



Law Council
OF AUSTRALIA

Legal Practice Section

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Ian Beckett
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By email: superannuation.policy@apra.gov.au

Dear Mr Beckett

Response to proposed class exemption: approval to own or control an RSE licensee

This submission is made by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia (the **Committee**).

The Committee welcomes the opportunity to provide feedback on the proposed class exemption and draft instrument concerning approvals to own or control a registerable superannuation entity (**RSE**) licensee (the **proposed exemption**).

1. Scope of relief unnecessarily limited to company secretaries and management

The Committee understands from the consultation materials that the proposed exemption is intended to relieve certain company secretaries and management employees with a direct control interest of less than 2% from having to seek approval before acquiring a controlling stake. However, directors of these types of companies could also have very small (less than 2%) direct control interest, but it appears that APRA intends to exclude directors from the class exemption.

The Committee cannot see a reason for such an exclusion and recommends that APRA either consider extending the class exemption to directors of the relevant companies or provide commentary, as part of the release of the final class exemption, in relation to its reasons for not extending the relief to directors.

2. Scope of relief should not be contingent on company approval

The Committee understands that the proposed exemption is intended to relieve company secretaries and management employees of a company from controlling stake applications only if the company is approved under *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) section 29HD. However, in many cases, the company secretary or management employee would have no ability to influence whether a controlling stake application is made on behalf of the company.

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The Committee is concerned that imposing this condition in the proposed class exemption undermines the exemption's purpose of removing unnecessary burden for relevant persons purely due to aggregation. The Committee notes that the company would still have breached the prohibition in section 29JCB, however, it suggests that the company's breach of the prohibition should not prevent the company secretary or management employee from accessing relief.

The Committee notes that the class exemption limits the relevant person's direct control interest to 2% and suggests that this limit is what is needed to achieve the regulatory purpose.

3. Removal of “only” to achieve the purpose of class exemption

APRA proposes to impose a condition that the class exemption is available *only* if the company secretary or management employee holds a controlling stake because that person is the company secretary or a management employee of the company. To satisfy this condition, it appears that:

- the only associate of the company secretary or management employee that holds a direct control interest can be the company; and
- it is the direct control interest of the company that causes the person's stake to exceed 15%.

However, “associate” (defined in clause 4 of Schedule 1 to the *Financial Sector Shareholders) Act 1998* (Cth)) is drafted extremely broadly and includes:

- for a company secretary:
 - any other company secretary, all management employees of the company and all directors of the company; and
 - the company secretary's relatives;
- for management employees:
 - other management employees, all directors of the company and all company secretaries; and
 - a management employee's relatives;
- subsidiaries of the company; and
- all associates of the above.

The width of the “associate” definition means that a company secretary or management employee could have a controlling stake in an RSE licence in a variety of other circumstances (ie due to a variety of other associates), including because other management employees and directors of the company have a direct control interest.

In light of this, the Committee is concerned that imposing a condition that the “only” reason that the company secretary or management employee has a controlling stake is because of the direct control interest held by the company could limit the operation of the class exemption to the point that the class exemption would have little practical impact, except in a very narrow set of circumstances (which could be addressed by individual relief application or simply applying for approval to hold the controlling stake).

This is a further reason why the Committee recommends that APRA consider removing this condition altogether and relying on the 2% limit as the factor to achieve the regulatory purpose.

As an alternative, APRA could consider expanding the types of associates who have direct control interests. For example:

... only holds a controlling stake in the RSE licensee because their associates referred to in sections 4(1)(c), (e), (j) and (l) have a direct control interest in the RSE licensee.

4. SIS Act section 29E stake notifications requiring equivalent amendments

The Committee also wishes to take this opportunity to point out the significant practical difficulties in RSE licensees complying with the obligation to notify APRA of changes in stakes under section 29E(1)(f) and (2) because they will not have the information required to notify APRA of changes in stake in most situations. One option would be for APRA to amend section 29E(1)(f) to require notification of changes in stake within 14 days of the “RSE licensee becoming aware” of the change in stake.

Conclusion

The Committee would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee, Joanne Dwyer, [REDACTED], if you would like to do so.

Yours sincerely



Greg McIntyre SC
Chair, Legal Practice Section