



Law Council
OF AUSTRALIA

Legal Practice Section

27 March 2020

Senior Advisor
Retirement Income Policy Division
Treasury
Langton Crs
PARKES ACT 2600

By email: FSRCconsultations@treasury.gov.au

Dear Sir/Madam

Supplementary Submission: Superannuation Regulator Roles - Amendments to Sections 56 And 57 of the Sis Act

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 in relation to the Exposure Draft *Bill on Financial Sector Reform (Hayne Royal Commission Response – Superannuation regulator roles)*. Please note this is a supplementary submission from the submission sent on the 2 March 2020.

Background

2. This supplementary submission is made with respect to the operation of the trustee and director indemnity provisions under sections 56 and 57 of the *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act)*.
3. In our earlier submission the Superannuation Committee of the Law Council of Australia's Legal Practice Section noted the proposed extension of the existing indemnification prohibitions, in particular to specify criminal penalties. The Committee also notes that the existing prohibition on indemnification for civil penalties was recently expanded indirectly by operation of *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019 (Cth)*, pursuant to which new section 54B of the SIS Act introduced civil and criminal consequences for contravening sections 52 and 52A covenants.
4. In a paper recently presented at the Committee's annual conference held on 12 and 13 March 2020 in Adelaide (copy enclosed)², Neil Young QC also identified a significant area of confusion with the operation of the so-called indemnity provisions under sections 56 and 57 of the SIS Act – particularly in view of the recent decision

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.

² *Trustee Liability in a Post-Royal Commission World*, Neil J Young QC, David Maclean Plenary Session, Law Council of Australia Superannuation Law Conference: 'Bear Necessities' (13 March 2020)

of her Honour, Justice Jagot of the Federal Court in *Australian Prudential Regulation Authority v Kelaher* [2019] FCA 1521, [20] to [22] (**IOOF Case**).

5. In short, the area of uncertainty identified by Neil Young QC is whether trustees (and their directors) may no longer be indemnified from the assets of the fund (including reserves) for *any* civil liability (putting aside the criminal and civil penalties for which it is clear and accepted that trustees and directors would not be indemnified from fund assets) in an action by beneficiaries for a breach of a covenant.
6. The confusion arises under section 55 of the SIS Act where in the IOOF Case her Honour, Justice Jagot, viewed section 55 as being akin to an overarching 'code' in respect of which the indemnity provisions (under sections 56 and 57) do not or cannot 'trespass'.
7. In addition to the matter simply giving rise to uncertainty in the law, there are serious and potentially unintended adverse practical consequences, including:
 - (i) the ability of superannuation funds to attract and retain directors (who have significant increased personal exposure to claims brought by beneficiaries, unlike directors in other business sectors);
 - (ii) the impact on industry, corporate and other profit-to-member funds (where there is no other capital or reserve other than fund assets, to provide an indemnity);
 - (iii) whether insurance premiums are properly payable from fund assets to provide cover to trustees and directors; and
 - (iv) there being limited avenues for trustees and directors to mitigate risk.

Submission

8. It is the view of the Committee that sections 56 and 57 of the SIS Act (as informed by section 55) do not operate, and should not be interpreted as operating, to prohibit trustees and directors from being properly indemnified from fund assets, so long as they have not failed to act honestly or have not intentionally or recklessly failed to exercise the degree of care and diligence required of a superannuation trustee or director (per the existing prohibitions under paragraphs 56(2)(a) and 57(2)(a) of the SIS Act).
9. However, in the Committee's view the uncertainty arising from the IOOF case, as articulated by Neil Young QC in his recent paper (mentioned above) needs to be urgently addressed by legislative clarification.
10. Conveniently, an opportunity to now address this matter arises because the amendments proposed by clauses 63 and 64 of the *Superannuation Regulator Bill* already operate to replace subsections 56(2) and 57(2) of the SIS Act and thereby affect the indemnity provisions of the SIS Act.
11. The Committee therefore submits that the uncertainty noted above be resolved by inclusion in the *Superannuation Regulator Bill* of a new subsection under section 55 of the SIS Act to the following effect:

(8) *This section does not limit the operation of sections 56 and 57.*

12. Finally, the Committee notes that a correction should also be addressed in subsection 57(4) where the reference to section 241 of the *Corporations Act 2001* (Cth) is outdated and should instead (presumably) refer to section 199B of the *Corporations Act*.
13. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact Superannuation Committee Chair, Dr Lisa Butler Beatty on BeattyLi@cba.com.au.

Yours sincerely

Margery Nicoll.

Margery Nicoll
Acting Chief Executive Officer