



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:RH1b1835308

28 February 2020

Senior Adviser
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Treasury
Langton Crescent
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By email: FSRCconsultations@treasury.gov.au

Dear Sir/Madam,

**Financial Services Royal Commission – Trustees of Registrable
Superannuation Entities should hold no other role or office –
Recommendation 3.1**

The Law Society of NSW appreciates the opportunity to comment on the exposure draft legislation to implement recommendation 3.1 of the Financial Services Royal Commission. Our Business Law Committee contributed to this submission.

The draft legislation will prohibit superannuation trustees from having duties other than those arising from or in the course of the performance of their duties as a trustee of a superannuation fund. The aim of the new licence condition is to minimise the risk of unmanageable conflicts of duties arising and promote improved outcomes for the beneficiaries of registrable superannuation entities (Explanatory Materials (“EM”), page 3).

Subject to certain limited exceptions, including performance of the registrable superannuation entities (“RSE”) licensee’s duties, the proposed new condition will prohibit a corporate RSE licensee from having “a duty to act in the interests of another person”.

The EM provide a non-exhaustive list of the situations or relationships that give rise to a duty to act in another person’s interest. While this list is helpful in understanding how the proposed new condition is intended to operate, uncertainty in relation to the operation of the condition remains.

The EM also provide, by way of example, a situation that would not fall within the proposed new licence condition. If a RSE licensee was to provide trustee administration services to another entity in exchange for fees, the EM states that this would involve a contractual duty to provide a service to the entity rather than a duty to act in the interests of the entity. This example highlights the potential legal challenges that could be made when interpreting the proposed new condition and the uncertainty this creates.

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These amendments are proposed to commence on 1 July 2020 and will apply in relation to any duty that an RSE licensee had before, on or after 1 July 2020, although any breach of the condition will only occur on or after 1 July 2020. RSE licensees, therefore, only have a short period of time to review their business operations and agreements and consider and implement any required restructure. It would be preferable for transitional provisions to be inserted in the draft legislation so that RSE licensees who need more time to restructure their business operations can do so without fear of action being taken against them for non-compliance with the new condition. This approach would provide greater certainty for RSE licensees rather than relying on an expectation that the Australian Prudential Regulation Authority will use its exemption and modification powers in Part 29 of the *Superannuation Industry (Supervision) Act 1993* to grant extensions where appropriate.

ASIC regulatory guidance

ASIC should provide final regulatory guides before relevant parts of the Acts commence. While such guidance is not legally binding, it is useful for business, consumers and professional advisers and will assist to increase compliance and reduces costs.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,



Richard Harvey,
President