Law Council
OF AUSTRALIA

11 March 2015

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Dear Ms Som

Consultation Paper 227 – Disclosure and reporting requirements for superannuation trustees: s29QC

Enclosed please find a submission prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia.

The Committee would welcome the opportunity to discuss the submission further. In the first instance, please contact:

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Yours sincerely

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Consultation Paper 227 Disclosure and reporting requirements for superannuation trustees: s29QC

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Executive Summary

About us
This submission has been prepared for the Law Council of Australia by the Superannuation Committee of the Legal Practice Section.

The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Law Council of Australia is the peak national representative body of the Australian legal profession and represents some 60,000 legal practitioners nationwide. Attachment A outlines further details in this regard.

General comments
We strongly endorse the direction in which ASIC is heading to provide class order relief from section 29QC.

Section 29QC has proved to be a contentious provision. It is a provision which would be difficult for superannuation funds to comply with, and compliance with the provision even poses its own risks to the extent that it could require funds to publish misleading and deceptive information.

As a general comment, we query whether APRA reporting should represent the 'standard' for consumer disclosure because it is designed for a different purpose, namely industry statistics. While the fundamental principle of consistency is laudable, it is the use of APRA reporting standards as the benchmark that seems to raise all of the difficulties. It would be much better to agree on realistic industry-based benchmarks for consistency of disclosure purposes.

A1

1. Of the three options identified by ASIC, we would strongly favour class order relief. The magnitude of the issues posed by section 29QC are such that mere guidance will necessarily be inconsistent with the literal meaning of section 29QC. It is therefore essential for relief to be provided in a legally binding manner, such as by way of class order (or at the very least by way of a formal no-action policy). There is an urgent need for relief and a class order may be the most efficient mechanism for providing that relief. Ultimately, however, it would be preferable for the legislation to be amended.

B1

2. We endorse ASIC's proposal to establish an exhaustive listing of matters which will be affected by section 29QC. This will be conducive to compliance monitoring and the creation of compliance checklists and sign-off forms which should ultimately result in higher rates of compliance within industry, compared to the alternative of having an uncertain and open-ended list of matters affected by section 29QC.

3. We agree that fees and costs should be excluded from section 29QC so that it is clear that the Corporations Act and Corporations Regulations alone govern product disclosure statements and periodic statements with respect to fees and costs disclosure.

4. If section 29QC is to be limited to advertising and promotional material, it will be crucial to define these concepts clearly. Otherwise there could be confusion concerning other materials such as: significant event notices, educational materials, member correspondence and Powerpoint slides for educational seminars and webinars.

5. We agree that section 29QC should be limited both by topic and by target audience and, specifically, that section 29QC should be limited to consumer facing disclosure. However, ASIC may wish to note that superannuation funds participate in surveys administered by research agencies such as Super Ratings and Chant West. These surveys often require return data to be provided in a particular format specified by the research agency. Presumably these communications could continue to occur without reference to section 29QC. ASIC may wish to reflect on the implications of research agencies publishing return data which does not comply with section 29QC, given that section 29QC does not apply to research agencies. There is also a question of whether superannuation funds will be able to re-publish the results of surveys by agencies such as Super Ratings and Chant West if the outputs from those surveys do not comply with section 29QC.

B2

6. We agree that the class order ought to limit section 29QC to past performance information.

7. It is significant to point out that, under the current regulatory requirements (as enacted), trustees have flexibility to publish either or both of the net return and/or net investment return. Parliament and APRA (through its reporting standards) have given trustees that flexibility. We would suggest that it is preferable that any class order relief not detract from the existing flexibility which the legislation has given trustees.

8. However, if an ASIC class order is going to prescribe a single methodology for disclosing past performance, we agree that the requirement should be to publish net investment returns. Net returns are problematic because they must be adjusted for administration fees which are typically dollar based. In order to convert these into

percentages, it is assumed that members have account balances of $50,000. As a consequence, the net return figure is inaccurate for all members (except for a member who had an account balance of precisely $50,000), and will significantly understate or overstate the returns actually experienced by members. In contrast, the net investment return will, for most funds, be an accurate representation of what has been experienced by every member invested in the relevant product over the relevant period.

9. Indeed, a problem with the existing product dashboard requirements is that trustees are, in effect, required to disclose how returns which members did not actually receive compare to return targets which were not really being pursued. ASIC's proposed class order is an opportunity to improve the quality of disclosures.

