fiduciary requires a trustee to avoid conflicts of interest and also prevents the trustee from making a profit, except in limited and specific circumstances.

The High Court of Australian in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36; (2010) 242 CLR 254 ruled at [35]:

> "The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the Supervision Act") and regulations made under it, imposed quite rigorous regulatory standards."

The "*No Conflict/No Profit Rule*"

Some of the relevant regulatory standards are to be found in **Section 52** and **Section 58** of the ***Superannuation Industry (Supervision) Act 1993***.

Subsections 52(2)(c) and **52(2)(d)** provide as follows:

Covenants to be included in governing rules--registrable superannuation entities

Governing rules taken to contain covenants

(1) If the governing rules of a registrable superannuation entity do not contain covenants to the effect of the covenants set out in this section, those governing rules are taken to contain covenants to that effect.

General covenants

(2) The covenants referred to in subsection (1) include the following covenants by each trustee of the entity:

.....

(c) to perform the trustee's duties and exercise the trustee's powers in the ***best interests*** of the beneficiaries;

(d) where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:

(i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and

(ii) to ensure that the duties to the beneficiaries are met despite the conflict; and

(iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and

(iv) to comply with the prudential standards in relation to conflicts;

Section 58 provides:

Trustee not to be subject to direction

(1) Subject to subsection (2), the governing rules of a superannuation entity other than a superannuation fund with fewer than 5 members or an excluded approved deposit fund must not permit a trustee to be subject, in the exercise of any of the trustee's powers under those rules, to direction by any other person.

Subsection 58(2) then prescribes certain exceptions.

Subsection 52A(2)(c) provides that the directors of corporate trustees are:

(c) to perform the director's duties and exercise the director's powers as director of the corporate trustee in the ***best interests*** of the beneficiaries;

When these provisions of the ***Superannuation Industry (Supervision) Act 1993*** are taken together it means that the directors of corporate trustees owned by the major banks cannot take a ***direction*** from the parent bank to only invest members' funds in in-house financial products where the parent bank is able to extract an above market rate profit and so reduce the net returns available to fund members.

These provisions are a statutory version of the "***no conflict/no profit***" principles of the general law {**Appendix C**}.

Commenting on the matter of "*ethical investments*" where for example the beneficiaries are members of a religious order and may not wish investments to be made by the trustees in tobacco companies as an example Meggary VC stated in ***Cowan v Scargill*** [1985] Ch 270:

> "Plainly the present case is not one of this rare type of case. Subject to such matters, under a trust for the provision of financial benefits, the paramount duty of the trustee is to provide the greatest financial benefits for the present and future beneficiaries"

Now these principles can be applied to Australian superannuation funds.

The trustees of "***profit-for-members***" funds {also called "***Industry Funds***"} act in the *best interests* of the members of their fund and invest in a manner that achieves consistently higher investment returns for fund members than "***profit-for-shareholders***" funds operated by the major banks.

The words "***best interests***" have also been subject to interpretation in an Australian Court where ***Cowan v Scargill*** [1985] Ch 270 was cited with approval {**Appendix D**}.

The trustees of the "***profit-for-shareholders***" funds also have "*a paramount duty to provide the greatest financial benefits for the present and future beneficiaries*" and they should be prepared to seek out investment opportunities that provide the greatest financial benefits for their fund members even if they have to make investments outside the "***approved investment funds***" of their parent bank.

The vertical integration of the major banks should not be to the detriment of superannuation fund members in a compulsory superannuation system.

Default Fund Selection Criteria

A number of filters can be used to identify funds which might be shortlisted to qualify for default superannuation fund status.

An important filter is compliance with the regulatory standards of the ***Superannuation Industry (Supervision) Act 1993 {SIS Act}.***

"***Profit-for-shareholders***" funds {also called "***Retail Funds***"} can be eliminated for non-compliance with **Section 52, 52A** and **Sections 58** of the ***SIS Act***.

