



FINANCIAL  
SERVICES  
COUNCIL

***Financial Sector Reform (Hayne Royal Commission Response - Stronger Regulators (2020 Measures)) Bill 2020: FSRC rec 6.14 (Financial Regulator Assessment Authority)***

Exposure Draft (ED) and Explanatory Materials (EM)

Financial Services Council Submission:  
28 February 2020



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## 1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

## 2. Introduction

The FSC welcomes the opportunity to make a submission in relation to the ED and the EM.

## 3. Key Recommendations

In summary, we recommend that:

- (a) there is alignment of the commencement date for the final legislation with the commencement date of the *Financial Regulator Reform (No. 2) Bill 2019: Governance (FSRC Recommendations 6.9 and 6.11): Exposure Draft*;
- (b) the three specific matters arising from the reforms in this context suggested by Commissioner Hayne in the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry :Report Vol 1 (Royal Commission and Report* respectively)<sup>1</sup>, should be more clearly reflected in the ED;
- (c) the quite specific comments of the Commissioner in relation to the establishment of the oversight body should be more clearly and expressly reflected in the ED as we have discussed below; and
- (d) that the legislation explicitly include reference to oversight of both the Australian Financial Complaints Authority (**AFCA**) and the Financial Adviser Standards and Ethics Authority (**FASEA**), given the critical role those bodies have in relation to improving standards of conduct in the industry.

Our detailed comments are set out below.

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<sup>1</sup> Canberra 2019, pages 474-475.

## 4. Background

Recommendation 6.14 (**Recommendation**) of the Royal Commission provided that:

*Recommendation 6.14 – A new oversight authority*

*A new oversight authority for APRA and ASIC, independent of Government, should be established by legislation to assess the effectiveness of each regulator in discharging its functions and meeting its statutory objects.*

*The authority should be comprised of three part-time members and staffed by a permanent secretariat.*

*It should be required to report to the Minister in respect of each regulator at least biennially.<sup>2</sup>*

## 5. The ED and the EM

### Observations as to the Commissioner's three specific matters and the ED

- (a) **Refinements:** Generally, the ED appears to implement the Recommendation. There are some areas however where we believe the Bill could be improved to more clearly reflect the principles underlying the Recommendation. We comment on these below.
- (b) **Regulator Co-Operation:** The Commissioner made the following observation concerning inter-regulator co-operation:

*The centrality of regulatory co-operation necessitates that the oversight body review each entity's compliance with the proposed statutory obligation to co-operate with the other, including fulfilling its information-sharing obligations.<sup>3</sup>*

We previously have provided a submission on the *Financial Regulator Reform (No. 2) Bill 2019: Governance (FSRC Recommendations 6.9 and 6.11): Exposure Draft (FRR 2)*. As we mentioned in that submission, it is extremely important that the commencement dates of these two items of legislation align so that the functions described in the FRR 2 can be considered by the Authority.

We also note that the EM indicates that the obligations set out in the FRR 2 *become part of each regulators' statutory functions*.<sup>4</sup> Although we understand the reasoning here, in our view this at the least should be referenced in the final legislation, given that this was of sufficient importance to the Commissioner for him to make express reference to the concept.

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<sup>2</sup>) at page 41 and discussed in detail at Pages 476-480 of the Report.

<sup>3</sup> see Report at page 475.

<sup>4</sup> EM at paragraph 1.31.

- (c) **Memorandum between ASIC and APRA:** Similarly, the Commissioner expressed the view that:

*the oversight authority's mandate should include consideration of the extent to which each entity has complied with the terms of the memorandum and the effectiveness of the operation of the memorandum.<sup>5</sup>*

We appreciate that the Authority has a function to assess and report to the Minister on each regulator's effectiveness and that these are defined terms in the ED. The Authority also has the function on an ad hoc basis either on its own initiative or when requested by the Minister to report to the Minister on any matters relating to effectiveness. Again, it would be preferable in our view that the Authority is given an express statutory mandate to consider to the extent to which each Regulator has complied with any relevant Memorandum of Understanding and the effectiveness of the operation of that Memorandum. We do not know if this is a matter which might be considered to be appropriate to be addressed under the Rules (clause 50). The impression we have however is that the Rules will address various administrative matters in relation to the Authority. Accordingly, given the importance attributed to this topic in the Report, we believe it requires express legislative mention.

