FSC FINANCIAL SERVICES COUNCIL

Financial Regulator Reform (No. 2) Bill 2019: Governance (FSRC Recommendations 6.9 and 6.11): Exposure Draft

Financial Services Council Submission:
24 January 2020

Contents

1. About the Financial Services Council

The Financial Services Council (**FSC**) is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Introduction

The FSC welcomes the opportunity to make a submission on the Exposure Draft of the *Financial Regulator Reform (No. 2) Bill 2019: Governance (FSRC Recommendations 6.9 and 6.11):* (**ED**). We note that the ED was released on 24 December 2019 together with Explanatory Materials (**EM**).

In broad terms, the EM indicates that the ED:

(a) implements recommendation 6.9 of the Financial Services Royal Commission (**FSRC**) to remove barriers to efficient cooperation and information sharing between the Australian Prudential Regulation Authority (**APRA**) and Australian Securities and Investments Commission (**ASIC**),(collectively, the **Regulators**). including requiring the Regulators to notify each other when they reasonably believe there may be material breaches of each other's legislation; and

(b) implements recommendation 6.11 of the Financial Services Royal Commission to formalise ASIC meeting procedures.

3. Key Recommendations

As a matter of general principle, given the recently enhanced Memorandum of Understanding between ASIC and APRA[1], the FSC is generally supportive of the Bill. However, there are a number of areas where we believe the ED could be improved for the benefit of consumers in particular, as well the Regulators and industry.

[1] Consistent with FSRC Recommendation 6.10.

In summary, we recommend that the ED be amended so that:

(a) It is **mandatory** for APRA and ASIC collaborate on information, documentation and **data requests (Information) and collection** and, where reasonably practicable, the Regulators be required to seek from industry participants the same or similar information in the same format and adopting common definitions;

(b) Given that:

(i) a failure to comply with the cooperation requirements by a Regulator, does not invalidate the exercise of power or give rise to a private right of action; and

(ii) further that broadly speaking compliance with the new obligations is to be overseen by the new Financial Regulator Oversight Authority (**Authority**);

the legislation introducing the cooperation obligations and the Authority commence at the same time. Further, it is also important, for both industry and the Regulators, that the **practical operations** of the Authority commence as soon as possible after the commencement of the relevant items of legislation.

(c) It is **mandatory** for APRA and ASIC collaborate on information, documentation and **data requests (Information) and collection** and, where reasonably practicable, the Regulators be required to seek from industry participants the same or similar information in the same format and adopting common definitions;

(d) Given that:

(iii) a failure to comply with the cooperation requirements by a Regulator, does not invalidate the exercise of power or give rise to a private right of action; and

(iv) further that broadly speaking compliance with the new obligations is to be overseen by the new Financial Regulator Oversight Authority (**Authority**);

the legislation introducing the cooperation obligations and the Authority commence at the same time. Further, it is also important, for both industry and the Regulators, that the **practical operations** of the Authority commence as soon as possible after the commencement of the relevant items of legislation. We assume that the legislation establishing the Authority will be sufficiently robust so that there will be consequences for a Regulator where the Authority determines that a Regulator has failed to act in accordance with its statutory obligations.

(e) The legislation should contain a provision to the effect that a Regulator of a dual-regulated entity, prior to making an Information request of the entity, must undertake at the outset a preliminary check with the other Regulator;

(f) In addition, the legislation should provide that such a jointly-regulated entity satisfies a new Information request by a Regulator if the Information requested has previously been supplied to another Regulator and the entity advises this in writing to the Regulator making the new Information request;

(g) The legislation **should provide expressly** that a Regulator which, under the new regime, receives from another Regulator Information subject to a protection or limitation such as a general law claim of legal professional privilege or a privilege against self-incrimination or a statutory protection, such as privacy rules, is also bound by and subject to the same protections or limitations in respect of that Information; and

(h) The legislation **should provide expressly** that the limitations or protections applying to certain Information as outlined in the Explanatory Material, are excluded from the new regime;

(i) It would be appropriate to take this opportunity to reconsider the interaction of other authorities and agencies with the Regulators. We have set out below some comments in relation to taxation and external dispute resolution. This could be addressed in the ED itself or in revised intra-governmental and agency formal arrangements;

(j) Although outside the scope of the ED, we strongly suggest that the review of inconsistent legislative items such as those mentioned in our submission, continue to be reviewed and addressed. There are also other areas where other stakeholders, industry and the Regulators could work together to agree upon a common set of definitions and standards for Information requests.[2] We would be happy to assist in advancing this concept with interested parties.