There are around 22 "***profit-for-members***" superannuation funds holding assets of greater than $2 Billion which account for 90% of members of what are described as "***Industry Funds***".

This submission proposes a performance and size filter with the following parameters be adopted:

(i) 10 years average rate of return equal to or greater than 5.8%;

(ii) Fund assets greater than $2 Billion

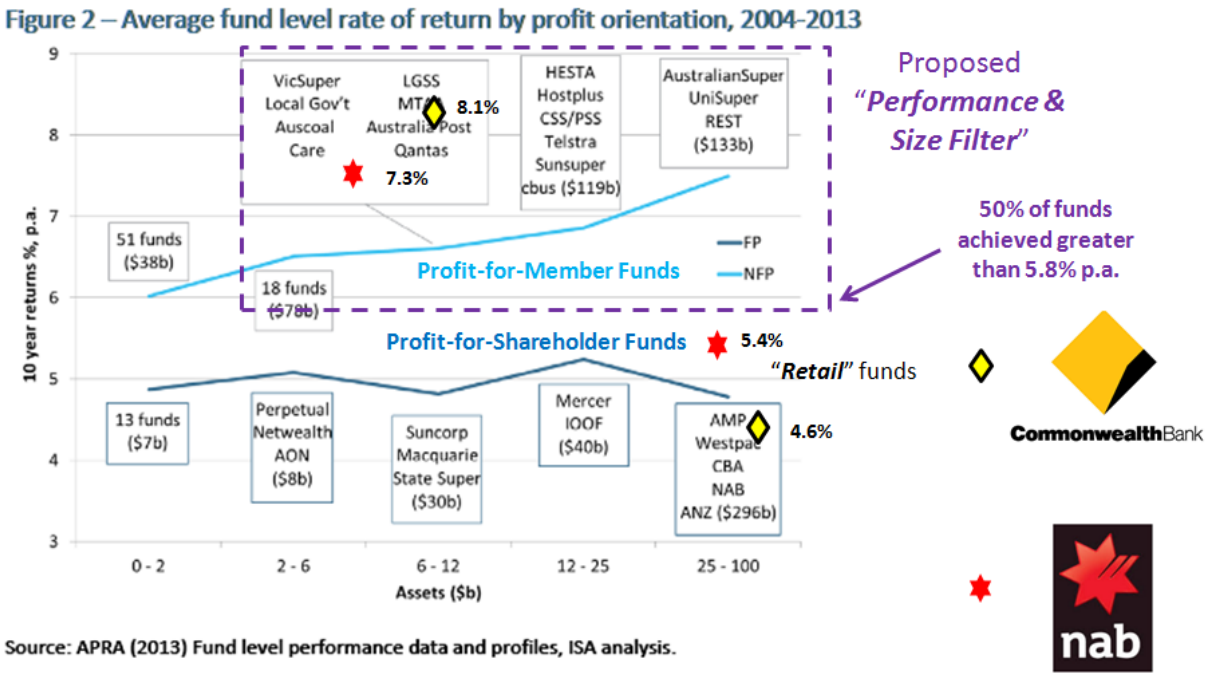
It should be noted that average returns for "***profit-for-members***" funds generally increase with fund size. Therefore a minimum level of fund assets of $2 billion is proposed as a lower qualifying limit.

Since 50% of funds have been able to achieve a 10 year average return of 5.8% or greater, 5.8% has been selected as the lower bound performance hurdle that a qualifying fund much achieve.

It is important to note that both the **Commonwealth Bank** and the **National Australian Bank (NAB)** currently operate "***profit-for-members***" funds that have achieved a 10 year average rate of return for members of **8.1%** and **7.3%** respectively and so fall within the proposed "***Performance & Size Filter***" illustrated below.

