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General Manager
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via email: superannuation@treasury.gov.au

Dear Sir / Madam

Improving accountability and member outcomes in superannuation

Thank you for the opportunity to provide a submission on the Australian Government's exposure draft titled *Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017* (Cth) (**Exposure Draft**) and associated explanatory material (together, the **Super Reforms**).

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

Given the significance of the superannuation sector to the financial wellbeing of Australians, the robustness of its governance is of particular importance to the nation.

The AICD strongly endorses the government's aim of improving accountability and member outcomes within the superannuation sector. However, we urge careful consideration of the design of the Super Reforms to ensure they are appropriately calibrated and can be effectively implemented.

This submission sets out the AICD's recommendations for the Super Reforms. We believe they will assist the new legislation to achieve its policy objectives.

1. Summary

In considering the Super Reforms, the AICD has focused on the proposed introduction of annual members' meetings (**AMMs**), a new directions power for the Australian Prudential Regulation Authority (**APRA**), and a penalty regime for directors of registrable superannuation entity (**RSE**) licensees (**Licensees**).

In summary:

- The AICD supports mechanisms that effectively promote member engagement and transparency in the superannuation sector. We therefore endorse the AMM in principle for its potential to provide members with further opportunities to ask questions and obtain information about the operation and performance of their RSE. However, we believe the AMM model envisaged by the Exposure Draft requires amendment in order to avoid adverse unintended consequences. (See Section 3 below.)

- While the AICD supports APRA being empowered to intervene at an early state to address prudential concerns, we are concerned that the directions powers proposed in the Exposure Draft go beyond that which is reasonably required to achieve the government's aim. We recommend the proposed powers be redefined. (See Section 4.)

- The AICD endorses in principle the government's objective of introducing a penalty regime for RSE Licensee directors that aligns with the regime applying to directors of responsible entities of managed investment schemes. However, we have serious reservations about the provisions of the Exposure Draft. The draft legislation does not address the interaction of the proposed penalty regime with the existing system in the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) for holding RSE Licensee directors accountable. Further, the proposed new directions power for APRA would enable the regulator to obtain materials which could be used in enforcement proceedings in a manner which far exceeds those of the Australian Securities and Investments Commission (**ASIC**) or ordinarily available in discovery processes. The analogous penalties regime administered by ASIC with respect to the directors of responsible entities contains checks and balances to ensure that it cannot be abused in prosecutions. (See Section 5.)

The AICD recognises the importance of the government's initiative in working to improve the quality of governance in the superannuation sector, in particular by increasing the accountability of key actors in the system and empowering the regulator to take action where it perceives a threat to the system's integrity.

However, we urge the government to carefully consider the design and implementation of the Super Reforms, so that the accountability measures and regulatory powers are appropriately calibrated and are capable of being effectively implemented in practice.

2. Period of consultation provided

It is essential that any reforms purporting to change the regulatory settings be progressed in a careful manner, to avoid unintended consequences and legislative anomalies. In our view, the consultation period provided for the Super Reforms has been insufficient.

The AICD strongly recommends that a further meaningful opportunity be provided for the community and business to consider the Super Reforms and their practical implications.

3. Annual members' meetings

The AICD supports mechanisms that effectively promote transparency and member engagement. In this regard we note that under current legislation:

- RSE Licensees must take all reasonable steps to ensure that all times there are arrangements under which a beneficiary or a former beneficiary can make an inquiry or complaint about the operation or management of the fund and have that inquiry or complaint properly dealt with within 90 days (s 101 of the SIS Act); and

- RSE Licensees must provide a person who is a member, was a member in the last 12 months or is a beneficiary with information that the person reasonably requests to:
  - understand any benefit entitlements that the person may have, has or used to have;
  - understand the main features of the RSE;
  - make an informed judgment about the management and financial condition of the RSE, or about the investment performance of the RSE; or
  - understand the particular investments of the RSE (s 1017C(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**).

