

Superannuation (prudential standard) determination No. 1 of 2016

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Superannuation Industry (Supervision) Act 1993, section 34C

Under subsection 34C(1) of the *Superannuation Industry (Supervision) Act 1993* (the Act), APRA has the power to determine standards (prudential standards), in writing, in relation to prudential matters to be complied with by RSE licensees of registrable superannuation entities (RSEs). Under subsection 34C(6) of the Act, APRA may, in writing, vary or revoke a prudential standard.

On 31 October 2016, APRA made Superannuation (prudential standard) determination No. 1 of 2016 (the instrument) which revokes *Prudential Standard SPS 510 Governance* made under Superannuation (prudential standard) determination No. 6 of 2012 and determines a new *Prudential Standard SPS 510 Governance* (SPS 510).

The instrument commences on 1 July 2017.

1. Background

SPS 510 was introduced in 2012, as part of a package of new prudential standards applying to RSE licensees. APRA was granted power to make prudential standards applying to RSE licensees in 2012. The introduction of SPS 510 was one of a large number of significant amendments to the prudential framework for superannuation to strengthen prudential requirements applying to RSE licensees and support the amendments to the legislative framework arising from the Government's Stronger Super reforms.

APRA has reviewed the prudential requirements relating to governance for RSE licensees and has enhanced obligations relating to the management of governance risks in SPS 510.

2. Purpose and operation of the instruments

The purpose of this instrument is to amend SPS 510, which sets out requirements for minimum foundations of good governance of an RSE licensee. The key new requirements in SPS 510 are that the Board of an RSE licensee must:

- have a governance framework which includes, at a minimum, the Board's charter (or equivalent document) and policies and processes that achieve appropriate skills, structure and composition of the Board; and
- have policies and processes relating to nomination, appointment and removal of directors that support appropriate Board composition and renewal on an ongoing basis.

These amendments are designed to support improved governance practices by RSE licensees.

Where this prudential standard incorporates by reference the requirements of another prudential standard, this is a reference to the prudential standard as it exists from time to time.

3. Consultation

APRA consulted publicly on the changes to SPS 510 in July-August 2015, with eight submissions received. Submissions were received from, and discussions held with, numerous RSE licensees and industry bodies.

Submissions largely supported the proposed changes to the governance framework.

4. Regulation Impact Statement

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for this legislative instrument.

5. Statement of compatibility prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instrument listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HRPS Act)

Overview of the Legislative Instrument

The purpose of making this legislative instrument is to make minor amendments to *Prudential Standard SPS 510 Governance* (SPS 510) which sets out minimum standards of governance required of RSE licensees. The amendments to SPS 510 support improved governance practices by RSE licensees by requiring the boards of RSE licensees to have in place a governance framework, which includes policies and processes on the nomination, appointment and removal of directors.

Human rights implications

APRA has assessed the instrument against the international instruments listed in section 3 of the HRPS Act and determined that Article 17 of the International Covenant on Civil and Political Rights (ICCPR) is potentially of relevance to the instrument.

Article 17 of the ICCPR prohibits the arbitrary or unlawful interference with a person's privacy, family, home and correspondence, and attacks on reputation. Article 17 is exclusively concerned with prohibiting interference with the privacy and/or reputation of individual persons. It does not extend to the privacy and/or reputation of corporate entities.

Amendments to SPS 510 require RSE licensees to have in place a governance framework, including policies on the size and composition of the board and board committees, board renewal and the management of nomination, appointment and removal of directors (including director terms and maximum tenure periods). The requirements of SPS 510 may necessitate RSE licensees obtaining personal information about candidates and potential candidates for appointment to the Board to assess their suitability as a potential director.

The personal information required to be collected for RSE licensees to meet the requirements of SPS 510 is essential to the effective operation of SPS 510 and supports the appointment of directors to RSE licensee boards who are suitably qualified and experienced and match the skills necessary to the role.

This information ultimately supports APRA achieving its mission of ensuring that, under all reasonable circumstances, financial promises made by the institutions APRA supervises are met within a stable, efficient and competitive financial system.

