



FAR Regulator Rules Amendment Instrument consultation

FSC Submission

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1. About the Financial Services Council

The FSC is a 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 and financial advice licensees. 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 more than \$3 trillion on behalf of over 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 one of the largest pools of managed funds in the world.

2. Introduction and comments

2.1. Introduction

The FSC welcomes the opportunity to provide feedback to APRA and ASIC (the **Regulators**) on the draft Financial Accountability Regime (**FAR**) Regulator Rules Amendment Instrument No.1 of 2024 (the **Instrument**) including the proposed Key Functions for superannuation and insurance.

The FSC is supportive of the proactive approach being adopted by the Regulators in preparing for the implementation of FAR for insurance and superannuation entities. However, it is important that the Instrument does not create impractical and uncertain requirements that result in unduly burdensome and unclear obligations for industry. The FSC acknowledges that the APRA/ASIC jointly hosted webinar of 9 April helpfully provided some clarity to the industry. Despite this, we think it would be useful to industry to have further clarity on some points as set out below.

We have made some general comments in Section 2.2 below, followed by our specific comments on the drafting of the Instrument/Key Functions proposals in Sections 3.

Our general concerns seek to highlight:

- the confusing overlap between the Prescribed Responsibilities and the Key Functions,
- the lack of clarity on the concepts of reasonable steps, reasonable grounds and material change,
- the duplication of information in the reporting forms and the accountability statements, and
- the need for a facilitative compliance approach for the new sectors.

Our specific comments on the Key Functions note in particular:

- the need for more guidance for complex group structures,
- the need to explain the rationale for adding Marketing and advertising as a Key Function for RSEs only,
- the confusion concerning the categories of ‘Product design and distribution obligations’ and ‘Product origination’ Key Functions, and
- the irrelevance of credit activities for insurance businesses.

2.2. General comments

1. **Confusing overlap.** The FSC submits that the proposed Key Functions are too broad and overlap unnecessarily with the Prescribed Responsibilities in the Minister Rules.
 - a. These concepts pose particular challenges for businesses that operate across more than one of the three categories of ADI, RSE Licensee and Insurer. For example, where there are similar key functions for both ADIs and RSE licensees, and the ADI key functions have been assigned to accountable

persons of the ADI, it should be clarified that these same accountable persons can also be assigned the equivalent RSE key functions.

- b. The overlap between the content required in the accountability statements and the content required in the Register is also of concern. Accountability statements are intended to make it clear what responsibilities lie with any given accountable person, as set out in the FAR Act. The FSC submits that having an overlay of additional Key Functions and Primary Areas of Focus is duplicative and administratively burdensome and can actually make it less clear who is accountable for a particular matter.
- c. We have also received feedback that indicates there is considerable confusion as to the role of Key Functions and PAFs. There is a concern that many of the Key Functions are so broad that they will end up being allocated to an overly large number of accountable persons without it being clear which specific individuals have responsibility for a particular aspect of the given Key Function. Indeed, there may be cases where an entity ends up allocating a Key Function to *all* (or a majority of) its accountable persons. Such steps are likely to reduce the ability of Regulators to determine which individuals are responsible for a particular issue and hence reduce the degree of individual accountability that the FAR regime seeks to introduce.

2. **Regulators' website and materials.** Regarding the amount of information and its location published by the Regulators over the 14th and 15th March 2024, it was not always easy to locate and follow the various references across these new and existing regulatory materials. Additionally, materials in relation to PAFs published on 14 March were not posted on the websites of both Regulators. It is not clear where revised materials have been published by the Regulators, where these materials supersede previous versions. The FSC notes that the Regulators' websites contain different material that is not always intuitive to locate and would suggest that the Regulators consider establishing a single dedicated website which would be a single source of all guidance/templates/forms related to FAR. Similarly, with the large number of separate guidance notes/documents that have been published it is a challenge for industry to be confident that all relevant current documents have been reviewed. The FSC suggests that the Regulators consider consolidating some of these documents, which would reduce the number of different sources that businesses have to identify and digest.

The FSC **recommends** that the Regulators set up a single dedicated website which would be a single source of consolidated guidance related to FAR.

3. **Reasonable steps, reasonable grounds and material change.** The FSC submits there is a lack of granularity on what reasonable steps and reasonable grounds mean in the context of the FAR. It would be helpful if the Regulators were able to provide a benchmark of expectations on the extent of work that a FAR regulated entity is required to undertake to meet the requirements surrounding the FAR framework. This should include the type of evidence repositories, systems management, and policy materials that this framework comprises. The FSC notes that the concept of

reasonable steps/reasonable grounds arises multiple times in RG 279 *Information for accountable entities*, notably:

- Para 2.2 Accountability obligations of accountable entities
- Para 2.3 Key personnel obligations of accountable entities
- Para 2.4 Identifying significant related entities
- Para 3.1 Accountability obligations of accountable persons
- Para 4.1 Core notification obligations
- Para 4.1.1. Reporting breaches and material changes to the Regulators on APRA Connect
- Para 4.2 Enhanced notification obligations
- Para 5.1 Overview of the deferred remuneration obligations.

