



Regulation of superannuation entities by APRA and ASIC

Overview

Registrable Superannuation Entity (RSE) licensees have a broad responsibility to act in the best interests of superannuation fund members.¹ Functional regulators have been established to provide appropriate oversight of how RSE licensees fulfil various aspects of their responsibilities. The key distinctions in responsibilities between regulators are that:

- APRA is primarily responsible for ensuring RSE licensees prudently manage their business operations in a manner consistent with their member best interest obligations and the delivery of quality member outcomes; and
- ASIC is primarily responsible for ensuring RSE licensees meet their conduct obligations in their dealings with consumers, including disclosure and advice to members and ensuring members have access to complaints processes.

This document outlines the current regulatory framework for RSE licensees and APRA and ASIC's respective roles within that framework. It also outlines steps APRA and ASIC take to work effectively under the twin peaks model as it applies in superannuation.

Background

Five years after the introduction of the Superannuation Guarantee in 1992, the Wallis Inquiry (1997) made some fundamental recommendations which influenced the way superannuation was regulated.² Key recommendations included the establishment of APRA as the prudential regulator and ASIC as the regulator for market conduct and disclosure. The regulation of the superannuation system involves an adjustment to the twin peaks model whereby APRA has general oversight of best interest obligations derived from trust law. The model reflects risks arising from the compulsory and market-linked nature of superannuation. The Wallis Inquiry also made recommendations about the need for RSE licencing arrangements.³

¹ References to members in this paper also include persons that have a beneficial interest in a registrable superannuation entity.

² For instance, no longer would superannuation be largely governed by a separate regulatory framework administered by the Insurance and Superannuation Commission.

³ *The Superannuation Industry (Supervision) Act 1993 (SIS Act)* was amended in 2004 to require RSEs to be licenced, with new obligations to comply with licence conditions on an ongoing basis. These conditions required, amongst other things, that directors must meet minimum standards of fitness and propriety.

APRA's role

APRA's objective is to protect the interests of members of RSEs, and more broadly, to promote financial system stability. The primary means by which it does this are:

- the administration of the core elements of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and associated regulations in respect of the operation of regulated superannuation entities and their RSE licensees, and in particular the prudential and retirement income provisions of the SIS Act; and,
- the collection of data from superannuation entities under the *Financial Sector (Collection of Data) Act 2001*, to support APRA's supervision of the industry and provide transparency on the operation of the industry through producing publications using that data.

ASIC's role

ASIC's objective is to protect the interests of consumers in relation to engagement with superannuation. The primary means by which it does this are:

- the administration of the *Corporations Act 2001* (the Corporations Act), the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) and parts of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) for providers of financial products and services; and,
- the oversight of specific conduct obligations applying to RSE licensees in dealing with consumers, including:
 - ensuring RSE licensees are meeting their disclosure obligations both to consumers and to the market more generally; and
 - that RSE licensees meet their obligations under the Corporations Act when providing financial product advice, including under intra-fund advice arrangements.

ASIC and APRA's responsibilities are explained further in Attachment A.

Approach to supervision and surveillance of superannuation entities

APRA's approach

APRA is responsible for granting RSE licences and authorising RSE licensees to offer MySuper products under the SIS Act. APRA's prudential framework is designed to promote behaviour by RSE licensees that supports the delivery of quality outcomes to members on an ongoing basis. APRA seeks to ensure that its prudential requirements are applied in a competitively neutral manner and are proportionate to the risk profile of each RSE licensee's business operations.⁴

As part of the Government's Stronger Super Reforms, the SIS Act⁵ was amended to impose explicit obligations on RSE licensees and their directors to act in the best interests of members and, in the event of a conflict, to prioritise those members' interests over the interests of any other

⁴ See chapter 3: https://www.pc.gov.au/_data/assets/pdf_file/0006/221865/sub022-financial-system.pdf

⁵ Sections 52 and 52A of the SIS Act.

person. APRA was also given the power to issue prudential standards for superannuation, so that a more comprehensive, principles-based prudential framework could be developed that established minimum requirements for RSE licensees in relation to key areas of their business operations.