B3

10. We agree that 'return targets' and 'investment objectives' should not be considered the same. The return target is an artificial construct of the APRA Reporting Standards which does not necessarily bear any resemblance to the true investment objective. This is because of the requirement for return targets to be calculated using a mere 50% confidence threshold and to be linked to CPI (which will often differ from the true investment objective).

11. It is problematic for both measures to be published in the same document – for example, it would be problematic to publish both the return target and the investment objective in a product disclosure statement. It is also problematic to publish the return target in a dashboard and the investment objective in the product disclosure statement. This is because engaged members notice the difference and this leads to confusion. Members who rely on the return target will almost always be left with an inflated sense of what investment returns are being targeted. It would be preferable for regulatory settings to avoid compelling the publication of material which is likely to mislead or deceive. Explaining the limitations of the 'return target' methodology is difficult to do in lay terms and only adds to the length of disclaimers and footnotes at a time when the focus is otherwise on simplifying and shortening disclosures. Hence, we do not consider that warnings and disclaimers would be useful in aiding consumer understanding.

12. We note that the return target issue does not only arise in the context of dashboards and can arise in the context of product disclosure statements also. For example, a product disclosure statement may cover a MySuper product as well as other investment options which for all intents and purposes are identical to the MySuper product but technically are not a MySuper product. For example, the Balanced option for pensioners might be the same as the Balanced MySuper option in practical terms and explained in the same product disclosure statement, but technically a pension product cannot be a MySuper product. In this context, the product disclosure statement may disclose a return target for the MySuper product which is very different from the investment objective for the pension product, even though they have identical investment strategies. This can lead to confusion amongst members.

B4

13. We agree that section 29QC should not affect how asset allocations are disclosed in product disclosure statements. APRA's nomenclature is unorthodox (albeit readily understood by investment professionals). For example, some funds are uncomfortable with changing well understood references to 'international private equity' to obscure categories such as 'equities unlisted – domicile international' (which is what section 29QC could require, if taken literally). There is perhaps a case for adopting standard asset class definitions (as suggested by ASIC), but they should be industry-based not regulator based.

14. Another issue is that APRA's Reporting Standards require details of target allocations to be provided for each individual asset class. However, a fund's strategy might not necessarily target specific allocations for each individual asset class. A strategy might target a combined exposure to multiple asset classes – for example, a bundled allocation to both cash and fixed income securities. Section 29QC should not prevent funds from disclosing what their strategy actually is, by requiring the publication of unbundled allocations (which are not the true strategy) merely because this is what has been provided to APRA. In extreme cases, some trustees may feel obliged to change their investment strategy solely for the purpose of fulfilling a data reporting and disclosure obligation, which is not an optimal outcome.

Transitional comments

15. Significant time will be required to update consumer facing material in order to comply with section 29QC (as affected by any forthcoming class order relief).

16. We reiterate the comments we made at the recent round-table conducted in Melbourne regarding existing documentation. Many funds will have websites with large volumes of historical publications – for example, historical newsletters, historical significant event notices, historical annual reports and so forth. We assume (and we gathered there was recognition from ASIC at the Melbourne round-table) that trustees will be exempted from updating historical documentation when section 29QC takes effect. It will be important to include this in any class order relief.

17. At the same time, it will be important to clearly demarcate the circumstances in which historical data will need to be updated to comply with section 29QC, since section 29QC (as affected by the proposed class order) will have a particular focus on past performance figures. Whereas a table of past performance in an historical annual report will apparently not have to be updated (which we agree is sensible), perhaps ASIC may expect that a table of historical performance on a live website should be updated. We suggest that ASIC give consideration to limiting the time periods for which trustees would have to go back and update historical data. It is possible that some trustees may disclose their long-run historical crediting rates (for example). If (contrary to our submission above) the net return is prescribed as the only measure that can be published, it could be a significant burden for trustees to go back and re-calibrate their data to estimate what the net return (as defined in 2015) would have been 10 or 20 years ago, for example. This would involve going back and adjusting for the impact of dollar-based administration fees and so forth, which could be a significant logistical burden, especially where different administration fees applied to different employer groups, for example. It should be borne in mind that trustees are not required to publish long-run performance figures on their website and if the regulatory burden is too great, some trustees could potentially make a decision to remove past performance data (especially very old data) from their website and instead start complying with their obligations under section 29QC afresh.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President Mr Duncan McConnel, President
- Mr Stuart Clark, President-elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.