

8 January 2015

12 Highland Way

Highton, 3216

Attn: Pat Brennan

General Manager, Policy Development

Policy, Statistics & International Division

**- Australian Prudential Regulation Authority**

GPO Box 9836,

Sydney 2001

Dear Mr Brennan

## **RE: Submission – Draft Prudential Practice Guide SPG Fraud Risk Management (SPG 223)**

Please find attached my submission on the **Draft Prudential Practice Guide SPG Fraud Risk Management (SPG 223)**.

**Redacted material**

Yours Sincerely

Phillip Sweeney

*Oursuperfund2012@gmail.com*

Attachment:

Submission

# Submission – Draft Prudential Practice Guide SPG Fraud Risk Management (SPG 223)

**APRA** in its approach to fraud risk management makes assumptions that are not necessary supportable.

The first is that an RSE Licensee has in fact been lawfully appointed to the office of trustee.

When **APRA** licences purported Trustee, **APRA** undertakes no due diligence that the purported Trustee has been lawfully appointed to the office of Trustee. **APRA** simply takes a purported Trustee's word that it has been lawfully appointed as a trustee of a given superannuation trust.

The purported Trustee could in fact be a *Trustee de son tort*.

If the true legal status of a purported Trustee as a *Trustee de son tort* is discovered by the members of the fund, then the *Trustee de son tort* will seek to use the "*successor fund transfer*" process as a means of escaping justice.

In **Attachment A, "Examples"** of potential fraud are listed including (g) "*Fraud during an RSE's wind up*".

However, one of the most obvious examples of fraud has not been listed, namely the drafting and execution of fraudulent Deeds of Variation.

This is a high fraud risk factor for most older Australians who are or were members of Defined Benefit superannuation funds.

Dishonest trustees can take advantage of a major loophole in the law.

Trustees are not required to register the Deeds of the Trust with a Public Authority where they are available for public inspection by members of the fund as well as members of the public.

Large superannuation funds are not strictly "*private trusts*" since trustees have to agree to be part of a Government Regulated Superannuation System, the Deeds should be available for public inspection just like title deeds to real property.

If **APRA** has copies of Deeds **APRA** claims "*secrecy provisions*" and refused to provide members of funds with access, even when a purported Trustee that has not been lawfully appointed to the office of Trustee and has criminally concealed the genuine Deeds from members and beneficiaries of the fund.

So the **SPG 223** fails to recognise an obvious type of fraud, the fraudulent amendment or substitution of the original Trust Deed.

## Redacted material

### Superannuation laws – Not Worth the Paper they are Written On

Actual and purported Trustees granted a RSE Licence by **APRA** know that **APRA** is a "*Paper Tiger*" and that Superannuation Laws are not worth the paper they are written on.

**APRA** simply ignores complaints by fund members that the Trustee of their fund is breaking the law.

Such an environment is the perfect breeding ground for the development of a culture of dishonesty and fraudulent opportunism.

Until **APRA** is seen to be actively investigating breaches of superannuation law, "*Prudential Practice Guides*" are complete waste of taxpayer money. They are simply ignored by dishonest Trustees.

### Seeking Judicial Advice

Nowhere in the **SPG 223** is a recommendation for trustees to seek judicial advice on how to properly construe the terms of the trust that governs the administration of the fund.

A Trustee has a personal liability for a Breach of Trust whether innocent or fraudulent that causes a loss to the members and beneficiaries of the fund.

In most jurisdictions there is no Limitations of Actions period for a fraudulent Breach of Trust, which may have been committed by a previous trustee.

An incoming Trustee has a duty to take proceedings against a former trustee who has committed a Breach of Trust and will be subject to an action if the Trustee fails to take proceedings and instead attempts to "*cover-up*" a previous fraud committed by a previous trustee.

However there is a well known legal maxim:

*Fraus est celare fraudem* - It is a **fraud to conceal a fraud**

**SPG 223** should advise trustees that they may have an exposure to fraud due to the conduct of a previous trustee.

### In Summary

Superannuation trusts are the perfect targets for white-collar criminals who seek to defraud members of the fund. Large amounts of "*other people's money*" is in under the direct control of a few individuals. These individuals may not even be lawfully appointed Trustees, yet **APRA** makes the assumption that:

- (i) The Trustee of a fund has been lawfully appointed to the office of trustee, and
- (ii) The Trustee of a fund has an interest in the prevention of fraud

Many superannuation funds have been around for decades or can trace their legal history for decades, even if they have merged with other funds.

**“Successor fund transfer”** cannot be used as a means of **“entitlement laundering”** to conceal fraud committed by former trustees.

SPG 223 focuses on **“trivial cases”** of fraud without addressing how serious cases of fraud can be committed and then covered-up.

## Attachment A

1. Examples of potential fraud may include:
  - a) fraud during the unit pricing process;
  - b) member identity fraud to unlawfully access benefits;
  - c) fraudulent benefit payments;
  - d) accounts payable fraud;
  - e) investment fraud, including the use of opaque structures to conceal the ultimate destination of investment funds;
  - f) improper use of confidential or commercially sensitive information to provide a benefit to a member or employee of the RSE licensee or outsourced service provider;
  - g) fraud during an RSE’s wind up; and
  - h) unauthorised access to information systems leading to theft of data and/or fraud.
2. Examples of corruption and bribery within an RSE licensee may include:
  - a) corruption of procurement processes, for example bribes paid to an employee of the RSE licensee or an outsourced service provider or decisions made by an employee to benefit themselves or an associate or other third party;
  - b) payment of bribes to foreign officials by a RSE Licensee or by an agent or outsourced service provider acting on behalf of a RSE Licensee; and
  - c) investment decisions made with the intention of benefiting parties other than the RSE’s members.
3. Characteristics of an investment that may create potential for fraud may include that the investment is:
  - a) involving a related party of a responsible person of the RSE licensee, of the parent of the RSE licensee or the investment manager of the RSE licensee;
  - b) specifically set up for the RSE licensee and not promoted to external investors;
  - c) new, untested or promoted by an investment manager with no track record;
  - d) located offshore in a poorly regulated jurisdiction;
  - e) an unlisted investment;
  - f) an investment that is opaque;
  - g) superficially rated or recommended by research agencies without adequate analysis;
  - h) subject to limited review, for example because it is part of an asset allocation mix and so is not considered as a standalone investment; and
  - i) not subject to adequate external assurance.

**Redacted material**