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## **Re: Superannuation Legislation Amendment (Further Measures) Bill 2012**

ISN welcomes the Superannuation Legislation Amendment (Further Measures) Bill 2012. Much of the Bill implements expected and consequential changes to the MySuper regime and has been the subject of previous consultation with the industry.

ISN notes that the final impact of the proposed legislative change will be affected by the final form of prudential standards developed by APRA. It is presumed that the draft standards are likely to be finalised without significant amendment.

We make the following comments on the Bill.

### **Provisions in Governing rules - *Schedule 1, item 68, subsections 58A(2-4)***

The amendments to the SIS Act to avoid any provisions in a funds governing rules that requires the use of a specified service provider are supported. Whilst we welcome the ability of funds to enter into or continue arrangements where it can be demonstrated that the arrangements are in the best interests of members, the final form of the relevant prudential standards will have a significant impact on the determination of which arrangements are considered to be in the best interests of members.

### **APRA infringement notices – *Schedule 1, item 109, Part 22***

The insertion of a new Part 22 into the SIS Act to provide APRA with the ability to issue infringement notices as an alternative to court action for limited breaches (which can be added to by way of regulation) is welcomed, as is the discretion provided to APRA to withdraw a notice of contravention.

The insertion of the additional offence for continuing offences in section 194A is not supported in its current form.

It is suggested that Part 22 currently allows for the application of multiple infringement notices by APRA and does not limit the Court's discretion to determine penalty amounts. Whilst ISN agrees that continued contravention should be the subject of additional penalties, it is suggested there is currently adequate processes for this concern to be addressed.

### **Reasons for decision – Schedule 1, item 70, subsection 101 and 14(6A)**

ISN is supportive of the changes that require trustees to provide reasons for decisions in relation to death benefit complaints and in relation to other complaints on request.

ISN is also supportive of extensions to the time limits to lodge a complaint with the Superannuation Complaints Tribunal to, (depending on the circumstances), six years or four after decision.

### **Dual regulated entities – Schedule 1, item 5 paragraph 912A**

The amendment to the Corporations Act that RSE licensees that also manage non-superannuation registered managed investment schemes will be required to have available adequate resources and risk management systems is supported.

### **Actions for breaches of director's duties – Schedule 1, item 65, subsection 55, item 43, section 29VPA, item 111, paragraph 323(1)**

ISN welcomes the new requirement upon a person who has suffered a loss due to a director's contravention of duties under the SIS Act to seek leave from the court before bringing a civil action. The Court must determine that the action is in good faith and that there is a serious question to be tried. The extension of the defence of having acted with reasonable precaution (section 323) to cover breaches of MySuper obligations by trustees and directors is also welcomed.

ISN stands by its earlier submissions and remains concerned that there remains no nexus between a claimed loss by beneficiary and the failure of trustees to meet a prudential obligation. Whilst ISN recognises that all statutory and fiduciary obligations should be adhered to, we are concerned that the current arrangement would result in a proliferation of litigation to the overall detriment of fund members.

We suggest that the onus of proof of adherence to the covenants contained in s52 of the SIS Act on the trustees will encourage broad claims of failure on the part of the trustees. Rather than mount a costly exercise of discharging their onus of proof, it is more likely that trustees will settle any claims. Whilst the requirement to seek leave from the Court to commence an action will have a welcome impact, it is expected that the current arrangements will encourage a significant growth in litigation.

It is suggested that it would be consistent with existing prudential requirements upon trustees for the onus to prove that trustees have met their obligations to apply only to "significant" obligations. Significant being those obligations which, in their nature are important, notable, or of consequence and the breach of which is, in itself, likely to have a detrimental impact upon a beneficiary.

We join others in arguing that the nexus between a breach and loss or damage suffered should be present, albeit that the nexus could be causal.

We also recognise that it is open to APRA to make submissions to the Court and provide relevant prudential guidance which may be relevant in any court proceedings.

We suggest that the last words of subsection 55(5) of the Superannuation Legislation (Trustee Obligations and Prudential Standards) Bill 2012 be amended to omit "*to the investment*" and substitute "*the particular loss or damage suffered*". And that in subsection 55(6) the words "*to the management of the reserve*" be omitted and substituted by: "*the particular loss or damage suffered*".

## **Other consequential amendments**

**Trust deed provisions - *Schedule 1, item 69, subsection 68C*** - The making ineffective of provisions in trust deeds that prohibit a director or trustee from voting on a matter (except where there is a conflict of interest) is supported.

**Large employer exemption- *Schedule 1, item 47, section 29WB*** – ISN supports amendment to ensure that, where a tailored MySuper product is utilised, all MySuper contributions made on behalf of employees of an employer must be paid into that tailored product unless the employee has directed otherwise in writing.

**Administrative fee exemption – *Schedule 1, item 42, paragraph 28VB*** - ISN also supports the prohibition of different administrative fees being charged to employees in relation to a tailored large employer MySuper product. Properly this should ensure that all employees must be charged the same administration fee. ISN believes that the use of general anti-avoidance provisions would be appropriate where it could be demonstrated that employees with a group were being employed by a different legal entity for the primary purpose of avoidance of this requirement.

**Switching advice – *Schedule 1, item 7, paragraph 947D***. ISN supports the extension of the switching advice requirements in the *Corporations Act* applying to financial products to MySuper products.

**Deceased members – *Schedule 1, item 39, paragraph 29TC(1)*** – The recognition that after death it is not possible to obtain written consent and allowing the trustee the discretion to move the member's interest in the fund to another class of beneficial interest, is supported.

**Fit and proper requirements – *Schedule 1, Item 71, subparagraph 107 -108*** -The insertion of the fitness and propriety criteria contained the relevant APRA prudential standard into the SIS Act, is supported.

**Obligation to pay contributions to a MySuper product – *Schedule 1, item 44, paragraph 29WA(1)*** - Amendments to the MySuper Core Provisions Act that clarify that it is necessary for a member to make a written direction to have contributions placed in a particular investment option other than a MySuper investment option is supported.

**Expected compliance consideration - *Schedule 1, item 115, item 11A of Part 2 of the Core Provisions Act 2012*** – ISN supports the amendment that when assessing MySuper authorisation applications, APRA will have the ability to consider the trustees expected compliance with enhanced MySuper obligations.

Thank you the opportunity to make a submission.

If you have any queries or issues you wish to raise, feel free to contact me.

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