Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks toward the Twin Peaks

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Licensing regimes form an integral part of Australia's Twin Peaks system of financial regulation. This article surveys three of the different licensing regimes that were particularly relevant to the Financial Services Royal Commission: the Australian Financial Services Licence (AFSL); the Australian Credit Licence (ACL); and the Registrable Superannuation Entity (RSE). Taking into account the changes to regulation of superannuation in the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (Cth), the article analyses the structure and content of these three regimes, and their broader regulatory context, to determine whether there is scope to consolidate, rationalise, and harmonise these licensing regimes. From that survey, the article concludes that there is scope for rationalisation of the AFSL and ACL regimes, but that the RSE licensing regime should continue to be separate.

For two decades, Australian financial regulation has been underpinned by the "Twin Peaks" model.[1] It separates "regulatory functions … according to the objective, rather than the target" of regulation.[2] Prudential regulation is the domain of the Australian Prudential Regulation Authority (APRA) while conduct regulation – market integrity and consumer protection – is the responsibility of the Australian Securities and Investments Commission (ASIC). Twin Peaks has not been free from critique,[3] nor has it been without adjustment.[4] Commissioner Hayne in the Final Report of the Financial Services Royal Commission (Financial Services Royal Commission),[5] affirmed Twin Peaks although not without recommendations for reform, particularly in relation to superannuation. The *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) (*2020 Response Act*) has adopted those recommendations and taken them further.

Licensing regimes which are used to regulate which entities are permitted to operate in Australia's financial system and to establish norms of conduct for those licensed are integral to the Twin Peaks system. Requirements are imposed upon a range of licensed actors including prudentially-regulated

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[1] See Andrew Godwin and Ian Ramsay, "Twin Peaks – The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" (2015) 26(4) JBFLP 240.

[2] Pamela Hanrahan, "Twin Peaks after Hayne: Tensions and Trade-offs in Regulatory Architecture" (2019) 13(2–3) *Law and Financial Markets Review* 124, 124.

[3] See, eg, Hanrahan, n 2; Steve Kourabas, "Improving Australia's Regulatory Framework for Systemic Financial Stability" (2018) 29(3) JBFLP 183; Steve Kourabas, "Prudential Regulation in Australia and the Banking Royal Commission: A Missed Opportunity for Reform?" (2020) 31(1) JBFLP 45.

[4] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (2019) Vol 1, 449–454 (*Final Report*).

[5] *Final Report*, Vol 1, 37 Recommendation 6.1.

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entities (authorised deposit-taking institutions (ADIs),[6] life insurers,[7] general insurers,[8] private health insurers,[9] and registrable superannuation entities (RSEs)[10]), together with those carrying on financial services businesses,[11] those who engage in credit activity,[12] and those operating financial markets[13] and clearing and settlement facilities.[14] APRA administers the licensing regimes for the first group, while ASIC administers those applicable to the latter group. Some entities are dual-regulated – they are required to hold multiple licences. This is particularly relevant for credit provided by ADIs, and financial products or services provided by RSEs.

Within the context of the reforms contained in the *2020 Response Act*, this article focuses on three licensing regimes that received particular attention during the Financial Services Royal Commission: the Australian Financial Services Licence (AFSL), the Australian Credit Licence (ACL), and the Registrable Superannuation Entity (RSE). The first two are ASIC-administered. The third is APRA-administered, with ASIC now having some enforcement powers. These regimes have arisen from different reforms but all have the common purpose of regulating the conduct of industry participants through: requiring a licence to operate; imposing conditions to both obtain and hold a licence; imposing obligations upon licence holders; and, imposing consequences for breach of these obligations. Given Commissioner Hayne's observations about legislative complexity,[15] this article surveys these regimes to determine whether there may be scope to rationalise them, within the context of Twin Peaks.[16] From that analysis, we suggest that future reform initiatives should consider the consolidation of the AFSL and ACL regimes, but that the separate RSE licensing regime should be retained. These conclusions have particular relevance given the reforms to the AFSL and RSE licensing regimes contained in the *2020 Response Act*.

Part I examines the role of licensing as a regulatory tool. Part II outlines the Twin Peaks model, the place of licensing in it and the changes proposed by Commissioner Hayne and enacted by the *2020 Response Act*. Part III considers the history, structure, and content of the AFSL, ACL, and RSE regimes. Part IV considers the potential for rationalisation of these regimes. Part V concludes.

I. Regulating through Licensing Regimes

Powers to grant and cancel a licence are key components of ASIC and APRA's regulatory toolkits. Licensing (or authorisation in the case of ADIs[17]) is one of the ways through which Australian law seeks to "achieve an efficient market which minimises risk and reduces regulatory arbitrage".[18] This is neither a new nor uniquely Australian phenomenon.[19] Regulation of entry into – and removal from – the market entails consideration of both prudential and conduct questions.[20]

Licensing is an "*ex ante*" regulatory strategy.[21] As "entry regulation" – it "affects the ability of (would-be) participants in the financial system to engage in financial transactions with other participants" and

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[6] *Banking Act 1959* (Cth) Pt II.

[7] *Life Insurance Act 1995* (Cth) Pt 3.

[8] *Insurance Act 1973* (Cth) Pt III.

[9] *Private Health Insurance (Prudential Supervision) Act 2015* (Cth) Pt 2.

[10] *Superannuation Industry (Supervision) Act 1993* (Cth) Pts 2A, 2B.

[11] *Corporations Act 2001* (Cth) Pt 7.6.

[12] *National Consumer Credit Protection Act 2009* (Cth) Ch 2.

[13] *Corporations Act 2001* (Cth) Pt 7.2.

[14] *Corporations Act 2001* (Cth) Pt 7.3.

[15] *Final Report*, n 4, Vol 1, 16–19.

[16] M Scott Donald, "Regulating Superannuation in the Shadows of the Twin Peaks" (2020) 31(1) JBFLP 57, 57; Hanrahan, n 2, 129.

[17] *Banking Act 1959* (Cth) s 9.

[18] Gail Pearson, "Risk and the Consumer in Australian Financial Services Reform" (2006) 28(1) *Sydney Law Review* 99, 115.

[19] Paul Latimer, "Providing Financial Services 'Efficiently, Honestly and Fairly'" (2006) 24(6) C&SLJ 362, 363–366.

[20] Gail Pearson, *Financial Services Law and Compliance in Australia* (CUP, 2009) 107, 134.

[21] John Armour et al, *Principles of Financial Regulation* (OUP, 2016) 73; Pearson, n 18, 116.

restricts engagement "in particular sorts of financial transactions".[22] Licensing regimes endeavour to ensure the financial capability and competence of those permitted to enter the market and prevent those who have previously or subsequently engaged in misconduct from operating. As APRA has explained:

> Licensing is a critically important aspect of prudential regulation. Licensing requirements play a "gatekeeper" role, enabling the prudential regulator (APRA) to keep out of the regulated industry players that are considered to be unsuitable for one reason or another (whether due to lack of capital, lack of technical capability or lack of integrity) and to ensure that entities seeking to be licensed have the requisite capital, administrative and human resources and systems to enable them to be relied on to carry on their financial business in a prudent manner.[23]

Not all licensees are subject to prudential regulation, yet all licences promote adherence to relevant norms of conduct: "[i]nitial and continuing compliance is made a condition of the grant of a licence, with the consequence that the sanction for non-compliance could be the cessation of [the licensee's] business."[24] Rationales for licensing include promoting competence and high standards of conduct and honesty and fairness, as well as financial soundness.[25]

There are arguments for and against licensing. On the plus side, and in the public interest, licensing may: reduce the need for overly prescriptive rules; set standards for competence, including through education and training; encourage desirable practices; help overcome information asymmetries; and, promote choice. Negatives include creating barriers to entry that reduce competition and favouring existing actors by creating private interests.[26] Licensing has been justified from an economic perspective where there are "informational deficits" between the provider and consumer, and "externalities" in that "[t]he quality of the service may affect third parties and the client".[27] Licensing can help correct these "market failures".[28]

Licensing is only one method for addressing market failures although it may be preferable to others if it delivers "positive net benefits to the community".[29] If used inappropriately, "licensing systems may appear as 'sledgehammers to crack nuts'".[30] However, given the complexity, potential for harm, and social and economic importance of the financial system, regulation through licensing appears apposite in the financial services context.[31]

The requirement to hold a licence – and the prospect of a licence being cancelled if misconduct occurs – is consistent with licensing being "a more effective tool to prevent undesirable conduct than the criminal law, which punishes only after the event, or civil rights of action, which provide compensation only for losses already suffered".[32] Licensing provides regulators with powerful sanctions, in addition to powers to impose administrative penalties or commence civil penalty proceedings or criminal prosecutions. In its own enforcement approach, derived from responsive regulation theory,[33] ASIC views enforcement action involving licence removal (or banning orders) as potentially the "ultimate regulatory outcome in

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[22] Armour et al, n 21, 74.

[23] Explanatory Statement, *Australian Prudential Regulation Authority Instrument No 1 of 2010* (Cth) [9].

[24] Armour et al, n 21, 74.

[25] Latimer, n 19, 363 (citations omitted).

[26] Pearson, n 18, 116.

[27] Anthony Ogus, *Regulation: Legal Form and Economy Theory* (Hart Publishing, 2004) 216–218.

[28] Bureau of Industry Economics, *Business Licences and Regulation Reform* (Report 96/10, 1996) 10.