{Note: Data for similar funds operated by the **ANZ** bank and **Westpac** is unavailable, however it is expected that these banks' "***profit-for-members***" funds would also qualify.}

Fund Type Comparison



This filter would however exclude the "***Retail Funds***" {***profit-for-shareholders*** funds} operated by the **Commonwealth Bank** and the **National Australia Bank** (**NAB**) {along with those of other banks}.

However these banks should not complain since these banks have demonstrated that they can operate funds that comply with **Section 52, 52A** and **Sections 58** of the ***SIS Act***. In fact the returns of "***profit-for-members***" funds operated for the staff of these banks are well above those of most similar sized "***Industry Funds***".

The difference in member benefits is summarised in the following table which compares the retirement benefit that a member of the Commonwealth Bank's "***profits-for-members***" fund {staff fund} and the Commonwealth Bank "***profits-for-shareholders***" so called "***Retail***" fund using data sourced from ***APRA***.

Multiples of Final Salary

Years of Fund Membership	CBA "*Retail*" Super Fund	CBA Staff Super Fund	Percent More
	4.8%	8.1%	
10	0.94	1.10	17%
20	1.9	2.5	32%
30	2.7	4.9	81%
40	3.7	7.1	92%

10 Year average rate of return

This comparison shows that if the Commonwealth Bank's "***profits-for-members***" fund was nominated as a default superannuation fund for the employees of other employers, then these new members would receive **almost double** the retirement benefit after 4 decades of fund membership compared to allowing Commonwealth Bank's "***profits-for-shareholders***" fund to be allowed on the list of default superannuation providers.

If average weekly earnings are used as a basis this means that the if the Commonwealth Bank's "***profits-for-members*** fund was selected a default superannuation fund, then the new fund members would

receive around **$280,000** more in today's money compared to if the Commonwealth Bank's "***profits-for-shareholders***" fund was selected as the default superannuation fund.

The ***Productivity Commission*** cannot ignore such a wide disparity is retirement benefit outcomes.

The following comment appears in an article by Michael Roddan that was published in **The Australian** on 3 September 2016 titled "***Funds battle over default super***":

> "But senior industry fund executives believe the banks are worried they will not benefit from a "*quality filter*" applied by the Fair Work Commission, as retail funds generally underperform their industry rivals.

If these banks wish to compete as default superannuation funds then these banks should simply apply to ***APRA*** to have the RSE Licence of the trustees of these "***profit-for-members***" funds amended to that of "***public offer***" status so that the employees of other employers could also benefit from the higher return to fund members that these funds have consistently produced.

The banks would still stand to benefit since a "***profit-for-members***" fund offering would form part of a "***customer care***" package of home loan, insurance and credit card facilities.

The **Financial Services Council** (**FSC**) Chief executive, Sally Loan said:

> "The Fair Work Commission is an industrial tribunal and has no place choosing financial products for consumers."

However provided the major banks offered a competitive "***profit-for-members***" superannuation fund offering these banks would not be excluded from a well designed fund selection process based on the five assessment criteria proposed by the Productivity Commission.

Recommendations

This submission proposes the following recommendations for the ***Productivity Commission*** to allow the major banks (and other financial service providers) to participate as default superannuation fund providers:

Recommendation #1

If the **Commonwealth Bank** or the **National Australia Bank** wish to participate as default superannuation fund provides then these banks should apply to ***APRA*** to have the RSE licence of the banks' existing "***profit-for-members***" funds (or staff funds) amended to "***public offer funds***" so the employees of other companies can enjoy the high returns being achieved by these funds.

