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YOUR FUTURE, YOUR SUPER EXPOSURE DRAFT REGULATIONS

On behalf of the Australian Council of Superannuation Investors (ACSI), thank you for the opportunity to make a submission in relation to the exposure draft of the *Your Future, Your Super Regulations* ('the Regulations').

About ACSI

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) issues on behalf of our members. Our members include 36 Australian and international asset owners and institutional investors. Collectively, they manage over \$1 trillion in assets and own on average 10% of every ASX200 company.

Our members believe that ESG risks and opportunities have a material impact on investment outcomes. As fiduciary investors, they have a responsibility to act to enhance the long-term value of the savings entrusted to them.

ACSI staff undertake a year-round program of research, engagement, advocacy and voting advice. These activities provide a solid basis for our members to exercise their ownership rights.

ACSI's position on the Draft Regulations

We support the introduction of Regulations that aim to increase transparency and accountability. However, as they currently stand, the Draft Regulations fail to clarify important areas of the *Treasury Laws Amendment (Your Future, Your Super) Bill 2021* ('the Bill'). Provisions therefore remain in the Bill that have the potential to undermine the ability for trustees to act in the best interests of their members.

Need for greater clarity on Schedule 3 (best financial interests duty)

As outlined in our submission on the the Bill, ACSI's focus is on the 'best financial interests' duty (Schedule 3) of the Bill. The Bill proposes a number of areas in which the Government has the power to enact further regulations, including to:

- prohibit certain payments and investments; and
- impose additional requirements on trustees in order to fulfill their best financial interests duty.

If enacted, these broad regulation-making powers would have significant impact on the decisions of superannuation trustees, and therefore the broader economy in Australia. Given the significance of these proposed changes, there is widespread concern about the lack of clarity that has been provided regarding the regulations to be introduced by the Government.¹ The Regulations fail to provide any clarity on the kinds of payments and investments that would be prohibited, or the additional requirements that would be imposed on trustees in the exercise of their best financial interests duty.

Superannuation funds are large institutional investors, and investment favours certainty. In order to meet their fiduciary duties, trustees benefit when there are consistent and clear policy signals from Government to guide carefully considered long-term investment decisions that seek the best financial outcomes for fund members. The potential for the Government to prohibit certain payments or investments at any point via regulation will reduce the level of certainty.

¹ As outlined in the Report of the Senate Economics Legislation Committee on the Treasury Laws Amendment (Your Future, Your Super) Bill 2021 [Provisions], p 59.

It is not possible for the Parliament or the public to properly assess and provide an informed view on the impacts of the Bill without further clarity on the substance of Regulations related to Schedule 3.

Broad-reaching regulation-making powers

Given that the power for the Government to enact further regulations under Schedule 3 remains unclear, we remain concerned that the provisions create an undue degree of uncertainty and ignore the broader implications of such wide-ranging powers.

Prohibition of certain payments

A sweeping power for the Government to enact significant change to permitted payments or investments via regulation would create a high risk of market uncertainty, with unclear policy signals that are subject to change on an ongoing basis. This regulation-making power could therefore undermine the capacity of trustees to act in the best interests of their beneficiaries, by eroding their ability to invest based on clear and predictable market signals. The provision also opens the possibility for a future Government to interfere in the decisions of trustees at the expense of the long-term stability of the market. This creates the potential for misalignment between decisions that are prohibited due to a short-term focus and decisions that are truly in the best financial interests of beneficiaries over the long-term.

Additional requirements to fulfill the best financial interests duty

Likewise, the power for the Government to prescribe 'additional requirements' is unclear. Without further guidance, trustees will be unable to determine the additional requirements they might need to meet in the future. As currently proposed, this power is broad enough that future regulation could restrict or control a trustee's ability to undertake activity and make decisions in the best financial interests of beneficiaries. It is difficult to see any justification for this provision, which has the potential to undermine the fundamental role and expertise of trustees in fulfilling their fiduciary duty.

The stated rationale is to signal to the superannuation industry 'that the Government is ready to respond if any evidence of trustees seeking to avoid the best financial interest duty requirements is detected'². Given that the regulator exists to fulfil this function, it is neither necessary nor appropriate to provide an additional, broad power to enact regulations. When the regulators are sufficiently resourced to identify and respond to breaches on a case-by-case basis, this operates as an effective response and deterrent to breaches of the best financial interest duty.

Changes with such significant potential impacts on the investment market should be made via legislation rather than through regulations, to allow for thorough review and debate. As a matter of good policy, regulations should address detail only, so as not to circumvent the legislative process. This recommendation was made by the Senate Standing Committee for the Scrutiny of Bills, which noted that 'significant matters' should be included in primary legislation 'unless a sound justification for the use of delegated legislation is provided'³. The Committee was not convinced that a sound justification existed in the case of this Bill⁴.

ACSI therefore reiterates its recommendation that the regulation-making powers proposed in Schedule 3 of the Bill be removed. This is crucial to enable trustees to carry out their best financial interests duty with certainty and predictability.

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



Louise Davidson AM
Chief Executive Officer
Australian Council of Superannuation Investors

² Explanatory Memorandum for the Bill, para 3.82.

³ Standing Committee for the Scrutiny of Bills, Scrutiny Digest 4 of 2021, p28.

⁴ Ibid, p29.