Our detailed comments are set out below.

4. Data Collection

4.1. Co-operation obligations

It is clear, and the ED and EM acknowledge, that the focus of APRA on operational risk overlaps with the ASIC focus on conduct. The FSRC recommendations 6.9, 6.10 and 6.11 also recognise this interaction and overlap and seek to address the consequential practical issues.

It is important as matters of Regulator efficiency and governance that:

(a) APRA and ASIC continue to work together to ensure more effective and consistent regulation; and

[2] Such as information requests made by the Life Code Compliance Committee of life insurers.

(b) the twin peaks regulatory scheme which separates conduct and prudential regulation is maintained consistently with FSRC recommendation 6.1 and the Government's commitment to that model.

The ED in imposing the following obligations does seek to achieve this outcome:

(a) APRA and ASIC **must** cooperate with each other in the performance of their functions and powers, so far as is practicable;

(b) In addition to having the discretion to share Information, APRA and ASIC **must** comply with a request in writing for Information from each other unless they formally refuse in writing from the relevant Chair or Chairperson; and

(c) APRA and ASIC **must** notify each other of material breaches in respect of which the other has enforcement responsibilities.[3]

4.2. Express provisions to deal with Information requests

We support these proposed changes. However, in our view the changes should extend further to strengthen the statutory obligation to co-operate in relation to Information requests.

Currently, each Regulator commonly traverses the same operational field, for example, APRA and ASIC requests for Information of the same insurers. Unfortunately, it is commonplace, in our experience, for each Regulator to require financial service entities to provide similar Information but in slightly different forms. A current example of this is the recent and quite significant insurance Information requests by ASIC; some elements of which APRA already holds or holds in a slightly different format. This results in significant unnecessary cost, inefficiencies and duplication for our members; particularly life insurers and RSE licensees. In the end result, it is policy holders and superannuation fund members who meet these additional costs (as a result of premium increases or returns reduced to meet costs of complying with these overlapping and differing forms of requests). We also note that the requirement to retain and produce Information in a certain format for one Regulator and then having to re-work it for another and taking time to do so, furthers the (often mistaken) perception that entities have poor data retention and extraction capabilities. Indeed , this criticism was made in ASIC Report 633 *Holes in the safety net: A review of TPD insurance claims* (**Report 633**).[4]Other specific examples include the following:

(a) ASIC high-level "thematic" investigations – such as those resulting in Report 633. In relation to this matter, we note that:

[3] Table at page 7 of EM.
[4] ASIC, October 2019.

https://download.asic.gov.au/media/5311117/rep633-published-17-october-2019.pdf

(i) ASIC requested insurers provide very detailed data – 64 data points on each TPD claim over a two-year period, including customer name and address, presumably to facilitate customer surveys by ASIC;

(ii) these data requests differed from similar TPD data previously collected by APRA;

(iii) ASIC however, could have conducted an initial high-level analysis on the APRA data and then requested insurers provide data on "customers of interest" (such as name and addresses). This would have reduced significantly, the burden on insurers. It would have resulted result in ASIC using same data as that held by APRA.

(b) An example of non-alignment between the ASIC Life Insurance Framework (**LIF**) reporting and APRA LRS 750[5] is set out below.

(i) Sums insured for income protection products are annualised under ASIC LIF but reported per calendar month for APRA LRS 750.

(v) Lapse reporting is not measured like for like under APRA LRS 750 and ASIC LIF (a different methodology is used).

In this context, It is also worth noting, as mentioned in (a) above, that the definitions provided for ad hoc ASIC requests (such as the recent Value for Money in Insurance notice provided to some trustees) often do not align with existing APRA definitions. This increases the length of time insurers take to respond to ad hoc regulatory requests.

(c) Although the Australian Financial Complaints Authority,(**AFCA**) is not covered by the ED, it is important to note the impact of differing regimes on providers (and thus ultimately consumers), in the context of internal dispute resolution (**IDR**). The data sets that each of ASIC, APRA and AFCA request of providers in this context, differ. Accordingly, providers must collate such IDR data in accordance with three separate and distinct regimes. The outcome is that these requests become unnecessarily burdensome on providers and confusing to a reviewer of the provided data, particularly consumers.