  There are exceptions for:
  - internal working documents of the RSE Licensee;

- information or documents that would (or tend to) disclose personal information of another person when that disclosure would be unreasonable, trade secrets or other information having a commercial value that would be reduced or destroyed by the disclosure; and
- information or documents in relation to which the RSE Licensee owes another person a duty of non-disclosure (s 1017C(4) of the Corporations Act).[1]

AMMs have the potential to provide members with another avenue by which to ask questions and obtain information about the operation and performance of their RSE. While we support the concept of an AMM in principle, we encourage the government to consider a lighter touch model that more closely reflects the well-established conventions of company annual general meetings (**AGM**).

The AICD has reservations about whether the amendments proposed in the Exposure Draft will, in their present form, achieve their policy objective of enhancing transparency and engagement in the superannuation sector. In particular, we are concerned that the current AMM model is unnecessarily prescriptive. Our concerns, and recommendations for addressing them, are set out in the table below.

Concern	Recommendation
Electronic AMMs	
The Exposure Draft anticipates that AMMs may occur electronically (s 29P(4)(a)(ii)). Although we believe this is important for efficiency, remote participation and cost management, we anticipate issues where members have expressly opted out of electronic disclosure and interaction with the RSE Licensee (as, for example, permitted under regulation 7.9.75BA(5) of the *Corporations Regulations 2001* (Cth)). In those circumstances, the RSE Licensee may have to make available non-electronic means of participating, partly as a result of the covenant imposed by s 52(2)(c) of the SIS Act (the 'best interests' covenant) and partly because the Exposure Draft (in s 29P(5)) requires the RSE Licensee to give members 'reasonable opportunities' to ask questions. For RSEs with a widespread (national) membership base this could prove very expensive.	We suggest that the legislation specifically allow AMMs to occur electronically despite any election made by a member in relation to communications from the RSE Licensee.

[1] The existence of these mechanisms are not reflected in the following statement in the explanatory memorandum to the Exposure Draft ([7.3]):

> '*Many superannuation fund members seek to ask questions of their funds concerning their operation and performance. However, in most cases members have little or no ability to have their questions asked or answered*.'

Attendance by all 'Responsible Officers' and certain auditors and actuaries	
The Exposure Draft requires all 'Responsible Officers' to attend an AMM. The definition of 'Responsible Officers' encompasses a wide variety of individuals, many of whom would not ordinarily be involved in providing information directly to members. It is even possible that some of the individuals may not be officers or employees of the RSE Licensee; for instance they may be employees of a RSE sponsor or, in the case of an outsourced business model, of a service provider. We do not believe it is necessary for such a wide range of individuals to be personally involved in the AMM, especially given the potential for an answer to be provided after the meeting (within one month) 'if it is not reasonably practicable to do so' at the meeting.	The AICD recommends reconsidering this requirement and pursuing a narrower and more flexible attendance requirement for senior officers and directors. Under the AGM format, only the chair is required to attend an AGM, though it is best practice for other directors to also attend. This appears to work well in practice without recourse to a prescriptive model.
People who can attend the AMM	
The AMM is specifically directed at members. Yet other parties can have significant interests in a RSE, including beneficiaries and non-member spouses and standard employer sponsors of defined benefit RSEs that are liable to contribute to the RSE.	We recommend the government clarify that, while notice need not be provided to such other persons, they are entitled to attend an AMM.
Questions and answers (Q&A) at the AAM	
If a Responsible Officer of an RSE Licensee is asked a question by a member at the AAM, the Responsible Officer must answer the question at the AAM, unless it is not reasonably practicable to do so, in which case the question must be answered within one month (s 29PB(2)). We are concerned that this model is unnecessarily prescriptive when compared with the objective the Super Reforms seek to achieve, and in contrast to the AGM format. The Responsible Officer to whom a question is posed may not in fact be the person best positioned to answer it.	We believe it would be more appropriate for answers to be provided formally by the RSE Licensee, through the chair of the AMM. This more closely reflects the fact that many of the decisions taken by RSE Licensees are not taken by individuals but by combinations of individuals (such as the Board, management teams) and are the result of multi-step processes. It would not, for instance, be appropriate to require an individual Board member to disclose how they personally voted on a Board resolution.
The Exposure Draft requires that RSE Licensees give members 'reasonable opportunities' at an AMM to ask questions in relation to the matters set out in s 29P(5). For the following reasons, this requirement concerns us: • The meaning of a 'reasonable opportunity', particularly in the context of an electronic meeting, is unclear and may have adverse unintended consequences. For example, an online forum such as that envisaged in	Consideration should be given to adopting a more flexible Q&A approach similar to that applicable to AGMs. The AGM Q&A approach has worked well in practice. Under the Corporations Act, the chair of an AGM must allow a 'reasonable opportunity' for the members as a whole at the meeting to ask questions about or make comments on the management of the company (s 250S). This means that not all questions must be answered.

