Legal Practice Section

Your Future, Your Super package

The Treasury

23 December 2020

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia 3
About the Section 4
Executive Summary 5
Introduction 6
Treasury Laws Amendment (Measures for a later sitting) Bill 2020 6
Best financial interests obligation 6
Addition of the word 'financial' to the best interests covenant 6
No further articulation required 6
Significant change to trust law meaning: 7
Financial/non-financial subtleties 8
Statutory law already deals with beneficiaries' financial interests 8
Risk of incorrect focus 8
Reversed burden of proof 9
Reversal of burden of proof should be resisted even in civil matters 9
Limited number of statutes with reversal 9
Impact of the reversal on directors 9
Requirement for evidence should be sufficient 10
Clarity in relation to non-applicability of reversal in member actions 10
Expenditure limitation reforms and effect on directors 11
Record-keeping requirements 11
Singular elevation 11
Impact on directors 12
Existing law sufficient 12
Transitional provisions for prohibited expenditures 13
Self-managed superannuation funds 13
Trustee director indemnity 13
Single default account 14
Consultation on regulations 14
Standard employer-sponsor provisions: 14
Interaction with *Fair Work Act 2009* (Cth) 14
Addressing underperformance in superannuation 15
Concept of 'product' 15
Successor fund transfers 15
Consultation on regulations: 16
Reviewable decision 16
Timing for beneficiary notification 16
Content of notification 16
Formulas for ranking products 17
Contact 17

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Geoff Provis, Deputy Chair
- Dr Leonie Kelleher OAM, Treasurer
- Ms Tanya Berlis
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Ms Christine Smyth

Executive Summary

1. The Superannuation Committee of the Law Council's Legal Practice Section (**Committee**) is pleased to make a number of submissions on the Your Future, Your Super package. The Committee's key submissions are as follows:

   - In relation to the 'best financial interests' proposals:

     - The word 'financial' should not be added to the existing best interests covenant. The Committee provides five specific legal reasons in support of this submission.

     - The evidential burden of proof should not be reversed, particularly in the case of actions against individual directors. The Committee suggests an alternative approach in relation to a requirement for evidence instead of legislating a reversed burden of proof.

     - The record-keeping obligations should not be singularly elevated in the way proposed above other existing obligations. This is because the existing legal and regulatory powers are not deficient and can be utilised to achieve the desired results.

   - In relation to the 'underperformance in superannuation' proposals:

     - The key term 'product' against which performance assessments will be made should be clearly articulated to avoid ambiguities and unintended outcomes, given that investment returns are more usually assessed in relation to 'investment options'.

     - The timing for fail assessments to be given by trustees to beneficiaries should be extended beyond 28 days. This is because 28 days is likely to be insufficient time to prepare the notice (unless the notice format is completely prescribed and allows for no discretionary content).

     - Assessments by the Australian Prudential Regulation Authority (**APRA**) should be included within the definition of 'reviewable decision' in section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) given the significant consequences which can flow from an assessment and that there will be an element of discretion exercisable by APRA.

2. The above is only a summary of six key points of the submission, and the Committee has made numerous other legal points in relation to the proposed package. The detail is contained in the following pages.

Introduction

3. The Government's Your Future, Your Super package was released for consultation on 26 November 2020, comprising exposure draft legislation and explanatory materials on three matters:

   - best financial interests duty;
   - single default account; and
   - underperformance in superannuation.

4. The Committee does not comment on matters of policy, but makes this submission to comment on matters concerning legal principles, the clarity of the law, and whether the draft legislation appropriately achieves its intended outcomes.

5. The three aspects of the package are dealt with separately on the following pages.

6. References in this submission to 'sections' are references to the SIS Act, unless stated otherwise.

Treasury Laws Amendment (Measures for a later sitting) Bill 2020

Best financial interests obligation

7. The Committee notes the intent of this aspect of the package is to increase the accountability of superannuation trustees in relation to the execution of their fiduciary duties in the many actions trustees take in operating a superannuation entity; such as incurring day-to-day essential operational expenditure and investing members' money, as well as less frequent strategic decisions and discretionary expenditures.