- (d) **Extension to Regulators' adoption of BEAR principles?** We note that the meaning of APRA's effectiveness and ASIC's effectiveness includes the effectiveness of a Regulator's framework for executive accountability (consistent with recommendations 6.12): Clause 13. This is consistent with comments of the Commissioner.<sup>6</sup> However, as mentioned above, it is not entirely clear from either the ED or the EM to the extent to which the rules may prescribe or further clarify any other matters which fall within the performance of a Regulator's statutory functions or the exercise of their statutory powers (cf: Clause 13 (1)(h) and (2) (g)). It would be useful if an indication could be provided of the nature of the matters which might be prescribed under the rules to an extent greater than currently set out in the EM.

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<sup>5</sup> Report at page 475.

<sup>6</sup> *ibid.*

## 6. The Commissioner's Comments

### General

It is useful to recall here the Commissioner's comments in relation to the legislation to establish an oversight body. In some respects, it seems to us that the ED falls short in satisfying these comments. We will provide some more detailed observations on this topic under the following heading. The Commissioner indicated that:

The legislation to establish the oversight body should:

- provide that the authority is independent of Government;
- empower the authority to conduct inspections of either regulator at will;
- empower the authority to issue a notice to either regulator requiring it to produce documents or provide information in any form;
- empower the authority to issue a direction to APRA or ASIC in connection with the adoption and implementation of the BEAR principles;
- require the authority to report to the Minister, and through the Minister to Parliament, in respect of each regulator at least biennially;
- authorise the authority to report separately on particular matters if the authority thinks it appropriate and necessary; and
- require the authority to produce or commission quadrennial capability reviews of each entity.

Although the Commissioner no doubt did not consider that his comments were to be taken as binding and immutable code, we expect that these comments were made for good reason and in our view should be departed from in this context if only there is at least an equally good and countervailing reason. In a number of instances, we are struggling to understand the reasoning for, it seems, not reflecting the Commissioner's comments in either the ED or the EM.

### The Comments

- (a) *The legislation to establish the oversight body should... provide that the authority is independent of Government...***

We appreciate that the object of the legislation is set out in clause 3 as follows:

*The object of this Act is to provide for the independent assessment of APRA's effectiveness and ASIC's effectiveness.*

This is expanded on somewhat in clause 19, which makes it clear that the independence of the kind described in that clause is, necessarily, subject to the Act itself and to other laws of the Commonwealth. It would be appropriate given the importance of the legislation and the significance of the Commissioner's comments that the object in clause 3 is developed further to make it clear that the Authority is indeed intended to be and will operate independently of Government as set out in the Act and in particular clause 19;



**(b) The legislation to establish the oversight body should... empower the authority to conduct inspections of either regulator at will;**

We assume the intention is that the function conferred upon the Authority by clause 12 (1) (e), will address this comment, i.e., *on its own initiative or when requested by the Minister...* However, this provision addresses Regulator **effectiveness** only. In terms of capability reviews, the Authority must receive a Ministerial request before undertaking a capability review of a relevant Regulator. Again, we suggest that the ED be re-drafted so as to more clearly reflect the Commissioner's comments; i.e. that the Authority on its own initiative may undertake either or both effectiveness and capability reviews;

**(c) The legislation to establish the oversight body should... empower the authority to issue a notice to either regulator requiring it to produce documents or provide information in any form;**

This appears to be addressed by clause 20. We do note however that clauses 20 (1) and (2) are subject to the caveat:

*to the extent reasonably necessary to enable the Authority to perform its functions and exercise its powers.*

This appears to contemplate that a person to whom the section applies may make a decision, which presumably is supportable objectively, as to whether a request is reasonably necessary to enable the authority to perform its functions and exercise its powers. In our view, these caveats are not necessary given that there is a qualifier in sub-clauses (3) and (4) that a reasonable time must be provided to a relevant person. The caveats also appear to confuse the issue of the Authority's functions and powers and make the same dependent upon an express pre-condition. We suggest they be removed;

**(d) The legislation to establish the oversight body should... empower the authority to issue a direction to APRA or ASIC in connection with the adoption and implementation of the BEAR principles;**

