Dear Ashly

I refer to *Consultation Paper 224: Facilitating electronic financial services disclosure.*

On behalf of the Law Council of Australia's Superannuation Committee, I note the following high-level comments. Note that all of our comments pertain to the superannuation context.

- As a general proposition, we have no concerns from a legal perspective with ASIC's proposal to implement Options 1 – 3 (as outlined at para 18 of CP 224). We expect that industry will welcome the flexibility which will be provided by the proposed relief.

- We make the observation that this clearly represents a step away from the previous objective of standardising disclosure to facilitate 'side-by-side' comparisons of competing financial products. We merely make this observation in passing and do not express a view either way.

- If the proposals were to be implemented, it is clear that greater use will be made of emails to communicate with members – either to provide members with the relevant disclosure documentation, or to advise members that the documentation can be accessed electronically. It would be helpful if ASIC were to indicate what ASIC's expectations would be in situations where issuers receive 'bounce-back' notifications to indicate that an email was unable to be delivered (for example, because the email address was incorrect or incomplete or no longer in-use, or because the file-size was too large for the recipient's inbox). In doing so, we make the observation that, the more onerous the obligations on issuers are in this situation, the less likely issuers may be to take advantage of the relief. The obligations on issuers in this situation should arguably not be disproportionate to obligations on issuers when conventional mail is unable to be delivered. Where documentation needs to be re-sent, consideration should be given to creating a defence for issuers who made a good faith attempt to provide disclosure using the email address that had been provided to them.

- CP 224 foreshadows email addresses being provided by the member or by their financial adviser as their agent. In the superannuation context, this requirement is potentially too narrow as there are other legitimate sources of email address information. For example, superannuation funds (especially corporate funds and industry funds) could potentially obtain email addresses from the relevant employer (e.g. their work email address) which, in most instances, would be permitted under the employer's privacy policy. We suggest that ASIC consider allowing email addresses to be used by superannuation funds in this situation, which may involve revisiting the requirement for members to have agreed to a particular email address being used.

- CP 224 foreshadows the use of emails which include hyperlinks to disclosure documents. We make the practical observation that, for some time, consumers have been encouraged to be vigilant about phishing scams and encouraged to always manually type in the URL address when accessing websites of financial institutions, as opposed to following links included in emails.

- The obligation to keep a copy of the PDS (or to allow a version to be saved) may be difficult to comply with where interactive versions have been used. We query whether it should be sufficient for an issuer to keep a version (or to allow a version to be downloaded) even if this is not precisely the same as the interactive version accessed by the member. ASIC foreshadows a similar approach vis a vis the obligation to make a hard copy available on request, and we see no reason why a symmetrical approach could not be adopted to meet the retention obligation.

- We note that para 221.3 of draft updated RG 221 contains the following statement:

  > *Providers need to determine the method of delivering disclosures that best suits their clients and which will not expose those clients to undue risk of scams and fraud.*

This could be interpreted as suggesting that trustees have a duty to choose the medium that best suits their members, and a duty to protect their members from scams and fraud. While this may be good practice, and may well be an aspirational goal, there is no legal duty to achieve either of these ends. We would suggest altering the language accordingly. If RG 221 were to suggest that

trustees will be exposed to a risk of legal liability which does not currently exist, some trustees may be less inclined to take advantage of the relief.

- We note that ASIC is proposing to waive certain requirements as to form when an 'interactive PDS' is used (e.g. requirements about the title, page length, prescribed wording etc). Clearly this is essential if alternative, innovative media (e.g. videos) are to be used for making disclosures going forward since certain of those requirements are not capable of being complied with outside of the printed PDS context. However, if this is implemented, it will be interesting to see how the circumstances in which the relief could be relied upon are defined. Presumably the intention is not to create an exception which allows issuers who use a substantially traditional (printed) PDS to circumvent the requirements of, say, Schedule 10D of the Corporations Regulations and so forth. That said, if the circumstances in which the relief can be relied upon are too narrowly defined, this may impede the development of innovative disclosure solutions.

If you wish to discuss these comments, please contact me.

Regards

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