

SUPERANNUATION REFORM SERIES PART II: ANNUAL MEMBERS' MEETINGS

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Legal Briefings - By **Sarah Yu and Scott Donald**

On 14 September 2017, the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 was introduced in the Senate.

Much focus has been placed on the proposed amendments to require registrable superannuation entity (**RSE**) licensees to hold annual members' meetings (**AMMs**).

RATIONALE

Under the current regulatory framework, trustees are required to provide annual reports and periodic statements to members. Members are also able to request information under section 1017C of the *Corporations Act 2001* (Cth) and section 101 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**). However, as noted in the Explanatory Memorandum (**EM**) to the Bill, there is no statutory mechanism that gives members the right to engage directly with trustees.

Accordingly, the proposed amendments seek to 'ensure greater accountability and transparency of superannuation funds', by remedying the 'information asymmetry' and general lack of engagement between members and their superannuation funds.

Against this background, the EM emphasises that while many members seek to ask questions of their superannuation funds, in a large number of cases, members have little or no ability to have their questions asked or answered. This provides limited opportunities for members to hold trustees to account, which may affect fund performance. It is anticipated that AMMs will fill this gap. We question the rationale of members not being able to ask questions and have these questions answered or that members cannot hold trustees to account.

KEY PROVISIONS

The proposed amendments will require RSE licensees to hold an AMM within 9 months after the end of each income year. Members will be given an opportunity to discuss the key aspects of the superannuation fund and be provided with a forum to ask questions about all areas of the superannuation fund's performance and operations.

Some of the key features of AMMs are:

- **timing:** the AMM must be held within 3 months of notice of an AMM being given;
- **notice:** a RSE licensee must provide notice to members of an AMM within 6 months of the end of the superannuation fund's financial year and hold the AMM at least 21 days after notice is given;
- **form:** an AMM can be held electronically;
- **attendance:** a quorum of directors must attend, along with each other responsible officer (ie secretary and executive officers), auditor and actuary;
- **questions:** members must be given a reasonable opportunity to ask questions;
- **answers:** if a responsible officer, auditor or actuary is asked a question at the AMM, they must answer the question at the AMM unless it is not reasonably practicable to do so, in which case the question must be answered within 1 month. There are some limited exceptions (eg the question is not relevant to the acts or omissions of the RSE licensee in relation to the superannuation fund or a member, it would breach the law to answer the question or would cause detriment to members as a whole); and
- **minutes:** the minutes of the AMM (including the answers to questions that are raised) must be posted on the superannuation fund's website.

Observations

It is not in doubt that trustees must have a strong appreciation of their members' needs, and that member engagement is beneficial. However, there are several issues with some of the key features of the proposed amendments:

- **form:** although meetings can be held electronically, it is unclear whether RSE licensees would have to hold physical meetings (in light of their best interests duty) if a number of

members choose to receive hard-copy information;

- **attendance:**

- the requirement for all 'Responsible Officers' to attend an AMM will require any individual who is 'concerned in the management of the body' to attend. This will require some individuals to attend and respond to members who usually do not interact directly with members;
- there is the possibility for competitors, who may contribute a nominal amount to become a member, or hackers, who may pose as members, to undermine the process;

- **answers:**

- it is problematic to require an individual responsible officer to answer a question when it may be more appropriate for the answer to be provided by the RSE licensee. This may undermine boardroom solidarity and be inconsistent with the RSE licensee having regulatory accountability for the superannuation fund;
- if a question is outside an individual responsible officer's area of responsibility and expertise, it seems inappropriate for that individual to be required to answer the question;
- for a master trust where there are many different benefit arrangements, answers provided to one member may be misleading to another member; and
- trustees may be placed at risk of breaching their privacy obligations (eg where members who have had claims denied seek to use an AMM as a forum to raise their personal circumstances).

Further, the relationship between AMMs and existing requirements of trustees to answer questions and provide information to members is uncertain.

Giving members the opportunity to engage interactively with superannuation funds may engender confidence and enhance the legitimacy of the system. However, we consider that a preferable approach would be to leave the operational detail of AMMs to legislative instruments, rather than it being enshrined in the SIS Act. The Bill has been referred to the Senate Economics Legislation Committee for reporting by 23 October 2017.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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