8. Particular measures that concern the Committee are:

   - the addition of the word 'financial' to the best interests covenant;
   - the reversal of the burden of proof in respect of that covenant; and
   - the impact on individual directors.

9. Each of these concerns are explained below, together with a range of other comments.

Addition of the word 'financial' to the best interests covenant

10. Proposed amendments to subsections 52(2)(c), 52A(2)(c) and 52B(2)(c) will add the word 'financial' to the existing covenant requiring trustees and directors to perform their duties and exercise their powers 'in the best interests of the beneficiaries'. The Committee has a number of concerns about this proposal.

No further articulation required

11. The exposure draft explanatory materials (**EM**) state at paragraph 1.21 that the amendments are a response to recommendation 22 of the Productivity

Commission's review into superannuation which stated that Government should pursue a clearer articulation of what it means for a trustee to act in members' best interests under the SIS Act.[1] The Productivity Commission left open the mechanism for Government to do this and noted it might be achieved by pursuing legislative change, greater regulatory guidance, and/or proactive testing of the law by regulators. The Committee respectfully rejects the view that the duty was in need of clearer articulation, particularly by legislative change.

12. Commissioner Hayne observed in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in relation to a suggestion that trustees should be prohibited from engaging in political advertising:

> *I consider that the existing rules, especially the best interests covenant and the sole purpose test, set the necessary standards. Those standards should be applied according to their terms and without more specific elaboration.*[2]

13. The Committee respectfully agrees with Commissioner Hayne's observations and notes his deep expertise and experience in legal matters. The Committee does not understand why the Productivity Commission's recommendation, on what is fundamentally a legal matter, has been given greater weight than the conclusions of a former High Court judge. The proposed legislative reform should be abandoned. The Committee notes that APRA has relevant powers to determine prudential standards that elaborate, supplement or otherwise deal with covenants if further *binding* 'guidance' is considered necessary.[3]

Significant change to trust law meaning:

14. The risk of changing the formulation of the covenant in a manner which deviates from the general trust law meaning is that the many advantages and benefits of the general law, currently applied to inform the best interests covenant, will be jettisoned. In so doing there is a risk that, instead of the legislative reform resulting in a better articulation of the best interests covenant, it will create further uncertainty. The case law makes it clear that the 'best interests' duty usually, but not always, means 'best financial interests'. As Megarry V-C observed in *Cowan v Scargill*:

> *When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are* ***normally*** *their best financial interests (emphasis added).*[4]

15. In this way, the general law recognises the myriad of different circumstances and exercises of power to which the best interests duty must be applied, and provides appropriate flexibility in light of that complex reality.

16. It is important to consider the exercises of power which lead to decision-making in a practical context. The decisions affected by the covenant may range from decisions involving a particular member to those affecting larger cohorts; for example, a decision concerning the transfer or rollover of a member's benefit to another fund, to

[1] Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness* (Inquiry Report, Report No 91, 21 December 2018) rec 22.
[2] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (1 February 2019) vol 1, 235 [2.2.4].
[3] *Superannuation Industry (Supervision) Act 1993* (Cth) s 34D(1)(a) ('*SIS Act*')
[4] [1985] Ch 270, 287.

decisions about investments, group insurance, outsourcing arrangements and expenditure, staffing levels and staff remuneration, strategic decision-making and fund mergers. Decisions about the rollover of a member's benefit might be made with the consent of or direction by the member concerned. In those circumstances, there is limited scope for the trustee to engage with whether the exercise of the trustee's power in the act of rolling over the benefit is in the best financial interests of the member; the member has presumably made that determination for themselves and it would be difficult to categorise it as being other than in the member's interests if the member is directing payment of their own benefit. However, if the decision is not in fact in the member's best financial interests because, for example, the transferee fund has significantly higher fees, a question arises as to whether the new covenant might pose a problem for the trustee, noting the portability standards would give way to the covenant.[5]