This does not appear to have been accepted or recognised in the ED. Indeed, the EM states as follows:

*1.33 The regulators are independent entities responsible to the Parliament, they are not accountable to the Authority.*

*1.34 Accordingly, the Authority does not have the power to direct the regulators to implement any recommendations it makes.*

*1.35 Further, the Authority's functions do not include assessing or reporting on only a single case. [Subsection 12(2) of the Assessment Authority Bill]*

It is not clear to us why the ED has been drafted in this way – the Commissioner certainly thought the issue was of sufficient importance to make express mention of it in his Report. We accept that ultimately the Regulators are responsible to Parliament. However, as the Commissioner noted parliamentary oversight necessarily has some limitations:

*Those limitations include the amount of time that can be devoted to a particular entity or topic, the time available to committee members to prepare for the hearings and the training, skill and experience of the members of the committee, who will sometimes need to review and assess complex information on matters of expertise.<sup>7</sup>*

Accordingly, we suggest that the Authority be given this specific directions power.

We also express concern as to the limitation on the Authority's functions **not including** the assessment or reporting on only a single case. The rationale for this limitation contained in paragraph 1.37 of the EM, is, with the greatest of respect, mistaken. It seems to us that the independence of the Regulators could in no way be imperilled by a report as to the effect of this of one particular action or enforcement matter undertaken by a Regulator. The reference to the Ombudsman jurisdiction is not as such relevant in this area as we see it. The intention is not to oust the jurisdiction of the courts or any other tribunal or body; the intention is to ensure that the Regulators remain accountable and effective. Given that an Authority report is provided to the Minister in any event and who may or may not act upon it, it is not clear to us why in all these circumstances, this limitation has been imposed. Thus, we suggest this limitation be removed from the Bill to be introduced into the Parliament.

- (e) *The legislation to establish the oversight body should... require the authority to report to the Minister, and through the Minister to Parliament, in respect of each regulator at least biennially;***

This does appear to be addressed in clause 14 (1) of the ED and other relevant provisions, such as clauses 16 (4), 16 (3) and 17. The only observation that we would make is that it appears to be envisaged that the first effectiveness assessment with unions in 2021. We assume that this is to enable the legislation to be passed and the Authority to be constituted (clause 14 bracket 1) of the ED).

- (e) *The legislation to establish the oversight body should... authorise the authority to report separately on particular matters if the authority thinks it appropriate and necessary; and***

This does appear to have been implemented in the ED subject to our earlier comments concerning the limitation on the authority's ability to report on a single matter.

- (f) *The legislation to establish the oversight body should... require the authority to produce or commission quadrennial capability reviews of each entity.***

Rather than require the Authority to produce or commission the report, the ED contemplates that:

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<sup>7</sup> op. cit. 470.



14 *Timing for performance of functions*

(1)....

(2) *At least once every 4 years, starting in 2021, the **Minister must:***

- (a) **consider requesting the Authority to undertake a capability of APRA; and**
- (b) **consider requesting the Authority to undertake a capability review of ASIC.**

***(Our emphasis)***

The EM does not appear to give any background to this proposal and why there has been a diversion away from the Commissioner's comments that the authority should be obliged to conduct quadrennial capability reviews of the Regulators.

Thus, a positive obligation on the authority now is expressed as a requirement for the Minister to consider requesting the Authority to undertake the capability reviews. This seems to us to undermine the robustness of the system and potentially detract from the independence of the Authority. Accordingly, we suggest the provision be re-drafted so that it is consistent with the Commissioner's comments.

## 7. Oversight of AFCA and FASEA

AFCA and FASEA each play a critical role in improving standard in the industry as set out below:

- (a) AFCA's role is the resolution of complaints about financial services entities. Part of its vision is minimising disputes and raising standards, and one of its corporate goals is to 'influence reform. It is regulated by ASIC, however unlike other ASIC-regulated entities, it operates under its own legislation and has a unique and important role in improving standards;
- (b) FASEA was established under legislation to set the education, training and ethical standards of financial advisers in Australia. It also plays a unique role in improving standards in the industry.

Given the critical roles these two organisations play, we recommend that they should be subject to the oversight of the Authority and that this should be explicitly recognised in the legislation.

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We trust our comments are of assistance and if you have any questions please do not hesitate to contact us.

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