Similarly, there is a lack of guidance as to what constitutes a “material change” to e.g. the register, accountability maps and statements which businesses need to notify to the Regulators. The brief guidance provided highlights the absolute ends of the range of changes which may be made to an accountability map or statement but does not necessarily assist where judgment may be required. For example, the guidance speaks to a redistribution of key functions (an evidently material change) and correction of a typographical error/slight amendment to role title (an evidently non-material change). More can be included to address the less clear-cut areas.

The FSC **recommends** that the Regulators provide more granularity on the meaning of *reasonable steps*, *reasonable grounds* and *material change* in the context of RG279.

4. **New Reporting Forms.** The new reporting forms issued by the Regulators for the purposes of FAR compliance are materially longer than under the Banking Executive Accountability Regime, and require significant information not expressly required by the FAR Act and supporting regulation. Noting the feedback being sought on costs of compliance as part of this consultation, the FSC notes that these forms are much more onerous to complete, however the true extent of the cost of compliance will only be known once regulated businesses have a better understanding of how to complete the forms and have had practical experience of doing so for their own sectors. In particular, the FSC notes that these forms seek to replicate significant amounts of information captured in accountability statements, adding heightened risk of error (and misalignment between the form and such accountability statements) which requires significant effort to manage and ensure accuracy. Removing the form fields which are also captured in the accountability statement for ‘enhanced entities’ could be considered, to avoid duplication of content submitted hence minimising the risk of error (form fields should remain for ‘core entities’ as ‘core entities’ are not required to create accountability statements for their accountable persons).

The FSC **recommends** that the Regulators reduce the overlap between the new reporting forms and the accountability statements.

5. **Primary Areas of Focus (PAFs).** The accountabilities and responsibilities under the prescribed responsibilities (set out in the Minister Rules) and Key Functions (set out in the Regulator Rules) arguably are sufficiently detailed to allow entities to then apply

them to their structure and the responsibilities of an accountable person without the additional level of granular detail set out in the PAFs (which appear in the guidance as to how to complete an accountability statement). In addition, while the FSC notes that the Regulators have stated that PAFs should be considered a prompt “and should be used by entities as guidance only”, this message does not seem to have been fully understood by industry and could be articulated more prominently. The Regulators should also clarify that there is no expectation that businesses should have to justify or record why they have not included any particular PAFs when they are considered not applicable.

The FSC notes that the revised accountability statement guidance and template has made a large number of additions to the section *Primary areas of focus for all sectors*. In some instances, it is unclear what the Regulators’ intent is in relation to content which appears on an initial reading to be intended to target RSEs and Insurance. We would appreciate clarification from the Regulators as to how they intend these new PAFs to apply to all sectors, noting that they may sometimes inadvertently capture other business activities.

- a. By way of example, the revised PAFs includes ‘*Reinsurance management including reinsurance strategy, management and administration*’ (page 9). The FSC would expect that this is likely intended to apply only to insurers in respect of products issued to customers. However, it is possible that this may capture corporate insurance arrangements purchased by an Accountable Entity as well. It is confusing that the PAF has been included in the section intended to apply to all industries and not specifically to insurance.
- b. As another example, the revised PAFs includes “*retirement income strategy; methodology for setting member fees and costs; and member advice and ensuring adherence to the sole purpose test*” (page 8). While this is relevant for RSE licensees, it is not clear why this PAF should apply to all sectors and why it has not been included in the section headed *Additional primary areas of focus for RSE licensees*.

The FSC **recommends** that the Regulators review and clarify the rationale of the new PAFs that have been included in the section *Primary areas of focus for all sectors*.

6. **Third-party service providers.** During the webinar on 9 April 2024, APRA noted that a regulated entity may appoint an accountable person from a third-party administrator if the person with the relevant influence and senior executive responsibility is not situated within the entity. The FSC suggests further clarity be provided on how this would work in practice where third-party providers are not regulated by APRA or ASIC and are not subject to their jurisdictional enforcement scope?
7. **Facilitative compliance.** Given the considerable delay with the implementation of the FAR subordinate legislation, guidance, rules and related industry engagement (such as webinars for RSE licensees and insurers and bilateral engagement), the FSC submits that the Regulators should considering adopting a facilitative compliance

approach when the FAR first applies to RSE licensees and insurers. We note that these sectors have not had previous experience of the BEAR regime and accordingly much of the FAR regime is new to these sectors. This would be similar to the approach outlined by the Regulators in their letter to industry of 5 February¹. The FSC recognises that granting additional time for submission compliance as set out in that letter was primarily due to the Ministerial Rules not being finalised ahead of the 15 March 2024 FAR commencement date, however given that for insurance and superannuation businesses there is a considerably steeper learning curve given that they were not covered by BEAR we think that such an approach should nonetheless be considered.