(d) Similarly, we note the Australian Taxation Office (**ATO**) is not covered by the ED, but it collects substantial data from financial services businesses, and again this can differ in format, timing, and content. This is also unnecessarily burdensome.

(e) We also note that the ATO has substantial regulatory oversight of financial services, particularly through regulating Self-Managed Super Funds (**SMSFs**) and in providing views on what constitutes a superannuation contribution. For consistency, there are

[5] Noting that LRS 750 data is shared between ASIC and APRA but life insurers submit their data directly to APRA.

significant arguments that the requirements for cooperation between ASIC and APRA should also apply to the ATO in relation to its superannuation activities. While it is likely outside the scope of the ED to address this issue, there would be value in the ATO, ASIC and APRA having a Memorandum of Understanding (**MOU**) that covers the same territory.

Accordingly, we suggest that each of proposed Parts 1 and 2 of Schedule 1 to the ED be amended so as to:

(i) specifically address requests made by Regulators of industry participants in relation to Information;

(ii) require that Regulators co-operate and positively collaborate on Information requests and collection from industry participants so that insofar as is reasonably practicable:

A. Information is only collected once i.e. for each type of data, there is Regulator agreement as to a single source and format of data collection; and;

B. Information so requested and collected is then shared between the Regulators;

(iii) require a Regulator of a dual-regulated entity, prior to making an Information request of the entity, to undertake at the outset a preliminary check with the other Regulator. The check should focus on whether there is Information held by the other Regulator which would satisfy the proposed Information request.

In addition:

A. the legislation should provide that such a jointly-regulated entity satisfies a new Information request by a Regulator if the Information requested has previously been supplied to another Regulator and the entity advises this in writing to the Regulator making the new Information request;
B. In this regard, we note that it is important that there be ongoing consultation by Regulators with a regulated entity so that where there has been Information sharing between Regulators, subject to any practical constraints (such as impeding an investigation), the regulated entity should be advised of the nature of the Information sharing. The legislation should reflect this position;
C. Indeed, it would be appropriate for the ED also to be amended so that Regulators are obliged to confer with other entities such as AFCA and the ATO, where those other entities also make Information requests. The other suggestions we have made above should also extend to these circumstances. The most beneficial outcome for all stakeholders, and particularly consumers, is that Information requests be in common form, assuming it is necessary to issue more than one request, and that such Information be shared to the extent possible.
D. ASIC and APRA should have MOUs with the ATO replicating the requirements of the ED in relation to the ATO's superannuation activities.

For completeness, we also note that some legislative items under the jurisdiction of each of the Regulators, commonly are "at odds". For example, the disclosure obligations for returns for MySuper Dashboards (section 1017BA of the *Corporations Act* and Regulations 7.9.07R-W of the *Corporations Regulations*) conflict with APRA reporting standard SRS 700.0 (such as in the context of the definition of "predecessor product" for lifecycle stage options).These kinds of instances should be reviewed.

We note that the EM indicates at paragraph 2.4 that these new cooperation requirements operate alongside existing cooperation and coordination provisions (which often relate to specific circumstances or areas of regulatory responsibility). In our view, Information collection and requests by Regulators are of sufficient importance to industry with ultimate impact on consumers in terms of costs, that require express mention and attention in the legislation, rather than in the Regulations.

4.3. Consequences of Regulator Non-Compliance and Timing of Commencement

These particular amendments are expressed to apply from the day after Royal Assent[6].

We appreciate there are good policy reasons for providing in the ED that a failure by Regulators to cooperate does not invalidate the exercise of a function or power by either Regulator nor will this give rise to any private right of action.[7] This also is consistent with the general legislative approach in Commonwealth legislation.

We also note that Regulator compliance with these obligations is intended to be overseen by the *Financial Regulator Oversight Authority as part of that authority's mandate to assess and report on APRA and ASIC's effectiveness*.[8]

We understand that legislation relating to the Financial Regulator Oversight Authority (**Authority**) is to be consulted on and introduced by 30 June 2020. This new Authority will be introduced to implement Recommendation 6.14 of the FSRC – a new oversight authority for APRA and ASIC.[9]

Given these various factors and timings, it is important that insofar as possible there be consistency between the commencement dates of these items of legislation. Thus, in our view, it is critical for both industry and the Regulators that the new obligations and the Authority commence operation within the same timeframe.