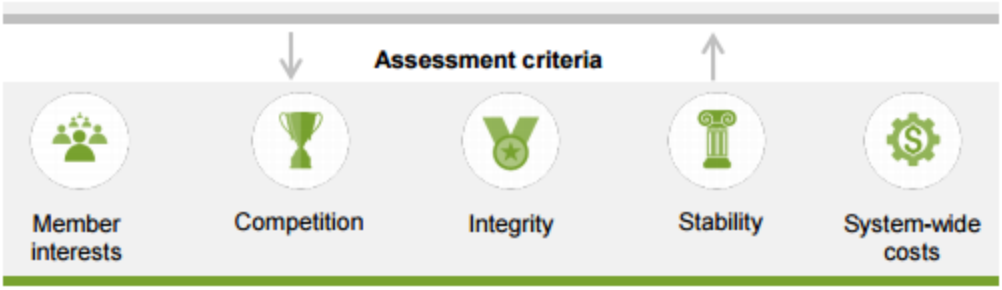
Recommendation #2

If the existing "***profit-for-members***" fund operated by the **ANZ** bank and **Westpac** have consistently provided returns to members of 5.8% p.a. or greater and have more than $2 billion in assets then the same recommendation as **Recommendation #1** applies.

Appendix A

Filters

The assessment criteria proposed by the Productivity Commission are:



This submission proposes that there be five "*filters*" that should be used to narrow the category of funds that would qualify as being able to be selected as default superannuation funds.

Filter #1 {Member Interests}

A performance filter would be the first priority that would eliminate funds that had a consistence substandard net investment return to fund members over say a 5 to 10 year period.

Filter #2 {Competition}

An "***Uber***" style member feedback filter that would eliminate funds where fund members would be able to lodge complaints or provide a satisfaction rating with the body that provided an approved list of fund as default funds. Members who experienced extensive delays in obtaining insurance payouts and

disputed or delayed superannuation benefit payments would be able to provide feedback on their experience with the fund in question {*Also refer to Maurice Blackburn submission DR-79*} .

Funds that rated poorly on member satisfaction would be excluded from the approved list of default funds.

Filter #3 {Integrity}

A transparency assessment would be made on the amount and clarity of information provided to members in annual reports and the ability to access other relevant documents such as the original Trust Deed and all amending Deeds on line.

Current it is not a statutory requirement for trustees to hold annual meetings for fund members, however there is no reason why trustees should not hold annual meeting for members on a voluntary basis.

Funds that operated on minimum disclosure standards would be eliminated from the approved list.

Funds whose trustee complies with the "***equal representation***" provisions of the ***Superannuation Industry (Supervision) Act 1993*** should also rank higher than funds whose trustee does not.

Filter #4 {Stability}

A compliance filter would assist in ensuring confidence in funds regulated by ***APRA*** and would eliminate funds that had a poor compliance record as reported by ***ASIC*** and ***APRA***.

Also the trustees of all qualifying default funds should be required to sign an "***Onus of Proof***" declaration confirming that the trustee is aware of the ruling of the High Court of Australia in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36 and the Victorian Court of Appeal in ***Aloca of Australia Retirement Plan Pty Ltd v Frost*** [2012] VSCA 238.

These cases confirm that a person with a *beneficial interest* of a regulated superannuation fund does not bear the onus of proof in establishing their credible claim to a benefit entitlement from the fund. Rather the trustee of the fund bears the onus of repudiating the claim if the trustee honestly believes that the claimant is misconceived as to their legal entitlement or the quantum of that entitlement.

That means that the trustee cannot adopt the tactic of: "If you want your superannuation benefit you can take us to court to get it – and we will aim to bankrupt you in the process with legal costs."

Trustees in a COMPULSORY superannuation system do have to act in the ***best interests*** of their members even when claims are the subject of dispute and not under the dictation of a parent company.

Filter #5 {System-Wide Costs}

Net returns to members can be reduced by explicit fees and charges as well as by related party transactions where the related party, such as an in house insurance provider or fund manager captures profits that the trustee as a fiduciary is unable to capture itself.

Whist explicit costs are easy to document and compare, the impact of related party transactions can only be effectively determined by examining the net returns to members over an extended period (say 5 to 10 years}.

Therefore while a filter covering explicit fees and charges should be included, this filter should be used in conjunction with the first filter – net investment returns.

