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Attention:

Superannuation Industry (Supervision) Amendment (Annual Members' Meetings Notices) Regulations 2022.

We are pleased to have an opportunity to make a submission on the exposure draft of the *Superannuation Industry (Supervision) Amendment (Annual Members' Meetings Notices) Regulations 2022* (**Draft Regulations**).

About Mills Oakley

Mills Oakley is a leading independent Australian law firm with over 130 partners and more than 700 staff located in Melbourne, Sydney, Brisbane, Canberra and Perth.

We are a Top 10 Australian law firm by size. Our mission is to provide a superior service experience while operating an efficient business model that delivers value for clients, without compromising quality.

We service a full range of clients, from ASX200 corporates through to government departments and agencies, private companies, and individuals.

We also have a strong sense of social purpose, assisting vulnerable Australians through our dedicated pro bono firm, Everyday Justice. Our commitment to social justice and the community is indicative of the sense of integrity that we bring to everything we do and it is another reason for the trust our clients place in Mills Oakley as a preferred legal service provider.

Our Financial Services team advises a range of superannuation trustees, responsible entities, financial advice firms and other participants in the financial services industry. Mills Oakley has also collaborated with Argos Reg-Tech in providing Argos, an online regulatory change management service, to assist financial services firms manage the the significant operational, compliance and legal risks arising from the volume of complex changes to their regulatory environment.

Submission

It is our view that the amendments in the Draft Regulations meet their purpose, as stated in the draft Explanatory Statement (**Draft ES**):

> "The Regulations ensure that superannuation funds are required to disclose an appropriate amount of information to members, while keeping compliance costs low to preserve members' money for retirement."

This indicates an intention that the Draft Regulations balance two objectives: a member's need for information; and the impact of compliance costs on the retirement savings of members. We address how we believe the Draft Regulations satisfy each of these objectives below.

Our submissions focus on the repeal of the existing requirement to make itemised disclosure of certain categories of expenses (**Itemised Disclosure**) and require instead only a summary of these expenses (**Summary Disclosure**), broken into categories of marketing expenses; political donations; payments to industry bodies or trade associations; and payments to related parties. The Draft Regulations would also change the scope of the category of "payments to related parties" to align it with information already disclosable by superannuation trustees (or RSE licensees).

In summary, we submit as follows:

1. The Itemised Disclosures are highly unlikely to have any value to fund members and, if they would have value to a particular member, there is an existing mechanism through which they can obtain it.
2. The regulatory impact of the Itemised Disclosure obligation was grossly underestimated and its repeal would significantly reduce compliance costs on the retirement savings of superannuation fund members and thousands of organisations affected through possibly unintended consequences.

Appropriate amount of information to members

In our view there is no basis to support an argument that the existing requirement of Itemised Disclosure is appropriate.

The Itemised Disclosure requirement was inserted by *Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Improving Accountability and Member Outcomes) Regulations 2021* (**AMM Regulations**). In the Explanatory Statement (**ES**) to these Regulations, it was stated that the these regulations support the amendments in the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019* which are stated to have "introduced measures to increase the amount and quality of information available to superannuation fund members and other stakeholders."

The only basis stated in the ES for providing Itemised Disclosure is: "Disclosure will enable members to ask questions about the purpose and value of this expenditure".

The basis for Itemised Disclosure can therefore be summarised as: to increase the amount and quality of information, and to enable members to ask questions about the purpose and value of the expenditure.

The basis of Itemised Disclosure is not substantiated in the ES and is undermined by the findings in *ASIC's REP 632 Disclosure: Why it shouldn't be the default*, a evidence based report on ASIC's research into behavioural economics and consumer experience. Under the heading "Disclosure does not solve the complexity in financial services markets", ASIC states:

> "One of the key assumptions on which disclosure has traditionally been premised is the idea that if information asymmetries are corrected, we will make optimal choices. However, this assumption disregards how difficult it can be to choose the best option (if, in fact, it is possible at all), given the computational complexities involved. As the Nobel laureate Richard Thaler says, 'People aren't dumb, the world is hard'."[1]

[1] Page 8

Regardless of the merits of disclosure, we believe Itemised Disclosure is also not appropriate because there is currently a mechanism for members to obtain further information about the management of their superannuation fund in the *Corporations Act 2001*.

If a member seeks further information about what is comprised in the Summary Disclosure, this could likely be obtained by way of a request under s1017C of the Corporations Act, which requires that a superannuation trustee provide information that the concerned person reasonably requires for the purposes of understanding the management of the superannuation entity. This provision also has protections addressing some of the concerns raised by the industry in the making of the AMM Regulations, such as the protection of "information having a commercial value that would be reduced or destroyed by the disclosure".

A contravention of s1017C is a criminal offence with a maximum penalty of 2 years imprisonment or 2,400 penalty units for body corporate ($532,800).

We note the public commentary about the adverse impact the Draft Regulations would have on members because of the reduction in transparency. These comments have not been supported by any evidence of the need or desire for such transparency by members. If there is indeed a need, and that need is based on a good faith interest in how their superannuation fund is operated, they will be able to access this information through the existing rights of members without causing an adverse financial impact of members who don't require this information, both by the disclosure of commercially sensitive information and the associated compliance costs.