APRA also considers that Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is arguably relevant. The ICESCR proclaims the right to work in a general sense. The United Nations Committee on Economic, Social and Cultural Rights (the UN Committee) has stated that ‘the right to work affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly’. The right not to be deprived of work unfairly is relevant for the purposes of this Legislative Instrument.

This definition implies that depriving an individual of work may not be a violation of Article 6(1) where that deprivation is regarded as fair. In determining what is ‘fair’, regard may be had to Article 2 of the ICESCR. Article 2 prohibits discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the intention or effect of impairing or nullifying exercise of the right to work. Where an individual is deprived of work on the basis of any of these grounds, it is reasonable to assume that that deprivation will be regarded as ‘unfair’ and, therefore, that the right to work has been engaged.

SPS 510 requires RSE licensees to have policies relating to the size and composition of the board, and the nomination, appointment and removal of directors (which includes the setting of director terms in office and maximum tenure periods). SPS 510 also extends the requirements relating to the nomination, appointment and removal of directors to require RSE licensees to establish and implement formal policies and processes which address, at a minimum:

- (a) the length of the term to which a director is appointed to the Board;
- (b) the maximum tenure limit for an individual director;
- (c) how vacancies will be managed, including, where applicable, how the RSE licensee will comply with the vacancy requirements in Part 9 of the SIS Act;
- (d) the process by which a candidate will be nominated for a vacant Board position;
- (e) the factors that will be considered when assessing the suitability of a nominated candidate, including how the RSE licensee assesses the independence of the candidate where relevant and the Board’s process for determining whether a particular candidate is appointed;
- (f) the process by which a director will be appointed to the Board;
- (g) the factors that will determine when an existing director will be re-appointed, including whether the director has served on the Board for a period that could, or could reasonably be perceived to, materially interfere with their ability to act in the best interests of beneficiaries;
- (h) the process by which the Board will resolve disputes about nominations, appointment, re-appointment or removal of directors;

- (i) when and how a director will be removed from the Board; and
- (j) the Board's policy on voting rights and procedures in relation to nomination, appointment, reappointment and removal of a director.

These requirements support both the appointment of appropriate candidates and ongoing board renewal by requiring boards to set maximum periods of tenure that limit the total length of time a director would serve on a Board. The aim of these requirements is to support the maintenance of an appropriate level of independent judgment on the Board.

This requirement for an RSE licensee board to set limits on the tenure of directors is not based on any of the grounds of discrimination stated in Article 2. Therefore, it is arguable that requiring an RSE licensee to set pre-determined limits on the length of service of a director is not unfair and, therefore, does not derogate from the right to work contained in Article 6(1) in the necessary sense.

Accordingly, as SPS 510 is premised on an RSE licensee board establishing and implementing policies so as to achieve the appropriate board skills, structure and composition necessary to effectively govern its business operations, an individual affected by such policies is arguably not being unfairly deprived of work and, therefore, the right to work has not been engaged.

However, the proper interpretation of the right to work contained in Article 6(1) is ambiguous and, in particular, the right not to be deprived of work may not be qualified to the notion of unfairness. Therefore, the above analysis is not conclusive and the alternative might be argued: that is, this Legislative Instrument does engage the right to work.

Article 4 of the ICESCR provides that countries may subject economic, social and cultural rights only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The UN Committee has stated that such limitations must be proportional and should be of limited duration and subject to review.

The objective of SPS 510 is to ensure that that an RSE licensee's business operations are managed soundly and prudently by a competent board, which can make reasonable and impartial business judgements in the best interests of beneficiaries and which duly considers the impact of its decisions on beneficiaries. Requiring an RSE licensee board to limit the size, structure and composition of the board strengthens the protection afforded to beneficiaries and other stakeholders.

Failure to limit access to reasonable persons to the appointment of director of an RSE licensee considerably increases the risk of significant loss to beneficiaries of superannuation funds. Consequently, the limitation of the right to work by this Legislative Instrument is reasonable, necessary and proportionate to its objective as described above.

Conclusion

Superannuation (prudential standard) determination No. 1 of 2016 is compatible with human rights because:

- (i) to the extent that determination No. 1 of 2016 may limit human rights, those limitations are reasonable, necessary and proportionate; and
- (ii) the remaining parts of the determination do not raise human rights issues.