[29] Bureau of Industry Economics, n 28, xiii.

[30] Ogus, n 27, 230.

[31] Compare Ogus, n 27.

[32] Pearson, n 18, 116–117 (citations omitted).

[33] See Ian Ayres and John Braithwaite, *Responsive Regulation* (OUP, 1992); Vicky Comino, "The Challenge of Corporate Law Enforcement in Australia" (2009) 23(3) *Australian Journal of Corporate Law* 233, 236–237.

response to misconduct", since it is "incapacitative".[34] Such a response, "sits at the top [of] the responsive regulation pyramid and is used in response to 'incompetent or irrational actors'".[35]

Yet, licensing regimes also act as a regulatory "switch". Their function is not solely to sit at the top of the enforcement pyramid. While revocation may be the ultimate sanction, the AFSL, ACL and now the RSE regimes act as the "switch" to enliven the obligations attached to holding the licence. By requiring licences and then requiring licensees to do certain things, the legislature has imposed obligations on participants in the financial system. Failure to abide by these norms of conduct often constitutes contravention of a civil penalty provision or a criminal offence in its own right, and can be upheld by enforcement action. Licensing is key to stating and maintaining norms of conduct in the industry, through the way obligations are tied to the requirements to hold and maintain a licence. The regulatory utility of licensing requirements does not lie solely in the ability to remove a licence – it lies also in the ability to apply and enforce specific licence obligations.

II. The "Twin Peaks" Model and Its Influence on Licensing Regimes

The origins of the contemporary Australian system of financial regulation lie in the Financial System Inquiry (Wallis Inquiry), established in 1996.[36] The Wallis Inquiry's greatest contribution was its two recommendations about regulatory bodies: a single agency for the "regulation of corporations, financial market integrity and consumer protection"[37] and a single agency "to carry out prudential regulation in the financial system" of deposit taking institutions, life and general insurance and superannuation entities.[38] This led to the adoption of the Twin Peaks model in 1998.

A. Separation of Prudential and Conduct Regulation

The Twin Peaks model involves separation of prudential and conduct regulation for the financial sector between two separate and independent agencies: now APRA and ASIC, respectively.[39] As observed, "APRA's focus is on promoting financial system stability, whereas ASIC's focus is on promoting 'the confident and informed participation of investors and consumers in the financial system'".[40]

APRA's authority is confined to specific, prudentially-regulated sectors – deposit-taking, insurance, and superannuation – where "[t]he intrusiveness and cost to the public purse of financial safety regulation" is appropriate given that "the extent of information asymmetry and the risk of systemic failure [are] great".[41] ASIC's remit is broader, not least because "conduct regulation" itself is a broader concept than prudential regulation. The separation of both forms of regulation is attractive for a number of reasons:

> First, the two peak regulators are more likely to have "dedicated objectives and clear mandates to which they are exclusively committed." Secondly, there is less danger that one aspect of regulation – such as market conduct regulation – will come to dominate the regulatory landscape. … Thirdly, the model may be better adapted towards keeping pace with the growing complexity of financial markets and the continuing rise of financial conglomerates. Further, the Twin Peaks model may avoid the inherent conflict of interest that arises within a super-regulator.[42]

[34] Australian Securities and Investments Commission, Submission No 54 to Australian Law Reform Commission, *Corporate Criminal Responsibility Inquiry*, 7 January 2020, [36] (citations omitted).

[35] Australian Securities and Investments Commission, n 34, [34]–[35] (citations omitted).

[36] Stan Wallis et al, *Financial System Inquiry Final Report* (1997) vii.

[37] Wallis et al, n 36, Recommendation 1.

[38] Wallis et al, n 36, Recommendation 31.

[39] See Godwin and Ramsay, n 1; Donald, n 16.

[40] Godwin and Ramsay, n 1, 248, quoting *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(b).

[41] Donald, n 16, 58.

[42] Andrew Godwin, "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" (2017) 11(4) *Law and Financial Markets Review* 151, 151.

The Twin Peaks model embraces a recognition that different *modi operandi* of regulation and enforcement may be appropriate for prudential regulation as opposed to conduct regulation, with a resulting difference in the culture of each regulator. These differences arise from differences in the regulated population (large APRA regulated conglomerates compared with ASIC's responsibilities for both large entities and a multitude of small actors); and APRA's close supervision to anticipate emerging risk compared with ASIC's after the fact enforcement.[43]

ASIC is the "legal regulator", "relatively blind to institutional failure", whereas APRA is the "economic regulator",[44] "[focused] … on protecting consumers of prudentially regulated institutions, such as bank depositors and insurance policy-holders, from institutional failure".[45] Both provide regulatory guidance, yet it is "conceivable that action undertaken by APRA in the interests of financial stability, particularly in a time of crisis, would run counter to the interests of consumers or consumer protection laws".[46]

B. The Role of Licensing Regimes under Twin Peaks

To promote their respective objectives, APRA and ASIC administer licensing regimes. APRA-regulated entities are required to hold licences issued by APRA.[47] Such entities may also be required to hold a licence that is part of a regime administered by ASIC. APRA licenses and supervises ADIs, insurers, and RSEs as part of its prudential regulation role "to ensure that under all reasonable circumstances, the financial promises made to their beneficiaries … are kept"[48] whereas financial services, credit, financial markets, and clearing and settlement facility licensing is administered by ASIC. The obligations and requirements imposed as part of the ASIC and APRA licensing regimes differ,[49] with:

> [t]he division between the licensing responsibilities of the two regulators [reflecting] their distinct spheres of regulatory authority. APRA is concerned with issues such as capital adequacy, whereas ASIC's focus is on whether the consumer is adequately protected such that she or he can make informed product choice and investment decisions.[50]

C. The Challenges of Separating Prudential and Conduct Regulation

Achieving a clear delineation between prudential and conduct regulation in operation has become more difficult as "the notion of 'prudential' regulation has evolved".[51] It has moved from being conceptualised as "preventative", to ensure capability to meet promises, to include the "propensity" to meet promises.[52]

Commissioner Hayne commented that:

> In its prudential sense, conduct is most directly concerned with the institution in question being administered with appropriate integrity, prudence and professional skill and with action by the institution that, alone or in aggregate, could present a threat to the survival of the institution or the stability of the market. In each case, the focus is on the health of the institution and its ability to meet the promises it has made, and the health of the broader market. In its more common, non-prudential sense, "conduct" is concerned with consumer protection and market conduct rules. Its essential focus is on the rights and interests of consumers.[53]

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[43] Donald, n 16, 66–67.

[44] Godwin and Ramsay, n 1, 248.

[45] Godwin and Ramsay, n 1, 248.

[46] Godwin and Ramsay, n 1, 248.

[47] Pearson, n 20, 107. *Australian Prudential Regulation Authority Act 1998* (Cth) s 3(2) defines a "body regulated by APRA".

[48] Australian Prudential Regulation Authority, "What Does APRA Do?" <https://www.apra.gov.au/what-does-apra-do>.

[49] Pearson, n 20, 107.

[50] Pearson, n 20.

[51] Donald, n 16, 59; Gail Pearson, "Twin Peaks and Boiling Frogs: Consumer Protection in One or Two Ponds?" in Andrew Godwin and Andrew Schmulow (eds), *The Cambridge Handbook of Twin Peaks Financial Regulation* (CUP, forthcoming 2021).

[52] Donald, n 16, 59.

[53] *Final Report*, n 4, Vol 1, 450.

The continued efficacy of the Twin Peaks model has been considered by several inquiries since its introduction.[54] Despite "significant criticism"[55] of Twin Peaks by some during the Financial Services Royal Commission, it was ultimately reaffirmed.[56] Commissioner Hayne made substantial recommendations for reforms to the regulators, including ASIC's enforcement approach and the relationship between ASIC and APRA.[57] There is no current traction for the suggestion of a "Three Peaks" model that divides consumer protection, conduct regulation, and prudential regulation between three separate regulators.[58]

Commissioner Hayne identified superannuation as a challenge for Twin Peaks. As stated, "the superannuation system involves an adjustment to the Twin Peaks model whereby APRA has general oversight of best interests [and other] obligations derived from trust law. The model reflects risks arising from the compulsory and market-linked nature of superannuation".[59]

Others have noted this,[60] and used superannuation regulation to support arguments for a "Three Peaks" model.[61] The quandary lies in the nature of superannuation itself as compulsory, long term, and favourably taxed, yet subject to failure.[62] For these reasons APRA regulates superannuation RSEs for "financial safety".[63] Yet, the superannuation industry is different from other APRA-regulated sectors, in that the "financial promise" is made by a trustee who cannot promise a particular outcome as returns are market-linked.[64] The Productivity Commission criticised APRA's approach to superannuation through solely a "prudential lens" as it:

> is not a market characterised by prudential risk (most members and taxpayers underwrite the risks) nor one of "caveat emptor" (buyer beware).[65]

Recalling the blurring of prudential and conduct regulation, APRA's role is not restricted to licensing and supervision and includes the conduct of superannuation trustees as required by the statutory covenants (conduct obligations) in ss 52, 52A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (*SIS Act*). The covenants have both a prudential and consumer protection function.[66] This was criticised as "inapt" for APRA.[67] Prior to the passage of the *2020 Response Act*, ASIC's role in relation to RSEs (outside of the AFSL regime) was limited to enforcing disclosure obligations.[68]

Commissioner Hayne was critical of APRA's approach and recommended a further blurring of the classic Twin Peaks' model – interpenetration of the functional lines between the two regulators with both APRA and ASIC being responsible for the covenants. APRA would retain its licensing and supervision

[54] See, eg, Commonwealth, Royal Commission into HIH Insurance, *Final Report* (2003); Jeremy Cooper et al, *Super System Review Final Report* (2010); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Collapse of Trio Capital* (2012); David Murray et al, *Financial System Inquiry Final Report* (2014); *Final Report*, n 4.