the Exposure Draft may be particularly vulnerable to a barrage of questions or comments, or hijacking of the agenda by special interests. • Almost by definition the vast majority of members of RSE Licensees will be employed. This will prove difficult from a scheduling perspective for those RSEs with members undertaking shift-work, for instance, for whom even scheduling AMMs in the evening would not necessarily amount to a 'reasonable opportunity.'	We recommend the Exposure Draft be similarly crafted. In practice, the chair acts as a mediator of which questions are addressed. The chair is responsible for the general conduct of the AGM and, subject to the law of meetings, determines who can speak, in which order, and for how long. Thus, the chair has a degree of discretion in dealing with questions arising from members. It is also usual for members to be encouraged to send in questions ahead of the AGM. This enables the chair to deal with frequently asked questions at the AGM before opening questions from the floor. We believe this should be permitted and encouraged at AMMs also. Failing that, we suggest that the RSE Licensee should be able to group similar questions together in a single answer, and not be required to answer each question separately. We further recommend that the regulations referred to in paragraph (d) of proposed ss 29PB(3), 29PC(3), 29PD(3) and 29PE(3) proscribe frivolous, vexatious and other questions not posed genuinely (ie not posed for a proper purpose). The regulations should also include exclusions that mirror the exceptions contained in s 1017C(4) of the Corporations Act.
Master funds	
The Exposure Draft appears implicitly to rely on a simplistic model of a RSE. It does not, for instance, appear to accommodate master funds in which the rights and interests of the members of different sub-funds and classes might vary markedly. Answering a question posed by a member of one sub-fund may confuse a member of a different sub-fund within the master fund that has different rights and interests to the member who asked the question.	The AICD recommends the government give further consideration to the way in which an AMM will apply to complex RSEs, including master funds, so as to avoid the practical difficulties which may arise.
Timing	
The Exposure Draft requires an RSE Licensee to hold an AMM within five months of the end of the entity's income year. We question this restriction. The rationale behind an AGM being held within 5 months of the end of a company's financial year is based on the need for resolutions to be passed relating to the company's financial report and audit. No such requirements would apply in relation to AMMs.	The AICD recommends that the timing requirement be amended so that RSE Licensees obliged to hold an AMM need only do so once each calendar year. This will provide greater flexibility for RSE Licensees regarding the timing of their AMMs, and avoid AMMs further crowding an already congested AGM season.

Allow members to endorse preferred model	
The Exposure Draft envisages a single AMM to be held each year. We understand that a number of funds currently run AMM-style meetings at different dates in different locations, to accommodate member attendance and participation.	The AICD recommends that the requirement to hold an AMM be drafted to allow RSEs flexibility to meet the AMM obligation by way of multi-meetings or other delivery mechanisms, if member support can be demonstrated (for example, by means of a member vote).
Minutes	
The Exposure Draft requires that the RSE Licensee prepare and publish minutes of the AMM (s 29P(6)). Ordinarily minutes are directed towards recording the deliberations and decisions of an entity. In contrast, an AMM will not fulfil a decision-making function.	We believe it would be more appropriate for the RSE Licensee to be responsible for publishing a summary of its answers to the questions addressed at the AMM.

We believe that these concerns, when taken together, point to the need for the government to consider a different regulatory approach to achieving its objective. In our view, the requirement for an AMM could be imposed by statute in much the way currently envisaged by ss 29P(1) and (2). The detail of what is required in an AAM could then be specified formally in a SIS Regulation or Operating Standard. This approach would introduce needed flexibility and additional opportunities for consultation, enhancing the prospect of an AMM model that is workable and effective in achieving meaningful member engagement.

4. APRA directions powers

The AICD supports the government's objective in strengthening APRA's supervisorial and enforcement powers, in order to enable APRA to intervene at an early stage to address prudential concerns in a manner that is in the best interests of the members.

