16 March 2023

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SYDNEY NSW 2001

Via email: superannuation.policy@apra.gov.au

Dear Ms Morris,

RE: APRA Consultation on Superannuation Transfer Planning: Proposed Enhancements

The FSC welcomes the opportunity to consult on proposed changes to transfer planning requirements.

Successor fund transfers (**SFT**s) are complex matters which require bespoke approaches from both a fund and regulator perspective. This complexity is created by two key issues, the need for equivalent rights and the legislated best financial interests duty. For this reason, they are exceedingly difficult to plan in abstract terms, that is without knowing what you need to plan for.

The FSC submits that it is not appropriate, nor even feasible, for funds to make significant headway on planning for a potential transfer. This is because there are significant costs associated with the planning process, the outlay of which would not be in best financial interests of members. Further, the transfer plan would, to be complete, require some insight into who the potential transfer partner would be. This would then require the sharing of commercially sensitive information, which would not be desirable unless the transfer had a high likelihood of occurring.

For this reason, the FSC submits that the need for a transfer plan should be deferred until such time as a trigger event occurs. This trigger event, set by funds and based on existing obligations, would require funds to begin transfer planning.

Answers to the specific consultation questions are outlined below.

Summary of Recommendations

1. The requirement to create a plan for a hypothetical SFT should not apply to all funds. Instead, the need to have a plan should be triggered by an event or events with reference to a tolerance test set by individual funds. This should not be at the discretion of APRA, but instead be a rules-based approach.
2. Funds should be required to consider the prospect of a potential future transfer by requiring them to have an action plan in place. This action plan should contemplate how the fund would go about planning for a transfer, including what resources might be necessary. This would negate the need for funds with no realistic risk of requiring a SFT

in the near future to complete costly transfer planning unnecessarily.

3. There should be a tiered approach to preparedness with the first stage being the need to craft an action plan. After reaching an appropriate threshold, the action plan should be acted upon, and transfer planning can begin in earnest.
4. Careful consideration needs to be given to the treatment of capital gains tax rollover relief, which is only available if all of the fund assets transfer. Where a superannuation member has a mix of Choice and MySuper products, they may be significantly impacted.
5. APRA approach Treasury about potential CGT tax rollover relief for partial transfers to aide in the efficient transfer of members who have a mix of MySuper and Choice products.
6. Consider an option to allow for a transfer of members to another MySuper product offered by the same fund, where the fund has authorisation for multiple MySuper products.
7. Guidance is required about how APRA intends to make decisions as to whether a fund is reasonably believed to not meet the criteria of section 29U(2) of the SIS Act, and will therefore need to enact a transfer.
8. Funds would benefit from bespoke, practical guidance from APRA once the transfer process has been initiated as well as prospective guidance incorporated into CPG 190 and SPG 114.
9. A review of the 90-day approval SLA is required. Funds would benefit from a shorter SLA for approval so that the transfer process can occur in a more timely manner.
10. APRA undertake a separate consultation for SPG 227 owing to their fundamentally different natures.

Transfer Preparedness

Question 1 – Principle of Preparedness for Future Transfer of Members

The process for planning a transfer is vast and complex. It may involve the need to procure advice from outside consultants, as well as external service providers such as insurers and investment managers and incur significant costs for matters such as legal advice. Further, it often involves the sharing of commercially sensitive information with potential competitors. Transfers themselves should be considered a last resort as they involve disruption for members and can potentially lead to a deterioration in service and performance. It is not practical to travel far down this road with little indication that the transfer will actually occur.

Not all funds would necessarily be in a position to consider or plan for such an event and the additional burden that this creates on funds and trustees in terms of operational and regulatory costs may be considerable. Requiring funds to consider the possibility that they may need to transfer is appropriate and having an action plan in place (see Question 2 below) is prudent, however, actual planning will incur undue cost and detract from a funds focus on improving member outcomes.

The FSC suggests that funds could set a “tolerance test” style threshold or trigger requirement that indicates when funds would need to go further into the planning stages. These triggers may be based on existing obligations. For example, a trigger might be that a product has been determined by the Trustee as not promoting the best financial interests of

members, or a MySuper product fails the performance test for the first time.

This would be more suitable than applying the requirement to the whole industry unnecessarily.

Recommendation

1. The requirement to create a plan for a hypothetical SFT should not apply to all funds. Instead, the need to have a plan should be triggered by an event or events with reference to a tolerance test set by individual funds. This should not be at the discretion of APRA, but instead be a rules-based approach.

Question 2 – Preparatory Steps

As noted above, the process for planning for a transfer is complex and costly. Members can spend millions of dollars creating migration plans, noting that not all members have the capability to do this process in house, and external consultations may be required to complete the transfer plan.

