



Law Council
OF AUSTRALIA

Legal Practice Section

2 March 2020

Senior Advisor
Retirement Income Policy Division
Treasury
Langton Cres
PARKES ACT 2600

By email: FSRCconsultations@treasury.gov.au

Dear Sir/Madam

SUPERANNUATION REGULATOR ROLES

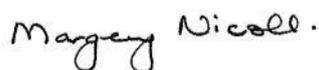
1. The Superannuation Committee (**the Committee**)¹ of the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to the Treasury in relation to the Exposure Draft Bill on Financial Sector Reform (Hayne Royal Commission Response – Superannuation regulator roles).
2. This measure proposes to make 'superannuation trustee services' a 'financial service' for purposes of the Australian Financial Services License (**AFSL**) regime.
3. It is the Committee's view that this measure will exacerbate the existing overlap between the Registrable Superannuation Entity (**RSE**) licensing and Australian Financial Services (**AFS**) licensing regimes. For example, it will lead to greater breach reporting requirements, and not only for *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) contraventions but potentially breaches of other laws such as privacy, tax, anti-money laundering and possibly other legislation if the breach of those other laws could also be said to have prejudiced the "efficient, honest or fair" "operation" of the RSE and thereby contravened paragraph 912A(1)(a). However, the Committee acknowledges that this legal outcome arises from a deliberate policy decision.
4. Notwithstanding the overarching concerns the Committee raises in relation to this measure, the Committee suggests that the proposed new subsection 766H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) would have clearer application if it were more simply expressed, as follows: 'A person provides a **superannuation trustee service** if the person is the trustee of a registrable superannuation entity'. Such language removes any confusion about whether a person is 'operating' such an entity as trustee – which may beg the question as to whether an administration service entity or a custodian might be taken to also provide a 'superannuation trustee service'. Consequential modifications to subsection 766H(2) would also be required. The

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia

Committee suggests that these changes would better align section 766H of the Corporations Act with section 29J of the SIS Act. The remarks made at paragraph [1.126] of the Explanatory Memorandum is relevant to this issue.

5. The Committee queries the extension of the application of the existing indemnification prohibitions such that they also apply to civil and administrative penalties pursuant to the changes to sections 56 and 57 of the SIS Act. It is apparent that numerous industry fund RSE licensees would not have any means to pay a penalty other than from the fund assets because the only assets of such entities (apart from their right of indemnity from fund assets) is represented by nominal capital. It is not clear that new paragraph 1317G(6)(e) of the Corporations Act (also new subsection 93C(2) of the *Australian Securities and Investments Commission Act 2001* (Cth)) is designed to address this concern or some other concern that is not apparent to the Committee.
6. Another potential issue arises in relation to the extension of the indemnification prohibitions as to whether prior to 1 July 2020 as a precautionary measure all trustees will need to review and amend their trust deeds to adopt the extended language so as to ensure that the existing provisions for indemnification are not (inadvertently) rendered void.²
7. The Law Council would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact Superannuation Committee Chair, Dr Lisa Butler Beatty on BeattyLi@cba.com.au.

Yours sincerely



Margery Nicoll
Acting Chief Executive Officer

² See paper by Howard Insall SC, The scope of a trustee's obligations in relation to member claims, overpayments, remediation and litigation, [148] – [165] presented at Law Council of Australia, Superannuation Lawyers conference 2019 'Great Expectations'.