There is already nowhere for super trustees to hide

By Eva Scheerlinck (https://investmentmagazine.com.au/author/eva-scheerlinck/) | 11/08/2017

OPINION | If culture starts at the top, so does accountability. Too often, when bad behaviour occurs in the corporate environment, we've seen senior executives and directors escape any serious consequences while more junior employees are shown the door.

The Australian Prudential Regulation Authority (APRA) has been granted a number of new special powers. In applying them, it's important to remember that trustees at profit-to-member funds are already held accountable to a much greater degree than bank executives and directors.

The need for a greater degree of accountability among top executives and directors in the banking sector was recognised in May's federal budget. Treasurer Scott Morrison announced a suite of additional powers for regulators, including the authority to make direct adjustments to the banks' remuneration policies and enforce new obligations on bank conduct with costly penalties.

The majority of the proposed new measures relate to banks and not superannuation funds. But a measure to strengthen the APRA's existing power to remove and disqualify executives and directors is intended to apply to all APRA-regulated entities, including super funds.

Under existing legislation, the APRA already has the power to apply to the Federal Court for the disqualification of directors or "responsible persons" of any supervised entity. Similarly, the Australian Tax Office can also disqualify directors or trustees of self-managed super funds.

The change announced on budget night would allow the APRA to remove individuals from banks super funds and insurers without first applying to the Federal Court. Removing the need for APRA to go to Federal Court to seek director disqualification may result in quicker action but we don't expect to see great change in the profit-to-member super sector.

In fact, the power to disqualify already exists under the regulator's 'fit and proper' regime, which covers senior executives. Perhaps it is the rarity of disqualifications in our sector, credited to our strong governance practices, that allows us to forget that sometimes. In contrast, disqualifications occur frequently in the SMSF sector.

Strong protections

The Australian Institute of Superannuation Trustees (AIST) will not oppose the new measure tha strengthens the regulator's power to disqualify directors and responsible persons where clear shortcomings have been identified. The right to review a decision APRA makes under these proposed new powers remains.

We are, however, less comfortable with suggestions that some of the other budget measures applying to banks be extended to superannuation funds for no other reason than to align regulation across the financial services sector.

More clarity is needed on these new measures and how they are intended to work in practice. Meanwhile, it is important to recognise that current prudential standards provide a robust framework for the regulator to supervise and monitor super funds and require them to adopt the necessary systems and behaviours that meet best-practice governance obligations.

The duties and obligations now imposed on super fund directors are already much higher than those for banks or insurance company directors. These legal obligations were heightened in 2013 as a result of the Stronger Super reforms.

Harsh penalties apply to super fund directors who breach their obligations, and rightfully so. The can be held personally liable for the payment of monetary penalties and, in extreme cases, end up in jail.

Underpinning these obligations, trust law requires super trustees to take extra care as fiduciaries of others' money.

New governance code

As a third layer of accountability, AIST has developed a new Governance Code that our membe funds (which include industry, public-sector and corporate funds) will be required to adopt from July 1, 2018. The code, which some AIST member funds are voluntarily moving to adopt for this financial year, includes requirements around the appointment and renewal of directors above APRA's current standards.

As our industry grows and changes, AIST recognises that there is a collective need to review the way we govern ourselves, to preserve those good things that distinguish us and to further develop those areas where we can improve.

In terms of accountability, directors and executives of profit-to-member super funds already have nowhere to hide. And this is exactly how it should be in a compulsory system where we act as stewards for people's hard-earned retirement savings.

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