Appendix B

Data Source

APRA

Statistics

Superannuation Fund-level Rates of Return

June 2013 (issued 8 January 2014)

Appendix C

The "No Profit/No Conflict" Rule

The key principles governing the conduct of fiduciaries are described as the "***no conflict rule***" and the "***no profit rule***".

The two related principles have been described in the following fashion by Deane J in the High Court of Australia in ***Chan v Zacharia*** [1984] HCA 36; (1984) 154 CLR 178 at [24]:

> "The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage."

This principle was expressed in the following manner by Lord Herschell in ***Bray V Ford*** [1896] AC 44:

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule".

Appendix D

Meaning of "*Best Interests*"

Murphy J provided the following ruling in relation to "***best Interests***" in ***Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)*** [2013] FCA 1342:

9.2.1 The meaning by reference to ss 601FC(1)(c) and 601FD(1)(c)

> 462. To understand the meaning of the expression I first look to the text of ss 601FC(1)(c) and 601FD(1)(c) in their context. The use of the superlative "best" in each of the provisions may be seen to require a comparison between different courses of action available to an RE, and the requirement to choose between them, including a choice between taking action and inaction. The word "best" may also be seen to set a requirement not only in relation to what must be done by an RE but also in relation to how it is done, thereby imposing standards of conduct on the RE.
> 463. It is difficult to discern the outer boundaries of the best interests duty from the text of the provisions alone. For example, the expression may be argued to indicate a requirement that the RE meet the "highest" standard rather than just a high standard. It may also be argued to set a requirement for the RE to obtain an objectively determined "best" outcome rather than requiring the best efforts of the RE. I am disinclined to such a view because such meanings may cause real difficulties for a trustee in performing his or her role. It is not clear to me how in many common circumstances the "highest" standard is to be determined let alone met, or how any requirement to achieve an objectively determined "best" outcome sits with the general law obligation on a trustee to act with care, competence and caution. The language of the statute alone does not make clear where the boundary lies and it is appropriate to consider the meaning of the term under general law.

9.2.2 The meaning under general law

> 464. There is a presumption that where words used in a statute have already acquired a legal meaning, unless the contrary intention clearly appears from the context, *prima facie* the legislature is taken to have intended to use them with that meaning: *Attorney-General of NSW v Brewery Employees Union of NSW* [1908] HCA 94; (1908) 6 CLR 469 at 531 per O'Connor J.
> 465. There can be no question that the heritage of the best interests duty is equitable. In an often quoted dictum in *Cowan v Scargill* [1985] Ch 270 at 295 Sir Robert Megarry V-C said:
>
> > The starting point is the duty of trustee to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty ... is paramount. They must, of course, obey the law; but subject to that, they must put the interest of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries...the best interests of the beneficiaries are normally their best financial interests.

and later:

> > Trustees must do the best they can for the benefit of their beneficiaries and not merely avoid harming them.

466. In a later article the Vice Chancellor said that his judgment showed no "bold novelty of approach": Megarry, Sir Robert, *Investing Pension Funds: The Mineworkers Case*, Equity, Fiduciaries and Trusts (T G Youdan (ed), Carswell, 1989) at 149-159.

467. Megarry V-C's dictum has been affirmed on numerous occasions, although sometimes expressed as a separate duty and other times linked to other well established duties: see *Martin v The City of Edinburgh District Council* [1989] PENS. L. R. 9;*Harries and Others v The Church Commissioners for England and Another* [1993] 1 WLR 1241 at 1248; *Edge v Pensions Ombudsman* [2000] Ch 602; *The Registrar of the Accident Compensation Tribunal v Commissioner of Taxation of the Commonwealth of Australia* [1993] HCA 1; (1993) 178 CLR 145 at 182; *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715 ("*Knudsen v Kara Kar*") at [57]. In *ASEA Brown Boveri Superannuation Fund No 1 Pty Ltd v ASEA Brown Boveri Pty Ltd* [1999] 1 VR 144 at [58] and [65] its relationship to the duty of loyalty was emphasised. In *Gra-Ham v Perpetual Trustees* (1989)1 WAR 65 at 92 Pigeon J linked the best interests duty to the duty imposed on trustees to act fairly and in good faith. In *Knudsen v Kara Kar* at [60] the duty was linked to the duty to act for a proper purpose.