Financial/non-financial subtleties

17. Further to the previous point, the Committee notes that with some trustee decisions, the financial aspects are not always fully clear or will not be realised at the time the initial decision is made. For example, if a trustee is deciding upon the acquisition of a new IT system and is faced with a choice between two differently priced systems, it is axiomatic that the cheaper option responds to an immediately better financial outcome, but such a decision would disregard qualitative elements which should also be properly considered by a prudent superannuation trustee. The Committee is concerned that the addition of the word 'financial' to the best interests covenant may cause trustees to narrow the scope of matters they take into account in properly considering a decision. In the context of the IT example above, the non-financial benefits of choosing a higher quality IT system which can 'future proof' the trustee's fund operations and provide superior service delivery to members should be relevant permitted considerations. If, in fact, the real policy concern is around particular kinds of expenditure which trustees incur, such concern can be met through new section 117A, without any need to amend the best interest covenants.

Statutory law already deals with beneficiaries' financial interests

18. There is already a covenant in section 52(2)(12) requiring a trustee to '*promote the financial interests of the beneficiaries of the entity*'. This relatively new covenant has not been tested in the courts as yet, but already expressly and clearly requires an overarching financial consideration to be applied to any trustee decision-making. As such, the Committee does not understand why a change to the 'best interests' covenant is needed (other than potentially for funds with fewer than five members where the covenant to promote the best financial interests of beneficiaries does not apply).

Risk of incorrect focus

19. Finally, although the EM acknowledges that the proposed new test is not about outputs, but rather about the process of making the decision with the information available at the time (see example 1.3 under paragraph 1.33), the Committee is concerned that by focusing on best financial interests there will be a singular or exclusive emphasis on short term financial outcomes, rather than on what is truly best for fund beneficiaries and their retirement savings in the medium to long term.

---

[5] See SIS Act s 34L(2).

Reversed burden of proof

20. Proposed subsections 220A(1) and (2) reverse the evidentiary burden of proof in relation to civil proceedings for a contravention of subsections 54B(1) or 54B(2) in relation to a trustee or director covenant regarding best financial interests. The Committee has a number of concerns about this proposal as outlined in the following paragraphs.

Reversal of burden of proof should be resisted even in civil matters

21. Although Parliament has relative freedom to reverse the burden of proof in a matter, it should be justified and reasonable, and although it is particularly unpalatable for criminal matters it should also be resisted in civil matters, particularly civil penalty matters, unless the case for reversal is compelling. In particular, in the present case, although the reversal is proposed for civil proceedings in relation to a contravention of the best financial interests covenant, a subset of those proceedings (civil penalty proceedings) are penal in nature and the civil penalties which can flow are significant.

22. The proposed amendments state that 'it is presumed that a [trustee/director] did not perform [their] duties and exercise [their] powers in the best financial interests of beneficiaries…'. In relation to the presumption of innocence, the House of Lords in *Joseph Constantine SS Line Ltd v Imperial Smelting Corp* stated:

> *The ordinary rule is that a man is not held guilty of fault unless the fault is established and found by the court. This rule, which is sometimes described as the presumption of innocence, is no doubt peculiarly important in criminal matters, but it is also true in civil disputes … there is, for example, no presumption of fraud. It must be alleged and proved.*[6]

Limited number of statutes with reversal

23. There is, in fact, only a limited number of Commonwealth statutes in which there is a reversal of the burden of proof for civil matters. In the present case, any contravention would be pursued by a well-resourced and experienced regulator with significant investigative powers to collect and marshal evidence against superannuation trustees and their directors.[7] As such, the Committee considers that a reversal of the burden of proof is not warranted.

Impact of the reversal on directors

24. The impact particularly on individual directors must be considered.

25. First, directors are entitled in civil penalty proceedings to claim privilege against exposure to penalties and may on that basis properly determine to remain silent and require the regulator to prove its case. The proposed reversal of the burden of proof therefore essentially eliminates the right of directors (and other individuals involved in a contravention) from relying upon such privilege. The privilege is a substantive common law right that reflects the long standing antipathy of the common law to compulsory interrogations about conduct for which penalties may be imposed.

---

[6] [1942] AC 154.

