

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

2017 - 2018

Division/Agency: Australian Prudential Regulation Authority

Question No: 81

Topic: Trustee Duties

Reference: Written

Senator: Ketter, Chris

Question:

Has APRA identified a specific conflict between super fund trustee directors' duties to the corporation (taken to be to the shareholders of the corporation) and their duties under the SIS Act to trust beneficiaries?

1. If so, what are the requirements in managing this conflict, and where it cannot be entirely managed, which set of duties takes precedence?
2. How should the conflict be managed when parent entity shareholders as well as members are deriving financial benefit from the fund?
3. How can directors of for-profit funds meet the one duty without breaching the other?

Answer:

Conflicts can occur between the duties the RSE licensee has to beneficiaries, and the duties it has to others, including an associate, owner or shareholder of the RSE licensee. These conflicts may involve, but are not limited to, financial benefits.

In 2012, the existing trustee covenants in Part 6 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) were expanded to add new conflicts management obligations to sections 52 and 52A.

These amendments now require that RSE licensees and the directors of RSE licensees give priority to the interests of beneficiaries above the duties to and interests of any other person, where a duty to those beneficiaries conflicts with an interest or other duty of the director or trustee. This obligation to prioritise beneficiaries' interests applies equally to all RSE licensees.

All RSE licensees must therefore act in the best interests of their beneficiaries, regardless of the business model they choose to adopt. That means that RSE licensee directors must seek to ensure the delivery of appropriate outcomes to beneficiaries – high quality, value for money benefits and services – notwithstanding the potential conflicts that may arise from the relationships between the RSE licensee and other parties; including the profit objectives of their parent entity.

The explanatory memorandum supporting this legislative amendment sets out the requirements relating to the new conflicts covenant:

The general law requires trustees to avoid conflicts of duties and interest, subject to certain exceptions that allow the trustee to act despite the conflict, for example by authorisation under the fund's governing rules. Where a

conflict exists, and general law allows the trustee to proceed despite the conflict, there will be a number of additional requirements that must be met.

The first is a requirement for trustees to give priority to the duties to and interests of beneficiaries over the duties to and interests of the trustee to other persons.

The second requirement is that the trustee must ensure their duties to beneficiaries are met despite the conflict. The duty to beneficiaries includes, but should not be limited to, the duties to act in the best interests of beneficiaries and to exercise the relevant degree of care and diligence.

Thirdly, the interests of beneficiaries must not be adversely affected by the conflict.

Fourthly, the trustee must comply with any prudential standards in relation to conflicts that are developed by APRA

The purpose of the conflicts requirements, supported by APRA's prudential framework, is not to seek to eliminate all conflicts, but to impose obligations on RSE licensees to identify and effectively mitigate or manage them.

Prudential Standard SPS 521 Conflicts of Interest (SPS 521) therefore requires an RSE licensee to develop a conflicts management framework which includes taking all reasonable steps to identify all potential and actual conflicts in the RSE licensee's business operations, and taking all reasonably practicable actions to ensure that they are avoided or prudently managed. The requirements of SPS 521 include that RSE licensees must have in place a conflicts management policy which includes controls and processes to ensure that conflicts are managed in accordance with the requirements in sections 52(2)(d) and 52A(2)(d) of the SIS Act.

APRA's supervisory approach includes regular assessment of RSE licensees' compliance with SPS 521 and discussions with RSE licensees about how conflicts are reported and managed by the Board.