

SUBMISSION

Submission to Treasury —
Financial Regulator
Oversight Authority

28 February 2020

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Via email: FSRCconsultations@treasury.gov.au

28 February 2020

Dear Sir / Madam,

Royal Commission Recommendation 6.4 – Financial Regulator Oversight Authority

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to Treasury's consultation on this matter.

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 Julian Cabarrus, Director of External Affairs and Strategy, on (02) 8079 0815 or by email jcabarrus@superannuation.asn.au, or me on (02) 9264 9300 or by email gmccea@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



Glen McCrea
Deputy CEO and Chief Policy Officer

Rec 6.14 – Financial Regulator Oversight Authority

ASFA supports this recommendation.

To be an effective oversight body, the scope of the Financial Regulator Oversight Authority's (the Authority) oversight must match the remit of ASIC and APRA and critically assess all functions undertaken by the Regulator. If it is not granted a sufficiently broad role in assessing the regulators, the Authority will be unable to fulfil the function outlined by the Commissioner.

As recognised by the Commissioner, it is important that the Authority that is established that strengthens the accountability of ASIC and APRA, particularly with regards to enforcement and regulatory decisions.

We provide further detail on our concerns below.

Scope of the Authority's oversight

Scope of function

Subsection 12(1) prescribes the function of the authority to:

- Assess the effectiveness of APRA and ASIC
- When requested by the Minister, undertake capability reviews of APRA and ASIC and report to the Minister
- On its own initiative or where requested by the Minister, report to the Minister on any matter relating to APRA's and ASIC's effectiveness

We are concerned that the function prescribed in subsection 12(1) may not reflect the essential role of the Authority outlined in the Commissioner's final report to assess "how the regulator exercises its statutory powers".¹

Expanding the function of the Authority in this manner is critical to ensuring that a genuine assessment is made, that looks beyond metrics and benchmarks to the underlying governance, culture and conduct within APRA and ASIC.

Recommendation

Subsection 12(1) be amended to incorporate assessment of how the regulator exercises its statutory powers.

Limitations on function

Subsection 12(2) of the exposure draft and paragraphs 1.35 – 1.39 of the Explanatory Memorandum (EM) limits the scope of the Authority's functions in a manner that would compromise its ability to provide effective oversight of APRA and ASIC.

It prescribes that the functions of the Authority do not include assessing or reporting on only a single case. Paragraph 1.37 of the EM goes further and states that the Authority is "not permitted to assess and

¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1, p.477

prepare a report about the effectiveness of one particular regulatory action or enforcement matter undertaken by APRA or ASIC.”

In ASFA’s view, the Authority could not properly perform its functions with this strict limitation on its function and powers. The Commissioner discussed the importance of evaluating regulatory decisions in making assessments,

“In most cases, that assessment (of the tasks entrusted to each regulator by its statute) will not be capable of measurement or quantitative expression. For example, the number of proceedings filed, or infringement notices issued, will say little about ASIC’s enforcement culture unless the decisions behind those numbers are evaluated.”²

Regulatory actions are the culmination of processes occurring within APRA and ASIC. To fulfill the essential role of the Authority and genuinely examine how the regulators exercise their statutory powers, the Authority must have the capacity to assess regulatory actions. This will aid in the identification of systemic issues within the regulator and support improvements to decision making and enforcement to the benefit of the Australian community.

Clearly, this should not require the Authority to assess *each and every* regulatory or enforcement action. However, it will be necessary for the Authority to assess particular actions, or groups of actions, in order to properly assess APRA and ASIC’s overall effectiveness.

Recommendation

Subsection 12(2) be replaced with a subsection confirming that the Authority may assess and report on particular regulatory actions or enforcement matters (or groups of these) as is necessary, as part of its broad assessment of APRA’s and ASIC’s effectiveness.

Safeguarding regulator independence and decision-making governance

The rationale provided in the EM for the limitation in subsection 12(2) is that “this safeguards the independence of the regulators and ensures that the functions of other government bodies responsible for investigating complaints about individual matters (such as the Ombudsman) are not duplicated by the Authority.”

We consider that the Authority assessing and reporting on regulatory and enforcement actions does not compromise the independence and decision making of APRA, ASIC, or other government bodies responsible for decisions in relation to these actions. Nor does it duplicate the role of these bodies, as the function of the Authority is clearly distinct and separate.

The Authority role should be to assess regulatory and enforcement actions to support its broader assessment of APRA’s and ASIC’s effectiveness. The Authority would assess matters such as the influence of process, governance and culture within the regulators on regulatory and enforcement actions, to support improvements within APRA and ASIC over time.

The Authority would not be charged with investigating individual complaints or reviewing decisions of APRA and ASIC, as it is not a body of administrative review. This should remain the role of bodies such as AFCA, the Administrative Appeals Tribunal and the Courts.

² ibid

Other oversight models

In establishing the scope and functions of the Authority a model worth considering is that of the Inspector General of taxation (IGTO), and particularly its review and oversight functions of the Australian Taxation Office (ATO) and Tax Practitioners Board (TPB).

The IGTO reviews the operation of the tax administration laws and system, and reports (publicly) their recommendation to the Minister, Government, Parliament, ATO and TPB.

The IGTO's stated purpose is to provide independent advice and assurance (to individual taxpayers, agencies or the community in general) through investigation, review and reporting that Australian taxation and administration laws are operating effectively and consistent with community expectations.

In discharging its oversight function the IGTO investigates and assesses regulatory actions that the ATO and TPB have undertaken and makes recommendations to improve the delivery of regulatory functions by these agencies over the course of time.