468. Under general law the best interests duty is a reference to a trustee's duty to give undivided loyalty to the beneficiaries, which includes the duty to act in the interest of the beneficiaries, to avoid any conflict between the interests of the trustee and the interest of the beneficiaries, and to adhere to the terms of the trust. These are well established principles of the law of trusts: see *Keech v Sandford* [1726] EWHC J76; (1726) 25 ER 223; *Re Whitely* (1886) 33 Ch D 347; *Bray v Ford* [1896] AC 44; *Boardman v Phipps* [**1967] 2 AC 46** ; *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 43-4343; *Raby v Ridehalgh* [1855] EngR 311; (1855) 44 ER 41 at 43.

469. Numerous learned commentators have taken the view that Megarry V-C's dictum was a reference to a combination of established trustee's duties. Writing in 1995, before his appointment to this Court, JRF Lehane said:

> It seems reasonably clear from what follows that Sir Robert Megarry, in speaking of a duty to act in the best interests of beneficiaries, had in mind a combination of the established duties (a) to have regard, in exercising fiduciary powers, to the interests of the beneficiaries and not to extraneous considerations, and (b) to act with reasonable care and prudence.

: Lehane JRF, "Delegation of Trustees' Powers and Current Developments in Investment Funds Management" (1995) 7 Bond L Rev 36 at 38.

470. Writing extra-curially in 2007, Justice Stone described the best interests duty as no more than a description of the duty of undivided loyalty, requiring trustees to act in their beneficiaries' interests and avoid conflicts of interest. Her Honour was unconvinced the word "best" had much if anything to add in that context, and considered that it may create confusion by inviting focus on the outcomes of a trustee's decision rather than on the making of such a decision: Stone M, "The Superannuation Trustee: Are Fiduciary Obligations and Standards Appropriate?" (2006-2007) 1 J Eq 167 at 172.

471. The duty of undivided loyalty is the fundamental duty of a trustee requiring it to solely pursue the members' interests, to eschew conflicts of interest between the members' interests and its own, and in the event of a conflict of interests to put the members' interests first.

472. The duty of undivided loyalty also requires a trustee to "perform and adhere to the terms of the trust": Ford and Lee, Vol 1 at [9.250]. This must be so. It could not be in the best interests of the beneficiaries for a trust to be managed or administered other than in accordance with its terms. As RP Meagher and WM Gummow explain in *Jacobs Law of Trusts in Australia*:

> The rule that the trustee must strictly conform to and carry out the terms of the trust modifies all other rules because these other rules are applied subject to any provisions contained in the trust instrument itself.

: RP Meagher and WM Gummow *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, 1997) at [1704] ("Jacobs").

473. In Scott *and Ascher on Trusts* the authors describe the trustee's duty of undivided loyalty as "the most fundamental duty of a trustee": Scott, Fratcher and Ascher, *Scott and Ascher on Trusts*, (5th ed, Wolters Kluwer Law & Business, 2007) at 1077 ("*Scott and Ascher on Trusts*"). The learned authors go on to note (at 1079) that:

> The duty of loyalty is, then, the fruit of the courts' efforts to regulate the behaviour of trustees when their duties as trustees require them to act in ways that may or do conflict with their own personal interests. In a nutshell, the duty of loyalty ordinarily requires trustees to avoid all transactions that involve self-dealing, as well as those that involve or might create a conflict between the trustee's fiduciary and personal interests.

