

File Name: 2017/23

14 August 2017

General Manager
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

via e-mail to: superannuation@treasury.gov.au

Dear Sir/Madam,

Re: Consultation on Exposure Draft *Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017 and Explanatory Memorandum*

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission in response to the consultation on the exposure draft *Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017* (the Bill) and *Explanatory Memorandum* (Explanatory Memorandum).

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through our service provider membership, represents over 90 per cent of the 14.8 million Australians with superannuation.

General observation

ASFA welcomes the release for public consultation of the exposure draft Bill and Explanatory Statement but is disappointed at the short time allowed to consult our members and prepare this submission.

The superannuation system requires a strong regulatory framework and regulators should have appropriate powers and instruments to ensure that the system is stable, efficient and delivers on its objectives. However the system is already subject to significant regulatory obligations and oversight and there must be a clear justification for extensions such as those proposed in the Bill.

This should include an assessment of the impacts and costs of additional obligations on superannuation fund operations and member outcomes. Given the Bill will have a major regulatory impact on both industry and consumers if legislated, a Regulation Impact Statement is essential to demonstrate due consideration

of these elements. ASFA is particularly concerned about the impact of a number of the proposals on the regulatory and reporting burden for superannuation funds. In particular we question:

- the operation of the annual outcomes test and its potential to add a fresh layer of compliance and reporting for trustees
- the impact of the logistics of the annual members' meeting on superannuation fund costs and resources
- whether the proposed director penalties have adequate protections
- the breadth of the proposed APRA directions powers and whether they could be more precise
- the rationale for the proposed reporting standard.

We note that there are further details to come on some of the proposals, such as the precise measures and benchmarks which will apply for the outcomes test or the level of detail which will be required in the 'third party' reporting standards. ASFA recommends that these should be available for public consultation as soon as possible and would welcome the opportunity to be involved in this.

Specific comments

ASFA would like to raise the following issues with respect to the Bill:

1. Annual MySuper outcomes assessment

1.1. There may be an increased reporting and regulatory burden for superannuation funds

The proposed reform introduces a positive outcomes test with additional prescription, to be defined in regulations, as to how the test is to be applied. It is not clear whether this will be a 'one-size-fits-all' approach or whether there will be recognition of appropriate differences between superannuation funds. We suggest that caution should apply when determining the precise test criteria to ensure that it is effective and does not involve excessive analysis and reporting.

The requirements and design of the outcomes test and the associated reporting obligations should, to the extent possible, rely on existing reporting information and avoid the sourcing and reporting of new information or the need to recast existing information in a new format.

1.2. The outcomes test needs to be effective and consistent

ASFA can envisage scenarios where trustees draw the conclusion that they have met the outcomes test however the underlying data might point APRA to a different conclusion. For example, conclusions on investment strategy can differ depending on the timeframes selected. It is not clear how APRA intends to deal with a trustee who determines that it has satisfied the outcomes test where APRA disagrees with the trustee's assessment and on what basis APRA might reach a divergent conclusion. It is crucial for the outcomes test to be effective that it is applied consistently.

Consistency

As stated above, many of ASFA's members are concerned that the outcomes test should be a 'like for like' comparison and the risk of permitting false comparisons should be avoided, and this should be an important consideration when finalising the detail for the outcomes test.

Given the nature of quantitative measures, and the 'success or fail' results to which they tend to lead, it is important that any measures prescribed are appropriate and their application is clear, consistent and fair.

ASFA questions the need for the test to be annual and whether this may make the comparison timeframe too focused on the short term. It is not clear, given the lack of detail on this point, what time period is to be used to measure investment outcomes and how medium to long-term performance is to be assessed when applying a test at a specific point in time.

Early and wide consultation should be undertaken before the outcomes test requirements are prescribed or defined in guidance to ensure that it will apply consistently and equally for all RSE licensees.

1.3. Insurance

ASFA is conscious that the design of insurance in superannuation is of some concern to the government and that APRA has been asked to facilitate the ease with which a member might opt-out of insurance.

