Law Council
OF AUSTRALIA

Legal Practice Section

31 August 2021

The Proper Officer
Treasury
Langton Crescent
Parkes ACT 2600

By email: superannuation@treasury.gov.au

Dear Colleague

Corporations Amendment (Portfolio Holdings Disclosure) Regulations 2021 (Exposure Draft)

The Superannuation Committee of the Law Council of Australia's Legal Practice Section (**the Committee**) welcomes the opportunity to provide this submission to the Treasury in relation to the exposure draft Corporations Amendment (Portfolio Holdings Disclosure) Regulations 2021 (**Regulations**).

The Regulations set out, for the purposes of subsection 1017BB(3) of the *Corporations Act 2001* (Cth), the way in which information about investment items made publicly available under subsection 1017BB(1) is organised.

The Committee welcomes the changes to the previous exposure draft adopted following industry consultation.

The Committee notes, however, that the Regulations do not introduce any further exemptions from the primary disclosure obligation.

The Committee has made prior submissions regarding portfolio holdings disclosure, including submissions on matters to be dealt with by regulation. We again raise some of these concerns.

Commercially sensitive assets

1. Subsection 1017BB(5A) provides an exemption from disclosure for up to 5% of the investment items (other than derivatives) for an investment option if:

   (a) those investment items are commercially sensitive; and

   (b) making information publicly available about those investment items would be detrimental to the interests of the fund's members.

2. By the express terms of subsection 1017BB(5A), a trustee will be obliged to disclose information about an investment item where this would be detrimental to the interests of the fund's members, in any investment option that holds more than 5% of the portfolio in assets that meet the description.

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3. The Committee wonders what the rationale is for a statutory provision that requires trustees to act in a manner that is detrimental to the interests of the fund's members.

4. The prospect of detriment to members is not theoretical. Many superannuation funds have investment options with an exposure to unlisted assets considerably higher than 5%, and for many of these assets (particularly directly held assets) the value is commercially sensitive. The concern is that published values of unlisted assets will undermine the trustee's efforts to maximise sale proceeds when the assets are sold. Other market participants would be able to use information concerning a superannuation fund's book value of an unlisted asset to their own advantage – for example, if a third party wished to purchase an asset from a superannuation fund, they would know what book value they had to meet; equally, if a third party wanted to sell a stake in an unlisted asset to their superannuation fund co-investor, they would know how much the superannuation fund may be willing to pay, based on how the superannuation fund had valued their existing stake. We understand this point has been made by industry on numerous occasions.

5. The concern could be partly resolved by adjustments to the reporting of unlisted assets, to require either of the following:

   (a) the value is to be aggregated at asset class level – this could include identifying each investment item in the asset class but reporting a total value (however this approach may not work if a fund has a single investment item in the class – for example a single direct property investment); or

   (b) the value of each investment item is to be disclosed within ranges or "bands".

6. The adjusted reporting could be limited to assets that subsection 1017BB(5A) applies to – i.e., that are commercially sensitive and reporting the value would be detrimental to the interests of members of the fund.

Assets subject to confidentiality obligations

7. It is common for some categories of investments to have strict confidentiality requirements for investors, including restrictions on publicly identifying the asset, in particular venture capital and private equity.

8. The result of the portfolio holdings disclosure is likely to be that Australian superannuation funds are simply excluded from these investments as they will be unable to comply with the confidentiality requirements.

9. This could potentially be addressed by, for example, allowing a line item to identify the name of the investment as "Confidential" where the trustee is subject to a legally enforceable confidentiality obligation.

Materiality

10. The Committee understands that the asset-by-asset disclosure is anticipated to provide, in many cases, tens of thousands of lines of data for each investment option.

11. The Committee queries the usefulness of this information to consumers, or even to their advisers. (While some advisers, possibly those attached to larger dealer groups, may have the capability to analyse the data, smaller independent firms may not. In any event it would seem highly likely that a full analysis of the data across a list of

funds would increase the costs of advice; noting that affordability of advice is already a concern.) However, the data will be available to be used by a fund's competitors and by other market participants (to the detriment of superannuation fund members generally).

12. If the intention is to provide information that is useful to consumers (and their advisers) we suggest that a sensible materiality threshold is considered – for example, top 100 investments or investments that comprise not less than 1% of the portfolio. This could be introduced by regulation under subsection 1017BB(4(b)).

The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Committee Chair, Dr Lisa Butler-Beatty on lisabbeatty@kpmg.com.au.

Yours sincerely

Michael Tidball
Chief Executive Officer