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30 January 2004

Dr Sarah Bachelard
Committee Secretary
Senate Economics Legislation Committee
Room SG.64
Parliament House
CANBERRA ACT 2600
By email: economics.sen@aph.gov.au

Dear Dr Bachelard

Superannuation Safety Amendment Bill 2003

CPA Australia welcomes the opportunity to provide a submission to the Senate Economics Committee's inquiry into the above Bill.

Please find attached our submission for the Committee's consideration. Should you have any queries or require further information, please contact CPA Australia's Superannuation Policy Adviser, Michael Davison on Tel: 02-6267 8585 or by email: michael.davison@cpaaustralia.com.au

Yours sincerely

Greg Larsen, FCPA
Chief Executive
CPA Australia

Copy: M Davison
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CPA Australia Limited

Submission to the Senate Economics Legislation Committee
Inquiry into the Superannuation Safety Amendment Bill 2003

General Comment

CPA Australia is supportive of the proposed regulatory regime that will be introduced under the Superannuation Safety Amendment Bill (SSAB). We welcome a principles based approach that balances the need for a regulatory regime with the need for superannuation trustees to be able to operate efficiently in the superannuation environment without being unnecessarily burdened by excessive compliance requirements.

While we are generally supportive of the Bill, we note that a lot of the detail and operating standards will be incorporated in the Regulations. As such, we will provide additional comment during the continuing consultation process and may vary our comments where appropriate.

In the first instance, we will be providing comments on the drafting instructions for the operating standards to Treasury during February 2004 and will be able to provide a copy of our submission to the committee if required.

Our specific comments on the Bill are as follows:

Licensing of Trustees

In general, we are supportive of the proposed licensing regime and the distinction between public offer and non-public offer Registrable Superannuation Entity (RSE) licenses. We do, however, have some concerns with the implementation of the new regime.

Transition period and processing of licence applications

The Bill proposes a transition period of two years for existing trustees to apply for a RSE licence. However, subsection 23CB(3) gives APRA the power to refuse licence applications from existing trustees during the final six months of the transition period. Effectively this is giving APRA the ability to shorten the transition period by six months.

For the trustees of many non-public offer funds, this will be their first experience of having to prepare to operate under a licensing regime. The preparation required for lodging applications for a licence and the registration of an RSE, especially the development of the risk management strategies and plans, may be quite time consuming and will need to be done in addition to the normal day to day operations of the fund.

We recognise that existing approved trustees will already have most, if not all, of the existing infrastructure in place. However, they will have just come off the back of the transition period for the Financial Services Reform Act and may require time to bed down any changes and address any teething problems that may arise.

Further, APRA should be able to estimate from its own statistics the potential number of licence applications it will receive and ensure that it is adequately resourced to process the applications in a timely manner.

For these reasons, we believe this provision is unnecessary and the full two year transition period should stand. At the very least, if a trustee has given APRA a statement of intent to apply for a licence as allowed for by subsection 29CB(1), APRA should not be able to refuse the application if it is then received in the final six months of the transition period.

In addition to the above comments, APRA will have to amend its policies and procedures and release guidelines as allowed for in the proposed Regulations before the Bill commences. As the transition period is intended to allow trustees to continue operating while they go through the process of applying for a RSE licence it is essential that APRA has made the necessary preparations before the transition period commences thus ensuring trustees are aware of all the requirements they need to meet and avoiding any unnecessary delays before applications can be made. If this cannot be achieved, we suggest the Government considers delaying the commencement of the Bill until APRA is ready.

Section 29CC of the Bill requires APRA to decide applications from new licensees within 90 days of receiving the application with the provision of a further 30 day extension. There is no such timeframe for the consideration of applications from existing trustees except that they must be decided during the two year transition period. There appears to be no rationale for applying a set timeframe to new licensees but not to existing trustees especially when it is likely an existing trustee will be better placed to meet the licensing requirements than a new licensee. For consistency, the 90 day period for APRA to decide licence applications should apply to all applicants.

