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WAYNE BYRES
Chair

9 February 2022

Mr Jason Falinski MP
Chair
House of Representatives Standing Committee on Economics
By email: jason.falinski.mp@aph.gov.au

Dear Mr Falinski,

Thank you for your letter dated 25 January 2022 regarding a number of decisions recently made by various state Courts.

As noted in your letter, in 2020 the Parliament amended s. 56(2) and s. 57(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) (the amended provisions). The commencement of the amended provisions was deferred from 1 January 2021 to 1 January 2022 to afford RSE licensees sufficient time to respond to the impact of the reforms on their business operations.

Throughout 2021, APRA, with ASIC and Treasury, undertook significant engagement with RSE licensees and other industry stakeholders to understand the options RSE licensees were exploring to respond to the provisions.

In late 2021, a number of RSE licensees applied to the various state Courts for advice and direction regarding amending their trust deeds to enable the charging of fees to build a financial contingency reserve on the trustee balance sheet. While some RSE licensees have had a fee charging power in their trust deeds for many years, this was not the case across all RSE licensees.

The applications were made in the context of concerns that the commencement of the amended provisions would give rise to a significantly heightened risk of insolvency for RSE licensees with no financial reserves of their own, taking into account the wide scope of potential penalties now available to regulators. The disorderly failure of an otherwise sound and sustainable RSE licensee is seen by both APRA and RSE licensees as likely to be severely detrimental to the best financial interests of members, as it would likely impose material costs and create significant operational risks for the fund.

When notified of these applications, APRA considered it appropriate to seek involvement in the majority of these matters as amicus curiae, and approached this role in a manner consistent with the principles contained in the Commonwealth's model litigant obligations. I consider that APRA undertook this role correctly and consistent with its mandate.

APRA sought in each case to ensure that the Courts were fully appraised of all relevant legal matters, including the new best financial interests duty (BFID), the intent of the amended

provisions (as reflected in the Explanatory Memorandum to the amending legislation) and principles of prudent practice. APRA's submissions also emphasised the importance of ensuring that the impact on best financial interests of members was appropriately contemplated by the Courts in giving their advice, particularly in the context of setting fees. I note that the Courts also appointed a contradictor in a number of matters to provide additional assurance that issues relating to the interests of members were appropriately raised and considered by the Court.

Where an application appeared to include insufficient detail on relevant matters, such as the quantum of the reserve, the manner of its raising, application and treatment, APRA was instrumental in ensuring that applicants provided further information to assist the Courts in considering all relevant issues. This included ensuring RSE licensees explained their consideration of other options to build the reserve.

In approaching its role in these proceedings and making its submissions to the Courts, APRA was represented and advised by senior counsel. Consistent with usual practice, APRA provided relevant advice and updates to Government and the Treasury throughout the Court matters. APRA also engaged closely with other relevant regulators to provide regular updates on APRA's activities and the nature of the submissions to be made.

Based on the facts of the applications, their analysis of the amended provisions and the relevant legal precedent, the Courts concluded that the charging of a fee of this nature is not inconsistent with the amendments to s. 56(2) and s. 57(2) of the SIS Act. Reasons provided for these decisions were consistent across the judgments.

These decisions make clear that fee design and setting, including in respect of the fees considered in these recent Court matters, must support member outcomes and meet obligations to act in the best financial interests of members and comply with the sole purpose test.

Consistent with this position, APRA expects its proposed fee setting principles, as set out in APRA's recent discussion paper 'Strengthening financial resilience in superannuation', to inform decisions around the setting, design and level of any fees and for consideration of these principles to be supported by appropriate documentary evidence.[1] These are important principles that APRA will apply not just to RSE licensees who have sought Court approval to amend their trust deeds, but also to the (many more) RSE licensees who already had the power to charge such fees and do not need Court approval.

Your letter also asked whether, by virtue of charging new fees to build up financial reserves of the trustee, an RSE licensee would no longer be able to use the term 'profit for member'. That phrase is not defined in legislation, but rather is primarily used as a marketing term by superannuation funds that do not pay dividends to their shareholders. We understand from ASIC it is not necessarily the case that the term cannot continue to be used, but this is ultimately a matter for ASIC as the conduct and disclosure regulator to consider in light of the recent Court decisions and the specific facts in any particular case.

In summary, I assure you that APRA will continue to enforce the laws passed by the Parliament. As found by the Courts, the current law does not prohibit RSE licensees from amending their trust deeds to charge additional fees (or, by implication, RSE licensees that

[1] Fee charging principles are set out in APRA's *Strengthening Financial Resilience in Superannuation* discussion paper (November 2021) Strengthening Financial Resilience in Superannuation | APRA

already have that power from exercising it), provided they meet their other statutory obligations. Given these circumstances, APRA's proposed fee setting principles are an important safeguard, designed to protect superannuation fund members by establishing a framework in which the appropriateness and reasonableness of any fees charged can be judged to be in the members best financial interests.

I hope this information is of assistance.

Yours sincerely,