

Governance working group

Issues paper on providing APRA with an administrative power to impose fines

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PROPOSED REFORM

The Government's response to recommendation 10.4 of the Super System Review included in principle support for giving the Australian Prudential Regulation Authority (APRA) an administrative power to impose fines.

The proposed fines would be an alternative to criminal prosecution in relation to selected *Superannuation Industry (Supervision) Act 1993* (SIS Act) provisions, and would be contestable in a court.

Also relevant is the recommendation that the Australian Taxation Office (ATO) be able to issue administrative penalties to respond to certain breaches in self managed superannuation funds (recommendation 8.2). This will be considered in a separate paper.

RATIONALE

The Super System Review highlighted how it is valuable for regulators to have a wide range of potential responses available to them and that they need the ability to use them flexibly according to their assessment of the risk inherent in the behaviour being addressed.

Fines or infringement notices are designed to provide a fast and effective remedy which is in proportion to the alleged breach. Once an infringement notice is paid, any liability of the person for the offence specified in the notice is taken to be discharged, and the person is not regarded as having been convicted of the offence specified in the notice.

APRA currently has a power under Division 3 of the *Financial Sector (Collection of Data) Act 2001* to issue infringement notices in lieu of prosecution for certain offences. The infringement notices are contestable in court if the institution objects and must be served within one year after the day on which the offence is alleged to have been committed.

APRA can only issue infringement notices where it has reasonable grounds to believe that a person has committed an offence. Two areas where APRA can issue infringement notices include failure to lodge annual returns on time and failing to disclose status under the SIS Act.

Stronger Super

The review noted that the power has only been exercised on a handful of occasions and no penalty has been contested, however the ability to levy a modest penalty has resulted in a substantial improvement in the timeliness of lodgement of regulatory returns. The ability to issue infringement notices also means APRA and affected trustees are not faced with the substantial costs associated with a prosecution.

Other agencies which have the power to issue infringement notices include the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC).

ASIC has a statutory power to issue an infringement notice under the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001*. These include provisions dealing with: unconscionable conduct; false or misleading representations; 'bait' advertising; harassment or coercion in connection with the supply of credit or financial services; pyramid selling; sending unsolicited credit or debit cards; failure to respond to a substantiation notice; and giving false or misleading information in response to a substantiation notice.

ASIC also has the power to issue infringement notices for breaches of certain provisions of the *Corporations Act 2001* and *National Consumer Credit Protection Act 2009* and their associated Regulations. These include provisions dealing with continuous disclosure for disclosing entities, ASIC market integrity rules for market operators and participants, and persons engaging in credit activity under the National Consumer Credit Protection Act.

The *Competition and Consumer Act 2010* and the Australian Consumer Law provide for the ACCC to use infringement notices in carrying out its compliance and enforcement activities. The penalty amount in an infringement notice varies depending on the alleged contravention, but in most cases is fixed at \$6600 for a corporation (or \$66 000 for a listed corporation) and \$1320 for an individual for each alleged contravention.

Examples of where the ACCC's power has been used include in relation to alleged contraventions of the component pricing laws by restaurants and cafes for failing to display the single total price of menu items on public holidays and weekends and in relation to a builder falsely claiming to be a member of the Master Builders Association and the Housing Industry Association.¹

Both ASIC and the ACCC have 12 months from the date of the alleged contravention to issue a notice, and both organisations include information on their websites about infringement notices that have been paid.

Currently APRA does not have the power to impose fines as an alternative to criminal prosecution in relation to prudential superannuation issues.

¹http://www.accc.gov.au/content/item?itemId=935285&nodeId=9c617e4684c41f10b20fb5e37c8724a0&fn=Business%20Snapshot_ACCC%20powers%20to%20issue%20notices.pdf and <http://www.aimia.com.au/home/news/member-news/accc-issues-infringement-notice-for-alleged-false-membership-claims>

ISSUES

Issue 1 – Provisions of the SIS Act where fines may be applicable

The SIS Act contains a number of provisions where the prescribed penalty for contravention includes the imposition of a range of penalty units (which are \$110 under section 4AA of the *Crimes Act 1914*). For example, five penalty units for contravening a condition of an exemption under Part 29 of the SIS Act, and 600 penalty units for breaching the rules in relation to persons who may be appointed to be custodians of superannuation entities.

