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Inside:

A stronger prudential framework for the superannuation industry

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Safety legislation: what it means for trustees

The purpose of the new *Superannuation Safety Amendment Act 2004* is to strengthen the existing prudential framework in the superannuation industry. Trustees should make themselves aware of the new requirements, report Senior Associate Lois Dannecker and Lawyer Priya Sivakumaran.

Your new responsibilities after 1 July

From 1 July 2004, trustees of registrable superannuation entities (**RSEs**) will need to ensure that all new material outsourcing agreements include provisions to satisfy the new legislation.

Between 1 July 2004 and 30 June 2006, trustees will need to:

- ensure that all existing material outsourcing agreements are amended to include provisions to satisfy the new legislation;
- obtain an RSE licence from the Australian Prudential Regulation Authority (**APRA**);
- register with APRA all RSEs of which they are the RSE licensee; and
- prepare a risk management strategy and risk management plans.

Purpose of superannuation safety legislation

The purpose of the *Superannuation Safety Amendment Act 2004* (the **Act**), which amends the *Superannuation Industry (Supervision) Act 1993* (**SIS**), is to strengthen the existing prudential framework operating in the superannuation industry. In particular, it seeks to regulate the industry through the introduction of strict licensing and registration requirements.

The Act came into effect on 1 July 2004. A transitional period of two years applies, and those entities to which the Act applies will have until 30 June 2006 to meet the relevant requirements. It is important, however, that superannuation funds commence

preparations for compliance with the Act as soon as possible to ensure that they meet the 30 June 2006 deadline.

To whom does the Act apply?

The Act applies to RSEs, namely:

- regulated superannuation funds;
- approved deposit funds; and
- pooled superannuation trusts.

All APRA-regulated superannuation entities are captured by this definition. The Act does not apply to self-managed funds. Public sector superannuation schemes are also exempt.

All trustees operating an RSE must hold an RSE licence by 1 July 2006. All RSE licensees must register all RSEs of which they are the RSE licensee with APRA by that date. If a trustee does not obtain a licence by 1 July 2006, it will need to make arrangements for the appointment of a licensed trustee of the RSE or wind-up the RSE.

Classes of licence

There are three classes of licence, namely:

- public offer entity licence – enables holders to operate public offer RSEs;
- non-public offer entity licence – enables holders to operate RSEs that are not covered by the first class of licence, such as corporate superannuation funds; and
- extended public offer entity licence – enables holders to operate both public offer RSEs and non-public offer RSEs under one RSE licence.

How to apply for a licence

Trustees should obtain application kits from APRA's website: <http://www.apra.gov.au/> or by contacting APRA on 02 9210 3344. Application forms, and the relevant application fee, must be sent to APRA.

The application form requires the applicant to provide information in the following categories:

- general information about the applicant;
- information about the applicant to determine its current compliance, and ability to continue to comply, with the operating standards under the *Superannuation Industry (Supervision) Regulations*.

The applicant will need to provide supporting documentation; and

- certificates signed by the directors if the applicant is a body corporate or constitutional corporation, or certificates signed by each trustee if the applicant is a group of individual trustees.

In particular, the applicant will need to identify which class of licence is required.

While a constitutional corporation may apply for any kind of licence, bodies corporate that are not constitutional corporations, and groups of individual trustees, may only apply for non-public offer entity licences. Similarly, only constitutional corporations will be able to apply for licences for funds where the primary benefit is paid as a lump sum, rather than a pension.

APRA will take into account the nature, size and complexity of the application's operations when assessing a licence application.

Trustees should ensure that their licence application is received by APRA by 31 December 2005. At any time in the last six months before 1 July 2006, APRA can refuse to consider any further applications. Trustees should therefore commence the application process early to meet this deadline.

The grant of RSE licences

Under section 29D(1) of the Act, APRA must grant an RSE licence if the following requirements are satisfied:

- APRA has no reason to believe that the trustee (either as a body corporate, or the group of individual trustees, or any member of that group) would fail to comply with the RSE licensee law if the RSE licence were granted. The definition of 'RSE licensee law' includes SIS, the *Corporations Act* and the respective regulations;
- APRA has no reason to believe that the trustee would fail to comply with any condition imposed on the RSE licence if it were granted;
- the application is in the approved form and accompanied by the supporting documents required under s29C and is for a class of licence for which the trustee may apply;
- APRA is satisfied that the trustee meets the minimum fitness and propriety standards prescribed under the Act;
- APRA is satisfied that the risk management strategy (**RMS**) for the trustee meets the requirements of 29H;

- in cases where the trustee is not a constitutional corporation, APRA is satisfied that the trustee only intends to act as trustee for one or more superannuation funds that each have governing rules providing that the sole or primary purpose of the fund is the provision of old-age pensions;
- in cases where the application is for a public offer entity licence, APRA is satisfied that the trustee is a constitutional corporation that meets the capital requirements of s29DA. Those requirements are net tangible assets or an approved guarantee, or a combination of these, of a minimum of \$5 million; and
- the application has not been withdrawn, refused, or treated as either withdrawn or refused.

