2 March 2020

Senior Adviser
Retirement Income Policy Division
Treasury
Langton Cres
PARKES ACT 2600

By email: FSRCconsultations@treasury.gov.au

Dear Sir/Madam

TRUSTEES OF REGISTRABLE SUPERANNUATION ENTITIES (RSE) SHOULD NO OTHER ROLE OR OFFICE

1.   The Superannuation Committee (**the Committee**)[1] of the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to Treasury on the Exposure Draft in relation to the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: RSE license condition – no other duty (FSRC rec 3.1)*.

2.   It is proposed that all corporate trustees of registrable superannuation entities will have a new RSE Licence condition imposed so that the RSE Licensee must not have a duty to act in the interests of another person, other than a duty that arises in the course of:

- performing the RSE licensee's duties or exercising its powers as trustee of an RSE; or

- providing personal advice.

3.   It is noted that this change is proposed while retaining the express statutory covenant provision applicable to RSEs that under section 52(2)(d) of *Superannuation Industry (Supervision) Act 1993* (**SIS**) the trustee must:

(d)   where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:

(i)   to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and

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[1] The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

(ii) to ensure that the duties to the beneficiaries are met despite the conflict; and

(iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and

(iv) to comply with the prudential standards in relation to conflicts.

4. Further consideration is warranted as to whether this provision requires modification in light of the new licence condition requirement proposed.

5. The Committee is concerned by the proposed exception under which the RSE licensee may assume a duty to act in the interests of another arising in the course of providing personal advice. The Committee submits that, if this exception is to be retained, it should be limited to personal advice *about superannuation where the advice is given to a member of the RSE (or a member's spouse or dependants)*. Without these limitations (as to the subject matter of the advice and the recipient/s), the proposed exception could give a misleading impression about the personal advice that may appropriately be given by a superannuation trustee, having regard to considerations including the sole purpose test in section 62 of the SIS Act.

6. If, as the Committee submits, these limitations are justified, a question then arises whether the exception for personal advice is even necessary. This is because appropriate cases of personal advice would arguably fall within the RSE licensee's duties and powers as trustee of an RSE (and, therefore, within the main exception). Viewed another way, the exception for personal advice arguably casts doubt on whether superannuation trustees should have been providing personal advice. The Committee acknowledges that personal advice has always been something of a grey area for superannuation trustees and that there may be a case (from a policy perspective) for including the personal advice exception as part of making it clear that it is acceptable. Yet, if the personal advice exception is to be retained, we submit it should be narrowed in the respects identified earlier.

7. In relation to the draft Explanatory Memorandum (**EM**), in paragraph 1.21 the Committee queries the accuracy of the statement that providing trustee administration services for other trustees would not "involve acting in the interests of another person". It is correct that if an RSE licensee ("first licensee') also acts as administrator for another licensee ("second licensee") and, in that capacity, contracts with the second licensee effectively to help the second licensee perform its duties to its members, then strictly the first licensee does not owe a duty to the second licensee's members but the first licensee may have a *contractual obligation* to the second licensee to act in the interests of the second licensee's members. From paragraph 1.27 it appears that there might be no policy objection to this, but the Committee suggests that paragraph 1.21 could be clarified.

8. Paragraph 1.38 indicates that an RSE licensee will not contravene the proposed new subsection 29E(5A) if the licensee is also the responsible entity of an managed investment scheme (**MIS**), provided that membership of the MIS is only open to members of funds of which the licensee is trustee or other super trustees. However, this would appear to contravene subsection 29E(5A) because operating a scheme - even if only open to those classes of person - would not be "in the course of

performing" the licensee's duties or exercising the licensee's powers "as a trustee of a registrable superannuation entity".

9. The Law Council would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Superannuation Committee Chair, Dr Lisa Butler Beatty on BeattyLi@cba.com.au.

Yours sincerely
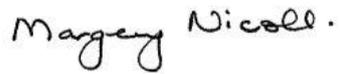
Margery Nicoll
Acting Chief Executive Officer