In addition to fines, individuals or trustees may be liable to gaol sentences if convicted of an offence under the SIS Act, for example six months for victimisation of whistleblowers and five years for giving false or misleading information to an auditor.

A table of the existing provisions within the SIS Act that are currently subject to criminal penalty is included in Attachment A.

Question 1.1 For which provisions of the SIS Act that are currently subject to criminal penalty should APRA be given an administrative power to impose fines?

Question 1.2 Should APRA fines have the same conditions as other infringement notices, including: 12 months to issue; 28 days to pay; no further action if pay on time; and information in relation to them will be available on APRA's website after the fine is paid?

Question 1.3 How much should the fines be? How should this be determined?

Question 1.4 In addition to the areas listed in Attachment A are there other areas where APRA should have the power to impose fines?

Provisions administered by APRA with penalties in the SIS Act

Failing to notify APRA:	that a condition has been breached in relation to the fund not being a public offer superannuation fund	section 18
	of modifications to or the repeal and replacement of risk management strategies	section 29HC
	of modifications to or the repeal and replacement of risk management plans	section 29PC
	of a breach of licence condition	section 29JA
Failure to comply with an APRA notice:	requesting information relating to the risk management strategy (section 29HD) or risk management plan	section 29PE
	of requirement to provide statistical information	section 347A
Failure to comply with an APRA direction:	to comply with licence conditions	section 29JB
	to notify APRA of modifications etc. to risk management strategies	section 29HC
	to comply with APRA notice requesting it to give APRA specified information relating to its risk management strategy	section 29HD
	to modify risk management strategy	section 29JC
	to modify risk management plan	section 29Q
	not to accept any contributions made to the fund by an employer-sponsor	section 63

	to remove auditor or actuary	section 131AA
	to do specified acts or things in relation to the superannuation entity in the capacity of an acting trustee	section 141
Failure to:	include a declaration on forms lodged electronically on trustee's behalf, or not retaining the declaration for 5 years or for not providing it on request	section 11C
	comply with prescribed operating standards	section 34
	keep accounting records	section 35A and 35B
	appoint an approved auditor or failing to respond to requests from auditors to provide documents	section 35C
	give a copy of the audit report to APRA	section 36
	comply with Part 9 which deals with equal representation	section 63
	comply with in-house asset rules	section 84
	establish arrangements for dealing with inquiries and complaints	section 101
	seek appropriate information from investment manager	section 102
	keep minutes and records	section 103
	keep records of changes of trustees	section 104
	notify regulator of significant adverse events	section 106
	notify Commissioner of Taxation of change of status of entity	section 106A
make and maintain superannuation investments on an arm's length basis	section 109	

	notify appointment as acting trustee to beneficiaries	section 140
	issue or redeem a superannuation interest while subsection 155(1) applies except at a price that is fair and reasonable as between the person and the beneficiaries of the entity	section 155
		section 156
	issue or redeem interest except at fair price	section 201
	give assistance to regulator in connection with application of a civil penalty order	sections 252A & 252B
	comply with notice to inform APRA or Commissioner on size and status of fund	section 252C
	disclosure by officer of ATO of protected information or document	
	provide information to the regulator	section 254
	comply with requirements made under the SIS Act	section 285
	comply with actuaries and auditors compliance obligations	Section 129
	comply with actuaries and auditors solvency obligations	Section 130
	comply with actuaries and auditors actuarial recommendations	Section 130C
	return identity card to Regulator after ceasing to be an inspector	section 265
	comply with conditions of written record of examination	section 282
	to correctly keep records	section 303
	comply with obligations of participants in the Regulator's statistics program	section 347A
Failure of:	a self-managed superannuation fund to lodge annual returns	section 35D
	the auditor to give the report to each trustee of the entity within the prescribed period	section 35C

