



SUBMISSION

Submission to Senate
Economics Legislation
Committee: *Financial
Accountability Regime Bill
2021*

17 December 2021

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Committee Secretary
Senate Economics Legislation Committee

Via email: economics.sen@aph.gov.au

17 December 2021

Dear Sir/Madam

Financial Accountability Regime Bill 2021

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Committee's inquiry into the Bill which establishes the framework for the Financial Accountability Regime (FAR).

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.4 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact Helena Gibson, Senior Policy Adviser on [REDACTED] or by email [REDACTED], or me on [REDACTED] or by email [REDACTED].

Yours sincerely

[REDACTED]
Julian Cabarrus

Director – Policy Operations, Member Engagement & External Relations

Establishment of the Financial Accountability Regime (FAR)

General comments

ASFA appreciates Government's consideration and incorporation of industry's feedback in the Financial Accountability Regime (FAR) legislation, particularly the clarification provided in the Explanatory Memorandum that the regime does not apply to ordinary salary and wages, which in some cases may be the only form of remuneration received by individuals.

We are concerned that the scope of capture arising from the definition of significant related entities is too broad and recommend this is tightened to ensure the regime is appropriately targeted and operates efficiently.

We also remain concerned with the misalignment between the requirements of the FAR legislation and APRA CPS 511 as it applies to deferred remuneration. We would welcome changes to either the legislation or APRA CPS 511 to ensure consistency between the two.

We would also encourage the release of supporting regulatory guidance as soon as is practicable.

1. Significant related entities

1.1. Corporate entities

Corporate superannuation fund's parent companies that are not APRA regulated entities could be captured as 'significant related entities'. We do not believe it is the intention of the legislation to capture directors and executives in these organisations. In the absence of a carve out the FAR could apply to parent companies beyond the financial services sector including companies operating in the telecommunication and aviation sectors.

1.2. Foreign entities

In a similar vein, a parent company operating in a foreign jurisdiction could be inadvertently captured as a 'significant related entity'. In this situation foreign entities and foreign executives are unlikely to have direct operational control over the activities of the RSE licensee. Furthermore, they would be subject to the regulation of their home jurisdiction and as such there would be practical difficulties in seeking to apply the provisions of the FAR in these circumstances.

1.3. Investment entities

The factors that are outlined in subsections 12(3) and 12(4) in the FAR legislation could unnecessarily capture entities of RSE licensees that are created for the sole purpose of holding a particular asset on behalf of the RSE licensee. These investment vehicle entities do not, generally, have decision making power nor have a substantial operational impact on the RSE licensee outside of holding the asset.

As the FAR requires accountable entities to ensure their 'significant related entities' provide accountability statements as if they were accountable entities, it would be a considerable administrative and compliance burden for RSE licensees if these investment vehicle entities were to be captured as a 'significant related entity' under the FAR when they do not have a material and substantial operational impact on the RSE licensee.

Recommendation

Exclude corporate, foreign and investment only entities from the FAR requirements

- Corporate entities are excluded from the requirements of the FAR where they are not otherwise APRA or ASIC AFSL regulated.
- Foreign entities are excluded from the requirements of the FAR.
- Investment entities created solely for purpose of holding specific assets are excluded from the requirements of the FAR.

Expand the definition of 'what is not a significant related entity'

- Include corporate entities that are not otherwise regulated under APRA or ASIC's AFSL regime, foreign entities and investment only entities within the definition of 'what is not a significant related entity for accountable entities that are RSE licensees'.

2. Deferred remuneration

2.1. FAR legislation and APRA CPS 511

There is misalignment between the requirements of the FAR legislation and APRA CPS 511 as it applies to deferred remuneration. It is imperative that these requirements are aligned and consistent to prevent duplication and ensure the regime operates efficiently.

One of the key issues of concern is that the FAR legislation is backward looking in its' approach to the determination of the deferral period and CPS 511 considers forward looking performance measures when calculating the deferral period. Secondly there is a difference between CPS 511 and the FAR in the calculation methodology for determining what constitutes variable remuneration. Finally, there is a significant difference in the minimum amount of variable remuneration that is required to be deferred and the timeframe for deferral, between CPS 511 and the FAR.

Recommendation

Align the FAR legislation and APRA CPS 511

- AFSA recommends the requirements of the FAR legislation and APRA CPS 511 are aligned.



SUBMISSION

Submission to Senate
Economics Legislation
Committee: *Financial
Services Compensation
Scheme of Last Resort Levy
Bill 2021* and related Bills

17 December 2021

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Committee Secretary
Senate Economics Legislation Committee

Via email: economics.sen@aph.gov.au

17 December 2021

Dear Committee Secretary

Financial Services Compensation Scheme of Last Resort Levy Bill 2021 and related bills

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Committee's inquiry into Bills which, in combination, establish the frameworks for the financial services compensation scheme of last resort (CSLR).

