



ASIC

APRA

14 February 2020

To: ALL RSE LICENCEES

Law reform: Superannuation regulator roles

Key points

- Changes to the regulatory oversight of superannuation are proposed.
- The proposed reforms enable ASIC to more effectively regulate trustee conduct in the superannuation industry, while retaining APRA's critical role as prudential and member outcomes regulator for the sector.
- APRA and ASIC are committed to working together to achieve better outcomes for members and reducing regulatory burden to the extent feasible. APRA and ASIC recognise that this involves effectively harnessing each agency's different approach to regulation and supervision, while minimising duplication of regulatory effort.
- If the reforms are implemented, for most trustees, no action will be required to amend or obtain appropriate Australian Financial Services (AFS) license authorisations.

On 31 January 2020, the Government released for consultation proposed legislation concerning the roles the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulatory Authority (APRA) will play in regulating the superannuation industry in the future.

The draft legislation and explanatory materials ([Superannuation regulator roles reforms](#)) implement the Government's response to recommendations 3.8, 6.3, 6.4 and 6.5 of the *Financial Services Royal Commission* (Royal Commission) final report.

ASIC and APRA strongly support these reforms and would like to provide some context that might assist you in understanding their impact. In particular, we want to draw attention to how APRA and ASIC intend to operate if the proposed reforms become law.

Purpose of the reforms

The Government's response to the Royal Commission included a commitment to expand ASIC's role in superannuation to better promote consumer

protection and market integrity in the superannuation industry. To achieve this, the Royal Commission recommended giving ASIC power to enforce provisions of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that concern consumer protection.

The Royal Commission hearings clearly demonstrated the significant impact that trustee misconduct can have on members' retirement savings. The proposed reforms are designed to enable ASIC to play a more effective role in regulating conduct in the superannuation industry, while retaining APRA's critical role as the prudential and member outcomes regulator for the sector.

What specific reforms are proposed to strengthen ASIC's role as conduct regulator in superannuation?

Broadly, the proposed reforms increase ASIC's consumer protection powers by:

1. Broadening the scope of the conduct covered by ASIC's existing consumer protection powers under the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Act 2001* (ASIC Act) – by creating a new financial service, *Providing a Superannuation Trustee Service*, for the purposes of these Acts.
2. Expanding ASIC's role under the *SIS Act* – by providing that ASIC will share administration with APRA of more civil and criminal penalty provisions that relate to consumer protection and market integrity, including the covenants in the *SIS Act*.
3. Requiring all APRA-regulated trustees to hold an AFS licence to operate a superannuation fund – by removing existing exemptions for non-public offer trustees. This will ensure that all trustees are treated in the same way and held to the same standards.

What do superannuation trustees need to do?

If the proposed reforms are implemented, most trustees should not have to take additional steps to comply with the new regime. ASIC will write to the 25 trustees who will need to take action to comply with proposed AFS licensing changes.

More information about what will change for superannuation trustees is included at **Appendix A** of this letter.

What does this mean for ASIC and APRA?

These reforms increase the already existing areas of common interest in APRA and ASIC's roles. APRA and ASIC recognise the importance of a close working relationship between regulators and are already working together to lift industry practices and achieve better outcomes for members.

We will continue to enhance our regulatory co-operation and our approach to regulatory activities, guided by high-level statements introduced in the SIS Act which reflect that:

- APRA will be responsible for prudential regulation and member outcomes (including licensing and supervision of RSE licensees); and
- ASIC will be responsible for protecting consumers from harm, market integrity, disclosure and record keeping.

In addition, ASIC and APRA recognise that:

1. **ASIC and APRA approach regulation and supervision of trustee conduct differently.** ASIC is primarily issues-driven and focused on conduct in relation to the relationship between superannuation trustees and their individual members. APRA undertakes prudential supervision of trustee activities, largely focused on outcomes that trustees deliver for their whole membership, or cohorts of their membership. So, for instance, while the superannuation industry's level of engagement with ASIC is likely to increase if the reforms are implemented, ASIC does not intend to replicate the day-to-day supervision approach of APRA.

Importantly, we recognise that the success of the reforms lies in ASIC seeking to complement APRA as a regulator by applying different insights, tools and focus. The reforms are not designed to empower ASIC to duplicate APRA's role nor does ASIC intend to approach the proposed new powers in this way.

2. **Industry may be concerned about the potential for conflicting messages or guidance issued by ASIC and APRA.** We recognise that conflicting messages or guidance do not promote better outcomes for members and we are committed to avoiding this wherever possible. We will continue to consult with each other before issuing new guidance or amending existing guidance, and will also consider the development of joint or coordinated regulatory policy or guidance, where appropriate.
3. **Industry may be concerned that the proposals will mean both regulators will have the power to bring enforcement action in relation to the same trustee misconduct.** APRA and ASIC will be deliberately strategic in how we use our formal enforcement powers. This means both regulators will work together to determine which agency has the best available tools to address the conduct at issue and support each other in achieving the outcome that is in the interests of consumers. This is already occurring.

Further information about APRA and ASIC's working relationship, including examples of how ASIC and APRA use formal and informal arrangements to facilitate an effective working relationship, are provided in **Appendix B**.

Further guidance

APRA and ASIC are considering what additional communications about the superannuation regulator roles reforms are required to assist the industry to comply with their obligations. Given the volume of law reform at the present time, we will prioritise guidance in relation to new or unclear obligations over consequential updates to existing guidance.