[55] Hanrahan, n 2, 124.

[56] *Final Report*, n 4, Vol 1, 423.

[57] See *Final Report*, n 4, Vol 1, Recommendations 6.1–6.14.

[58] Hanrahan, n 2, 125, 128–9.

[59] *Final Report*, n 4, Vol 1, 448.

[60] Hanrahan, n 2, 125; Donald, n 16, 65.

[61] Hanrahan, n 2, 125.

[62] See, eg, the collapse of Trio Capital: Parliamentary Joint Committee on Corporations and Financial Services, n 54. Since the collapse of Trio Capital, no funds have failed but there have been "persistently underperforming funds": Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness* (Report 91, 2018) 461.

[63] Donald, n 16, 58 (citations omitted).

[64] *Final Report*, n 4, Vol 1, 449–450; Donald, n 16, 64.

[65] Productivity Commission, n 62, 27.

[66] *Final Report*, n 4, Vol 1, 449.

[67] Hanrahan, n 2, 125.

[68] *Final Report*, n 4, Vol 1, 449.

functions and responsibility to enforce prudential standards.[69] ASIC would oversee the relationship between licensees and individual consumers[70] and have new powers to enforce the *SIS Act* covenants that give rise to a cause of action against an RSE licensee or director for conduct that may harm a consumer. This would not limit APRA's existing powers under the *SIS Act*.[71] The *2020 Response Act* implements these recommendations, and goes further.[72]

The key import of Commissioner Hayne's recommendations in relation to RSE licensees was the maintenance and strengthening of Twin Peaks.[73] At the same time, the RSE licensing regime's uniqueness was re-emphasised in that, even though the licensing regime *itself* will continue to be supervised by one regulator (APRA), RSE conduct regulation will be undertaken by two regulators. This differs from the AFSL and ACL regimes. The *2020 Response Act* also adjusts the relationship between the RSE and AFSL licences to require all RSEs to hold an AFSL.

D. Dual-regulated Entities

"Dual-regulated entities" are participants in the financial system that are regulated by both APRA and ASIC. This arises where an entity is a "body regulated by APRA" under s 3(2) of the *Australian Prudential and Regulation Authority Act 1998* (Cth) and must also hold an AFSL or an ACL. Dual-regulation is a consequence of a "functional or objectives-based approach" to financial regulation.[74]

"Dual-regulated" entities include those that provide superannuation or insurance and ADIs that carry on a financial services business. The Financial Services Royal Commission highlighted the then dual-regulation of RSEs[75] – while an RSE licence authorises an RSE "to operate a superannuation fund", an AFSL was required for an RSE to "provide financial product advice or [deal] in financial products such as interests in superannuation funds".[76]

ASIC observed that, for superannuation, APRA licensing "concentrate[s] on the probity and competence of superannuation trustees, as measured by the fitness and propriety of their 'responsible persons'". It also focuses "on the operations, systems and resources (including risk management systems and financial resources) that trustees have in place to prevent or minimise losses to those who hold interests in the superannuation fund".[77] The AFSL regime focuses on matters relevant to "consumer protection and market integrity".[78]

There are statutory modifications to the AFSL regime to "minimise potential overlap".[79] APRA-regulated entities are exempt from holding an AFSL if the service provided is APRA-supervised and "provided only to wholesale clients".[80] Where an APRA-regulated entity is required to hold an AFSL, certain AFSL obligations do not apply (unless the entity is also the responsible entity of a managed investment scheme):[81] primarily, the obligations to have adequate resources,[82] and to have adequate risk

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[69] *Final Report*, n 4, Vol 1, Recommendations 6.3, 6.5.

[70] *Final Report*, n 4, Vol 1, Recommendation 6.3.

[71] *Final Report*, n 4, Vol 1, Recommendation 6.4.

[72] See Part IIE.

[73] *Final Report*, n 4, Vol 1, 480.

[74] Godwin and Ramsay, n 1, 246.

[75] *Final Report*, n 4, Vol 1, 450.

[76] Australian Securities and Investments Commission, "How Do RSE and AFS Licensing Application Processes Work Together" <https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/licensing-certain-service-providers/how-do-rse-and-afs-licensing-application-processes-work-together/>.

[77] Australian Securities and Investments Commission, n 76.

[78] Australian Securities and Investments Commission, n 76.

[79] Australian Securities and Investments Commission, n 76.

[80] *Corporations Act 2001* (Cth) s 911A(2)(g).

[81] *Corporations Act 2001* (Cth) s 912A(4), (5).

[82] *Corporations Act 2001* (Cth) s 912A(1)(d).

management schemes.[83] Restrictions also exist on ASIC's ability to suspend or cancel the AFSL or ACL of an APRA-regulated body.[84]

The term "dual-regulated entities" might also be used where an entity is regulated only by ASIC, but subject to both the AFSL and ACL regimes. Although these "impose broadly similar obligations on licensees … the two regimes also impose some distinct obligations".[85] The similarity and differences between the two regimes are discussed below. ASIC itself notes that "[t]he obligations under both regimes are broadly similar" and if a licensee holds both an AFSL and an ACL, obligations "can generally be met through similar systems and processes", save for some obligations.[86] Some entities such as ADIs will be authorised by APRA and required to hold an AFSL and ACL.

E. Changes in the 2020 Response Act

The *2020 Response Act* adjusts the "supervision responsibilities" of APRA and ASIC under the *SIS Act* and *Corporations Act 2001* (Cth) (*Corporations Act*).[87] Commissioner Hayne recommended licensing of RSEs should remain the responsibility of APRA with ASIC sharing responsibility for some conduct obligations. This legislation advances the blurred lines between the regulators. The new Act recognises the "prudential focus of the SIS Act" and that both it and "the RSE licensing regime are primarily designed with prudential supervision in mind".[88] It retains APRA as the chief licensing authority, yet by also amending the definition of a "financial service" to include a "superannuation trustee service", it requires all RSEs to also hold an AFSL.[89] This means that an RSE must meet the licence obligation of both regimes; solely *being* an RSE will require the entity to hold an AFSL. However, there are limitations on ASIC imposing, varying, or revoking a licence condition or suspending or cancelling an AFSL without APRA's permission if it would prevent the RSE from providing the superannuation trustee service.[90]

The effect of the reforms is intended to be in line with Commissioner Hayne's recommendations and result in an environment where:

> APRA and ASIC now share general administration of, or co-regulate, the SIS Act provisions that have consumer protection and member outcomes as their touchstone. These co-regulated provisions are either civil penalty provisions or provisions that are otherwise enforceable.[91]

Commissioner Hayne had "recommended ASIC's regulatory role in superannuation be expanded to better promote consumer protection and market integrity in the superannuation industry".[92] The *2020 Response Act* goes further – to provide a "simple and effective way of ensuring that ASIC has access to appropriate powers and enforcement tools" by making "financial service" under the AFSL regime include a "superannuation trustee service".[93]

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[83] *Corporations Act 2001* (Cth) s 912A(1)(h).

[84] *Corporations Act 2001* (Cth) s 915I; *National Consumer Credit Protection Act 2009* (Cth) s 46.

[85] Australian Securities and Investments Commission, "Complying with Your Obligations If Both Credit Licensee and AFS Licensee" <https://asic.gov.au/for-finance-professionals/credit-licensees/your-ongoing-credit-licence-obligations/complying-with-your-obligations-if-both-credit-licensee-and-afs-licensee/>.

[86] Such as the obligation to manage conflicts of interests: Australian Securities and Investments Commission, n 85.

[87] See *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Sch 9.

[88] Explanatory Memorandum, *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth) [9.5]–[9.6].

[89] A trustee of an RSE provides a "superannuation trustee service", which is a financial service: *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Sch 9, inserting *Corporations Act 2001* (Cth) ss 766A(1)(ec), 766H(1); Explanatory Memorandum, *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth) [9.14]–[9.15].

[90] *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Sch 9, inserting *Corporations Act 2001* (Cth) ss 914A(4)(aa), 915I(1)(aa).

[91] Explanatory Memorandum, *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth) [9.10].

[92] Explanatory Memorandum, *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth) [9.3].

[93] Explanatory Memorandum, *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth) [9.6].

Consistently with Commissioner Hayne's recommendation, the Act also gives both APRA and ASIC power to enforce the ss 52 and 52A covenants and the requirement that the fund be maintained for the "sole purpose" of retirement.[94] Conversely, obligations about annual members' meetings and dispute resolution systems are solely the responsibility of ASIC under the amendment.[95]

III. "Three Tracks"? Licensing Regimes for Financial Services, Credit, and Registrable Superannuation Entities

This section analyses each of the three licensing regimes, and compares and contrasts their application, structure, and the obligations they impose.