ASFA notes that subsection 52(7) of the Superannuation Industry (Supervision) Act (SIS) already requires trustees to avoid the inappropriate erosion of retirement incomes by insurance premiums but that this requirement is repeated in the outcomes test

ASFA notes that the Insurance in Superannuation Working Group (ISWG) is working on an industry code which will deal with the erosion of retirement incomes (e.g. through addressing cessation of cover, opt-out arrangements and duplicate accounts). We recommend that the industry code developed by the ISWG be taken into account when defining the detailed requirements under this provision and that any inconsistency with the code be avoided.

1.4. The use of regulations to define the criteria of the annual MySuper outcomes assessment

The manner and methodology of assessing ‘the financial interests of the beneficiaries’ (subsection (2)), and the standards and methodology to be applied to the comparison of MySuper products (subsection (3)) will be prescribed in regulations. As so much of the detail for this proposal will sit in the regulations and APRA standards and guidance it is not possible at this time to assess how this will work in practice.

While this approach enjoys the benefit of flexibility ASFA is conscious that the use of regulations may expose trustees to ongoing changes to standards and methodology which can be introduced by the government with relative ease. We recommend that, whenever changes are proposed for the definition and operation of the outcomes test, the government consult early and widely.

1.5. Transparency

It is not clear from the proposal how a trustee will notify whether they have satisfied the outcomes test.

ASFA recommends that, when a trustee is unable to make a declaration that they satisfy the outcomes test, there should be statutory protection from legal action where they have acted in good faith.

2. Authority to offer a MySuper product

2.1. Application

Given that approvals of MySuper licenses have been rare since commencement, these new provisions would seem to be most significance in relation to the cancellation of existing MySuper authorities. ASFA supports this proposal as it is anomalous for APRA to have the power to authorise a MySuper application but not have the corresponding power to cancel it.

3. Director penalties

ASFA notes the intention to strengthen director penalties but we question the alignment of superannuation fund director penalties with those of managed investment funds. We submit that,

given these penalties will be with respect to a breach of the directors' covenants, there should be statutory defences available which reflect the common law defences.

3.1. *Trustees operate in a highly regulated environment very different from that of managed investment schemes*

The legal and regulatory obligations placed on directors of superannuation funds and directors of Managed Investment Schemes are markedly different. While the Corporations Act 2001 clearly sets out the need for directors of an MIS to protect the interests of investors, the regulatory framework is not as comprehensive as in the equivalent APRA-regulated superannuation trust environment.

3.2. *Trustees require appropriate protections*

We submit that, if there is to be an extension of criminal and civil penalties for superannuation trustees, at a minimum it should include protections similar to those contained in the common law and the Corporations Act 2001, for example for honest mistakes and actions undertaken in good faith.

4. **Approval to own or control an RSE Licensee**

ASFA supports this proposal.

5. **APRA directions power**

5.1. *The new grounds for making a direction are very broad*

We note that the scope of APRA's directions powers would be greatly expanded and certain criteria such as 'necessary in the interests of beneficiaries' are very broad and we consider that they should be narrowed by appropriate qualification (e.g. necessary to *protect* the interests of beneficiaries rather than to act because the direction is necessary in the *interests* of beneficiaries).

ASFA would prefer that where the new grounds on which a direction may be issued are imprecise that the drafting be tightened to ensure that directions are issued only for matters relating directly to APRA's regulatory responsibilities as a prudential regulator and which are necessary to protect the interests of beneficiaries.

Specifically ASFA recommends that sub-sections 131D (d), (e), (i), and the similar provisions which relate to connected entities in sub-sections 131DA(c), (d) and (g), be amended as follows.

ASFA contends that 'necessary in the interests of beneficiaries' (sub-sections 131D (d) and 131DA(c)) is too broad and submits that the drafting should refer to *the protection* of the beneficiaries' financial benefits to make it clear that the right to issue a direction arises where members' benefit faces a negative impact, or may be at risk, from the behaviour or operations of an RSE.

