

File Name: 2017/19

24 July 2017

ASIC Enforcement Review

Financial System Division

The Treasury

Langton Crescent

PARKES ACT 2600

E-mail: ASICenforcementreview@treasury.gov.au

Dear Sir/Madam

Re: Consultation on ASIC Enforcement Review - Position and Consultation Paper 4 *Industry Codes in the Financial Sector*

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission in response to the consultation on the draft Position and Consultation Paper 4 - ***Industry Codes in the Financial Sector*** – as part of the ASIC Enforcement Review.

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system so people can live in retirement with increasing prosperity. We focus on the issues that affect the entire Australian superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through our service provider membership, represents over 90 per cent of the 14.8 million Australians with superannuation.

General observation

ASFA welcomes the release for public consultation of the exposure draft of ***Industry Codes in the Financial Sector*** and the opportunity to provide comment. Our submission is focused on the potential impacts of the proposed reforms on the APRA-regulated superannuation sector.

We have concerns that a co-regulation model that provides ASIC with the ultimate authority to approve, monitor industry and enforce codes will add to the regulatory burden and not lead to better consumer outcomes. ASFA sees a risk that the lines of responsibility and accountability are likely to become blurred - with the co-regulation model proposed - and this will impact on the ability for the industry to develop appropriate and flexible solutions to improve consumer outcomes.

ASFA supports a self-regulation approach in which the need for a code covering a particular industry or particular matters is determined by the industry and consumers, in consultation with stakeholders such as ASIC. However there should be flexibility in the role that organisations such as ASIC should play in the process (that is, in terms of whether they approve, monitor and enforce a particular Code).

Specific comments

1. **The proposed reform may add to the regulatory burden with no certainty of improved consumer outcomes**

Superannuation is a heavily regulated industry. Trustees of APRA-regulated superannuation funds are subject to extensive legislative and prudential requirements as well as overarching fiduciary duties designed to ensure that funds are operated in the best interests of members. A trustee's regulatory and governance framework also includes obligations set out in its trust deed (or governing rules), as well as self-imposed service standards.

There is also a well-established and effective complaints resolution framework for APRA-regulated superannuation trustees. This provides members and beneficiaries with an internal and external forum through which to raise concerns about a trustee's adherence to the myriad requirements that make up its regulatory and governance framework.

It should be acknowledged that significant reforms have recently been proposed to the internal and external dispute resolution (IDR and EDR) models applicable in the financial services industry. However, it appears that these reforms are intended to retain key aspects of the current EDR model for APRA-regulated superannuation and to further increase trustees' already stringent obligations around IDR. In light of this, it is not clear what additional benefit would flow to consumers from the overlay of an industry code.

ASFA considers there is a risk that, should the industry seek to introduce a code in future to address an identified regulatory gap, mandatory ASIC involvement may add to the existing weight of regulation and additional costs without any guarantee of improvement in the prevention of breaches or in resolving member complaints.

ASFA considers that it is more appropriate for the industry to work with consumer groups to identify regulatory gaps and the need for a Code with flexibility and that this is the best way for organisations such as ASIC to be involved in the process. This is best illustrated by the Insurance in Superannuation Working Group that has acted quickly to form a broadly based committee to review current practice and is drawing up a code of practice.

2. **The proposed reform may lead to blurring of lines of responsibility and jurisdiction**

The extension of ASIC's authority into an already heavily regulated area could lead to regulatory or jurisdictional overlap and result in uncertainty for members and the industry as to who is responsible for dealing with supervision, breaches and complaints. For example, in superannuation it is possible that ASIC's automatic involvement in any code that might be developed in the future could lead to overlap with the regulatory jurisdiction of APRA or other bodies.

This uncertainty would be remedied to an extent if ASIC's involvement were only at the request of the industry when establishing a new code rather than automatic as it would be defined specifically under the industry code.

3. Under the co-regulation model ASIC would be the senior partner and this could weaken the effectiveness of self-regulation

Regulation works best when the responsibilities of the regulator and the regulated are clearly defined. Giving ASIC the power to intervene in the formulation of industry codes while they are under development by the industry may introduce uncertainty about who is responsible for what and may make the task of self-regulation harder for the industry.

A flexible co-regulation approach that could include ASIC on a needs basis would be a more appropriate model.

4. Uncertainty over regulatory boundaries may lead to increasing ASIC involvement in co-regulation

The jurisdictional uncertainty built in to the proposed model is likely to lead to scope creep with regard to ASIC's role as breaches or other events may lead to questions about why ASIC failed to take a more active role or to use its powers to the fullest extent. An unused power always places an implicit responsibility on the bearer to justify why the power is not used and permits aggrieved parties to question the reasons for the bearer's failure to act.

It is therefore possible that the balance of regulatory power between ASIC and industry will change over time and the consequences of this evolution need to be taken into account.

In summary, ASFA supports industry self-regulation where the industry can choose to invite ASIC to participate and on terms determined by the particular needs of the industry (or sector) and the regulatory gap it has identified as requiring attention.

We would like to thank you for the opportunity to provide comments on the exposure draft and would welcome the opportunity to discuss with Treasury the matters raised in this submission.

If you have any queries or comments in relation to the content of our submission, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, or Byron Addison, Senior Policy Adviser, on (02) 8079 0834 or by email baddison@superannuation.asn.au.

Yours sincerely



Glen McCrea
Chief Policy Officer