

File Name: 2013/44

22 October 2013

Committee Secretary
Senate Economics References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Mr Bryant,

Inquiry into the Performance of the Australian Securities and Investments Commission

Thank you for the opportunity to provide comments in relation to the *Inquiry into the Performance of the Australian Securities and Investments Commission* ("Inquiry").

We appreciate the challenges faced by ASIC in performing its real economy and financial service industry regulatory and oversight functions. The following input is aimed to assist ASIC enhance the outcomes of its oversight of the financial services industry. Most of the feedback in this submission has been received directly from ASFA members across all sectors.

ABOUT ASFA

ASFA is a non-profit, non-politically aligned national organisation. We are the peak policy and research body for the superannuation sector. Our mandate is to develop and advocate policy in the best long-term interest of fund members. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

THE TERMS OF REFERENCE OF THE INQUIRY

The terms of reference of the inquiry are with respect to the performance of the Australian Securities and Investments Commission (ASIC), with particular reference to: -

- a) ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations;
- b) the accountability framework to which ASIC is subject, and whether this needs to be strengthened;
- c) the workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies;
- d) ASIC's complaints management policies and practices;
- e) the protections afforded by ASIC to corporate and private whistleblowers; and
- f) any related matters.

VIEWS OF ASFA AND ITS MEMBERS

Set out below, under the relevant term of reference, are the collected views of ASFA members.

Term of Reference a) ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations

Resourcing

- ASIC should be funded to allow it to utilise legal services of comparable quality to those employed by Australian businesses and individuals when defending themselves in actions taken by ASIC.
- The potential inadequacies with respect to the ASIC legal resources budget may create difficulties for ASIC when pursuing legal remedies or enforcement action against entities or persons alleged to have contravened legislative obligations.
- ASIC needs to be appropriately resourced generally. The current structure and resourcing of ASIC limits its ability to influence industry and the resultant criticism which ASIC receives in respect of delayed action can erode public confidence.
- ASIC should be armed with the power and resources to be in a position to better monitor internet and telemarketing scams and to work with international regulators and law enforcement bodies to catch and shut down such scams and, if possible, to recover money obtained by misrepresentation, fraud or identity theft. This includes dealing with situations where members transfer their superannuation from Registrable Superannuation Entities (RSEs) to real or fake Self Managed Super Fund (SMSF) accounts and then find it has been invested inappropriately, accessed illegally or transferred off-shore.

Term of Reference f) Any related matters

Regulatory style \ proactive engagement with industry

- ASIC, as a regulator, needs to be clearer on its regulatory approach and style. There is a degree of uncertainty in the industry on the ASIC approach to consultation, supervision and enforcement. This is a particularly important matter in areas where there is an overlap between APRA and ASIC.
- At present, ASIC's engagement with the superannuation industry is largely limited to registration, reporting and enforcement. ASIC's substantial powers appear to act as a disincentive to establishing collaborative relationships with industry. The result is that ASIC seeks rectification \ enforcement after a regulatory breach has occurred, as opposed to the prudential stance adopted by APRA.
- Given the degree of legislative change for Australian Financial Services and Australian Credit licensees, it would be helpful for licensees to have regular contact with an ASIC team akin to the APRA model for RSEs.

The above differences in regulatory approach can be explained in part by the fact that APRA is a prudential regulator and ASIC is not. However, there is an argument that a move by ASIC down a path towards introducing a degree of staff specialisation may prove more effective and potentially more efficient than the current "first cab off the rank" style approach.

Provision of guidance material

- Members found ASIC guidance to be high quality, observing that generally it provides sufficient detail for the trustee to be able to act on the information provided. Regulatory Guides RG 245, 246 and 247, published by ASIC in 2013, are good examples of the quality of the ASIC guidance.

MoneySmart website

- ASIC provides exceptional information on their MoneySmart website. It is an excellent initiative which benefits Australians and supports financial services organisations in their goal of providing members with better financial outcomes through the provision of education and communication materials.
- ASIC should consider maintaining a central register of individual advisers with serious breaches recorded. The register could be referenced by AFS licensees in the recruitment of advisers and by the public in selecting an adviser.

Provision of relief

- More timely provision of relief, such as class orders, would be of significant benefit in reducing:
 - unnecessary uncertainty for the industry, and
 - costs to superannuation funds, and therefore their members, resulting from increased resourcing to implement legislative changes where, relatively late in the piece, the time frame for compliance is extended, or the scope amended.

One example is ASIC Class Order CO 13/752, which issued on 12 July 2013 extending an earlier Class Order that was due to expire on 19 July 2013. Similarly, ASIC Class Order CO 13/830, which issued on 28 June 2013, provided super fund trustees with additional time to make the necessary arrangements to comply with subsection 29QB(1) of the SIS Act and regulations 2.37 and 2.38 of the SIS Regulations which were scheduled to commence on Monday 1 July 2013.

Responsiveness of ASIC staff

- Industry appreciates the responsiveness of the Investment Managers and Superannuation stakeholder team when urgent guidance is sought.

Potential subject of investigations

- A potential subject for ASIC investigation within the superannuation sector is third line forcing with respect to employers and their selection of a default superannuation fund for their employees.

Superannuation Complaints Tribunal

Supplementary to the above views of ASFA members, ASFA has specific concerns about recent developments in relation to the Superannuation Complaints Tribunal (SCT). In ASFA's view, as the SCT is an independent tribunal, best practice dictates that it should operate independently of ASIC in all respects.

As the SCT has the authority to determine claims or disputes the function the SCT performs is more akin to a judicial function than an administrative or regulatory one. While, technically, the SCT is exercising powers of administrative review, a hallmark of tribunals is that they should operate, and importantly be perceived by consumers to be operating, on a truly independent, quasi-judicial basis. This is reflected on the SCT's web-site which states "*The Superannuation Complaints Tribunal is an independent dispute resolution body which deals with a diverse range of superannuation-related complaints and offers a free, 'user-friendly' alternative to the court system*".

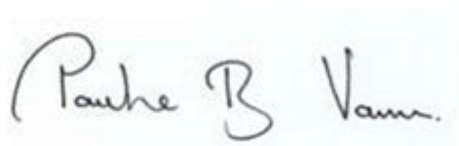
Accordingly, it is imperative that the SCT should be free to operate as a truly independent authority. In order to achieve this, it is our view that:

- The SCT should be functionally separated from ASIC and established as a body in its own right.
- The funding for the SCT under the industry supervisory levy, collected from the industry by APRA, should be entirely separate from that provided to ASIC.
- Even if the SCT is not established as an independent body then, at an absolute minimum, there should be full and transparent disclosure by ASIC of the amounts allocated to the SCT each financial year and the basis on which that allocation was determined.

+++++

If you have any queries or comments regarding the contents of our submission, please contact me on 0433 169 342 or pvamos@superannuation.asn.au or Fiona Galbraith, Director Policy, on (03) 9225 - 4021 or 0431 490 240 or fgalbraith@superannuation.asn.au.

Yours sincerely

A handwritten signature in dark ink, reading "Pauline B Vamos". The signature is written in a cursive, flowing style.

Pauline Vamos
Chief Executive Officer