A. History of the AFSL, ACL, and RSE Regimes

The AFSL regime was introduced to implement the Wallis Inquiry recommendation to establish a single licensing regime for financial products and services[96] by unifying various product specific licensing regimes,[97] which had imposed different requirements.[98] The resulting *Financial Services Reform Act 2001* (Cth), inserted Ch 7 into the *Corporations Act*. Prior to AFSL, regulation was "product-specific", with providers "obliged to obtain multiple licences" and comply with potentially inconsistent regulation.[99] This, it was argued, imposed barriers to entry on new market participants; imposed compliance costs and administrative burdens on providers who offered multiple services and products;[100] and, had a negative impact on consumers due to the confusing array of regimes and difficulty in ensuring compliance with "minimum standards".[101]

Historically, licensing and regulation of consumer credit in Australia lacked both national uniformity and integration with the regulation of other financial services. Consumer credit was not incorporated into the AFSL regime because the now repealed Uniform Consumer Credit Code (UCCC) had been adopted in 1996. This was an attempt at harmonisation through template legislation to replace State laws but was weakened by States and Territories enacting it in their own varying legislation.[102] The *National Consumer Credit Protection Act 2009* (Cth) (*NCCPA*) introduced a national credit regime and the ACL. This resulted from the referral of power over consumer credit to the Commonwealth.[103]

The Wallis Inquiry had contemplated integrating credit but instead recommended a review after the UCCC had been in operation for two years.[104] Credit was thus not included in the definition of "financial product" introduced by the *Financial Services Reform Act*.[105]

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[94] *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Sch 9, amending *Superannuation Industry (Supervision) Act 1993* (Cth) ss 4–6. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 62.

[95] *Superannuation Industry (Supervision) Act 1993* (Cth) s 6. As amended, s 6 is a table summarising the different regulators' responsibilities.

[96] Wallis et al, n 36, Recommendation 13.

[97] The *Financial Services Reform Act 2001* (Cth) also introduced the Australian market licence and Australian clearing settlement facility licence regimes: see *Corporations Act 2001* (Cth) Pts 7.2, 7.3.

[98] Pearson, n 20, 106. As to the pre-Wallis licensing regimes for financial services, see, eg, National Companies and Securities Commission, "A Review of the Licensing Provisions of the Securities Industries Act and Codes" (Discussion Paper, 1985); Australian Securities Commission Licensing Review Taskforce, *Issues Paper* (February 1995); Australian Securities Commission Licensing Review Taskforce, *Draft Report* (August 1995).

[99] Revised Explanatory Memorandum, *Financial Services Reform Bill 2001* (Cth) [2.39].

[100] Revised Explanatory Memorandum, *Financial Services Reform Bill 2001* (Cth) [2.39].

[101] Revised Explanatory Memorandum, *Financial Services Reform Bill 2001* (Cth) [2.40].

[102] For a history, see Hal Bolitho, Nicola Howell and Jeannie Paterson, *Duggan & Lanyon's Consumer Credit Law* (LexisNexis Butterworths, 2nd ed, 2020) Ch 1. As to earlier regimes, see also Rogerson Committee, *Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law relating to Consumer Credit and Moneylending* (1969); Law Council of Australia, *Report on Fair Consumer Credit Laws to the Attorney-General of Victoria* (1972).

[103] Bolitho, Howell and Paterson, n 102, 22–23.

[104] Wallis et al, n 36, Recommendation 6.

[105] See *Corporations Act 2001* (Cth) s 765A(1)(h), but note that credit does fall within the definition of "financial product" in *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA.

The State and Territory regimes in force prior to the enactment of the *NCCPA* varied with respect to whether they imposed licensing requirements. The majority of the frameworks did not require credit providers or brokers to be licensed. The *NCCPA* introduced a national licensing system – the ACL regime. The Explanatory Memorandum to the Bill explained that "[t]he ACL is tailored to meet the issues arising in the credit context", which involved "consumers receiving money that they must repay, rather than the purpose of, or investment in, a financial product that generally includes the expectation of a benefit or return".[106]

The RSE regime relates to compulsory superannuation, introduced in Australia by the *Superannuation Guarantee (Administration) Act 1992* (Cth), which requires employers to provide an "employer contribution" to their employees' superannuation funds. The *SIS Act* was then enacted to provide the legal framework for the superannuation industry. In 2004, the *SIS Act* was amended to require all RSEs to be licensed by APRA,[107] to "modernise and strengthen the prudential regulation of superannuation".[108] It was envisaged that RSE licensing would promote the following:

> trustees must demonstrate they meet minimum standards of competence, possess adequate resourcing and have in place appropriate risk management procedures. With the introduction of this new framework, fund members can have the confidence that the people managing their retirement savings will have met these benchmarks.[109]

B. Overview of the AFSL, ACL, and RSE Regimes

1. Australian Financial Services Licence Regime

(a) Obtaining an AFSL

Part 7.6 of the *Corporations Act* stipulates licensing of providers of financial services. Pursuant to s 911A(1), "a person who carries on a financial services business[110] in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services". The licence held must cover the particular financial services provided. Not every person who provides a financial service must hold their own licence.[111] The regime allows for "authorised representatives"[112] and "representatives"[113] to act on behalf of an AFS licensee.

The chief gateway to acquiring a licence is meeting the "fit and proper" test. ASIC must assess whether there is "no reason to believe that the person is likely to contravene the obligations that will apply under [s 912A] if the licence is granted"[114] and be satisfied that the applicant (and its officers and management) is a "fit and proper" person to hold the licence.[115] The relevant ASIC Regulatory Guide states that:

> To be a fit and proper person means that the person:

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[106] Explanatory Memorandum, *National Consumer Credit Protection Bill 2009* (Cth) 4.

[107] See *Superannuation Safety Amendment Act 2004* (Cth).

[108] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2003 (Peter McGauran, Minister for Science) 23110.

[109] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2003 (Peter McGauran, Minister for Science) 23111.

[110] "Financial service", "financial services business" and "carry on a financial services business" are defined in *Corporations Act 2001* (Cth) ss 761A, 761C respectively. As noted, following the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth), "financial service" now includes a "superannuation trustee service": *Corporations Act 2001* (Cth) ss 766A(1)(ec), 766H.

[111] *Corporations Act 2001* (Cth) s 911B.

[112] *Corporations Act 2001* (Cth) s 916A and see Pt 7.6 Div 5.

[113] *Corporations Act 2001* (Cth) s 910A and see Pt 7.6 Div 6.

[114] *Corporations Act 2001* (Cth) s 913B(1)(b).

[115] *Corporations Act 2001* (Cth) s 913B(1)(c), 913BA. See further ss 913BA, 913BB. See also Exposure Draft, *Financial Regulator Reform (No 1) Bill 2019 (Cth): (Licensing)*.

(a) is competent to undertake their role in relation to your financial services business (or in relation to an entity to controls your financial services business);
(b) has the attributes of good character, diligence, honesty, integrity and judgement;
(c) is not disqualified by law from performing their role; and
(d) either has no conflict of interest in performing their role, or any conflict that exists will not create a material risk that the person will fail to properly perform their role.[116]

ASIC may impose, vary or revoke conditions on an AFSL[117] and may suspend, cancel or vary a licence.[118]

(b) AFSL Obligations

The AFSL regime imposes "general obligations" upon AFS licensees under s 912A of the *Corporations Act*. The obligation to ensure the financial services are provided "efficiently, honestly and fairly" in s 912A(1)(a) has received much attention. Examples of conduct found to have contravened s 912A(1)(a) include: trading with the purpose of influencing the bank bill swap rate contrary to the statutory prohibition on unconscionable conduct;[119] conducting a telephone campaign to induce customers to consolidate superannuation after receiving only general advice, where more tailored advice was required;[120] and, engaging in "churning" in relation to insurance products.[121] While s 912A(1)(a) has generally been interpreted as imposing a compendious obligation,[122] Allsop CJ and O'Bryan J questioned this in the 2019 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (*Westpac Securities Administration*) case. Allsop CJ reserved for future consideration whether the phrase is compendious or instead contains "three discrete behavioural norms".[123] As his Honour observed, the words and phrase "do not admit of comprehensive definition", although "examples of conduct failing to satisfy the phrase" and "an articulation or description of the norms involved" would be "helpful".[124] O'Bryan J, expressed "considerable reservations" about whether the phrase imposed a compendious obligation, noting that "it is not apparent why a licensee cannot comply with each of the three obligations, efficiently, honestly and fairly, applying the ordinary meaning of each word".[125] Taking their Honours together, the "commercial norm" of acting fairly involves substance not form; it requires an "absence of injustice", as well as "even-handedness and reasonableness".[126] Edelman J has observed this obligation connotes "reasonable expectations of performance and standards of performance".[127] It is argued that *Westpac Securities Administration* provides a "fresh start to develop a coherent body of

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[116] Australian Securities and Investments Commission, *AFS Licensing Kit: Part 1 – Applying for and Varying an AFS Licence* (Regulatory Guide 1, January 2021) [RG 1.18].

[117] See *National Consumer Credit Protection Act 2009* (Cth) Pt 2-2 Div 4.

[118] *National Consumer Credit Protection Act 2009* (Cth) Pt 2-2 Div 6.

[119] *Australian Securities and Investments Commission v Westpac Banking Corp (No 2)* (2018) 266 FCR 147; [2018] FCA 751.

[120] *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170; [2019] FCAFC 187.

[121] *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 377 ALR 55; [2020] FCA 69. For another example of churning, see *Australian Securities & Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206; [2012] FCA 414.