For both existing trustees and new licensees, APRA is taken to have refused the application if it has not been decided by the last day of the transition period or 90 day period respectively. We believe the only situation in which this should occur is when APRA has requested additional information from an applicant and having given them sufficient time to reply, they have not. It would be inappropriate if an application were to be refused if the processing period expired due to internal APRA reasons that were out of the control of the applicant.

APRA's powers in relation to licences

As the regulator, APRA has a number of powers in relation to RSE licences, licence applications and licence variations. APRA may treat applications as having been withdrawn if requested information has not been provided, refuse licence applications, vary or revoke licence conditions, or cancel licences.

In each of these situations, the Bill only requires APRA to notify the licensee or licence applicant of this action after the event. While each of these decisions will be a reviewable decision, trustees will not be able to take action to address APRA's concerns, rectify problems or provide the necessary information until after the event.

We believe it would be more appropriate for APRA to advise the licensee or licence applicant of its intended action before the event giving them the opportunity to address the issue before action is taken. We recognise there will be situations where it is necessary for APRA to act swiftly in taking this action to protect members' interests. Generally, however, we believe taking such action without first giving trustees the necessary recourse may actually be detrimental, costly and, at the very the least, inconvenient to members and trustees.

It is also essential that APRA has the necessary policies and procedures in place to ensure a consistent approach to approving or refusing a licence application, varying licence conditions or revoking a licence. In particular, applicants and licensees should be treated consistently and adequate reasons should be given for APRA's actions.

Risk Management Strategies and Plans

We believe the risk management strategy (RMS) and risk management plan (RMP) provisions provide a sufficiently flexible framework for licensees to develop sound risk management policies and procedures.

We note that there is provision for additional requirements to be included in the Regulations and for APRA to develop risk management guidelines. We strongly recommend the development of guidelines be done in consultation with the industry.

Our only concerns are with the reporting of modifications to APRA and the requirement to provide additional information to APRA upon request.

Firstly, Sections 29HC and 29PC require APRA to be notified of any modifications to a RMS or RMP. Practically, this means any modification, irrespective of how insignificant it may be will need to be notified which has the potential to overwhelm APRA. We recommend these provisions are changed so that APRA is only notified of material or significant modifications.

Secondly, licensees are required to modify a RMS or RMP as directed by APRA within 14 days as well as notify APRA of any modifications within 14 days. Sections 29HD and 29PE allow APRA to request additional information relating to a RMS or RMP that must be provided "by a specified time that is reasonable in the circumstances". We recommend that a timeframe of at least 14 days be provided in these requirements to maintain consistency with the other RMS and RMP provisions.

Notification of breaches of licence conditions

Section 29JA of the Bill requires licensees to notify APRA of any breaches of the licence conditions within 14 days of the breach occurring.

Practically, this means even very minor or insignificant breaches, even if they have already been rectified will have to be notified to APRA. Potentially, APRA will be inundated with notifications and there is a risk that a significant breach impacting on members' entitlements may be overlooked. As an example, when similar reporting requirements were introduced in the UK, the regulator was swamped by notifications with the number of notifications being significantly higher than initial forecasts.

As such, we recommend that a materiality or significance test be introduced for the notification of breaches to APRA to ensure meaningful information is provided to APRA. A further suggestion is that minor or insignificant breaches could be reported to APRA as part of the annual return reporting along with details of the rectification action taken.

Registration of RSEs

Generally, we are supportive of a registration regime for superannuation entities. We have some concerns regarding APRA's actions in relation to the registration process and our comments mirror those we have made regarding licensing above (see **APRA's powers in relation to licences**).

We do have some comments regarding the registration of RSEs during the transition period. The Bill provides for a two year transition period for existing trustees to become licensed. The drafting instructions for the Regulations indicate that similar provisions will apply for the operating standards.

However, the Bill is silent on what the transitional requirements are for the registration of existing superannuation funds. Can an RSE licensee operate an unregistered superannuation fund during the transitional period once they have become licensed? Is there an expectation that a trustee will apply for the registration of their fund at the same time they apply for their RSE licence? What happens where a public offer RSE licensee operates multiply superannuation fund. They may not be in a position to apply to register all of their funds at the one time.