Impact of compliance costs

We note that the Draft ES does not contain a Regulatory Impact Statement because it is considered that the amendments " . . . have been assessed as having no more than a minor regulatory impact (OBPR Reference Number OBPR22-02488). Accordingly, no Regulatory Impact Statement has been prepared."

We understand that changes are considered to be minor where they do not substantially alter the existing regulatory arrangements for businesses, individuals or community organisations.[2]

There was, however, a Regulatory Impact Statement in the ES to the AMM Regulations to the regulations that would be amended by the Proposed Regulations. It stated:

> "A regulation impact statement (RIS) was undertaken in relation to the primary legislation, the Amending Act. The scope of that RIS included any regulations which would prescribe information to be provided to members.
>
> The regulatory impact for the primary law measures, including any regulations made, were estimated to have a start-up cost of $8.5 million and ongoing costs of $13.7 million which result in an estimated annual compliance cost impact, averaged over 10 years, of $14.6 million."

We consider the impact of the Draft Regulations would be to significantly reduce compliance costs. This is principally because they would remove a potentially unintended consequence of the drafting of the requirement of the Itemised Disclosure of the "related party" category.

The current requirement for disclosure for the "related party" category is in regulation 2.10(1)(h) of the SIS Regulations. It requires disclosure in the Notice of Annual Member Meeting:

> "(h) if any payments were made, by the entity (the ***main entity***) during the year of income, to any of the following:
>
> (i) a connected entity of the RSE licensee of the main entity;
>
> (ii) an associated entity of another entity (the ***third party***) if the third party is a connected entity of the RSE licensee of the main entity;
>
> (iii) an entity over whom the RSE licensee of the main entity has significant influence;

[2] Office of Best Practice Regulation's "OBPR involvement for minor and more than minor impacts".

(iv) an entity who has significant influence over the RSE licensee of the main entity;

(v) an entity whose key management personnel include the RSE licensee, or an executive officer of the RSE licensee, of the main entity;

(vi) an associated entity of another entity (the ***third party***), if the RSE licensee, or an executive officer of the RSE licensee, of the main entity is a member of the key management personnel of the third party;

an itemised list showing each such payment and the name of the entity to whom each payment was made."

This obligation is extraordinarily onerous in application.

Under paragraph 2.10(1)(h)(ii), a corporate RSE licensee must identify all of its associated entities as defined in s50AAA of the Corporations Act, and then seek to identify in respect of each of those entities, whether they have any associated entities. Having identified such entities, the RSE licensee must identify and then disclose any payments during the relevant year.

A holding company of the RSE licensee may be an associated entity if the operations, resources or affairs of the principal are material to the associate. Assessing that may involve judgement. The shareholders of the RSE licensee and beneficial owners of shares who control exercise of the shareholders right may be associated entities if the shareholding is material to them. Assessing this will require judgement. If the RSE licensee is controlled by another entity, and that entity controls a third entity and the operations, resources or affairs of both the RSE licensee and the third entity are both material to the controller, the third entity will also be an associated person. Determining this involves judgement concerning the affairs of the controller and the third entity which may be difficult for the RSE licensee. These issues are multiplied when the text is applied in respect of each associate, as the RSE licensee may not have information to enable the determination or any right to obtain it.

To be clear, the above process will only satisfy one of the six categories under reg 2.10(1)(h).

Item (vi) is potentially less complex but has far reaching implications. It requires the RSE licensee to conduct a data matching exercise involving a potentially significant amount of other organisations, likely community organisations. It requires the RSE licensee to:

1. identify all organisations (**Third Parties**) which have a person who is "key management personnel" who is also an executive officer of the RSE licensee;
2. identify all "associated entities" of Third Parties (**Third Party Associates**); and
3. identify all of the Third Party Associates to whom the RSE Licensee makes payments.

This will require an RSE licensee to request that Third Parties apply the complex legal and accounting concepts of "key management personnel" and "associated entity" to their organisations. If the Third Parties will not do this, they may be potentially liable to prosecution for being involved in a contravention by the RSE licensee of the SIS Act.

The unreasonableness of this requirement can be illustrated by the example where an executive officer of an RSE licensee is a committee member of a local football club.

The RSE licensee will be required to contact the local football club and request that they identify their "key management personnel" and "associated entities". These are complex terms.

"Key management personnel" is defined in s9 of the Corporations Act by reference to the accounting standards. *AASB 124 Related Party Disclosures* defines "key management personnel" as those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.

"Associated entity" is defined in s50AAA of the Corporations Act and involves the application of broad concepts such as "control", "influence" and "materiality".

The football club may well require legal advice on the meaning of these terms and their application to the football club.

In our conversations with our superannuation trustee clients, we have been advised that this may impact 60 to 100 organisations, per trustee.

There are further complexities and judgement required in applying reg 2.10(1)(h), such as interpreting and applying broad concepts such as “connected entity” and “significant influence”.

We hope that the above analysis is sufficient to demonstrate the excessive compliance costs that would be imposed by the current Itemised Disclosure requirement, not only on superannuation trustees but on broader community organisations, many of which will not have the resources to apply such complex legal and accounting concepts.

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If you have any questions or require further information, please do not hesitate to contact me on +61 3 9605 0832 or mbland@millsoakley.com.au.

I am grateful for the assistance of my colleagues Geoffrey McCarthy and Jules Ioannides in preparing this submission.

Yours sincerely

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PARTNER