[7] Cf *Fair Work Act 2009* (Cth) s 361 ('FWA') where the reversal applies because employees would otherwise have to adduce evidence about their employer's decision-making in order to bring their case.

26. Secondly, directors already face significant potential penalties for a range of breaches of the SIS Act, indemnity insurance is becoming increasingly difficult to obtain (and often impossible in relation to penalties and defending penalty proceedings) and indemnification from trust assets is impermissible in respect of penalties. The proposed statutory presumption in a civil proceeding that a director did not perform the director's duties and exercise the director's powers in the best financial interests of beneficiaries is another cause for reticence. However unjust the reversal may be for a corporation, it is even more unjust for an individual. If the barriers and risks inherent in performing the role continue to be raised higher, eventually no sensible director will choose to act.

27. Thirdly, the Committee raises for consideration the concern that former directors of a trustee may have in accessing appropriate records, including those that may be the subject of privilege claims.[8]

28. The Committee therefore submits that, even if the current reforms proceed, the reversal of the burden of proof should not apply in relation to civil proceedings taken against individual directors.

Requirement for evidence should be sufficient

29. The Committee notes that the reversal of the burden of proof in proposed subsections 220A(1) and 220A(2) applies '*unless the [trustee/director] adduces evidence to the contrary*' (i.e. evidence to show that the trustee/director did perform its duties and exercise its powers in the best financial interests of beneficiaries). Under proposed subsection 220A(3), the trustee/director bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist, and then the burden shifts back to the Regulator to prove, on the balance of probabilities, that the trustee/director did not perform their duties and exercise their powers in the best interests of the beneficiaries. In addition to the problematic aspects to which this gives rise concerning privilege which has already been raised, the Committee submits that if the policy concern relates to the lack of *evidence* to support decision-making, then the focus should simply be on requiring that there be evidence.

30. The Committee notes that, in recent times, APRA has imposed conditions on the licences of some Registrable Superannuation Entity (**RSE**) licensees, requiring them to document how and why their decisions are in the best interests of fund beneficiaries. The Committee suggests that something along these lines would be a more useful, sensible and just approach to take in the legislation, as opposed to reversing the burden of proof.

31. In other words, a more straightforward or direct approach than reversing the evidentiary burden would be to simply require that trustees maintain appropriate books, records and other evidence of decision-making in relation to the performance of their duties and the exercise of their powers. In such case, the Committee recommends some attention be given to an appropriate materiality threshold (i.e. so that trustees would not be required to produce records in relation to decisions on matters of minutiae).

Clarity in relation to non-applicability of reversal in member actions

32. The Committee is concerned that although the intention seems to be that the reversal of the burden of proof would only apply in relation to civil proceedings

[8] See, eg, the facts in *Rickus v MTAA Superannuation Fund Pty Ltd* [2010] FCAFC 16.

commenced by the Regulator, proposed section 220A is not abundantly clear in that regard. That is, the question arises whether it could be said that a beneficiary may launch a 'civil proceeding' for a contravention of the best financial interests covenant under subsection 55(3) and thereby avail him or herself of the reversal of the burden of proof. Similarly, it should not be able to be used by class action litigants and funders. Accordingly, the Committee submits that if proposed section 220A is retained, then for the avoidance of any doubt it should be expressed to apply only: '*In civil proceedings taken by the Regulator for a contravention of …*'.

Expenditure limitation reforms and effect on directors

33. Proposed section 117B will require directors to 'ensure' that the corporate trustee of an entity does not make prohibited payments or investments. The Committee queries how directors can 'ensure' that the entity does not do the prohibited matters and what is then contemplated in terms of the obligation which flows from the duty to 'ensure'. Each director only has one vote. In the case of a trustee where equal representation applies, the board makes decisions by a two-thirds majority as prescribed by the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**Regulations**). Further, the Committee queries why there is an effective 'double-up' of the expenditure/investment prohibition. It should be sufficient that the trustee entity simply cannot make the prohibited payment/investment. There is no other wording in the SIS Act which currently has such a double-up conferring a duty on each singular director to 'ensure' that the entity does not do something which is already separately prohibited. The Committee submits that proposed section 117B should be removed. Alternatively, if it is retained, it should be changed to a 'reasonable care and diligence to ensure compliance' obligation – see, for parity, section 52A(5).