General licence requirements

Under s29E(1) of the Act, all RSE licensees will be required to:

- comply with the RSE licensee law;
- properly perform the duties of the trustee for the fund;
- have an RMS that complies with the Act and to comply with that RMS;
- ensure that each RSE of which it is the RSE licensee is registered under the Act or is the subject of an application for registration;
- comply with each measure and procedure set out in the risk management plan (**RMP**) for each RSE of which it is the RSE licensee and which the trustee will be required to have under the Act;
- notify APRA of any change in the composition of the RSE licensee within 14 days after the change takes place; and
- comply with any other conditions prescribed by regulations.

The Act also imposes further specific conditions on certain classes of RSE licensees.

Registration of RSEs

As referred to above, it is a condition of RSE licences that the licensee applies for the registration of each RSE of which it is the RSE licensee. This means that trustees must have been granted an RSE licence before applying for registration. APRA has requested, however, that trustees should submit an application for registration in draft form at the same time as they

submit the licence applications so that the applications can be considered together in order to expedite the process.

Also, to expedite the process, trustees may give APRA a statement of intention to apply for an RSE licence that includes the anticipated date of lodgment of the licence application. This is to enable APRA to schedule its next regular audit review of each RSE of which the applicant is trustee before the licence is granted.

Risk management strategies and risk management plans

As stated above, trustees must prepare an RMS, which is to be submitted with the licence application. The RMS must set out reasonable measures and procedures to identify, monitor and manage risks that arise in respect of the operations of the RSE licensee. The specific requirements are set out at s29H of the Act.

The RSE licensee must also submit an RMP for each fund of which it is the RSE licensee as part of each registration application. The required content of an RMP is similar to the required content of an RMS but relates to the RSE rather than to the trustee. The specific requirements are set out at s29P of the Act.

Both the RMS and the RMP must be maintained and reviewed regularly in order to comply with the Act. APRA must be notified of any modifications to, or of the replacement or repeal of, an RMS or RMP.

Licence and registration numbers

Trustees should be aware that on obtaining an RSE licence and registration of an RSE, they will be provided with a unique licence number and a registration number for the RSE. These numbers must be displayed on trustee documents and fund documents.

Operating standards

The Act expands the current SIS operating standards applicable to trustees. The standards now include requirements as to:

- the fitness and propriety of RSE licensees and trustees of RSEs;
- the outsourcing agreements relating to the operation of RSEs; and
- the adequacy of the resources of, or available to, RSE licensees.



An RSE licensee must meet the fit and proper standard for a licensee with reference to certain attributes (such as diligence, honesty, integrity and educational or technical qualifications) that enable the RSE licensee to discharge its duties and responsibilities in a prudent manner.

Trustees must ensure that provisions specified in regulations are included in outsourcing agreements. These include provisions relating to:

- the service provider being required to audit its activities and allow the trustee and APRA to have access to the service provider's premises and documents on request;
- default, dispute resolution and termination;
- confidentiality, privacy and security; and
- auditing, monitoring, assessment and liability of the service provider.

These requirements apply to agreements with custodians, administrators, investment managers and other service providers to whom significant business activities are outsourced. The new provisions must be included in agreements with service providers before 1 July 2006. In some cases, APRA may not grant an RSE licence until material outsourcing agreements include these provisions.

The requirement for an RSE licensee to have, or to have available to it, adequate resources includes human resources, technical resources and financial

resources. The resources of service providers available to an RSE under outsourcing agreements will be taken into account.

Penalties

The Act incorporates strict penalties for failure to comply with the requirements of the new scheme. For example, monetary penalties will apply if a trustee of an RSE:

- acts as a trustee of an RSE after 30 June 2006 while unlicensed;
- fails to notify APRA of a breach of a licence condition. No materiality threshold applies and, therefore, even minor breaches must be notified to APRA;
- fails to comply with a direction from APRA to comply with a licence condition or to modify an RMS or RMP; or
- fails to notify APRA of modifications to an RMS or RMP.

Action required

Trustees of RSEs should obtain the application kit from APRA's website soon and start compiling the supporting proofs and documents for their application for an RSE licence and registration of the RSEs of which they will be the RSE licensee, to allow for any unforeseen delays in the licensing and registration process.

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