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.4 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact Byron Addison, Senior Policy Adviser on [REDACTED], or me on [REDACTED].

Yours sincerely

[REDACTED]
Julian Cabarrus

Director – Policy Operations, Member Engagement & External Relations

1. Establishment of the financial services Compensation Scheme of Last Resort (CSLR)

In combination, the *Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021*, the *Financial Services Compensation Scheme of Last Resort Levy Bill 2021* and the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2021* (collectively referred to in this submission as the 'CSLR Bills') establish the frameworks for the CSLR and for the levy to fund both the operation of the CSLR and the compensation paid under it.

Under the CSLR Bills, the CSLR is limited (broadly) to providing capped compensation where a person has accepted a 'relevant determination' made by the Australian Financial Complaints Authority (AFCA) against an AFCA member, the determination remains unpaid after 12 months despite steps taken by AFCA to secure payment, and the CSLR operator reasonably believes the AFCA member is, having regard to their financial position, unlikely to fully pay the amount. The scope of the CSLR is further restricted, by virtue of the proposed definition of 'relevant AFCA determination', to apply only to determinations about three specific categories of financial products and services:

- engaging in a credit activity
- dealing in securities for a person as a retail client (other than issuing securities)
- providing financial product advice that is personal advice provided to a person as a retail client about products that include at least one relevant financial product.

The particular model adopted in the CSLR Bills is the result of an extensive process of consultation, across many years and many inquiries and reviews. ASFA considers the proposed model to be appropriately targeted and supports the limitation of its application to financial product advice that is *personal* advice.

ASFA welcomes the implicit recognition that many sub-sectors of the financial services industry have not contributed to the issue of uncompensated losses historically, and are unlikely to do so going forward — and therefore should not be required to contribute toward the funding of that liability. As we have noted in many previous submissions in relation to the CSLR, the APRA-regulated superannuation sector operates under prudential regulation and extensive legislative constraint. We are unaware of any instance where a determination made by AFCA, or its predecessor the Superannuation Complaints Tribunal, against an APRA-regulated superannuation fund, has gone unpaid. We further note that the sector has an established sector-funded mechanism to address eligible losses suffered by an APRA-regulated fund as a result of fraud or theft (part 23 of the *Superannuation Industry (Supervision) Act 1993*).

The CSLR Bills do not specify the 'primary sub-sectors' which will be subject to an annual levy in relation to the CSLR, nor the methodology to be used in calculating an entity's levy liability — these are to be prescribed via regulation. It is expected that the 'primary sub-sectors' will be limited to those providing the specific categories of financial products and services covered by the CSLR (as noted above). We encourage the Government to undertake consultation on the regulations to support the CSLR Bills available as soon as possible, to provide the industry with certainty regarding potential levy liabilities.

We note that the CSLR Bills provide a mechanism to address situations where additional funding may be needed by the CSLR. The Explanatory Memorandum cites the examples of a large financial firm becoming insolvent, or a 'black swan event' occurring in the financial services industry. The Bills provide the Minister with the power to determine an additional 'special' levy to be paid by the primary sub-sectors in which the compensation liability arose. Significantly, the Bills also allow for the Minister to determine that a special levy should also be paid by sub-sectors that are not liable to pay the annual levy — that is, those which are not 'primary sub-sectors'.

It is imperative that the power to charge this special levy on sub-sectors not liable to pay the annual levy should be used only in the most extreme of circumstances. Further, we consider that any special levy for a period should only be determined following consultation with the industry in relation to the proposed special levy amounts and the sub-sector(s) on which it will be imposed.

We maintain our long-standing view that the CSLR model should avoid cross-subsidisation by the APRA-regulated superannuation sector of losses incurred within other sectors, or in relation to financial services that are not provided by the APRA-regulated superannuation sector. Compensation payable by the CSLR for any large failures must be funded by the (sub)sector(s) in which those events occurred and must not be spread more broadly across the industry.

Recommendation

Providing certainty around the levies to support the CSLR

ASFA recommends that:

- the Government undertakes consultation on the regulations to support the levies to be imposed under the CSLR Bills available as soon as possible, to provide particular sub-sectors, and the industry overall, with certainty regarding potential levy liabilities.
- A special levy under the CSLR should only be imposed on entities not subject to the annual levy in extreme circumstances. Any special levy should only be determined following consultation with the industry in relation to the proposed amount of the special levy and the sub-sector(s) on which it will be imposed.