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Financial System Inquiry
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Dear Sirs

FINANCAIL SYSTEM INQUIRY – INITIAL SUBMISSIONS

Thank you for the opportunity to submit these initial submissions to the Inquiry. As invited, we have elected to make submissions on some only of the terms of reference announced by the Treasurer, The Hon Joe Hockey, on 20 December 2013.

Our initial submissions are directed to aspects of the regulation of trusts under the laws of the Commonwealth and of the States and Territories, and particularly to widespread endeavours by trustees to limit their liability to persons with whom they deal to, essentially, the assets of a particular trust.

A vast proportion of Australia's retirement savings in the form of superannuation are held in trusts, the public form of which are categorised as managed investment schemes under the *Corporations Act 2001* (Cth). Recent figures of which the author is aware place Australia's pool of such savings as the third largest in the world at approximately A$1.9 trillion, and the largest in the world on a per capita basis.

Yet Australian law does not specify in a certain and uniform way the liability of trustees to those with whom they deal. The base position is that trustees are fully personally liable to those with whom they deal, subject to the contractual effectiveness of any limitation that they seek to introduce into any relationship, transaction or situation, and with a right of indemnity against the assets of the trust and an often excluded right of indemnity against the trust beneficiaries personally. Limitations sought vary from trustee to trustee, and their effectiveness varies from transaction to transaction, situation to situation.

Contractual limitations sought will either not operate at all or be of limited effect as one moves away from a trustee's home jurisdiction and laws, and from bases of liability apart from contract.

Not only is this individualised, atomistic approach economically inefficient but it also puts at considerable risk Australians' savings held by trustees. Common trustee companies, acting as trustees of multiple trusts, have long been part of the Australian commercial landscape. But why should the beneficiaries of one trust have their assets and savings placed at risk by reason of the wrongdoing or misadventure of a common trustee and in its dealings for another trust?

We submit that limitations on the liability of trustees of Australian organised trusts should be standardised and the best way to do this is by statute. This could be readily done by way of amendment to the Trustee Acts of our States and Territories – consistently across the jurisdictions - or a referral of powers to the Commonwealth. The introduction of a standardised liability limitation approach should not be seen as creating a new form of legal entity, but rather giving statutory recognition and force to currently inefficient and often-times ineffective endeavours by trustee company market participants to limit their liability. Statutory limitation of liability in this way could work not only across our own Australian jurisdictions but also beyond our borders. Its effectiveness would not be reserved to contractual liability and where contract can effectively limit potential liability on other grounds.

The United States of America has recognised the efficacy of statutory limitation of liability trustees under its Federal law for some three decades. As the third largest retirement savings pool in the world, through our superannuation funds, there is much sense in our own laws being in this regard aligned with those of the United States of America, home to the world's largest retirement savings pool. Wider market familiarity through the adoption of a common approach in Australia to the approach adopted in the United States would lead to greater certainty and therefore opportunity for our own trustees. The flexibility afforded by our growing Free Trade Agreement networks – and therefore our perceived jurisdictional neutrality – can only but be enhanced by adopting a common approach to trust liability to that adopted by our United States friends.

Such an approach to trustee liability should, we submit, not lead to a frustration of the structuring and taxation objectives and consequences of those who have already invested considerable time and assets into Australian trusts. Again, our submitted approach would only affect the legal means and efficacy of liability limitation and not create new legal entities. Existing Australian tax treatment of trusts should be retained. Further, there seems to us be no reason to distinguish between trusts presently established and trusts established after the enactment of legislation to give effect to our submissions.

We commend these submissions to you and welcome the opportunity to amplify them as the Inquiry progresses.

Yours sincerely

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