[122] *Story v National Companies & Securities Commission* (1988) 13 NSWLR 661.

[123] *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170, [170]–[171]; [2019] FCAFC 187.

[124] *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170, [172]; [2019] FCAFC 187.

[125] *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170, [424]–[429]; [2019] FCAFC 187. Compare Paul Latimer, "Providing Financial Services 'Efficiently, Honestly and Fairly': Part 2" (2020) 37(6) C&SLJ 382, 386–387. See also Joshua Anderson, "Duties of Efficency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?" (2020) 37(7) C&SLJ 450; Jessica Zarkovic, "Are the 'Efficiently, Honestly and Fairly' and Unconscionable Conduct Civil Penalty Provisions Equally as Effective in Combating Unfair Practices by Licensees?" (2020) 48(3) ABLR 272.

[126] *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170, [173], [426]; [2019] FCAFC 187.

[127] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209, [674]; [2016] FCA 1023.

principle regulating fair dealing in commerce", and "provides ASIC with an opportunity to construct a principles-based approach to financial services regulation".[128]

Judicial interpretation of the obligation to manage conflicts of interest in s 912A(1)(aa) has emphasised this does not require elimination of conflicts, but assumes conflicts may be managed[129] through contextually appropriate arrangements.[130] The obligations in s 912A(1)(b) and (c) to comply with conditions on the AFSL and with the financial services laws[131] are also significant. While not civil penalty provisions in their own right, they may trigger ASIC's licensing powers. The content of the obligation to take reasonable steps to supervise representatives in s 912A(1)(ca) is contextual, arguably requiring "a formalised compliance program", designation of compliance personnel, and "procedures for review of representatives' activity".[132]

In comparing licensing regimes, the obligation to have adequate resources in s 912A(1)(d) is relevant. It does not apply to APRA-regulated entities. ASIC Regulatory Guides provide guidance regarding adequate financial, technological, and human resources.[133] Licensees must provide sufficient information to demonstrate they possess adequate resources.[134] As to the related obligation[135] in s 912A(1)(h) to have adequate risk management systems, ASIC expects such systems to be tailored to the "nature, scale and complexity" of the AFS licensee's business and the particular AFS licensee.[136] This obligation is also linked in Regulatory Guide 104 to the obligation to maintain adequate financial resources in s 912A(1)(d). There is regulatory guidance for the obligations to maintain competence to provide the licensed services in s 912A(1)(e), and to ensure representatives are adequately trained in s 912A(1)(f); these obligations require ongoing oversight.[137]

Section 912A(1)(g) requires AFS licensees who provide financial services to retail clients to have a compliant dispute resolution procedure, consisting of both an internal dispute resolution (IDR) procedure and membership of the Australian Financial Complaints Authority (AFCA),[138] which is designed to provide consumers with an informal means of dispute resolution without resort to court proceedings.[139]

Other obligations of AFSL holders include: having compensation arrangements in place for financial services provided to retail clients;[140] provision of statements to ASIC;[141] reporting

[128] Anderson, n 125, 469.

[129] *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525, [193]; [2017] FCA 497; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35; [2007] FCA 963.

[130] *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525, [194]; [2017] FCA 497.

[131] "Financial services laws" are defined in *Corporations Act 2001* (Cth) s 761A.

[132] LexisNexis, *Australian Corporations Law: Principles and Practice* (January 2019) [7.7.00085].

[133] Australian Securities and Investments Commission, *Licensing: Financial Requirements* (Regulatory Guide 166, September 2017); Australian Securities and Investments Commission, *AFS Licensing: Meeting the General Obligations* (Regulatory Guide 104, April 2020).

[134] *Watson v Australian Securities and Investments Commission* [2018] AATA 4677, [93]–[95].

[135] As acknowledged in Australian Securities and Investments Commission, *AFS Licensing: Meeting the General Obligations*, n 133, [RG104.66].

[136] Australian Securities and Investments Commission, *AFS Licensing: Meeting the General Obligations*, n 133, [RG104.63]–[RG104.65].

[137] See further LexisNexis, n 132, [7.7.0095]. See also Australian Securities and Investments Commission, *AFS Licensing: Organisational Competence* (Regulatory Guide 105, April 2020); Australian Securities and Investments Commission, *AFS Licensing: Meeting the General Obligations*, n 133; Australian Securities and Investments Commission, *Licensing: Training of Financial Product Advisors* (Regulatory Guide 146, July 2012).

[138] *Corporations Act 2001* (Cth) s 912A(2).

[139] See *Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd* (2014) 288 FLR 374, [266]; [2014] VSCA 179. See further Tania Sourdin and Mirella Atherton, "Treating Vulnerable Consumers 'Fairly' When They Make a Complaint about Banking or Finance in Australia" (2020) 32(1) *Bond Law Review* 1, 2.

[140] *Corporations Act 2001* (Cth) s 912B.

[141] *Corporations Act 2001* (Cth) s 912C.

breaches;[142] and obligations in respect of the provision of personal advice,[143] as set out in Table 1. From October 2021, design and distribution obligations relating to financial products for retail clients will be imposed.[144] Additional or varied obligations may also be imposed on AFS licensees that provide particular financial services through ASIC Legislative Instruments.[145]

2. Australian Credit Licence Regime

(a) Obtaining an ACL

The *NCCPA* introduced the ACL regime. It has substantial similarities with the AFSL regime both in structure and general licensing obligations, with some differences.[146] The Act (and the *National Credit Code*, contained in Sch 1 to the *NCCPA*) applies to "credit to which the [*National Credit Code*] applies".[147] Section 29 requires a person to hold an ACL if the person engages in "credit activity",[148] unless a relevant defence or exemption applies.[149] As explained,[150] by s 6, a person can engage in "credit activity" in "three distinct areas of activity" – where the person provides consumer credit;[151] provides a credit service, through providing credit assistance or acting as an intermediary;[152] or, "performs obligations or exercises rights under credit documents".[153] An ACL authorises a licensee to engage in the credit activities specified in the conditions of the licence.[154] This licensing requirement was intended to increase the regime's coverage.[155] Like the AFSL regime, the ACL regime also holds licensees liable for conduct engaged in by those who represent the licensee.[156] These persons are exempt from the obligation to hold a licence,[157] and may either be a "credit representative"[158] or a "representative".[159]

The process relating to the application, grant, variation, or withdrawal of an ACL is similar to that for an AFSL.[160] This also requires ASIC to assess whether there is reason to believe the person "is likely to

[142] The *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Sch 11 (commencing 1 October 2021) has expanded and strengthened the breach reporting regime: see *Corporations Act 2001* (Cth) ss 912D, 912DAD, 912EA, 912EC.

[143] As to the obligations that apply to personal advice, see *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 95 ALJR 149, [37]–[41] (Gordon J); [2021] HCA 3.

[144] See *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* (Cth).

[145] For example, in respect of custodial or depository services, *ASIC Class Order*, CO 13/1410, and *ASIC Class Order*, CO 13/763 in respect of AFS licensees that are authorised to operate an IDPS.

[146] Gail Pearson, "A Credit Lens: Implementing Twin Peaks" (2017) 11(4) *Law and Financial Markets Review* 174, 177.

[147] As to which, see *National Credit Code* (Cth) ss 3–6. See discussion in Bolitho, Howell and Paterson, n 102, 37–65.

[148] *National Consumer Credit Protection Act 2009* (Cth) s 29(1), (2).

[149] *National Consumer Credit Protection Act 2009* (Cth) s 29(3).

[150] Bolitho, Howell and Paterson, n 102, 115.

[151] Whether a credit contract, consumer lease, mortgage, guarantee, or other prescribed activity: *National Consumer Credit Protection Act 2009* (Cth) s 6.

[152] See definitions in *National Consumer Credit Protection Act 2009* (Cth) ss 7–9.

[153] Bolitho, Howell and Paterson, n 102, 121. The Exposure Draft for the *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021* (Cth) proposes including a "debt management service" as a prescribed activity under *National Consumer Credit Protection Act 2009* (Cth) s 6(1).

[154] *National Consumer Credit Protection Act 2009* (Cth) s 35(2).

[155] Bolitho, Howell and Paterson, n 102, 121.

[156] See *National Consumer Credit Protection Act 2009* (Cth) Pt 2-3.

[157] *National Consumer Credit Protection Act 2009* (Cth) s 29(3).

[158] A "credit representative" is a person authorised by the licensee to engage in specified credit activities on behalf of the licensee: *National Consumer Credit Protection Act 2009* (Cth) s 64.

[159] A "representative" is a person who is "acting on behalf of the licensee": *National Consumer Credit Protection Act 2009* (Cth) s 5.

[160] *National Consumer Credit Protection Act 2009* (Cth) Pt 2-2 Div 3. Different rules apply for grant of a licence to an applicant that is also an ADI: *National Consumer Credit Protection Act 2009* (Cth) s 38.

contravene the obligations that will apply under [s 47] if the licence is granted"[161] and be satisfied that the applicant is a "fit and proper" person to hold the licence.[162] The considerations in ASIC Regulatory Guide 204 relevant to this assessment align with those relevant to AFSL applications.[163]

ASIC has the power to impose, vary or revoke conditions on ACL licences.[164] It also has powers to suspend, cancel or vary an ACL licence,[165] which is where, coupled with the requirement to hold an ACL licence to engage in credit activity, the regulatory force of the licensing regime comes in.