474. The best interests duty is also linked to a trustee's duty to pursue only the trust's purposes. As Lord Nicholls explained:

> To decide whether a proposed course is in the best interest of the beneficiaries it is necessary to decide first what is the purpose of the trust, and what benefits were intended to be received by the beneficiaries. Thus to define the trustee's obligation in terms of acting in the best interest of the beneficiaries is to do nothing more than formulate in different words, a trustee's obligation to promote the purpose for which the trust was created.

: Lord Nicholls of Birkenhead, "Trustees and their Broader Community: Where Duty, Morality and Ethics Converge" (1996) 70 ALJ 205 at 211.

475. In 2008 Professor G Thomas described the duty to act in the best interests of beneficiaries as a compendium of the individual specific and well recognised duties of a trustee, and as "foundational" duty that underpins or an "umbrella" duty that shelters, these specific duties. He wrote:

> So, by way of summary, what can one say about the 'best interests duty'?
>
> ...

- The duty demands of the trustees their best efforts in pursuit of the best possible end, outcome or result. There are the two elements of best outcomes and best efforts, of ends and means (or standards) - although, in judging both effort and outcome, what matters is the reasonableness of the trustee's judgement at the time and in the then prevailing circumstances, and not what turns out to be the better outcome in retrospect.
- It is essentially an 'umbrella' duty - one which embraces a large number of individual, well-recognised duties. A breach of the 'best interests duty' in relation to a trust (or company), once particularised, necessarily involves breach of one or more of these individual duties.

> ...

- For most practical purposes, the duty is indeed short-hand for the combination of the duty to act for the 'benefit' of the beneficiaries and the 'proper purpose' rule, but it is not always so. A trustee's duties to act in good faith, to pursue a proper purpose only and to avoid conflicts of interest are generally distinguished from the 'best interests duty'. There is an additional element here. True, it is difficult to pin down; but it seems to involve not just the pursuit of the best possible authorised end or outcome (as the trustee rationally conceives the matter) for the trust as a whole but also the observance of proper procedures and processes in decision making.

> ...

:see Thomas, Professor GT, “The Duty of Trustees to Act in the “Best Interests” of their Beneficiaries” (2008) 2 J Eq 177 at 202-203; See also Donald MS, “‘Best’ interests?” (2008) 2 J Eq 245 at 248; Mendoza-Jones D, “Superannuation Trustees: Governance, Best Interests, Conflicts of Interest and the Proposed Reforms” (2012) 30 C&SLJ 297 at 301.

476. Ford and Lee describe it as a duty which “marshalls” the trustee’s duty of loyalty to the service of the economic well-being of the trust fund, and as a general duty that complements the more specific obligations to act honestly and to exercise care, diligence and skill.

9.2.3 The meaning in other materials

477. Further assistance as to the content of the best interests duty may be obtained from the report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee *Collective Investments - Other People’s Money*: Report No 65 (1993) (“ALRC 65”). The *Managed Investments Act* which introduced Part 5C into the Act was the Commonwealth Government’s response to ALRC 65: see Explanatory Memorandum, *Managed Investments Bill 1997* (Cth) (“the Explanatory Memorandum”) at [1.1].

478. Paragraph 10.8 of ALRC 65 states:

> *Duty to act in the interests of investors.* **Investors in collective investment schemes rely heavily on the operator to act in their best interests.** Nevertheless, there will often be a potential for conflict between their interests and those of the operator. **This may arise over the fees and charges payable to the operator** or the use of scheme property for dealings with parties related to the operator. DP 53 proposed that the law should impose on operators a duty to avoid conflicts of interest. A number of submissions argued that this proposal was neither realistic nor desirable. Conflicts of interest between scheme operators and investors are inevitable. The Review has concluded that **the appropriate formulation of the test is that operators must prefer the interests of investors over their own interests where any conflicts arise**. The Review recommends that **the Corporations Law should impose an obligation on the operator of a collective investment scheme to exercise its powers and perform its duties as operator in the best interests of investors rather than in its own, or anyone else’s, interest, if that interest is not identical to the interests of the scheme investors.** This duty should be complemented by specific rules for related party transactions.