2.3. Specific Key Functions

8. **RSE licensee and Insurance Key Functions - multiple regulated entities within a group structure.** It would be helpful to have more regulatory guidance in respect of Key Functions for large or more complex organisations where multiple regulated entities exist within a group structure. In some instances, financial firms will have an ADI, RSE, insurer or combination of these regulated entities under a Non-Operating Holding Company (NOHC), all of which meet different notification thresholds. Guidance in respect to the regulatory expectations of these entities would be helpful where they outsource part of their regulated function oversight back to the parent company or an associated significant related entity (SRE) of the group (i.e.. 'Marketing and advertising' or 'training and monitoring of relevant representatives' functions). The FSC suggests that specific guidance on Key Functions for complex organisations should be provided, where multiple regulated entities exist within a group structure.

9. **RSE licensee Key Function – Marketing and Advertising.** While the RSE Key Functions outlined by APRA and ASIC in the draft rules are largely consistent with those in place currently for ADIs, the FSC questions why *Marketing and advertising* has been added. This Key Function has not been added as a Key Function for Insurance or ADIs, and it is unclear what the Regulators' intention is in expecting this to be allocated for RSEs only. We note that this may be complex to navigate where an RSE exists as part of a Group structure and interacts with other entities (including Accountable Entities) in relation to their brand and marketing. It would be helpful if the Regulators were able to provide some further background by way of guidance as to why this Key Function is appropriate for RSE licensees only and not insurers/ADIs. Further clarity on whether it is intended that this Key Function would capture marketing of the group brand or solely only the RSE licensee's products (even if these are

¹ [APRA and ASIC release letter on the Financial Accountability Regime \(FAR\) ADI commencement and implementation | APRA.](#)

marketed by another entity within the group e.g. distribution entities) would also be helpful.

10. **RSE licensee Key Function – Investment management.** The FSC notes that this Key Function includes Monitoring of investment risk incidents or breaches of the RSE(s) and ensuring appropriate and timely remediation. Due to the effective dual regulation of the regime, it is expected there will be significantly more enforcement investigations of potential breaches of FAR than what has been seen under the BEAR. The current breach reporting regime prescribed in financial services legislation and RG78 is comprehensive. For this reason, it would be appropriate for the Regulators to provide further information on how this dual regulation will now work in practice and what type of evidence may be required in a remediation event or investigation. For example, we note that the Regulators clarified that ASIC will not dually regulate superannuation unless the RSE is part of a corporate group that would otherwise hold an AFSL or ACL. This should be made clear in the guidance.

11. **RSE Licensee Key Function - Member outcomes.** This proposed Key Function contains a number of themes that overlap with other Key Functions and/or prescribed responsibilities and/or positions. Given the existing regulatory landscape and other proposed Key Functions it is questionable whether this Key Function is required at all. For example, *Design of products, advice and services* and *Design of insurance arrangements for members, including insurance fees and costs* could both be deleted given that they are already covered by *Product design and distribution services*.

12. **Insurance and RSE licensee Key Function – Product origination.** The proposed definition covers obligations ...*that relate to financial products or credit contracts/consumer leases*..... However, it is submitted that credit contracts and consumer leases are not relevant to insurance businesses and accordingly these references should be deleted here and elsewhere that they appear in the draft (see also the immediately following paragraph). More broadly, we acknowledge that the Regulators helpfully provided some clarity on the difference between the ‘Product design and distribution obligations’ and ‘Product origination’ Key Functions during its 9 April webinar. It would be helpful to have that clarity added to the descriptions of each of those Key Functions if it is envisaged that they are distinct responsibilities. Notwithstanding this, based on the current wording, it appears that both of these Key Functions appear to be focused on the responsibility for formulating a financial product – if that is intended – these functions could be combined for simplicity (and this would also apply to ADI Key Functions).

13. **Insurance Key Function – Training and monitoring of relevant representatives and staff.** The proposed definition covers staff engaging in credit activities on behalf of a licensee. However, it is submitted that credit activities are not relevant to insurance businesses and accordingly these references should be deleted.

14. **Insurance Key Function – Capital management.** The insurer functions demonstrate descriptive wording consistent with entities that manage short tail risk such as general insurers. This is particularly apparent in the ‘capital management’ function. It may be useful for the Regulators to reassess the descriptions and apply a more holistic approach for drafting to ensure the vast majority of the Regulator functions apply to the full suite of ‘insurer’ entities under this regime such as life insurers and life companies.

15. **Insurance Key Function – Reinsurance management.** The proposed definition simply states *Reinsurance functions including reinsurance strategy, management and administration*. The FSC suggests that more clarification around the meaning of this function with a more prescriptive description is required.