It also is important that the legislation establishing the Authority be sufficiently robust so that where a Regulator breaches its statutory obligations in relation to Information, there are real

---

[6] EM at 2.34.
[7] Schedule 1, items 1 and 2, subsections 9AA(3) and 9AA(4) of the APRA Act and subsections 12AA(3) and 12AA(4) of the ASIC Act.
[8] EM at 2.6.
[9] https://www.treasury.gov.au/sites/default/files/2019-08/399667_Implementation_Roadmap_final.pdf at page9.

consequences of such actions. We will provide comments on this aspect when the consultation draft is made available.

4.4. Aspects of Mandatory Information Sharing

Out of scope information and documents

In relation to the new mandatory information sharing regime, certain documents are "out of scope". For example, in addition to documents relating to internal or administrative functions of a Regulator, information or documents that disclose a matter in respect of which the Regulator or another person has claimed legal professional privilege are excluded.[10] We strongly support these exclusions.

Observations in the EM

However, the EM goes on to make the following observations:

> *2.24 There are other more specific limitations that exist on the use of certain information that may be shared through the mandatory information sharing scheme. For example, where a party has enlivened their privilege against self-incrimination with one regulator, this would apply to the information or documents in the hand of the next regulator.*
>
> *2.25 There are also a number of protections and limitations on use and disclosure of information that apply under existing Commonwealth legislative provisions or the general law. Some examples of this are:*
>
> - *privacy legislation.*
> - *equitable duties of confidence.*
> - *whistle-blower protections.*
>
> *2.26 These protections and limitations will continue to apply to any document or information that has been shared between the regulators in compliance with a request. This will only limit how each regulator is able to use a document or information after receiving it under a request.*

In relation to these observations, we note as follows:

1. Unfortunately, it is not entirely clear that the outcome expressed in 2.24 of the EM necessarily follows. It is arguable that a claim of privilege against self-incrimination attaches to the information or documents themselves and another Regulator obtaining

[10] EM at 2.12 and 2.13.

those documents is subject to the same limitations as to use. However, the matter should be put beyond doubt by an express provision in the final form of legislation which provides that the attributes claimed in respect of Information are not lost because of the operation of the regime. In our view, it is only fair and appropriate that a Regulator obtaining Information under the regime should be subject to the same limitations as the disclosing Regulator .

2. Paragraph 2.25 of the EM correctly identifies a number of other protections and limitations on the use and disclosure of Information. It would be preferable and appropriate in our view for these protections and limitations to be expressly contained in the legislation, rather than being referred to in extraneous material such as in Explanatory Memorandum. Accordingly, we suggest that an express provision be inserted to the effect that this section does not cover information or documents which are unable to be shared because of protections are limitations arising under statute or the general law.[11] Examples then could be provided on a without limitation basis such as those set out in paragraph 2.25 of the EM. One example may be, for example, any limitations applying to the use of Information by Government agencies and authorities under the *Privacy Act* 1988 . Another example could be Information, the disclosure of which is governed by equitable or common law obligations of confidence.

3. An alternative approach would be to include these examples in the regulations. However, it is perhaps more consistent with the structure of the proposed legislation that the express exclusions are contained in the legislation. In relation to the proposed Regulations, we note that it is intended that these may exclude from the regime information or documents of a kind specified in the Regulations. We appreciate that such a provision commonly is included to provide flexibility in respect of circumstances and events which cannot be reasonably foreseen at the time of drafting of legislation. However, it would be useful for industry to understand precisely what sort of information or documents, if any, at this stage, might be anticipated as being covered by the Regulations and thus carved out from the new regime.

Knowledge of Relevant Legislation

We do note that a precondition to Information sharing between Regulators is that there is a reasonable belief that there may be material breaches of the other Regulator's relevant legislation. This seems to require that APRA and ASIC turn their "minds" to whether or not breaches of the other's legislation has occurred. This then means that APRA will need to acquire expertise in ASIC regulatory requirements and vice-a-versa. Once each regulator starts making enquiries to satisfy itself as to whether or not legal requirements have been breached, this may lead to increased scrutiny, questions and voluntary information sharing and clarification between the Regulators to determine if there has been a breach, or the

[11] For example, in proposed section 55C(2) of the APRA Act and section 122D(2) of the ASIC Act

prospect of such a breach. We assume the Authority will exercise some supervision and review function in this context.

Should you have any questions in relation to our submission, please do not hesitate to contact us.

Paul Callaghan
General Counsel