We acknowledge that APRA currently has broad general powers of direction under the Acts it administers in the banking and insurance industries. Notwithstanding these precedents for such powers of direction, in our view, the powers granted to APRA under the Exposure Draft are too broad and go beyond that which is required to achieve the government's policy objective.

In particular, we are concerned that:

- The threshold required to be satisfied for APRA to issue a direction is too low.

  Proposed s 131D(1) permits APRA to give a direction to an RSE Licensee if APRA 'has reason to believe' that one of the criteria in paragraphs (a) through (j) is satisfied.

  To ensure that this power has some appropriate checks and balances in place, the AICD recommends amending s 131D(1) of the Exposure Draft so that APRA is only empowered to act when it 'reasonably believes' one of the criteria has been satisfied. This requirement contains both an objective element (was the belief reasonable) and a subjective element (APRA did actually believe it).

  The AICD also is concerned that a number of the criteria in paragraphs (a) through (j) are diluted by phrasing such as the RSE Licensee being 'likely to' contravene, or that there 'might be' a material risk or material deterioration.

  As a result of these features of s 131D(1), the Super Reforms will permit APRA to exercise the directions power in a very wide range of circumstances and, significantly, the exercise of this power will in a great many circumstances be difficult to challenge.

- The range of directions that APRA can make is too wide.

  A number of the directions listed in s 131D(2) are particularly wide, for example:
  - to appoint a person as a responsible officer of the RSE Licensee for such term as APRA directs (paragraph (c)(iii));
  - not to pay or transfer any amount to any person (paragraph (j));
  - not to undertake any financial obligation (paragraph (k));
  - not to discharge any liability of the RSE or RSE Licensee (paragraph (l));
  - to make changes to RSE Licensee's systems, business practices or operations (paragraph (m)); and
  - to do, or refrain from doing, anything else in relation to the affairs of the RSE or RSE Licensee (paragraph (n)).

  Other examples seem redundant given current mechanisms, for example:
  - to comply with the SIS Act, the *Superannuation Industry (Supervision) Regulations 1994* (Cth), a Prudential Standard or the *Financial Sector (Collection of Data) Act 2001* (Cth); and
  - to remove a responsible officer of the RSE Licensee (paragraph (c)(i)), which can already be achieved by APRA's Fit and Proper regime.

- There is no requirement that APRA's response to a situation be directed towards or proportionate to the risks or costs of the situation.

  The directions that APRA can issue under proposed new Part 16A should be required to be tailored specifically to address the relevant contravention or risk, and be proportionate to the contravention or risk.

5. Director penalty regime

The AICD supports the government's broad objective of introducing a penalty regime for RSE Licensee directors which aligns with the penalty regime applying to directors of responsible entities of managed investment schemes.

However, the AICD is deeply concerned that the Exposure Draft goes beyond equivalence, for the following reasons:

- There is already a mechanism in the SIS Act to hold RSE Licensee directors directly accountable to members with the leave of the court by virtue of the covenants imposed by s 52A of the SIS Act. In addition, APRA can cause civil proceedings to be commenced in the name of a person if, after investigation, the proceedings appear to APRA to be in the public interest (s 298 of the SIS Act). The Exposure Draft therefore anticipates that the SIS Act will contain two parallel systems for holding RSE Licensee directors accountable but does not address the consequences of that co-existence, most notably for a member-initiated suit which follows an APRA prosecution.

- The considerable information advantage that APRA will have as a result of the directions power (discussed above) would enable the regulator to acquire and use information that would not ordinarily be available under discovery in a litigation context, or to ASIC under its existing investigatory powers. These powers have been carefully calibrated over time to ensure they are balanced and fair, and accord with principles of justice and the rule of law. The analogous regime administered by ASIC with respect to responsible entities contains a carefully calibrated set of check and balances to ensure that it cannot abuse its position as regulator in prosecutions. The requirement that the government be a model litigator is another manifestation of this concern that the coercive powers of the state not be abused.

6. Conclusion

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Lysarne Pelling, Senior Policy Adviser, on (02) 8248 2708 or lpelling@aicd.com.au, or Matt McGirr, Policy Adviser, on (02) 8248 2705 or at mmcgirr@aicd.com.au.

Yours sincerely

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