APRA's approach to prudential supervision involves a range of activities targeted at assessing the extent to which RSE licensees maintain appropriate practices across the range of areas covered by the prudential standards, and in particular governance, internal controls, risk management and financial strength. APRA's activities include supervisory engagement with individual entities and reviews conducted on an industry-wide basis, and seek to be pre-emptive in identifying and mitigating emerging problems. This approach recognises that the Board and management of an RSE licensee are primarily responsible for the management of an RSE licensees' business operations, and the outcomes delivered to members.

APRA is also responsible for the collection and publication of data from RSE licensees under the *Financial Sector (Collection of Data) Act 2001*. APRA uses this data to inform its supervision of RSE licensees, and also makes this data available to other regulators such as ASIC to assist them to fulfil their roles.

ASIC's approach

ASIC is responsible for granting Australian financial service licences to RSE licensees making public offers of superannuation products or providing other financial services, such as financial product advice. ASIC also oversees compliance by RSE licensees with a range of obligations designed to promote good consumer outcomes, including in relation to marketing, disclosure, regular information updates and complaints handling, irrespective of whether the RSE licensee holds an Australian financial services licence with ASIC. ASIC is also responsible for RSE licensee transparency obligations and regulates the conduct of RSE licensees in providing licensed financial services (such as advice).

ASIC seeks to ensure that market conduct promotes confident and informed participation by consumers in superannuation.

ASIC's approach to surveillance and supervision is primarily risk-based, focused on acting where consumer harm may arise as a result of the failure to meet specific conduct obligations by RSE licensees or Australian financial service licensees. ASIC undertakes reviews in response to identified issues and proactive reviews across industry around particular areas of potential concern. In addition, ASIC exercises its administrative powers to prevent consumer harm and takes strategic enforcement action to punish and deter behaviour with adverse consumer impacts.

ASIC also has a critical role to play in consumer protection and in relation to financial literacy more generally in Australia. ASIC is responsible for the ASIC MoneySmart website which provides information and tools for consumers in relation to a range of financial products, including superannuation. Updates to ASIC's MoneySmart website may reflect issues arising in ASIC's review work in superannuation.

Cross-agency coordination

APRA and ASIC have a strong working relationship to support the carrying out of their respective responsibilities for regulating superannuation entities, including carrying out coordinated actions in respect of individual entities, preparation and follow-up of thematic reviews, and the routine

sharing of information. This relationship is described in the ‘APRA - ASIC relationship statement’, issued under the Memorandum of Understanding between the two agencies.⁶

APRA and ASIC are both focused on promoting practices and behaviour by RSE licensees that support the delivery of appropriate outcomes for members, and hence there are necessarily areas and issues that will be of common interest to both agencies. However, APRA primarily focuses on the overall operations and processes of RSE licensees and how these may impact the funds within the RSE licensees’ business operations and the overall outcomes for members of those funds. ASIC, on the other hand, is primarily focused on protecting the interests of consumers in relation to their engagement with superannuation RSEs and RSE licensees, with a particular emphasis on disclosure.

Communication and cooperation on matters of common interest between the two agencies, both formal and informal, is therefore critical and occurs regularly and involves numerous staff at a variety of levels. These mechanisms are in place to enable effective use of regulatory resources to achieve desired outcomes for members, and also reduce the potential for regulatory duplication for individual RSE licensees and the industry as a whole.

As part of their ongoing engagement, APRA and ASIC seek to proactively identify opportunities to improve coordination and cooperation, with a view to improving industry practices and hence enhancing member outcomes. This includes:

- developing strategic priorities in close consultation and taking coordinated action where appropriate; and
- sharing information, including data collected under the APRA reporting standards, to inform surveillance and monitoring activities.

⁶ Refer to: <https://www.apra.gov.au/memoranda-understanding-and-letters-arrangement> and <https://asic.gov.au/about-asic/what-we-do/our-role/other-regulators-and-organisations/the-apra-asic-relationship/>

