

28 February 2020

Treasury

By email - FSRCconsultations@treasury.gov.au

Re: Financial Regulator Assessment Authority Bill 2020

This reform will establish a new oversight body for APRA and ASIC. It is essential that this new body encourages APRA and ASIC to be bold and proactive regulators that protect the financial wellbeing of Australians.

Financial regulators are already subject to significant oversight. This legislation must clearly clarify what additional purpose this body would serve and how this would improve outcomes for consumers. Existing accountability measures have focussed too much on the interests of industry rather than the interests of consumers, and the Authority should fill this gap.¹

This new body must be accountable to the public for who they stand to serve. We consider that there needs to be radical change in accountability mechanisms so that this is more focused on the interests of consumers, rather than industry. Key elements of accountability to consumers include transparency and effective consultation.

In its current drafting, we are not convinced the Authority will achieve better outcomes for consumers, which should be its core purpose. At a minimum, the law must be significantly reworked to:

- explicitly state that the object of the body exists to enhance the financial wellbeing of Australians and improve outcomes for consumers;
- embed regular consultation with consumer groups; and
- provide stronger guidelines about appointees to ensure that they are independent and have the necessary expertise to assess regulator performance.

The Authority must exist to serve the long-term wellbeing of consumers

In assessing the effectiveness of regulators, the Authority's core focus should be on whether regulators are improving outcomes for consumers. The Treasury must codify this principle in the objective of the legislation. This will ensure that the focus of the Authority in exercising its duties remains on enhancing consumer wellbeing, rather than furthering industry interests. We encourage the Treasury to look at the Competition and Consumer Act 2010 for drafting guidance. This law states that,

“The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”²

¹ See Consumer Action submission to the Financial Services Royal Commission Interim Report for further commentary from para 209: <https://consumeraction.org.au/wp-content/uploads/2018/10/181026-Interim-Report-submission-FINAL.pdf>.

² Competition and Consumer Act 2010, s2.

This is also consistent with the *Telecommunications Act 1997*, which states that the main object of the Act is to provide a regulatory framework that promotes:

*“the long-term interests of end-users of carriage services or services provided by means of carriage services”.*³

The Royal Commission urges policymakers to clearly state the underlying norms and principles of financial services legislation. Commissioner Hayne established that best practice for statutory drafting is that,

*“the first requirement will be to settle upon the principle or principles to which the law is to give effect.”*⁴

The Treasury is presented with a clear opportunity to establish the principles and underlying norms of this body. This will help simplify and clarify the law for the Authority, business, regulators, and the broader community.

Recommendation 1

- The draft Bill must be amended to specify that the Authority’s core focus in assessing regulator effectiveness should be on whether regulators are improving outcomes for consumers and enhancing the financial wellbeing of Australians.

Consultation with consumer groups should be mandated

We are concerned that the current proposal does not embed consultation with organisations that act in the interests of consumers. It is imperative that consumers and consumer groups should be part of assessment and reporting processes – the effectiveness of regulators should be measured with consumer outcomes at its core. This needs to be embedded.

We note that consumer protection regulators overseas, such as the Financial Conduct Authority (**FCA**) in the UK, invest significantly in seeking consumer feedback. The Financial Services Consumer Panel (**FSCP**) which is hosted by the FCA. The FSCP is an independent statutory body set up to represent the interests of consumers in the development of policy for the regulation of financial services. The FSCP panel members are selected through a competitive recruitment process, paid fees and supported by a small secretariat. The Panel Chair meets regularly with the FCA Chairman and Chief Executive, has a research budget and produces annual reports. The FSCP describes its role as bringing a 'consumer perspective to aid effective regulation', supporting or challenging the FCA where required.

³ *Telecommunications Act 1997*, s3,

⁴ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 1, p486

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3333 | Fax 02 9577 3377 | Email ausconsumer@choice.com.au | www.choice.com.au

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Recommendation 2

- The draft Bill should include consultation with consumers and consumer organisations as part of the assessment process.

There should be no Department member on the Authority

The Final Report of the Royal Commission was clear - this body should be “independent of Government.”⁵ The draft Bill specifies that the Authority consists of four members:

- A Chair
- A Departmental member
- Two other members appointed by the Minister.

We do not believe it is appropriate for a current member of Treasury or any government department to be appointed to this role. It is more appropriate for Department staff to instead advise and support the work of the Authority.

The Authority should consist only of a Chair and two other members appointed by the Minister with support from a secretariat.

Recommendation 3:

- Amend sections 10 and 23 to ensure that there is no Department member of the Authority. Instead, the Minister should instruct the Department to provide advice and support as requested by the Authority.

The Bill should be clearer about who can be appointed

The draft Bill has very little guidance about who could be appointed as an Authority member, leaving appointments to the discretion of the Minister. The only restriction is that:

An appointed member must not engage in any paid work that, in the Minister’s opinion, conflicts or could conflict with the proper performance of the member’s duties. (s 30).

There should be further, strict guidance about what constitutes a conflict. At minimum, we expect that people employed by or recently employed by any APRA or ASIC regulated entity could not be appointed.

It is also essential that at least one member of the Authority has experience in and understanding of consumer protection. The Bill should be amended to require this. It could mirror similar requirements for experience for ACCC appointments.⁶ Similar rules should also be applied to consultants working for the Authority.

⁵ Final Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, p. 479.

⁶ See *Competition and Consumer Act 2010 (Cth)*, s7(4), ‘At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection’.

Recommendations 4-5:

- Amend section 24 to require that 'At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection'
- Amend section 30 to:
 - An appointed member must not
 - engage in any paid work for any APRA or ASIC regulated entity.
 - have engaged in any paid work for any APRA or ASIC regulated entity in the past five years.
 - engaged in any paid work that, in the Minister's opinion, conflicts or could conflict with the proper performance of the member's duties.

For further information please contact CHOICE on eturner@choice.com.au

Yours sincerely,



Erin Turner
Director - Campaigns & Communications
CHOICE



Katherine Temple
Director - Policy & Campaigns
Consumer Action Law Centre



Karen Cox
Chief Executive Officer
Financial Rights Legal Centre

57 Carrington Road Marrickville NSW 2204

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