



AUSTRALIAN INSTITUTE of
SUPERANNUATION TRUSTEES

22 December 2021

Committee Secretariat
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Sir/Madam,

RE: Financial Accountability Regime Bill 2021

In brief:

AIST fully supports the principles of accountability, responsibility, and transparency which underpin the proposed Financial Accountability Regime. Improvements can be made to the Regime, including clarifying the definition of a “material contravention” and developing a facility to enable accountable entities to check if potential accountable person candidates have been deregistered. We recommend clarifying and narrowing the scope of ministerial powers and reconsidering the scope of how the secrecy provisions apply to the directions power in light of the APRA Capability Review which recommended that APRA depart from a ‘closed door’ approach.

About AIST

The Australian Institute of Superannuation Trustees (“AIST”) is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public sector superannuation funds.

As the principal advocate and peak representative body for the \$1.5 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST advocates for financial wellbeing in retirement for all Australians regardless of gender, culture, education, or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

In February 2020 and July 2021 AIST made submissions in relation to the proposed Financial Accountability Regime (FAR). AIST is generally supportive of the Bill introduced to Parliament in November 2021 but would like to raise several important issues with the Committee.

Our key recommendations are:

- the threshold for ‘material contravention’ be made clear;
- a facility be developed to enable accountable entities to check if potential accountable person candidates have been deregistered;
- the scope of ministerial powers be clarified and narrowed and the Minister Rules, which set out the Government’s proposal regarding the responsibilities and positions which result in a person being an accountable person be released as early as practicable for consultation prior to the passage of the Bill; and
- the scope of the secrecy provisions related to the direction powers be reconsidered in light of the APRA Capability Review which recommended that APRA depart from a ‘closed door’ approach.

Specific Comments and recommendations

What is a “material contravention”?

The threshold for ‘material contravention’ is unclear. The term is not defined in the Bill and it is not discussed in the Explanatory Memorandum. Nor is it linked to a reportable situation under section 912D of the Corporations Act.

AIST asks that the Committee clarify what this is and that detail be included in the Explanatory Memorandum.

Identification of deregistered persons

AIST proposes that a facility be made available (using the regulator’s registry of accountable persons) to enable a trustee to check whether an individual who is under consideration for a role as an accountable person is deregistered in Australia (and potentially overseas). This facility could be based on a similar approach to the ASIC ‘Banned and disqualified’ search tool. Such a system would reduce unnecessary effort and cost for entities covered by FAR. It would also minimise the regulator rejecting an accountable person candidate that had already been deregistered. Linkages with prudential authorities in countries like the UK, US and Canada may also be possible which would widen the effectiveness of such checks.

Scope of Minister rules should be less broad and draft rules made available for consultation

The draft legislation includes a set of Minister rules which mean that the Minister will determine fundamental parameters for the operation of the FAR. This includes the threshold metric for enhanced obligations and the list of ‘prescribed positions’.

AIST notes that the consultation materials released in July 2021 included a list of prescribed responsibilities and positions in a “Policy Proposal Paper”. This set out the responsibilities and positions that could result in a person being an Accountable Person. The FAR Bill says that these issues will be addressed in the Minister Rules, which are not available.

It is unclear what the rationale is for the Minister to have the scope to propose these important changes to the operation of the FAR. [Chapter 17](#) of the 2015 Australian Law Reform Commission Report 129 (Traditional Rights and Freedoms—Encroachments by Commonwealth Laws) states: *“Grants of delegated power ought not to be so expressed that it becomes impossible in practice for courts to review the limits of the power. For example, provisions should not give ministers powers to do that which is, in their opinion, ‘requisite or expedient for a broadly framed statutory purpose’.”*¹

AIST believes that the scope of the Ministerial Rules should be reduced with the aim of creating greater clarity and certainty of FAR’s application to the superannuation sector and prescribed roles within the sector. At the very minimum, details about the Minister Rules should be made available for consultation for a period of time that allows proper analysis and feedback. The profit-to-member superannuation sector represents more than \$1.5 trillion in investment and AIST believes that it is not unreasonable that it be afforded a more predictable framework for accountability.