SUMMARY OF APRA AND ASIC REGULATORY RESPONSIBILITIES IN RESPECT OF RSE LICENSEES

SUMMARY OF REGULATORY RESPONSIBILITIES			
Aspect	APRA responsible for:	ASIC responsible for:	Additional Information
RSE licensing	<p><i>Granting RSE licences, conditions, variations and cancellation of RSE licences and fund registrations (Parts 2A and 2B of the SIS Act).</i></p> <p>Licensing requirements are prudentially focused and concentrate on the probity and competence of RSE licensees. Operations, systems and resources are a focus of APRA's licensing processes.</p>	<p><i>Granting Australian financial services licences (AFSLs) to RSE licensees offering public offer RSEs and any entities that provide other financial services, such as financial advice.</i></p> <p>Licensing requirements are focused on ensuring businesses operate efficiently, honestly and fairly and deliver appropriate consumer outcomes. The licensing requirements are not specifically designed for RSE licensees but instead apply broadly for any person issuing financial products.</p>	<p>As at 27 July 2018 100 of the 132 RSE licensees held an Australian financial services licence.</p> <p>The AFSL regime is tailored to reflect primacy of the RSE licence:</p> <ul style="list-style-type: none"> • the usual requirements for adequate resources and risk management do not apply for RSE licensees because of the prudential provisions of the SIS Act;⁷ • breach reporting to ASIC can be satisfied by reporting to APRA only (as agent for ASIC); • ASIC must consult with APRA before seeking to suspend or cancel the Australian financial services licence of an RSE licensee, reflecting that such action would impact the ability of an RSE licensee to continue to operate its business.

⁷ But RSE licensees that are also responsible entities will have these requirements apply in respect of the business of the responsible entity.

SUMMARY OF APRA AND ASIC REGULATORY RESPONSIBILITIES IN RESPECT OF RSE LICENSEES

Fund operation and administration	<i>Making prudential standards governing prudential matters such as management of conflicts, risk management, and the operational risk financial requirement. Oversight of the operating standards except to the extent they relate to disclosure and reporting to members.</i>	<i>Oversight of operating standards to the extent they relate to disclosure and reporting to members (Part 3 of the SIS Act).</i> <i>RSE licensees that hold an AFSL are subject to requirements relating to fund operation (requirements such as conflicts management, or to act efficiently, honestly and fairly, or to comply with financial services laws). A breach of a financial services law may include sections in the SIS Act.</i>	<i>In practice, the risk of contravening the AFSL obligations is reduced by complying with the prudential and operating standards.</i>
Rules governing RSE licensees and funds	<i>Oversight of the sole purpose test, the superannuation covenants and the interaction between the law and a fund's governing rules (except as they relate to disclosure and reporting to members) (Part 6 of the SIS Act).</i>	<i>Oversight of the superannuation covenants and the interaction between the law and a fund's governing rules to the extent they relate to disclosure and reporting to members (Part 6 of the SIS Act).</i>	The roles of APRA and ASIC in relation to the superannuation covenants are complementary; in practice it is difficult to envisage a situation in which a contravention of the general covenants/governing rules would be limited to a disclosure or reporting to member matter only.
RSE licensee board structure, duties and remuneration	<i>Ensuring Board composition is consistent with legislative requirements. Assessing whether RSE licensees' Board policies and governance processes are consistent with APRA's prudential standards, and operating effectively in practice.</i>	<i>Oversight of the directors of a RSE licensee constituted as a company in relation to their compliance with the director duties set out in the Corporations Act.</i> <i>In addition, ASIC will have an interest in conflicts management where an RSE licensee holds an AFSL and has</i>	<i>In practice, whether a director has contravened relevant provisions under the Corporations Act is likely to be linked to whether there is a contravention of the superannuation covenants. Director liability is the subject</i>