(b) ACL Obligations

Like the AFSL regime, the ACL regime imposes obligations upon ACL licensees under Pt 2-2 Div 5 of the *NCCPA*. The "general conduct obligations" in s 47(1) generally align with those in s 912A(1) of the *Corporations Act*, although there are some differences. The "efficiently, honestly and fairly obligation" in s 47(1)(a) is analogous to that in s 912A(1)(a).[166] While there is also an obligation upon ACL holders to have adequate arrangements to manage conflicts, in contrast to s 912A(1)(aa), the ACL obligation involves a "higher standard of ensuring the client is not disadvantaged",[167] rather than merely managing conflicts. ASIC characterises this obligation as "more explicit" about the required consumer outcomes.[168]

The obligations in s 47(1)(c) and (d) to comply with conditions on the ACL and with the credit legislation[169] are also analogues of AFSL obligations, as are the other general conduct obligations in s 47(1), as set out in Table 1.

Division 5 also contains obligations to provide a statement or audit report if directed by ASIC; to give ASIC information required by regulations; to provide ASIC with assistance if reasonably requested; to cite a licensee's ACL number; to lodge an annual compliance certificate; to notify ASIC of a change in control; and to notify ASIC if the licensee does not engage in credit activities.[170] Breach reporting requirements for credit licensees have also been introduced.[171]

More broadly, and beyond the general obligations, the *NCCPA* and *National Credit Code* impose various obligations and prohibitions, including obligations relating to: conduct of representatives;[172] record keeping and trust accounts;[173] responsible lending, including specific rules in relation to certain types of credit, disclosure obligations, and obligations to assess unsuitability;[174] and, in the case of mortgage brokers, recently introduced best interests, conflicted remuneration and conflicts of interest obligations.[175]

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[161] *National Consumer Credit Protection Act 2009* (Cth) s 37(1)(b).

[162] *National Consumer Credit Protection Act 2009* (Cth) s 37(1)(c). See further ss 37A, 37B(1).

[163] Australian Securities and Investments Commission, *Applying for and Varying a Credit Licence* (Regulatory Guide 204, October 2020) [RG204.179].

[164] *National Consumer Credit Protection Act 2009* (Cth) Pt 2-2 Div 4.

[165] *National Consumer Credit Protection Act 2009* (Cth) Pt 2-2 Div 6.

[166] Bolitho, Howell and Paterson, n 102, 144. For a credit example, see *Australian Securities and Investments Commission v National Australia Bank Ltd* [2020] FCA 1494.

[167] Bolitho, Howell and Paterson, n 102, 147, and referring to Australian Securities and Investments Commission, *Credit licensing: General Conduct Obligations* (Regulatory Guide 205, June 2010) [RG205.80].

[168] Australian Securities and Investments Commission, n 167, [RG205.80].

[169] "Credit legislation" is defined in *National Consumer Credit Protection Act 2009* (Cth) s 5.

[170] *National Consumer Credit Protection Act 2009* (Cth) ss 49–53B.

[171] See *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Sch 11 (commencing 1 October 2021) amending the *National Consumer Credit Protection Act 2009* (Cth) to include obligations to provide information and assistance to ASIC: ss 50A–51C.

[172] *National Consumer Credit Protection Act 2009* (Cth) Pt 2-3 Div 4.

[173] *National Consumer Credit Protection Act 2009* (Cth) Pt 2-5.

[174] *National Consumer Credit Protection Act 2009* (Cth) Ch 3; but note proposed changes to the responsible lending obligations: *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020* (Cth).

[175] *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020* (Cth) Pt 3-5A.

There are also specific obligations for particular types of credit activity.[176] While some of these have parallels with AFSL obligations, others, such as the obligations of ACL licensees to make reasonable inquiries and assess whether the provision of credit would be unsuitable for the consumer before providing credit, are unique to credit.[177] The differences in disclosure requirements between the AFSL and ACL regimes also warrant further consideration, and are not canvassed in this article.

3. Registrable Superannuation Entity Regime

(a) Obtaining an RSE Licence

A fundamental feature of Australian superannuation funds[178] is their use of a trust structure. Consequently, they are governed by an amalgam of trust and statute law.[179] The *SIS Act* "employs both the mechanisms of trust law … and its language".[180] Superannuation funds can be placed in three categories: RSEs[181] regulated by APRA; self-managed superannuation funds regulated by the Australian Taxation Office; and Exempt Public Sector Superannuation Schemes.[182] This article is concerned with RSEs. All RSEs are prudentially regulated. This contrasts with AFSL and ACL holders where, although some are prudentially regulated (eg, ADIs), not all are. Following the *2020 Response Act*, all RSEs are also required to hold an AFSL. That regime is discussed above. This section discusses the RSE licensing regime, following those reforms.

RSE trustees are required to be RSE licensees.[183] The RSE licensing regime continues to be administered by APRA following the *2020 Response Act*. Part 2A of the *SIS Act* sets out the provisions of the RSE licensing regime. Sections 29A and 29C provide for who may apply for RSE licences, and the requirements for applications. Demonstrating compliance with prudential standards is foundational to the application process. *Prudential Standard SPS 520* sets out the "fit and proper" test for persons involved in the management of the RSE licensee. It is similar to the "fit and proper" test of the AFSL and ACL regimes and subjects each of the identified "responsible persons" of an RSE licensee – its directors, secretary, senior managers as well as the RSE auditor and RSE actuary[184] – to a "fit and proper" assessment. This includes whether "the person possesses the competence, character, diligence, experience, honesty, integrity and judgement to properly perform the duties" as well as "the education or technical qualifications, knowledge and skills relevant to the duties and responsibilities of an RSE licensee".[185] APRA must grant an RSE licence to applicants where APRA is satisfied the requirements have been met and there is no reason to believe the body corporate or group of individual trustees would fail to comply with "RSE licensee law" or any conditions imposed on the RSE licence if granted,[186] including the duties of a trustee in respect of each of the entities for which it is an RSE licensee.[187] Once

[176] See *National Consumer Credit Protection Act 2009* (Cth) Ch 3.

[177] See *National Consumer Credit Protection Act 2009* (Cth) Pt 3-1 Div 4, Pt 3-2 Div 3, Pt 3-3 Div 4, Pt 3-4 Div 3. As to Pt 3-2 Div 3, see *Australian Securities and Investments Commission v Westpac Banking Corp* (2020) 380 ALR 262; [2020] FCAFC 111.

[178] See *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1).

[179] Pamela Hanrahan, "Legal Framework Governing Aspects of the Australian Superannuation System" (Financial Services Royal Commission Background Paper 25, 2018) 7–8.

[180] M Scott Donald, "Beneficiary, Investor, Citizen: Characterising Australia's Super Fund Participants" in M Scott Donald and Lisa Butler Beatty (eds), *The Evolving Role of Trust in Superannuation* (Federation Press, 2017) 33, 35.

[181] "RSE" is defined in *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1).

[182] Hanrahan, n 179, 4.

[183] A person must not be a trustee or act as a trustee of an RSE unless an RSE licensee: *Superannuation Industry (Supervision) Act 1993* (Cth) s 29J(1). With the passage of the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth), they will also now have to hold an AFSL.

[184] *Prudential Standard SPS 520 Fit and Proper* [11].

[185] *Prudential Standard SPS 520 Fit and Proper* [17]–[18].

[186] *Superannuation Industry (Supervision) Act 1993* (Cth) s 29D. Prudential standards are included in the definition of "RSE licensee law": s 10(1).

[187] *Superannuation Industry (Supervision) Act 1993* (Cth) s 29E(1)(b).

granted, APRA may impose, vary or revoke additional conditions on an RSE licensee[188] or cancel a licence.[189]

(b) RSE Licensee Obligations

An RSE licensee must ensure that each RSE of which it is a licensee is registered with APRA.[190] This requirement includes providing APRA with up-to-date copies of the trust deed and the governing rules of the RSE.[191] These requirements were recently expanded[192] to require the RSE licensee of a registrable superannuation entity to hold an annual meeting of members and for certain officers to answer fund members' questions at the meeting or within a specific timeframe.[193]

Part 3 of the *SIS Act* requires RSE licensees to comply at all times with operating standards made under this Part[194] and prescribed in regulations.[195] Broadly, these standards address fund contributions, fees, actuarial standards, benefits, disclosure, and adequacy of resources.[196] RSE licensees must also comply with Prudential Standards (SPS) made by APRA under Pt 3A of the *SIS Act*.[197] These superannuation-specific prudential standards relate to governance,[198] risk management[199] and other requirements such as insurance.[200] Additionally, APRA publishes legislative instruments called Reporting Standards (SRS) that cover the reporting of financial or accounting data for RSEs[201] and Prudential Practice Guides (SPG), which do not have the force of law, but which should be taken into account by RSE licensees for the purposes of complying with RSE licensee law.[202]

The provisions in Pt 6 of the *SIS Act* relating to the governing rules of superannuation entities are fundamental to the RSE licensee regime and superannuation governance.[203] Reflecting the trust structure of superannuation, Pt 6 introduces statutory "covenants" taken to be included in the governing rules for the entity. Section 52(2) sets out the general covenants by each trustee, detailed further below. Section 52A sets out similar general covenants which apply to each director of a corporate trustee of a superannuation entity. Section 52A mirrors the s 52(2) covenants.[204] The s 52 covenants traverse matters similar to the

[188] *Superannuation Industry (Supervision) Act 1993* (Cth) Pt 2A Div 5-6.