Next steps

We would welcome feedback about issues that you believe may raise challenges for the industry as a result of the proposed reforms. You can send your feedback to Jane Eccleston, Senior Executive Leader, Superannuation at Jane.Eccleston@asic.gov.au or Heidi Richards, Executive Director at heidi.richards@apra.gov.au.

APRA and ASIC are committed to lifting practices across the superannuation industry, to deter and address trustee misconduct and to improve outcomes for all superannuation members.

We look forward to working with industry in doing so.

Yours sincerely,

Danielle Press
Commissioner
ASIC

Helen Rowell
Deputy Chair
APRA

Appendix A: Further information about the proposed reforms

The reforms make no substantive change to APRA's role and responsibilities. They broaden the scope of the conduct covered by ASIC's existing consumer protection powers under the Corporations Act and ASIC Act and expand ASIC's role under the SIS Act.

All superannuation trustees subject to APRA regulation will need to provide all services involved in operating a superannuation fund in accordance with the general obligations on AFS licensees under the Corporations Act and the consumer protection provisions of the ASIC Act. All trustees, including 'non-public offer' trustees, will be held to the same standards.

For trustees that already hold an existing AFS licence, the draft legislation provides that a new licence authorisation – to provide a superannuation trustee service – will automatically be deemed to apply. No steps need be taken by these trustees to acquire this authorisation.

For 'non-public offer' trustees that do not hold an existing AFS licence, a streamlined application process for the trustee to obtain an AFS licence will apply. ASIC will be writing to the 15 affected non-public offer trustees to provide more information about how to get the licence and the authorisations they need.

For 'non-public offer' trustees that hold an existing AFS licence to provide advice only, the streamlined application process will also apply for the trustee to obtain an authorisation to deal in superannuation. ASIC will also be writing to the 10 affected non-public offer trustees to provide information about this process.

ASIC will approach its licensing process in a way that reduces burden on trustees.

Breach reporting

The APRA Dual Reporting Framework will continue. Trustees will be able to continue to report breaches to both regulators by submitting one report to APRA, provided the information reported to APRA meets the breach reporting requirements in the Corporations Act.

This will be further supported by extending the timeframes under the SIS Act for trustees to report breaches from 10 business days to 30 calendar days in order to align with the Corporations Act requirements.

Appendix B: Further information about coordination between APRA and ASIC

A close and collaborative relationship between APRA and ASIC requires a combination of structured engagement and proactive, open dialogue. We are also working closely with Government to implement Royal Commission recommendation 6.9. The Government has committed to introduce a statutory obligation requiring ASIC and APRA to cooperate with each other and to share information.

We continue to strengthen our engagement, deepen coordination and improve information sharing. We achieve this formally through APRA-ASIC committees and the enhanced APRA-ASIC MoU, and informally, through day-to-day staff-level engagement across both agencies.

How APRA and ASIC will work together in super

APRA and ASIC recognise that regulatory duplication may be a concern for the industry. The following case studies demonstrate the range of ways in which the two agencies can and do work together to achieve their mandates efficiently and avoid unnecessary duplication.

Case study 1: Joint guidance

APRA and ASIC regularly share risk insights, data and guidance on trustee practices to identify opportunities to jointly communicate our expectations or concerns to trustees.

Inappropriate deduction of advice fees from superannuation member accounts can cause significant harm to members. Both agencies recognised this harm to be relevant to both regulators' mandates in superannuation. Inappropriate deductions may raise doubts about whether trustees:

- are complying with the law, including the sole purpose test (section 62 of the SIS Act); or the best interests covenant (section 52(2)(c) of the SIS Act); and
- are meeting conditions of their RSE and AFS licences.

Accordingly, in April 2019, APRA and ASIC issued a joint letter to superannuation trustees setting out both regulators' expectations for trustee oversight of fees deducted from the superannuation accounts of their members. The letter required trustees to review their existing governance and assurance arrangements relevant to fee deductions by 30 June 2019. Where deficiencies were identified, APRA and ASIC expected that trustees would take appropriate remedial action.

Following the release of the joint letter, APRA has been working with trustees to review their existing governance and assurance arrangements for fee deductions. We have also met with industry bodies to further discuss our concerns, which underpin the joint letter.

Case study 2: Data collection

Reliable data is an important tool for regulators. APRA has important powers to collect data from superannuation trustees. The data APRA collects and analyses, such as annual fund level statistics and quarterly superannuation performance data, is a key source of information for the superannuation industry, ASIC and a range of other stakeholders.

APRA and ASIC are working together to enhance APRA data collections and make the data more accessible to ASIC. Together, we have established a cross-agency working group that meets regularly to progress this work.

APRA and ASIC regularly share data and insights for various ongoing pieces of work where relevant. Data is shared across agencies under the MoU either by request or proactively, when we think the data is relevant to the other agency's ongoing work.

Under the enhanced MoU and APRA and ASIC's ongoing commitment to strengthening our engagement, we expect to be more across day-to-day operational matters, which will improve our oversight of data held by each agency.

Improved and expanded data sharing will improve the quality of the analyses we can perform and increase efficiency for both agencies and for industry. Improved data sharing will reduce duplication and the instances where both regulators request the same information from industry. Expanded data will reduce the need for ad hoc data requests and hence promote more efficient data collection.