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		oversight of website disclosure of director remuneration (application of 29QB).	of a current law reform proposal.
Products and fees	<p><i>Registering of any superannuation fund before it commences operation.</i></p> <p><i>Authorisation of RSE licensees to offer MySuper products, ongoing supervision of compliance with MySuper product and fee rules - both general and specific (Part 2C and 11A of the SIS Act).</i></p> <p>MySuper authorisation criteria include:</p> <ul style="list-style-type: none"> • a single diversified investment option; • the same options, benefits and facilities for members in the product; • a minimum level of death and TPD insurance cover; • compliance with the fee charging rules; • restrictions on how advice is provided and paid for, and • rules governing fund governance and transparency. 	<i>Overseeing the way in which products are marketed to consumers, including compliance with disclosure and cooling off period obligations as well as prohibitions on misleading or deceptive conduct, hawking, conflicted remuneration, unconscionable conduct, unfair contract terms and matters relating to the issuing, offer etc. of superannuation interests in public offer entities (Part 7.9 of the Corporations Act, Part 2 of the ASIC Act and Part 19 of the SIS Act).</i>	APRA's role is focused on assessing whether RSE licensees are likely to comply with the enhanced obligations for MySuper products; and, ASIC's role is focused on the way in which the product is offered.
Disclosure about superannuation products	<p><i>Publication of non-confidential superannuation data on APRA's website, at fund level/product level and industry aggregate level.</i></p> <p><i>Note: APRA has determined a specific reporting standard to set the methodology for MySuper product dashboards.</i></p>	<i>Overseeing the quality of consumer disclosure under specific requirements concerning product disclosure statements, product dashboards, annual reports, member statements, periodic reporting requirements (Chapter 7.9 of the Corporations Act) and required website disclosure (Section 29QB of the SIS Act).</i>	APRA's role is focused on the collection and publication of data to support prudential supervision and to inform and enable analysis by stakeholders. ASIC's role is focused primarily on consumer-facing disclosure, but also disclosures in the interests of systemic

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		<p>In the context of fees and costs, there are specific content requirements for PDSs: see Sch10 of the Corporations Regulations.</p> <p>ASIC also regulates other statements made by financial services providers, including RSE licensees given the prohibitions on misleading conduct in both the Corporations Act and the ASIC Act.</p>	<p>transparency (see s29QB as well as the proposed portfolio holdings disclosure reforms).</p>
Advice provided to members		<p><i>Oversight of provision of advice to consumers (including ‘best interest’ test) and administration of the restriction in the SIS Act for charging fees for intrafund financial advice (s99F of the SIS Act).</i></p> <p>In meeting intra-fund advice requirements, advisers must also meet all of the usual advice obligations (e.g. meet best interests test, provide a statement of advice etc).</p>	<p>APRA does not have a specific legislative role in relation to advice, but it may be considered as part of monitoring whether and/or how RSE licensees are meeting relevant obligations.</p>
Financial reporting for RSE licensees and funds	<p><i>General oversight of financial reports and audit of superannuation funds (Part 4 of the SIS Act) (primarily as they relate to prudential matters).</i></p>	<p><i>Oversight of financial reports and audit of RSE licensees (to extent they are corporate entities) (Chapter 2M of the Corporations Act) and public disclosure of the financial reports for RSE licensees (s29QB of the SIS Act).</i></p>	<p>The Corporations Act requires corporate entities to lodge their financial reports with ASIC but RSE financial statements are not subject to oversight under Corporations Act requirements.</p> <p>Note fund financials are included in the annual report for the RSE and annual reports are required to be</p>

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			included on a fund website under s29QB of the SIS Act.
Complaints and dispute resolution by RSE licensees		<i>Oversight of complaints handling by RSE licensees under the specific complaints handling requirements for RSE licensees (section 101 of the SIS Act).</i>	APRA does not have specific responsibilities in respect of complaints, however periodic review of the volume and nature of complaints may be used to assess whether they indicate wider deficiencies in the governance and risk management practices of an RSE licensee.
Enforcement against RSE licensees and directors	<p><i>Exercising statutory powers under the SIS Act to impose specific conditions on RSE licensees; suspend or remove an RSE licensee; appoint an acting trustee; apply to the Federal Court to disqualify a person from acting as a trustee or responsible officer; issue directions related to particular matters (noting the limitation of these powers); accept enforceable undertakings for breaches of prudential requirements; take criminal action against persons or RSE licensees; or seek restraining orders.</i></p>	<p><i>Exercising statutory powers under the SIS Act limited to the provisions administered by ASIC, including provisions relating to the keeping of reports to members, complaints handling, disclosure of information to members and the disclosure of information about funds (but not including disclosure of information to APRA).</i></p> <p><i>Exercising specific information disclosure and consumer protection powers under the Corporations Act and ASIC Act, including the ability to take action in relation to AFSLs and disclosure.</i></p>	The preconditions for exercise of enforcement powers vary according to the seriousness of the identified concern/issue (e.g. action to remove an RSE licensee has significant preconditions).