Proposed directions power and related secrecy provisions

The proposed directions power and related secrecy provisions indicate that the Regulator may determine that secrecy arrangements apply to a direction given under the Bill. This can be done if the Regulator considers it is necessary to *“protect certain customers of accountable entities, or to promote financial system stability.”*

AIST is concerned about how the secrecy provisions might be used in the context of superannuation and we believe that these should be reconsidered in light of the APRA Capability Review which recommended that APRA depart from a ‘closed door’ approach. The proposed directions power and related secrecy provisions do not seem consistent with the APRA Capability Review nor with the overall increased expectation of transparency in the sector.

Accountable entities and significant related entities

The profit-to-member sector corporate structure is very different from ADIs as well as RSEs in the retail sector. Within the profit-to-member sector there is a range of business models employed in terms of the extent of outsourcing as well as asset pooling structures. Some funds outsource material business activities such as administration and investment management while others undertake these activities internally.

¹ Australian Law Reform Commission Report 129 (Traditional Rights and Freedoms—Encroachments by Commonwealth Laws https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf Paragraph 17.51, page 458.

The 'worked example' provided on page 20 of the Explanatory Memorandum seeks to light on how FAR is expected to apply to the profit to member sector and AIST appreciates that this example has been included on how FAR will apply to significant related entities. While this is a step forward, it remains unclear how the materiality thresholds will work in practice for our sector. It would be helpful if additional commentary and clarity could be provided, without this, confusion will remain and there is a potential that entities intended to be captured under the regime will be unintentionally excluded and vice versa.

Implementation Timetable

AIST welcomes the intention that FAR will commence for RSE licensees 18 months after royal assent. We understand that for enhanced obligation RSEs, APRA expects to receive drafts of accountability statements and maps about six months ahead of the commencement of the Regime and that APRA expects funds to respond to more than one round of feedback on draft statements.

While 18 months may appear to give a long lead time, in effect, this implementation timeframe will be needed given the amount of work required to prepare accountability statements and maps as well as develop new structures to ensure that the required 'reasonable steps' are put in place. In addition, there are the multiple rounds of feedback on drafts which have been outlined by APRA in recent discussions, bringing forward the date key documents need to be ready for submission to the regulator by at least 6 months.

It will be important to those funds that need to respond to feedback that it is provided promptly as they will also be in the process of implementing a range of other requirements/standards over the period including the Retirement Income Covenant, remuneration, risk management, the investment governance standard, outsourcing, business continuity, information security, stress testing, and climate-related risk. Implementation of FAR will also occur at a time of significant consolidation in the industry.

There will also be significant resource implications for the regulators to complete the analysis of draft accountability statements and maps. It would be easy to underestimate the amount of work involved for the regulator and AIST urges that due consideration to be given to project planning and resourcing so that bottlenecks can be avoided.

End-to-end product responsibility and design and distribution obligations

The Financial Services Royal Commission received a large amount of evidence concerning 'administration errors', frequently involving errors programmed into technical systems, which had resulted in inadvertent overcharging of fees by ADIs. It called out two key causes of these errors:

- the number and complexity of products; and
- a lack of end-to-end accountability leading to a situation where 'the left hand does not know what the right is doing'.

Based on the July 2021 consultation papers, it was understood that individual end-to-end product responsibility would be 'subsumed' into the FAR by including it in the list of 'prescribed responsibilities and positions' for accountable persons, to be set by the Minister. Attachment A of the July 2021 policy proposal paper includes the position of: 'Senior executive responsibility for management of the accountable entity's end-to-end product responsibility'. It is suggested that this is likely to be the CEO of a small accountable entity or the head of a business division in a more complex accountable entity.

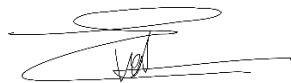
Even less information is available now than in July and AIST recommends that greater clarity and detail be made available to enable understanding of the expectations regarding end-to-end product responsibility and how this fits with design and distribution obligations. Worked examples and case studies of this would assist in implementation.

Closing comments

As part of the review five years after royal assent, AIST believes it would be appropriate to review the criteria for entities captured by the regime to ensure they remain relevant.

For further information regarding our submission, please contact Holly Lindsay, Senior Manager, Governance at hlindsay@aist.asn.au or Mel Birks, General Manager, Advocacy at mbirks@aist.asn.au.

Yours sincerely,



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