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Centre for Law, Markets and Regulation

13 April 2021

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee

By email to Economics.Sen@aph.gov.au

Question on Notice: *Treasury Laws Amendment (Your Future, Your Super) Bill 2021*

Dear Mr Fitt

At the Committee hearing of 7 April 2021, I was asked about the breadth of the Ministerial power under section 117A to issue Regulations in relation to making a payment or investment of a kind prescribed by the regulations. I intended to convey to the Committee my concern about the breadth of the phrase 'payment or investment.' In the course of discussion, I noted that I was not sure how the phrase 'of a kind prescribed by the regulations' might be interpreted by the courts, noting my understanding that a more common way to phrase such a criterion would be 'of a type ...'.

My research since that comment has found that although references of 'kind(s)' of things are present in a number of places in the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Corporations Act 2001* (Cth), there has been no judicial consideration of the phrase that is relevant in this context. Nor has there been judicial consideration of whether there is a difference in substance in the two forms of wording. Therefore, I feel the appropriate response from me at this time is to withdraw any suggestion that the use of the wording 'kind of' might generate a different outcome than might occur were the wording 'type of' employed in section 117A.

Yours faithfully

M. Scott Donald
Associate Professor
Director of the Centre for Law, Markets and Regulation