We question the need for sub-section 131D (i) *'the failure to issue a direction would materially prejudice the interests or reasonable expectations of beneficiaries of a registrable superannuation entity of the RSE licensee'* given the broad power provided under sub-section 131D (d). Alternatively we would accept sub-section 131D (i) to replace sub-section 131D (d) as we believe it achieves the purpose

stated above of permitting APRA to issue a direction to protect members' interest but in a limited fashion.

We are uncertain about what threshold is intended by 'is, or is about to become, unable to meet its liabilities' (sub-sections 131D(e) and 131DA(d)) – in particular whether this is confined to defined benefit funds - and we recommend the sub-section is amended to clarify in what circumstance a direction might be issued.

We recommend that the reference in sub-sections 131D (h) and 131DA (g) to 'conducting ... affairs in an improper or financially unsound way' be amended to include a concept that this is to the extent that it places members benefits at a material risk.

5.2. Appropriate protections

ASFA submits that the current proposal for extensive direction powers, if left unchanged, requires additional protections for trustees to permit them to challenge the use of directions where the trustee feels the direction to be inappropriate.

We acknowledge that trustees would be able to take matters to the AAT or judicial review but the current broad definition of the grounds on which a direction might be issued may limit the scope for such review.

In summary, the Bill contains insufficient checks and balances in relation to the regulators use of direction powers and ASFA recommends that the definition of the grounds for a direction should be tightened and trustees provided with a mechanism to dispute the use of these directions.

5.3. The directions power and connected entities

ASFA has two observations on making connected entities subject to directions:

1. APRA should initially direct the RSE licensee and should only direct a connected entity directly when it is time critical or the RSE licensee itself has refused to observe a direction.
2. A connected entity can be defined through being prescribed. We acknowledge that this is an existing arrangement but the extension of the direction power to connected entities raises the question of whether an entity could be prescribed as a connected entity to make it subject to a direction when it might not ordinarily qualify or be recognised as such.

6. Annual members' meetings

ASFA strongly supports members having the capacity to raise questions about any aspect of the fund's operations or their benefit and the fund answering in a timely and comprehensive fashion. ASFA does, however, have a number of reservations about the proposed annual members' meeting and believes that the desired benefits could be obtained with significantly less disruption and at a lower cost using a different and more efficient method such as a web-based bulletin board.

6.1. Members' access to the superannuation fund trustee and executive

ASFA considers that this proposal needs to be treated with some caution given any benefit is likely to involve considerable costs.

For the most part members are able to communicate with their superannuation fund trustee and executive satisfactorily and there are a number of member contact programs where funds make senior staff available to members through information roadshows on various topics of interest throughout the year.

Where a fund already has a member contact and consultation program it is important that the requirement to hold an annual members' meeting does not lead to duplication and it would be a pity if meeting the minimum requirements for the annual meeting led to a reduction in the quality of existing programs. ASFA does not accept the assertion in the Explanatory Memorandum that 'in most cases members have little or no ability to have their questions asked or answered.'

If this proposal is adopted, there should be flexibility in how members are able to have their questions answered, recognising the differing size, complexity, demographics and geographical presence of a fund and the relative cost of providing such a service. For example, for a fund with membership spread across the country it might be significantly more cost effective if the meeting were to take place as a facilitated webinar. Conversely another fund may decide to hold multiple meetings and to cater for members in remote communities if they considered this was in members' 'best interests'.

6.2. The Annual General Meeting model

The fact that superannuation fund members have no voting rights means there are substantial differences between an AGM and the proposed annual members' meeting. The proposed annual members' meeting of RSEs does not contain any matters for the approval of members as a collective. As this is the main purpose of holding an AGM this calls into question the benefit of holding a meeting, especially when considered against the costs involved.

6.3. Logistics

It is not clear from the Bill whether the notice to hold an annual members' meeting will need to be sent out in hard copy or whether electronic communication is adequate.

For large funds the requirement to notify by letter could impose a significant cost on the fund and its members if, for whatever reason, it could not be included in a standard member communication such as annual statements.