(Citations omitted and emphasis added.)

479. This indicates that the provisions are directed at requiring compliance by an RE with the duty of undivided loyalty. Because the members rely heavily on the RE, and because there is a potential for conflict between the RE’s personal interests and those of the members (particularly in relation to the fees the RE may charge), the RE is expressly required to prefer the members’ interests over its own. Consistently with the Commission’s recommendation, the statutory duty is expressed without qualification and it mirrors the general law position.

9.2.4 The meaning in a similar statutory provision

480. Some assistance in construing the provisions may also be obtained from the expression of an analogous duty in another statute. Section 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“SIS Act”) uses the same formulation of words in a trust context. It provides:

> (1) If the governing rules of a registrable superannuation entity do not contain covenants to the effect of the covenants set out in this section, those governing rules are taken to contain covenants to that effect.

General covenants

(2) The covenants referred to in subsection (1) are the following covenants by each trustee of the entity:
...
(c) **to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries;**

(Emphasis added.)

481. The SIS Act was introduced following the publication of the Australian Law Reform Commission's *Collective Investments: Superannuation*, Report No 59 (1992). Paragraph 9.22 describes the best interests duty as one of the essential duties of an RE and states:

> Ford & Lee describe this duty as the duty which 'marshalls' the trustee's duty of loyalty to the service of the economic wellbeing of the trust fund and of the personal welfare of the beneficiaries. This is a general duty that complements the more specific obligations to act honestly and to exercise care, diligence and skill.

Underlying s 52(2)(c) of the SIS Act is a general duty to give undivided loyalty to the service of the economic wellbeing of the members, complementing other more specific obligations.

482. In *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd and Others* (2006) 15 VR 87 at [107] Byrne J considered the best interests duty in an earlier version of s 52(2)(c) of the SIS Act. His Honour described the duty as:

> ... an amalgam of two distinct obligations said to be imposed by law upon trustees of a superannuation fund. The first, which is sometimes referred to as the duty of loyalty or the duty of fidelity to the trust, is that to act in the interests of the beneficiaries; that their interests are paramount and must certainly be placed ahead of the trustee's own interests. Nor may the trustee have regard to considerations which are extraneous to the trust. The second is to pursue to the utmost with appropriate diligence and prudence the interests of the beneficiaries.

(Citations omitted.) Byrne J treated the best interests duty as a combination of well-established more specific duties and did not suggest that it extended beyond any duty arising under general law. I respectfully agree with his Honour's approach.

483. In *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204; (2011) 282 ALR 167 at [121] in dealing with s 52(2)(c) of the SIS Act the New South Wales Court of Appeal per Giles JA, with whom Young and Whealey JJA agreed at [164]-[165], concluded that s 52(2)(c) did not materially extend the general law duty to act in the best interests of members. *Jacobs Law of Trust in Australia* also provides that s 52(2)(c) of the SIS Act corresponds with the general law: JD Heydon and MJ Leeming *Jacobs' Law of Trusts in Australia* (7th ed, Butterworths, 2006), [2922].

9.2.5 Conclusion

484. I conclude that the imposition of a duty to act in the ***best interests*** of the members in ss 601FC(1)(c) and 601FD(1)(c) does not extend its content beyond previously understood general law boundaries. I see the best interest duty as foundational and operating in combination with other duties. It encompasses the fundamental duty of undivided loyalty which in the present case required APCHL and the Directors to use their best efforts to pursue solely the members' interests, to act honestly and to exercise care, competence and prudence in doing so, and to eschew any conflict of interests between the members' interests and its own. If any conflict of

interests arose they were required to prefer the interests of the members to APCHL's own interests. The duty also required APCHL to adhere to the terms of the Constitution.