Further, transfer plans that are created without any real prospect of being imminently implemented may be ultimately defunct by the time a transfer actually eventuates. This is because a transfer plan requires foresight into where members might be transferred, which is likely not to be known so would just be a theoretical exercise. Even if there was a firm idea as to where members might be transferred, if the plan was not immediately implemented, it would still likely be out of date when a need for transfer did finally occur. This would unreasonably require the planning process to be undertaken twice, once without the real possibility of needing to enact it.

While it is appropriate to ask that funds consider the possibility, and even have an action plan in place as to how they might execute the planning stages of a transfer, it is not appropriate, nor in the best financial interests of members, to require them to have in place a plan for a transfer if there is no realistic prospect of the transfer actually occurring.

This action plan might include items such as preparing budgeting and resource estimates, consideration of product alignment and system needs, as well as working through potential compatibility and system limitations. But identifying and approaching potential partners and conducting any further due diligence would place significant financial and human resource costs on funds and would not be in the best financial interests of their members.

It should also be noted that APRA are currently consulting on changes to *SPS 114: operational risk financial requirement*, which is proposed to require funds to quarantine large sums of funds to enact a transfer that may never occur. As the FSC notes in that submission, the premise of reserving hundreds of millions of dollars for an event that might be a remote possibility is not in members' best financial interests.

The money spent on both planning for a transfer, as proposed in this consultation, and in quarantining funds, as proposed in the SPS 114 consultation, might be better spent improving outcomes for members with tangible benefits that could reduce fees and costs.

Recommendation

2. Funds should be required to consider the prospect of a potential future transfer by requiring them to have an action plan in place. This action plan should contemplate how

the fund would go about planning for a transfer, including what resources might be necessary. This would negate the need for funds with no realistic risk of requiring a SFT in the near future to complete costly transfer planning unnecessarily.

Question 3 – Balancing Preparedness with Member Benefits

As noted above, the FSC is not supportive of creating further requirements that apply to all funds, as this is not in the best financial interests of members. Instead, funds should be able to determine, with guidance from APRA, their threshold or tolerance level, at which point specific transfer planning requirements could trigger.

Prior to reaching the trigger point, funds would be required to complete an action plan. Once the trigger point was reached, the plan would need to be put into action and transfer planning could begin proper. This avoids funds spending significant capital planning for an event with a low prospect of it actually occurring.

Recommendation

3. There should be a tiered approach to preparedness with the first stage being the need to craft an action plan. After reaching an appropriate threshold, the action plan should be acted upon, and transfer planning can begin in earnest.

Trigger Frameworks

Question 4 – Performance Indicators for Trigger Requirements

Which metrics funds use is determined by the size, complexity, and type of fund. For example, funds naturally place emphasis on performance but there are a combination of metrics and other factors that might trigger consideration of a transfer. If reporting indicates relevant metrics fall below the threshold set by a funds risk appetite for an extended period of time, this would necessitate considering an alternative.

RSE Licence Decision Making

Question 6 – Circumstances for Determining a Transfer is Necessary

The determinants of when a transfer is necessary vary from fund to fund. A natural trigger is the requirement to transfer members due to a regulatory enforcement action such as may be required by APRA.

However, as noted above superannuation funds transfers are costly, potentially leading to significant disruptions for superannuation members and their benefits, as well as a deterioration of service and delivery standards. As such, transfers are often considered a last resort.

Question 7 – Proposed Requirements for Transferring MySuper Assets

The FSC submits it would be impossible to complete a transfer of assets to another MySuper product within 90 days, being the period stipulated in s29SAB of the *Superannuation Industry (Supervision) Act 1993 (Cth),* as proposed in Attachment A of the Discussion Paper. Even if the proposed pre-planning was completed prior to the licence being cancelled. As outlined throughout the rest of this paper, finalising a transfer requires a significant amount of time and resources to give effect to.

One of the key concerns with regard to the transfer of MySuper specific products relates to

the capital gains tax rollover relief, which is only available if all of the fund assets transfer. This will have significant impacts on members that hold a combination of MySuper and Choice products. The FSC suggests that APRA speak with Treasury about potential tax rollover relief for partial transfers.

Recommendation

4. Careful consideration needs to be given to the treatment of capital gains tax rollover relief, which is only available if all of the fund assets transfer. Where a superannuation member has a mix of Choice and MySuper products, they may be significantly impacted.

Recommendation

5. APRA approach Treasury about potential CGT tax rollover relief for partial transfers to aide in the efficient transfer of members who have a mix of MySuper and Choice products.

An alternative option not specifically recognised in the Discussion Paper that may be open to a Trustee where the fund is authorised to offer multiple MySuper products is considering a transfer to another MySuper product of the same fund.

Recommendation

6. Consider an option to allow for a transfer of members to another MySuper product offered by the same fund, where the fund has authorisation for multiple MySuper products.

FSC members would also like to seek clarity about how APRA will apply the "reason to believe" test where the regulator will form a view that a fund is likely to fail to meet the criteria under section 29U(2) of the *Superannuation Industry (Supervision) Act* 1993 (Cth) (**SIS Act**). Clear guidelines about how these decisions will be reached to ensure that they approached consistently between funds will be of paramount importance.

