SUBMISSION

Submission to Treasury — Superannuation regulator roles

28 February 2020

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Dear Sir/Madam

Royal Commission Recommendations 3.8, 6.3, 6.4 and 6.5 – Superannuation regulator roles

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the exposure draft legislation released on 31 January to implement recommendations 3.8, 6.3, 6.4 and 6.5 of the Royal Commission into *Misconduct in the Banking, Superannuation and Financial Services* Industry.

About ASFA

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 and its $2.9 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 16 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact me on (03) 9225 4021 or by email fgalbraith@superannuation.asn.au. We acknowledge that the deadlines for this consultation are tight but we would welcome the opportunity to discuss our submission with you if time permits.

Yours sincerely

Fiona Galbraith
Director, Policy

General comments

ASFA generally is supportive of the adjustment of APRA and ASIC's roles, including the reinforcement of ASIC's role as a conduct regulator and APRA's retention of its current functions.

It is imperative, however, that government and Treasury, when adding regulatory responsibilities to the regulators, consider:

- whether it is warranted / necessary
- the scope and size of the responsibility
- whether it fits in with the objectives of the identified regulator(s).

Specific comments in relation to the exposure draft legislation

Is this the end of Twin Peaks regulation? Have the Twin Peaks effectively collapsed into a 'Double Peak'?

It is proposed that a number of legislative provisions are to be regulated by both APRA and ASIC.

This has the effect of extending the concept of a 'dual-regulated' entity from being an entity subject to two legislative regimes, each (largely) administered by a different regulator, to the functions and activities of entities being governed under two legislative regimes, where a significant proportion of provisions are administered by both regulators.

The logical extension of this expansion of dual-regulation to 'two regulators administering the same provision' is to question whether this effectively undermines the policy rationale underpinning the recommendation of the Final Report of the Wallis Inquiry — that there should be one regulator responsible for prudential regulation and another regulator responsible for market and disclosure regulation of any financial products being offered to Australian consumers.

If provisions increasingly are being regulated by both regulators, as opposed to one or the other, the question needs to be asked as to whether the 'twin peaks' have collapsed into a 'double peak'?

If this is the case, it is difficult to discern the benefit of this approach – the logical conclusion of a 'double peak' approach is that there should be a single, combined, financial regulator. Maintaining two separate regulators with common responsibilities poses significant increased risk for little or no gain.

Risk - increasing potential for overlap, duplication and gaps

At the time of the establishment of APRA and ASIC there were well defined roles for each of them — APRA as the prudential regulator and ASIC as the market conduct and consumer protection regulator. Over time, however, their roles and responsibilities have blurred.

Making an increasing number of provisions dual regulated has the result of creating confusion and increases the risk of potential overlap, duplication and gaps between regulators.

In particular, significantly increasing the number of provisions in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that are dual-regulated creates confusion and serves to blur the distinction between the roles, objectives and charters of APRA and ASIC.

By way of example, the covenants were originally APRA but now both APRA and ASIC have responsibility for these provisions. In the event of a breach, or potential breach, of a covenant how will it be decided which regulator will take compliance action against the organisation / trustee director?

It is difficult to visualise how such a decision would be made on an objective basis, or how the facts would need to differ in order for an appropriate determination in one set of facts is that it would be APRA, while in another it would be ASIC. Accordingly, it would appear that ultimately this will end up being an arbitrary decision as to which regulator would take action with respect to the non-compliance.

Risk – increased need for coordination and information sharing

Given the dual regulation model increasingly being adopted, the key focus should be to ensure that both regulators share data and information, ideally by having access to a common data base

The regulators should (in conjunction with other government agencies) work to minimise the number of data reporting processes and to develop common data standards, taxonomies and definitions. A single approach to the reporting of regulatory data would serve to significantly reduce costs for agencies and the industry alike.

There needs to be better coordination between regulators in dual regulated regimes with respect to the reporting of data and the sharing of information. Ideally a shared data / information portal should be created and expanded to include all regulatory data with respect to the provision of financial services.

Risk - need for collaboration to ensure consistency

Where there is overlap between regulators the regulators should ensure consistency and collaboration in their approaches to compliance and enforcement.

In particular, jointly issued regulatory statements are of significant benefit in providing clarity to the industry and serve to mitigate the risk of inconsistent approaches being adopted by different regulators.

Risk - conflicting priorities

There may be circumstances where ASIC's focus on / prioritisation of consumer protection outcomes might be at odds with APRA's responsibility for system stability.

By way of example – public action / disclosure of a consumer issue with a particular provider may cause a run on a particular product, which could serve to worsen the position of remaining consumers and, at the extreme, could result in contagion risk and a loss of consumer confidence generally. Consumer issues usually can be remediated, however, a loss of consumer confidence in a particular market can have a devasting outcome and can pose a considerable systemic prudential risk.

As such, it is imperative that ASIC consult with APRA prior to taking any enforcement action against a particular financial services providers, to enable APRA to exercise its responsibilities as the prudential regulator responsible for the stability and soundness of the financial s system. Given the different objectives of APRA and ASIC there is a question as to whether having two regulators serves to create an unnecessary, and avoidable, conflict of priorities.