	after the end of the year of income	
	an employer to pay to a trustee of the superannuation fund an amount deducted from salary or wages payable to the employee before the end of the 28-day period beginning immediately after the end of the month in which the deduction was made	section 64
	a trustee of a transferring fund to transfer any election made under section 71E to the new fund	section 71EA
	an RSE trustee to keep all member or beneficiary reports and provide them to APRA on request	section 105
	a trustee of an employer-sponsored fund to establish procedure for appointing: member representatives; or independent trustee or independent member of board of directors of corporate trustee	section 107 and section 108
	investment manager to appoint or engage custodian without the trustee's consent	section 122
	an auditor to notify the Regulator of attempts to unduly influence the auditor	section 130BA
	a public offer entity to comply with the requirements of the regulations in relation to the payment of commission or brokerage	section 154
	a trustee of superannuation entity to appoint an individual, or a committee, to investigate the financial position of the entity a person appointed to investigate and make a report to APRA	sections 260 and section 262
False representation:	about a form being provided by another person or including the electronic signature of another person without their consent	section 11B
	about status as RSE licensee	section 29JCA
	about being an actuary	section 131B

	or misleading information provided to an auditor	section 130BB
Failure to meet tax file number requirements:	an employer to inform the trustee of the tax file number of the employee where the employee has provided that number to the employer within the required time	section 299C
	a trustee to request a person who is a beneficiary at commencement to quote their tax file number	section 299F
	a person who becomes beneficiary after commencement to quote their tax file number	section 299G
	use of tax file number for certain purposes in relation to beneficiaries of eligible superannuation entities	section 299H
	use of tax file number for certain purposes in relation to beneficiaries of regulated exempt public sector superannuation scheme	section 299J
	use of tax file number for certain purposes in relation to applicants to become beneficiaries of eligible superannuation entities	section 299K
	use of tax file number for certain purposes in relation to applicants to become beneficiaries of regulated exempt public sector superannuation schemes	section 299L
	trustee of eligible superannuation entity must inform RSA provider or other trustee of tax file number for certain purposes	section 299M
	trustee of EPSSS informing RSA provider or other trustee of TFN for certain purposes	section 299N
trustee of former regulated exempt public sector superannuation scheme to destroy records of tax file numbers	section 299Y	
Other penalties:	being a trustee of a registrable superannuation entity while unlicensed	section 29J
	contravention of sole purpose test	section 62

contravention of prohibition to lend money of the fund to a member	section 65
contravention of prohibition to acquire an asset from a related party of the fund or enter into an avoidance scheme to acquire an asset from a related party	section 66
contravention of prohibition to borrow money or maintain an existing borrowing	section 67
committing an act of victimisation against a trustee of an employer-sponsored fund or a responsible officer of a corporate trustee of an employer-sponsored fund	section 68
contravention of prohibition of avoidance schemes	section 85
contravention of prohibition to borrow money by an approved deposit fund	section 95
contravention of prohibition to borrow money by a pooled superannuation trust	section 97
contravention of prohibition to lend money of the trust to unit-holders by a pooled superannuation trust	section 98
contravention of prohibition to pay an amount out of the fund to a standard employer-sponsor	section 117
limits on persons who may be appointed to be custodians of superannuation entities	section 123
a trustee of a superannuation entity making a non-written appointment of an investment manager of the entity	section 124
an individual (that is not a body corporate) being investment managers of a superannuation entity	section 125
a disqualified persons being a trustee, investment manager or custodian of a superannuation entity	section 126K

a disqualified person being an auditor or actuary of a superannuation entity	section 131C
former trustee breaching its obligations relating to books, identification of property and transfer of property	section 141A
intentionally or recklessly contravene the provisions of a scheme formulated by the regulator for the winding-up or dissolution, or both, of a superannuation entity	section 142
limitation on issuing, offering etc. superannuation interests in public offer entities	section 152
contravention of a civil penalty provision dishonestly or intending to deceive	section 202
being present at an examination unless person is an inspector or staff member of Regulator	Section 278
copies of records provided to a person's lawyer to be used only for proceedings	Section 281
concealing books relevant to an investigation of the regulator	section 286
failure to provide certain information where privilege is claimed	section 288
incorrect keeping or making records	section 306
incorrect keeping or making records with intention of misleading or deceiving	section 307
falsifying or concealing identity with intention of misleading or deceiving	section 308
contravention of Court order to prohibit payment or transfer money or property	section 313
contravention of Court order to disclose information or publish advertisements	section 314
contravention of a condition of an exemption under part 29	section 331
victimisation of whistleblowers	section 336C

disclosure of unauthorised information

section 336E