

CORPORATE SUPERANNUATION ASSOCIATION Inc.

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Manager
Financial Services Unit
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The Treasury
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PARKES ACT 2600
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Delivery via web page

Dear Sir or Madam

EXTERNAL DISPUTE RESOLUTION AND COMPLAINTS FRAMEWORK

We refer to the invitation to comment on the Consultation Paper, draft legislation and Regulations issued on 17 May 2017.

The Corporate Superannuation Association

Established in 1997, the Association is the representative body for large corporate not-for-profit superannuation funds and their employer-sponsors. The Association now represents a total of 21 funds controlling \$23 billion in member funds, held in a total of some 285,000 individual accounts. Of these funds, 14 have outsourced trustee services but maintain significant employer interest through policy committees. In general, these funds are sponsored by corporate employers, with membership restricted to employees from the same holding company group, but we also include in our membership two multi-employer funds with similar employer involvement and focus. A number of our funds have defined benefit divisions.

Size, in terms of funds under management, ranges from \$7.5 billion to \$64 million as at 30 June 2016. Some of the smaller funds have their place in the pension fund structures of international groups, hence play an important role in the care and welfare of the worldwide workforces of these groups.

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Our comments are restricted to the proposed arrangements for APRA-licensed superannuation funds.

Protection for superannuation trustees and beneficiaries

A primary concern for our Association is the retention of the current statutory protections for trustees and superannuation beneficiaries in the Superannuation (Resolution of Complaints) Act 1993 ('Complaints Act'). We have therefore highlighted below potential gaps in effect between the Complaints Act and the proposed new legislation. Included below are matters that we consider should be formally explicit in legislation and which should not be left for inclusion only in the proposed EDR scheme's terms of reference.

Complaints relating to the management of a fund as a whole

We consider that the constraint under subsection 14(6) of the Complaints Act, removing complaints relating to the management of the fund as a whole from the complaints body's jurisdiction, should be reproduced in the new regime.

Time limits for death and disability claims

Time limits for making death and total permanent disability claims are provided in the Complaints Act. Explicit legislative backing is needed to support these rights for potential beneficiaries, and should be included in the new legislation.

Claim-staking

It is important that the process of claim-staking be specified in legislation (and not be left to be included in terms of reference), to provide statutory protection for trustees who pay death benefits once no objection has been received within 28 days. The Complaints Act and Regulations currently provide such statutory protection. The purpose of the protection is to enable trustees to pay death benefits promptly without concern about ensuing disputes leading to further trustee liability and potential double payment of benefits.

Protection for trustees making "fair and reasonable" decisions

The Complaints Act currently provides statutory protection for trustees making decisions involving exercise of discretion, requiring the SCT to affirm the decision of a trustee if it does not remit it, vary it or set it aside (Complaints Act s 37(6)). The proposed legislation in Corporations Act s 1057 does not contain an explicit corresponding requirement. Such a requirement is needed to make explicit that the role of the EDR decision maker is to review the merits of the trustee's decision in the first instance and only to revise this decision in the event of unfairness or unreasonableness.

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Restriction of complaints to fund members and potential beneficiaries

Under section 15(1) of the Complaints Act, only fund members, former fund members or in the case of a death benefit, persons with an interest in the benefit (directly or indirectly) can make a complaint about a decision of the trustee. Proposed section 1047 of the Corporations Act states (in relation to the overall complaints resolution scheme) that it is a scheme function to ensure that the complaints mechanism is accessible to “any persons dissatisfied with members of the scheme.” In the context of a superannuation fund, the relevant “member of the scheme” would be the superannuation trustee. Although the scope of “superannuation complaint” is narrowed under proposed s 1052, we recommend, to avoid ambiguity, that the general provisions of proposed s 1047 should be narrowed by reference to Division 3 so far as complaints about superannuation trustees are concerned.

Preservation of legal effect of trustees’ decisions subject to complaints

Section 26 of the Complaints Act preserves the legal effect of a trustee decision, pending the outcome of a complaint. This provision has not been reflected in the proposed legislation (although a determination of the EDR decision maker that is subject to an appeal is to be maintained until the appeal is determined: proposed Corporations Act s 1062). The protection of the trustee’s decision is an important protection in cases where the trustee decision may affect a group of fund members, not just the complainant.

Trustees to give written reasons for decisions

The proposed removal of section 101 of the SIS Act once the first EDR scheme is authorised (Item 38 of the draft legislation), would remove the requirement for trustees to give written reasons for decisions about death benefit complaints and the facility for complainants to request reasons. These requirements were introduced by the Stronger Super reforms because trustees are not otherwise required to give reasons for their decisions, and these requirements would need to be retained in legislation.

Transition period

The SCT must be properly resourced to deal with complaints during the transition period.

ASIC’s role under the new framework

We are concerned about the potential conflict that arises between ASIC’s proposed role under the draft legislation and its existing role as financial services regulator. Under proposed sections 1049 to 1051 ASIC would be in a position to make legislative rules about how the EDR body performs its scheme functions, give directions to the EDR body, and approve material changes to the EDR scheme.

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At the same time, ASIC regulates the provision of financial services, and has extensive privileged knowledge about bodies that are potentially subject to financial complaints made by the consumers for whom ASIC is the watchdog. This gives rise to potential conflict, may provide obstacles to the intended independence (proposed paragraph 1046(2)(e)) of the EDR scheme, and overall places a heavy burden of performance on ASIC. We suggest that the powers listed at proposed section 1049 should be exercised by another authority without such conflict.

We are happy to provide further information as required.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mark Cerché', with a stylized flourish at the end.

Mark Cerché
Chairman
Corporate Superannuation Association