To provide flexibility and clarification, we recommend that the Bill be amended to explicitly provide for a two year transition period for the registration of existing RSEs.

License and registration numbers

Under the Bill, RSE licensees will be granted a unique licence number and RSEs a unique registration number. These numbers will only add to the confusion of identifying numbers already in existence, such as the SFN, ABN/ACN, SPIN and AFSL number. Therefore, we recommend the regulators use this as an opportunity to consolidate the various identifying numbers in consultation with the superannuation industry.

Further, Sections 29DC and 29MD require the RSE licence number and RSE registration number respectively to be displayed on particular documents. The Bill allows APRA to provide written approval for an individual licensee to be exempt from these requirements. We recommend this provision is extended so that the display of these numbers is optional during the transition period allowing licensees to run down stocks of existing documents.

Communication and co-operation between APRA and ASIC

The introduction of a dual licensing systems will require increased communication between APRA and ASIC and necessitate co-operation between the two regulators to eliminate unnecessary duplication. As an example, a number of provisions within the Bill require APRA to advise ASIC of its actions in relation to an AFSL holder.

Where possible the two regulators, and where necessary the ATO, should co-ordinate their information gathering and streamline information sharing as much as possible to ensure licensees are not burdened by duplicate reporting requirements.

Auditors' reporting responsibilities

Schedule 3 of the Bill extends the requirements of the auditor to notify the trustee of any breaches to also notifying APRA. While we are supportive of the formal notification of material breaches we are concerned about the proposed requirements of Schedule 3.

An appropriate working relationship between the auditor and the trustee is vital to an effective audit. Such a relationship needs to ensure the trustees and administrators are open and frank with auditors. Laws which unintentionally cast the auditor solely as a 'compliance policeman', such as the draft provision for every breach of law to be reported to APRA, whether or not it has been dealt with properly by the trustees, will impact on such a working relationship. The draft provision unintentionally reverses the principle of encouraging management to be open with auditors.

We recommend an amendment to the Bill to ensure that the principle is not lost and that reporting responsibilities will be effective. This amendment requires the auditor to report to APRA if the auditor believes that the conduct giving rise to the circumstances "has not been adequately dealt with after bringing it to the attention of the trustees".

We recommend this report be made "within a reasonable time" after the auditor becomes aware of the circumstances. This ensures that the trustees' fundamental duty to govern the fund is followed, but allows for direct reporting by the auditor should the trustees not fulfil their duty in this regard. It also ensures that the auditor's report is as timely as possible with sufficient investigation of the circumstances and ability for the trustees to take corrective action. For example, a straightforward contravention not dealt with appropriately by the trustees, or an attempt to interfere in the proper conduct of the audit, could be reported immediately by the auditor, whereas a circumstance requiring more investigation would be promptly followed through and reported as soon as the circumstances were clear.

The nature and significance of the breaches to be reported have also not been adequately dealt with by the current wording of the Bill. The current wording would suggest that all breaches would have to be reported to APRA. The effect of this is to potentially strain the limited resources of the regulator and further place at risk the identification of significant breaches that may be lost in the quantity of reported minor breaches.

Section 311, Schedule 1, Part 7 of the CLERP 9 (Audit Reform and Corporate Disclosure) Bill has been amended to reflect the concerns stated above and we recommend the SSAB be similarly amended.

We also feel the wording in Schedule 3 results in the auditor's (and actuary's) notification obligations to APRA being unclear. The existing wording contained in Section 66 of the RSA Act and Sections 129 and 130 of the SIS Act refers to the auditor 'telling' the RSA provider or superannuation fund trustee, respectively, about any breaches they identify.

Schedule 3 of the Bill carries over this usage of the word 'tell' in that the auditor is obliged to tell APRA of any licence condition breaches that are identified. While there is no legal definition of the word 'tell', common usage would suggest a more informal notification is involved such as in verbally telling someone.

Given the importance of APRA being notified of material breaches, we recommend Schedule 3 of the Bill be amended to ensure APRA is notified of breaches in a proper manner and any ambiguity arising from the current wording is removed.

30 January 2004