

24 December 2020

Mr Dolman
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Dear Mr Dolman

TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING) BILL 2020: BEST FINANCIAL INTERESTS OBLIGATION

On behalf of the Australian Council of Superannuation Investors (ACSI), thank you for the opportunity to make a submission in relation to the Treasury Laws Amendment (Measures for a later sitting) Bill 2020: Best Financial Interests (the Exposure Draft).

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) investment issues on behalf of our members, who include 37 Australian and international asset owners and institutional investors. Collectively, our members own, on average, 10 per cent of every ASX200 company, on behalf of millions of beneficiaries. Our members recognise that ESG risks and opportunities have a material impact on investment outcomes.

Our interest is in promoting the sustainable performance and financial success of companies over the long term in the best financial interest of our members' beneficiaries.

As active owners, our members engage with their investee companies using objective standards to identify issues that may have a material impact on investment outcomes. We do this through research and importantly through engagement with management and the board of investee companies.

In summary, we support the policy intent that trustees act in the best financial interests of beneficiaries. In respect of the Exposure Draft:

- at a minimum, an accurate regulatory impact assessment of the cost of the proposals, compared with their benefit, must be undertaken, to ensure that the policy intent of the measures is not compromised; and
- the provisions allowing for further regulation to prohibit (or prohibit unless certain conditions are met) certain payments should be removed.

The clarification is unnecessary and could create uncertainty

The existing best interests test is considered across the market to be a 'best financial interests' test. Our experience is that our member funds carefully consider whether expenditure is in the best financial interests of their beneficiaries.

Accordingly, we are of the view that the proposed clarification of the trustee duty to 'best financial interests' does little to clarify, rather it merely acknowledges the long-established position. The Final Report from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, referred to a number of cases that have clarified the position, and also noted the duty of 'acting in members' best interest is not hard to understand'¹.

¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report pg. 227; For example, *Cowan v Scargill* [1985] Ch 270, 29

The reversed onus of proof set out in the Exposure Draft could result in outcomes that conflict with the policy intent, given that the extent of information required to demonstrate that a payment is in the best financial interests of beneficiaries is not clearly set out in the Exposure Draft or the accompanying Explanatory Memorandum. Without additional guidance, this will likely cause trustees to undertake a higher level of due diligence than is necessary, creating unnecessary red tape and ultimately adversely impacting efficiency and member fees, contrary to the policy intent underpinning the Exposure Draft. Therefore, to protect beneficiaries' best financial interests, at a minimum accurate regulatory impact assessment of the cost of the measures, compared with their benefit, must be undertaken. That assessment should incorporate further consultation from industry.

An alternative that would meet the policy intent of ensuring trustees act in the best financial interests of beneficiaries could be to ask trustees to disclose to beneficiaries the governance arrangements they have in place to ensure payments made are in the best interests of beneficiaries.

Additional regulations

The Exposure Draft proposes that additional regulations could be made to prohibit or further regulate certain payments made by trustees, including in the circumstances where such payments are in the best financial interests of beneficiaries. At this stage, there appears to be no transparency on the kinds of payments contemplated for further regulation.

This proposal to allow for additional regulations is fatally flawed. It creates uncertainty, given the potential for conflict and confusion between matters prohibited and the 'best financial interests' test. In addition, this provision is contradictory to the stated policy intent of ensuring trustees are acting in the best financial interests of their beneficiaries. The provision also appears to contradict with the Explanatory Memorandum where it provides that the new duty does not preclude actions that also yield non-financial benefits to beneficiaries.

This proposal also has potentially far reaching consequences. Superannuation funds are large institutional investors, and investment favours certainty. The proposal acts to create unnecessary uncertainty for investment, with the potential for significant change to permitted payments or investments to be made via regulation. This could operate to adversely affect investment activity across the market, and is at odds with the long-term approach to investment that underpins retirement outcomes for beneficiaries.

As a general matter of good policy, regulations should address detail only, rather than seeking to circumvent the legislative process with a potentially far reaching prohibition.

We therefore recommend that if the Exposure Draft proceeds, it should be amended to remove the provisions allowing for further regulation to prohibit (or prohibit unless certain conditions are met) certain payments, whether or not they are considered to be in the best financial interests of beneficiaries.

I trust our comments are of assistance. Please contact me or Kate Griffiths, ACSI's Executive Manager – Public Policy and Advocacy, should you require any further information on ACSI's position.

Yours sincerely



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Australian Council of Superannuation Investors