Recommendation

Maintain 'Twin Peaks' model of regulation

The 'Twin Peaks' model of regulation should be maintained by ensuring that each legislative provision / obligation is characterised as being predominantly for prudential or consumer protection purposes and accordingly is regulated by APRA or ASIC respectively. If both regulators are responsible for administering the law jointly, there may as well be one financial services regulator.

Role of regulators - need for internal review of regulator decisions

It is important that regulated entities have an opportunity for decisions made by regulators to be reviewed internally, in addition to decisions that are reviewable externally by such bodies as the Administrative Appeals Tribunal.

By way of example, tax legislation provides an opportunity for taxpayers to lodge an objection to a decision made by the Australian Taxation Office (ATO), where the ATO internally reviews the facts and the basis of the decision.

Recommendation

Regulator decisions – internal review

The SIS Act and the *Corporations Act 2001* should be amended to establish a regime whereby regulated entities are able to request a decision be reviewed internally by APRA or ASIC.

Role of regulators - increase in delegated legislation

Progressively the government is providing the regulators with increased powers and discretions, including the ability to develop legally binding and enforceable regulatory regimes applicable to the entities they regulate, such as Prudential Standards in the case of APRA.

While regulators consult prior to finalising delegated legislation, it is not subject to the same degree of scrutiny and checks and balances that occurs during the course of Parliamentary processes. It is imperative the right balance is struck between regulatory discretion and appropriate delegation of legislative power.

Need for independent review of regulator's decision-making processes and delegated legislation

The decisions regulators make with respect to regulated entities – for example to exercise their directions-making powers or issue a stop order – potentially have significant commercial, financial and reputational implications.

They increasingly are making delegated legislation, which imposes new legal obligations and compliance requirements on regulated entities.

Given this, it is imperative there is appropriate oversight over their decision-making processes, including whether there are any underlying systemic issues, as well as the making of delegated legislation.

Requirement to acquire (or expand existing) Australian Financial Services Licence (AFSL) by 1 July 2020

There is a requirement for superannuation funds to acquire an AFSL, or for funds with an 'advice-only' AFSL to expand their licence, by 1 July 2020.

We support the proposal that funds which already hold an AFSL to deal in superannuation will have their licence automatically updated to include the proposed new 'superannuation trustee services' financial service. We are concerned, however, about the proposal that non-public offer funds that do not already hold an licence to deal in superannuation will be required to acquire an AFSL (or, where they hold an 'advice-only' AFSL, to expand their AFSL), by 1 July 2020.

Despite the fact that the legislation is merely an exposure draft, the consultation period does not close until 28 February 2020, the bill will not even be introduced until March 2020, the Explanatory Memorandum (EM) to the bill states the application will be required to be lodged on or before 30 June 2020.

This leaves very little time for trustees who have not previously had to deal with an application for an AFSL to determine, analyse and assess the requirements; identify their responsible managers; obtain all of the evidence required and submit their applications.

Unless these trustees are provided with a reasonable period of time in which to make an application for their AFSL, they will have no option but to expend considerable amounts of their members' retirement savings on expensive legal advice and assistance from consultants. In addition, the process of making an application for an AFSL will divert time, resources and trustees' focus from matters such as meeting the new business planning requirements; implementing the Putting Members' Interests First (PMIF) changes; dealing with their trial 'member outcomes' assessments and generally managing their fund.

Requirement to acquire (or expand existing) AFSL – increased obligations – effect on operations

Members have expressed concerns that the addition of superannuation trustee services as a service which necessitates an AFSL could require the implementation of significant operational changes for the trustee / fund as well as for their service providers.

There are a number of issues that arise from trustees being required to acquire (or expand) an AFSL, including the interaction with the proposal that insurance claims handling may become a licensed activity and the increase in the responsibility to report breaches. Could there be circumstances where both trustees and service providers have breach reporting responsibilities with respect to the same breach (or likely breach)?

Furthermore, for trustees that do not already hold an AFSL, there will be a number of practical matters that will need to be implemented, including the need to update a significant number of plan documents and website material to include details with respect to the trustee's new AFSL.

Relief will be needed to allow sufficient time for this to be done in a cost effective manner.

Recommendation

Extension of time to make an application for an AFSL

The deadline for funds to acquire (or expand existing) AFSLs should be extended to 31 December 2020.

Relief to update disclosure materials

Relief will be needed to allow sufficient time for disclosure materials to be updated in a cost effective manner.

Clarity re effect of creation of new 'superannuation trustee services' financial service

Ideally the explanatory material should be revised to provide clarity with respect to the practical implications for trustees of 'superannuation trustee services' becoming a financial service, such as whether additional authorisations will be required for service providers and/or for the staff of trustees and service providers, for example those involved in insurance claims handling.

If additional authorisations will be required there should be a streamlined process to enable these to be obtained as efficiently as possible.