Recommendation

7. Guidance is required about how APRA intends to make decisions as to whether a fund is reasonably believed to not meet the criteria of section 29U(2) of the SIS Act, and will therefore need to enact a transfer.

Barriers to Transfers

Question 8 – Barriers to Member Transfers

One of the key considerations when transferring members is the need for equivalent rights. Creating a trust deed that adequately meets this duty can be a time consuming exercise. Further, the legislated financial best interests test means funds must take care to ensure that the transfer meets the test appropriately.

This is made more difficult by significant inconsistency from fund to fund in relation to matters such as technology, tax treatment, treatment of fees and costs charged (and tax for each fee/cost), and the regulatory requirements applied to different funds based on differing conditions. The industry has been working consciously to improve this, however, areas

where a fund has discretion would ultimately result in issues when transferring into or out of another fund.

Further, and as noted above, the treatment of CGT tax relief is a barrier to funds completing a partial transfer of members. Depending on the type of fund and the product offered, the inability to transfer losses means a potential material impact on member's benefits and may also crystalise gains for members, directly reducing their benefit.

In addition, the Design and Distribution Obligations (DDO) also act as a barrier to transfers of superannuation fund members to another fund. ASIC rejected the need for specific guidance on this issue, and argued an exemption from the DDO for transfers of members would be "counter to the legislative intention for a broadly applicable regime."[1] However, there are already extensive consumer protections for SFTs, and imposing the DDO on top of these requirements is unnecessary red tape. In this context, we note that Ministers and APRA have strongly encouraged industry consolidation.[2] Further arguments in favour of removing DDO from SFTs are in the FSC's submission to ASIC's draft regulatory guide on the DDO (pages 62–64).

There are also issues relating to individual employee's contribution records that are held with their employers. Transferring members (either in part or in full) requires members in the accumulation phase to update their contribution details directly with their employer. For the transferring fund this means potentially needing to continue to receive and on-forward contributions to the new fund or reject the contributions back to the employer, but there's no infrastructure in place to allow those contributions to be redirected en-masse. Employers, particularly employers contributing to a fund under an employer sponsored arrangement may also have difficulty in determining if the member was defaulted into super (either pre- or post-stapling), or exercised their choice to join the employer's plan – which creates complexity for the employer in understanding their obligations under the superannuation guarantee.

Additional barriers include:

- Modern awards and enterprise bargaining agreements that nominate specific default funds;
- The sale or transfer of illiquid assets;
- Social security impacts, particularly for market linked or innovative income streams;
- Transfer of United Kingdom derived pension benefits where the fund is a former Qualified Recognised Overseas Pension Scheme;
- Existing vendor commercial arrangements including break costs; and
- complex or bespoke arrangements such as defined benefit arrangements and tailored employer-sponsored arrangements (difficulties/limitations with respect to identifying a suitable destination fund able to support equivalent rights and additional complexity in completing the transfer).

[1] See ASIC consultation report 674 at paragraphs 66 and page 23.
[2] See https://ministers.treasury.gov.au/ministers/jane-hume-2019/speeches/address-association-superannuation-funds-australia and https://www.apra.gov.au/myths-and-misconceptions-should-be-no-barrier-to-super-consolidation

Execution Phase Guidance

Question 9 – Additional Guidance

The FSC submits that member transfers each present unique circumstances which warrant a bespoke approach. Funds would benefit from more direct, practical engagement from APRA when a transfer is afoot.

That said, further practical guidance is best placed within CPG 190 as part of the existing guidance for Financial Contingency Planning as well as in SPG 114 for Financial Resourcing for Risk Events.

Recommendation

8. Funds would benefit from bespoke, practical guidance from APRA once the transfer process has been initiated as well as prospective guidance incorporated into CPG 190 and SPG 114.

Further, a reduction in the APRA approval period from 90-days to 30-days would assist funds greatly during the transfer process. Given the matter is time-critical in nature, waiting over 90 days for approval provides reduced agility and prolongs time dependent work.

Recommendation

9. A review of the 90-day approval SLA is required. Funds would benefit from a shorter SLA for approval so that the transfer process can occur in a more timely manner.

Question 10 – Matters to Retain in SPG 227

The FSC recommends that APRA undertake a separate consultation on SPG 227 in order to provide it a more fulsome and separate consideration. This could be linked to a further review of product rationalisation impediments and improvements and should not be connected to SPS 515.

This is because there is a natural separation that should be retained between “strategic planning” under SPS 515, which may extend to triggers for transfer, and “transfer guidance” under SPG 227. Transfer guidance needs to consider transfers resulting from voluntary activity, as well as those resulting from poor member outcomes.

Recommendation

10. APRA undertake a separate consultation for SPG 227 owing to their fundamentally different natures.

If you would like to discuss anything contained in this submission, please do not hesitate to contact me.

Yours sincerely,

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