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[REDACTED]

10 May 2023

Dear [REDACTED]

Response to APRA consultation: Proposed class exemption from the requirement to obtain approval to own or control an RSE licensee

Australian Retirement Trust Pty Ltd (ABN 88 010 720 840, RSE Licence No. L0000291) (**ARTPL**) the trustee of Australian Retirement Trust (ABN 60 905 115 063) (**ART**) is writing in response to the Australian Prudential Regulation Authority's (**APRA**) consultation on the draft class exemption which is proposed to exempt directors, former directors and nominee directors of RSE licensees from the requirement under the *Superannuation Industry (Supervision) Act 1993 (Cth)* (**SIS Act**) to apply for approval to own or control an RSE licensee (**Proposed Exemption**).

The Proposed Exemption is relevant to ART because, under ARTPL's constitution, a person who is appointed as a director of ARTPL must hold one share in ARTPL as soon as is reasonably practicable after being appointed as a director.¹

ARTPL supports the Proposed Exemption

ARTPL's experience is that arranging for a new controlling stake application to be made under section 29HA SIS Act each time there is a change in an ARTPL director (and therefore shareholder) involves significant time, cost, and effort. ARTPL expects that it will be able to rely on the Proposed Exemption in most instances of a new ARTPL director and shareholder being appointed. ARTPL therefore believes that the Proposed Exemption will result in significant time, cost and effort savings for its business and that the Proposed Exemption is in the best interests of the members of ART.

ARTPL expects other RSEs licensees and the members of their respective superannuation funds will similarly benefit from the Proposed Exemption. ARTPL therefore strongly supports the Proposed Exemption and appreciates APRA taking steps to reduce the administrative burden on RSE licensees.

ARTPL does not believe there are any undue risks associated with APRA making the Proposed Exemption. ARTPL agrees with APRA's comment in its letter of 19 April 2023 to RSE licensees that governance concerns with any individual director of an RSE licensee are already appropriately addressed, and can be appropriately managed, through other prudential requirements applicable to RSE licensees, including Prudential Standard SPS 520 Fit and Proper.

¹ Article 9.10(a) of ARTPL's constitution

Proposed changes to requirements for exemption

ARTPL does, however, believe a change to the conditions of the exemption is desirable to ensure the Proposed Exemption is able to be confidently relied upon by RSE licensees, including ARTPL, so as to achieve the purpose of the Proposed Exemption.

Clause 7(e) of the Proposed Exemption states that a condition of the Proposed Exemption is:

'the person [to whom the Proposed Exemption is to apply] must as soon as practicable after ceasing to be a director of the RSE licensee transfer or forfeit the person's shareholding in the RSE licensee.'

Where a vacancy in the directors of an RSE licensee occurs, section 89 SIS Act permits that vacancy to remain unfilled for up to 90 days without contravening the basic equal representation rules. ARTPL's experience is that, in some circumstances, it may take the duration of that 90-day period to source well qualified candidates to fill vacancies on its board and to conduct all appropriate checks prior to their appointment.

ARTPL's constitution does not contemplate that an outgoing director/shareholder will ordinarily forfeit their share in ARTPL. Instead, an outgoing ARTPL shareholder must transfer their share in ARTPL to a person nominated by ARTPL as soon as practicable after **both**:

- (a) the outgoing shareholder has ceased to be eligible to hold the share (i.e. they have ceased to be a director); and
- (b) the outgoing shareholder receives written notice from ARTPL to transfer their share to a new recipient (i.e. to the incoming director/shareholder).²

Under ARTPL's constitution, each shareholder can only hold one share in ARTPL and a share in ARTPL is only transferrable to a director of ARTPL who does not already hold a share.³ The result is the outgoing shareholder/director can only transfer their share once a replacement director has been appointed. As above, that may take up to 90 days, during which time the outgoing director/shareholder will remain a shareholder in ARTPL.

During that period, however, the outgoing director/shareholder is no longer entitled to vote at general meetings of ARTPL despite continuing to hold a share in ARTPL.⁴

ARTPL believes this process creates some doubt about whether the requirement in clause 7(e) of the Proposed Instrument to transfer or forfeit the outgoing director/shareholder's share 'as soon as practicable after ceasing to be a director' would be met. That is because, on one view, it might be said to have been 'practicable' for the outgoing director/shareholder to forfeit or transfer their share sooner if ARTPL's constitution was drafted differently.

ARTPL expects other RSE licensees with similar governance models may be in a similar position.

To avoid any uncertainty about whether a share transfer which occurs only after a new director is appointed would satisfy the 'as soon as practicable' requirement, and to accommodate a broader

² Article 5.1 of ARTPL's constitution

³ Articles 4.1 and 3.3(e) of ARTPL's constitution

⁴ Article 3.3(e) of ARTPL's constitution

range of potential governance arrangements for other RSE licensees, ARTPL proposes that clause 7(e) of the Proposed Instrument be replaced with the following drafting:

- “(e) *either:*
- (i) *the person must as soon as practicable after ceasing to be a director of the RSE licensee transfer or forfeit the person’s shareholding in the RSE Licensee; or*
 - (ii) *both:*
 - (A) *the person’s rights to vote at general meetings of the RSE Licensee cease upon the person ceasing to be a director of the RSE Licensee; and*
 - (B) *the person must transfer or forfeit the person’s shareholding in the RSE Licensee as soon as practicable after being directed to do so by the RSE Licensee.”*

ARTPL does not believe the proposal adversely impacts the intention of the Proposed Instrument or adds risk to the proposal. ARTPL believes its proposed amendment will better ensure the purpose of the Proposed Instrument is achieved by ensuring that a broader cross-section of RSE Licensees with potentially different governance models can be confident in relying upon it.

Thank you in advance for considering ART’s response.

[Redacted signature line]

[Redacted name]

Yours sincerely,

[Redacted signature]

Copy to

[Redacted list of recipients]

Email [Redacted email address]