[189] *Superannuation Industry (Supervision) Act 1993* (Cth) Pt 2A Div 7.

[190] *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29E(1)(d), 29M.

[191] *Superannuation Industry (Supervision) Act 1993* (Cth) s 29L(2).

[192] See the *Treasury Law Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019* (Cth) and *Superannuation Industry (Supervision) Act 1993* (Cth) Pt 2B Div 5.

[193] See *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29P, 29PA–29PE.

[194] See *Superannuation Industry (Supervision) Act 1993* (Cth) Pt 3 Div 2.

[195] See *Superannuation Industry (Supervision) Act 1993* (Cth) ss 31–34(1).

[196] See *Superannuation Industry (Supervision) Act 1993* (Cth) ss 31–34 for the comprehensive list of matters included in standards.

[197] See *Superannuation Industry (Supervision) Act 1993* (Cth) s 34C.

[198] *Prudential Standards: SPS 160 Defined Benefit Matters; SPS 310 Audit and Related Matters; SPS 510 Governance; SPS 515 Strategic Planning and Member Outcomes 515; SPS 520 Fit and Proper; SPS 521 Conflicts of Interest; SPS 530 Investment Governance*.

[199] *Prudential Standards: SPS 114 Operational Risk Financial Requirement; SPS 220 Risk Management; CPS 226 Margining and Risk Mitigation for Non-Centrally Cleared Derivatives; SPS 231 Outsourcing; SPS 232 Business Continuity Management; SPS 234 Information Security*.

[200] *Prudential Standards: SPS 250 Insurance in Superannuation; SPS 450 Eligible Rollover Fund (ERF) Transition*.

[201] Made under *Financial Sector (Collection of Data) Act 2001* (Cth) s 13.

[202] For a list of all APRA standards and guides relevant to the superannuation industry, see Australian Prudential Regulation Authority, *Prudential and Reporting Standards for Superannuation* <https://www.apra.gov.au/industries/33/standards>.

[203] *Superannuation Industry (Supervision) Act 1993* (Cth) s 51.

[204] *Superannuation Industry (Supervision) Act 1993* (Cth) s 52A(2). For analysis of several covenants, see M Scott Donald, "Regulating for Fiduciary Qualities of Conduct" (2013) 7(2) *Journal of Equity* 142; M Scott Donald, "A Servant of Two Masters? 'Managing' Conflicts of Duties in the Australian Funds Management Industry" (2018) 12(1) *Journal of Equity* 1.

"general obligations" and "general conduct obligations" for the AFSL and ACL regime respectively, but, despite their superficial similarity, vary in scope and content due to the superannuation context.

Some covenants do not have any analogue in the AFSL and ACL regime, and arise from unique aspects of superannuation. These include covenants concerning investment, insurance, and risk.[205] In 2019, trustee covenants were added[206] that relate to annual member outcome assessments, promoting the financial interests of beneficiaries and inclusion of the investment strategy for MySuper and choice products.[207] These amendments also aligned the penalty regime for RSE licensees and directors with that applicable to officers of a managed investment scheme[208] and made ss 52 and 52A covenants into civil penalty provisions.[209] It is also proposed to amend the covenants to include an express "best financial interests duty", in place of the existing "best interests" covenant.[210]

The decision in *Australian Prudential Regulation Authority v Kelaher* (*Kelaher*)[211] drew attention to the covenants in the *SIS Act* and their regulatory function. APRA's failure in *Kelaher* to establish contraventions of the covenants to exercise care, skill, and diligence; to act in the best interests of the beneficiaries, and to give priority to the interests of the beneficiaries in the event of a conflict of interest[212] led to observations that APRA's financial safety focus may make it ill-suited to bringing court proceedings relating to breach of the statutory covenants.[213] The sharing of enforcement responsibility in respect of the statutory covenants between ASIC and APRA under the amendments introduced by the *2020 Response Act* seeks to address such criticisms.

Other provisions relevant to trustees of regulated superannuation funds include Pt 7 and the "sole purpose test". In addition, Pt 12 of the *SIS Act* imposes a requirement to be a member of AFCA and to have an IDR procedure similar to the AFSL and ACL obligations.[214] Part 12 also imposes obligations to seek and provide relevant information, to keep records and reports,[215] and ensure that investments are made and maintained on an "arm's length basis".[216]

As a summary of the survey of the regimes undertaken in this Section, Table 1 compares the key obligations of AFSL, ACL, and RSE licensees imposed by the respective regimes. It does not include broader obligations.[217]

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[205] *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(6)–(8).

[206] *Treasury Law Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019* (Cth).

[207] *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(9)–(13). As to these reforms, see M Scott Donald, "Might Superannuation Trustees Owe a Duty to Merge?" (2020) 48(4) ABLR 304.

[208] Explanatory Memorandum, *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2017* (Cth) 31.

[209] *Superannuation Industry (Supervision) Act 1993* (Cth) s 54B(1)–(3).

[210] Exposure Draft, *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2020* (Cth): Best Financial Interests Duty, amending *Superannuation Industry (Supervision) Act 1993* (Cth) ss 52(2)(c), 52A(2)(c).

[211] *Australian Prudential Regulation Authority v Kelaher* (2019) 138 ACSR 459; [2019] FCA 1521.

[212] *Australian Prudential Regulation Authority v Kelaher* (2019) 138 ACSR 459, [3]–[5]; [2019] FCA 1521.

[213] See Donald, n 16, 69.

[214] *Superannuation Industry (Supervision) Act 1993* (Cth) s 101(1A).

[215] *Superannuation Industry (Supervision) Act 1993* (Cth) ss 102–108A.

[216] *Superannuation Industry (Supervision) Act 1993* (Cth) s 109.

[217] See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA–12DC, 12DF.

TABLE 1. Comparison of Key Obligations of AFSL, ACL, and RSE Licences

	AFSL (*Corporations Act*)		ACL (*NCCPA*)		RSE Licence (*SIS Act*)	
Do all things necessary to ensure licenced activities engaged in efficiently, honestly and fairly	Yes	s 912A(1)(a)	Yes	s 47(1)(a)	Yes	ss 52(2)(a),(e),(f); 52A(2)(a)
Conflicts of interest	Yes (adequate arrangements for the management of conflicts)	s 912A(1)(aa)	Yes (ensure clients not disadvantaged)	s 47(1)(b)	Yes (see below: give priority to duties and interests of the beneficiaries)	s 52(2)(d); 52A(2)(d); SPS 521
Comply with licence conditions	Yes	s 912A(1)(b)	Yes	s 47(1)(c)	Yes (comply with any additional conditions imposed by APRA at any time)	s 29EA
Comply with laws	Yes (financial services laws)	s 912A(1)(c)	Yes (credit legislation)	s 47(1)(d)	Yes (RSE licensing law)	s 29E(1)(a)
Take reasonable steps to ensure representatives comply with laws	Yes (financial services laws)	s 912A(1)(ca)	Yes (credit legislation)	s 47(1)(e)	No	NA
Comply with law of each host economy for fund	Yes (operators of Australian passport funds or with related responsibilities)	s 912A(1)(cb)	No	NA	No	NA
Adequate resources (including financial, technological and human resources)	Yes	s 912A(1)(d) (if not APRA regulated; otherwise, see prudential standard)	Yes	s 47(1)(l) (if not APRA regulated; otherwise, see prudential standard)	Yes	SPS 114; SPS 220
Adequate arrangements and systems to ensure compliance and a written plan documenting them	No	NA	Yes	s 47(1)(k)	No	NA
Maintain competence	Yes	s 912A(1)(e)	Yes	s 47(1)(f)	No	NA

TABLE 1. *continued*

Ensure representatives are adequately trained and competent	Yes	s 912A(1)(f)	Yes	s 47(1)(g)	No	NA
Have adequate IDR procedure	Yes	s 912A(1)(g)(i), 2(a)	Yes	s 47(1)(h),(i)	Yes	s 101(1)
Give ASIC information required under s 912A(1)(g)(ii)	Yes	s 912A(1)(g)(ii)	Yes	s 47(1)(ha)	Yes	s 101(1)
Be a member of the AFCA scheme	No	s 912A(1)(g)(i), (2)(c)	Yes	s 47(1)(i)	Yes	s 101(1)
Adequate risk management systems	Yes	s 912A(1)(h) (if not APRA regulated or RSE that is responsible entity of MIS; otherwise, see prudential standard)	Yes	s 47(1)(l) (if not APRA regulated; otherwise, see prudential standard)	Yes	s 52(8)(a); SPS 114; SPS 220; CPS 226; SPS 231; SPS 232; SPS 234
Comply with any other prescribed obligations under the regulations	Yes	s 912A(1)(j)	Yes	s 47(1)(m)	Yes	s 29E(1)(g)
Have compensation arrangements	Yes (for retail clients)	s 912B(1)	No	No	No	NA
Granting of licences						
No reason to believe that the person is likely to contravene obligations if licence is granted	Yes	s 913B(1)(b)	Yes	s 37(1)(b)	Yes (uses the language "condition imposed")	s 29D(1)(b)
Satisfy "fit and proper person" test	Yes	ss 913B(1)(c), 913BA, 913BB	Yes	s 37(1)(c)	Yes	s 29D(1)(d); SPS 520
Comparison of specific obligations of licences						
Properly perform duties of a trustee	No	NA	No	NA	Yes	s 29E(1)(b)
Most hold an annual meeting of members	No	NA	No	NA	Yes	s 29P
Comply with governance prudential standards	If APRA regulated		If APRA regulated		Yes	s 34C; SPS 160; SPS 310; SPS 510; SPS 515; SPS 520; SPS 521; SPS 530