We submit that, given that this initiative is targeted at engaged members, and the costs involved in tailored communications, notification on the fund's website, together with information in the fund's PDS and annual report, would be sufficient to satisfy the notification requirements.

One matter which needs to be clarified is whether a fund with a number of sub-funds would be required to hold a meeting for each sub-fund or whether a single annual members' meeting would be adequate. ASFA supports a single meeting for funds in this position.

Another issue which has been raised is whether there is an expectation that employers should be compelled to give employees time off work to attend the meeting, either in person or electronically. If so, such a requirement may raise significant implications for business operations.

6.4. Exclusions

If annual members' meetings are to proceed, ASFA believes that the following matter should be excluded from annual members' meetings:

- Questions in relation to the individual circumstances of a superannuation fund member. A governance mechanism such as an annual members' meeting is not an appropriate forum for such matters and it is more appropriate for such matters to be dealt with directly between the individual member and their fund.

6.5. Questions to be notified in advance

ASFA believes that questions should be required to be notified in advance with the proviso that time be set aside at the end of the meeting for follow-up questions to be asked relating to matters which were raised during the annual members' meeting.

6.6. Review

ASFA recommends that the effectiveness of annual members' meetings be reviewed three years after their introduction using a cost/benefit analysis.

6.7. Alternatives to the annual members' meeting

ASFA believes that there are more flexible, efficient, simple and cheap alternatives to what is proposed. For example there could be a requirement for superannuation funds to provide an electronic bulletin board on the fund website for member enquiries, with the response potentially publicly viewable and with a requirement for superannuation funds to respond within a reasonable time limit. The same exclusions should apply as described in 6.4. This mechanism would provide members with ongoing access to the executive and/or board (rather than just once a year).

ASFA does not believe that lack of access for members to have their questions answered is a significant problem due to existing member communication and support facilities in place across the industry, but we are supportive of appropriate measures that would give superannuation fund members a greater understanding of their fund's governance, operations, and investment arrangements.

7. Reporting standards

7.1. Transparency

While ASFA recognises the need for funds to report to APRA to ensure it has the necessary information to undertake prudential supervision of the industry, we note that this information can come at a cost and the specific purpose of this proposal is unclear.

We note that it is likely that it will increase the reporting burden for superannuation funds and it is hard to estimate the degree of the impact until the details are known. The reporting for transactions which involve more than one third party could be complicated and time-consuming to prepare.

Depending on the level of detail required under the new reporting standard the new requirement could add significantly to the reporting burden borne by superannuation funds and, without knowledge of the use of the information, it is hard to judge whether the additional reporting burden is justified. ASFA looks forward to being consulted on the draft APRA forms and guidance, to ensure the reporting requirements are appropriate and useful.

7.2. Application

There is no guidance in the draft proposal about the level of detail which will be required for 'look through'. As stated above, ASFA is supportive of additional reporting requirements which support the regulator's monitoring and oversight activities but would be reluctant to support any proposal which led to the burden of significant additional reporting without a clear countervailing benefit. For example, what level of detail might an administrator be required to supply to satisfy the 'look through' requirements and could this extend to staffing, capital expenditure and so on?

Conclusion

In general, ASFA is cautious about any reforms which add to the regulatory or reporting burden for its members without a clear purpose or benefit first being established.

While we can see merit in some of the proposed reforms, we have significant reservations about the requirements around an annual members' meeting and certain elements of the outcomes test proposals. We also suggest that there is a need for clarification about the purpose of the proposed reporting standard and question the use of managed investment schemes as the model for director penalties to be applied to superannuation fund trustee directors given the different regulatory frameworks that apply.

We would like to thank you for the opportunity to provide comments on the the Bill and welcome the opportunity to discuss with Treasury the matters raised in this submission.

Should you have any questions on any of the matters raised in this submission please do not hesitate to contact me on (02) 8079 0808 or via gmccea@superannuariuon.asn.au or Byron Addison on (02) 8079 0834 or at baddison@superannauon.asn.au.

Yours sincerely

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