TABLE 1. *continued*

Comply with risk management prudential standards	If APRA regulated		If APRA regulated		Yes	s 34C; SPS 114; SPS 220; CPS 226; SPS 231; SPS 232; SPS 234
Comply with other prudential requirements	If APRA regulated		If APRA regulated		Yes	s 34C; SPS 250; SPS 450
Care, skill, and diligence	No	NA	No	NA	Yes	ss 52(2)(b); 52A(2)(b)
Best interests duty	Yes	s 961B	Yes	ss 158LA; 158LE	Yes	ss 52(2)(c); 52A(2)(c)
Duty to give priority in event of conflict	Yes	s 961J	Yes	ss 158LB; 158LF	Yes	ss 52(2)(d); 52A(2)(d); SPS 521
Keep client money separate	Yes	ss 981A–981B	Yes	s 99	Yes	s 52(2)(g)
To not enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers	No	NA	No	NA	Yes	ss 52(2)(h); 52A(e)
Formulate, review and give effect to strategy for prudential management of reserves (if any)	No	NA	No	NA	Yes	s 52(2)(i)
Comply with annual outcomes assessments for regulated superannuation funds and investment strategies for MySuper products	No	NA	No	NA	Yes	s 52(9)–(13)
Satisfy the "sole purpose" test	No	NA	No	NA	Yes	s 62

TABLE 1. *continued*

Keep accurate financial records and kept in a way that allows them to be properly audited and show certain particulars	Yes	ss 988A–988B	Yes	ss 88–89	Yes	s 35A(1)–(2)
Provide documents requested by auditor	Yes	s 990I	Yes	s 102(3)	Yes	s 35AB
Obligation of licensee not to engage in unconscionable conduct	Yes	s 991A(1)	No	Note *National Credit Code* ss 76, 78	No	NA

IV. Continuing to Maintain These "Three Tracks"?

The optimal design of these three licensing regimes is a part of the broader debate about Australia's model of financial regulation and the interaction between the prudential and conduct peaks. We propose integration of the AFSL and ACL and retention of the separate RSE licence. The time is now ripe, after the Financial Services Royal Commission, to integrate consumer credit licensing with that of financial products and services. There is no prudential impediment to integration of the AFSL and ACL and the primary reason for separation of the AFSL and ACL regimes in Australia is historical.

Although there are some obligations specific to credit, there is no principled reason for different treatment of either the requirements to obtain an AFSL or ACL, or the major conduct obligations specifically attached to the licence. The degree of commonality among all three regimes as to the relevant considerations for obtaining a licence is greater for the AFSL and ACL. This includes the gateway "fit and proper" person test, and the requirement for the regulator to be satisfied that other licensing requirements are met, such as that the licensee will comply with relevant obligations and/or conditions while holding a licence.

A number of the general conduct licence obligations set out in s 912A of the *Corporations Act* and s 47(1) of the *NCCPA* are essentially the same, as evident from Table 1. Where there are substantive differences, such as between the general conduct obligations relating to managing conflicts and the more explicit requirement to have arrangements to ensure clients are not disadvantaged by any conflict, there is an opportunity to adopt the higher standard. This should also be considered for compensation arrangements. There is a question as to where any unified system should be enacted, given the AFSL regime is in the *Corporations Act* and the ACL regime is in the *NCCPA*. It may be that a principled solution would be for a unified regime to be enacted in the *Australian Securities and Investments Commission Act 2001* (Cth), although this would require further consideration. This could have the advantage of leaving the disclosure provisions for financial services and credit in their respective separate statutes. If credit were integrated into the *Corporations Act*, there is precedent for crafting product specific disclosure obligations as with superannuation, although this goes against the Wallis objective of utmost functional neutrality.[218] Consideration would also need to be given to how credit-specific obligations separate from those relating to disclosure should be accommodated. Again, there is precedent under the AFSL regime for the imposition of specific obligations upon licensees providing particular financial products or services.[219]

[218] See the Financial Services Guide provision in the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) inserting *Corporations Act 2001* (Cth) s 941C(3B).

[219] See, eg, the margin lending provisions: *Corporations Act 2001* (Cth) Pt 7.8 Div 4A.

It would not be prudent to integrate the RSE regime per se into any consolidated financial services/credit licensing regime. Financial safety has greater importance to retirement savings than it does to advice, investment and credit, particularly when there are no or only limited options to make alternative arrangements or recoup losses. Superannuation savings are not protected against the failure of an RSE in the same way as deposits in an ADI are protected. Apart from individual interests, there is a public interest in the ballast that "locked up" retirement savings in aggregate bring to the Australian economy. For these reasons, the prudential aspects of safety and stability should remain to the fore for RSEs, complemented by stronger conduct enforcement. Despite the similarities in the gateway "fit and proper test", it is primarily prudential for the RSE. There are different objectives for who should be permitted to hold assets for the retirement of others, and who should be able to provide credit or provide advice in innovative markets.

The foundational trust structure of RSEs, the emphasis on standards of governance and obligations to beneficial owners – together with prudential regulation – all favour retaining the RSE licensing regime. There are similarities between the obligations imposed upon RSE licensees and those imposed upon AFSL and ACL holders but there are also significant differences, arising from the use of the trust structure and the unique character of superannuation. The most significant differences are the "sole purpose" of superannuation, the statutory obligation to perform the duties of a prudent trustee with due care, skill and diligence, and the attendant prudential governance standards, along with the absence of requirements for the governance of representatives. There is an argument that the trust structure does not warrant bespoke regulation, yet the governance of managed investment schemes (where the "responsible entity holds scheme property on trust for scheme members"[220]) is addressed in Ch 5C of the *Corporations Act* and such schemes are subject to the AFSL regime. The *2020 Response Act* recognises the prudential focus of the RSE regime and is consistent with our analysis.[221]

The *2020 Response Act*, which requires every RSE to also hold an AFSL, creates two sets of conduct obligations. There is scope for further alignment of some of those aspects of the RSE licensing regime that are conduct focused, rather than prudentially or governance focused, and which have similarities with the general (and other) obligations of AFSL and ACL holders. A good example is IDR, which is moving toward integration.[222] Yet not all of the obligations in the covenants contained in ss 52 and 52A of the *SIS Act*, which are both governing rules and licence obligations, have an AFSL/ACL analogue. This includes the sole purpose requirement, the obligation to have a strategy for prudential management of reserves, and the prohibition on entering contracts that would hinder a trustee in that role.

Since 2019, ss 52 and 52A covenants have operated as civil penalty provisions.[223] As discussed, ASIC now has power to enforce these covenants, which at this point is preferable to amalgamating the APRA-administered RSE licensing regime into a wholly unified licensing system. Providing both regulators with power to enforce the covenants preserves the unique aspects of superannuation regulation, while upholding the broad spirit of the Twin Peaks model. As each regulator provides details and this power-sharing evolves, those covenants similar to AFSL and ACL licence obligations, over time, may come to resemble each other more closely. The intention of the *2020 Response Act* is consumer protection, but in some instances it risks overlap and complexity. For all RSEs to hold an AFSL may create a burden, but it will also tend towards similarity while preserving necessary differences in the obligations.

V. Conclusion

Much work has been done – and will continue to be done – in the aftermath of the Financial Services Royal Commission to implement and operationalise the recommendations of Commissioner Hayne.

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[220] *Corporations Act 2001* (Cth) s 601FC(2).

[221] See Explanatory Memorandum, *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) [9.5].

[222] See Australian Securities and Investments Commission, *Internal Dispute Resolution* (Regulatory Guide 271, July 2020), to come into effect in October 2021.

[223] *Superannuation Industry (Supervision) Act 1993* (Cth) s 54B, inserted by *Treasury Law Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019* (Cth) Sch 3.

This article has surveyed the history and content of the AFSL, ACL, and RSE regimes which are integral parts of the prudential and conduct regulation of Australia's financial system. We suggest there is scope to rationalise the AFSL and ACL regimes, but that the separate RSE licensing regime should be retained. Further work should consider whether there are any principled or practical impediments to such a reform, and how such a consolidation would impact upon other relevant regulatory mechanisms.

Despite the recent reforms in relation to RSE licensing contained in the *2020 Response Act*, we do not presently consider that any amalgamation of the RSE and AFSL regime would be justified. Indeed, those most recent reforms preserve the distinctiveness of the RSE licence as a prudential licensing regime directed at governance. The application of the AFSL regime to all RSEs through the "superannuation trustee service" concept ameliorates what has been recognised as the "great impediment" to greater regulation of RSEs by ASIC.[224] These reforms also open the way for alignment between the RSE covenants and AFSL obligations where it is appropriate, but not where differentiation is preferable. Finally, the reforms reflect the reality that, already, RSEs generally hold both licences.

In any event, only time will tell what final impact the reforms set in motion by the Financial Services Royal Commission and developed by the *2020 Response Act* will have upon the shape of the Twin Peaks landscape.

[224] Donald, n 16, 60.