Record-keeping requirements

34. A number of proposed amendments deal with elevating the existing record-keeping requirements in the SIS Act. The Committee has a number of concerns about this proposal as outlined in the following paragraphs.

Singular elevation

35. Proposed subsection 34(2A) calls out the existing operating standards in relation to record-keeping from the long list of matters in relation to which operating standards may be prescribed (subsection 31(2) for regulated superannuation funds). The proposed new measures will require each trustee to 'ensure' that those record-keeping standards are 'complied with at all times', and there is a correlating obligation in proposed section 34AA applicable to directors. Whilst the Committee notes the stated intention at paragraph 1.66 of the EM to supplement the offence in section 34 with a new strict liability offence (expressed at subsection 34A(2B)), it queries what practical and useful purpose subsection 34(2A) will add in terms of changing trustee record-keeping behaviour. The Committee rejects the notion (expressed at paragraph 1.67 of the EM) that the new strict liability offence for record-keeping obligations is consistent with other similar provisions of the SIS Act, where section 104 (duty to keep records of changes of trustees) is cited as an example. Importantly those other so-called 'similar provisions' are of a very confined kind of record-keeping pursuant to which a trustee or director is able to readily identify non-compliance in contrast to the potentially amorphous requirements that will be prescribed as operating standards.

36. If it is the policy intent to bring about behavioural change in trustee record-keeping, the Committee suggests that APRA's prudential standard making powers are already adequate and are better suited to targeting the kinds of records and methods for keeping them that will accord with policy and regulator expectations.

Impact on directors

37. Similarly, proposed section 34AA elevates operating standards in relation to record-keeping so high, such that an individual director will commit an offence if the director '*was in a position to influence the conduct of the trustee of the entity in relation to the commission of the offence*' and did not take 'all' reasonable steps to prevent the commission of the offence. By virtue of their role, directors will necessarily be 'in a position to influence' the trustee's conduct. This gives rise to the question of how this test might then be construed by the courts in view of a director only being entitled to one vote.

38. The uncertainty is compounded by the additional test at subsection 34AA(d), pursuant to which a director will only commit the offence under section 34AA if the director also failed to take '**all**' reasonable steps to prevent the commission of the offence by the trustee. This is a relatively unique formulation of an offence by a superannuation trustee director individually impugned for the conduct of the trustee differing from the 'reasonable care and diligence' provisions under section 52A of the SIS Act and the more familiar 'knowingly concerned' formulation under the *Corporations Act 2001* (Cth) (**Corporations Act**). The Committee notes the proposed new 'all reasonable steps' formulation is similar to a number of provisions of the Corporations Act (for example, section 344 relating to operating a foreign passport fund), but observes that those provisions under the Corporations Act relate to confined kinds of conduct where the offending would be serious and should be obvious to a director.

39. The Committee submits that the record-keeping standards are more likely to reflect an amorphous requirement where it will be more difficult to readily identify offending from a board perspective where strategy and systems should regularly be the focus and reliance is placed on management for compliance. Whether delegating record-keeping to management would fail the test of the director having taken 'all reasonable steps' is unclear.

Existing law sufficient

40. This proposed legislative departure is being made in the context of record-keeping which, while important, does not seem to justify the extreme elevation in legal standards and consequences achieved through proposed subsection 34(2A) and section 34AA when there are many and varied other matters upon which operating standards may be prescribed. The Committee submits that the existing law which states that there may be operating standards prescribed in relation to record-keeping and which trustees must comply with are sufficient. The EM states that the record-keeping amendments 'support' the best financial interests duty on the basis that the duty:

> *may encourage trustees and directors to keep better records to demonstrate compliance with their duties'), by 'ensuring that where regulations are made to require keeping of records regulators are able to take a proportionate enforcement response.*

41. However, the EM does not identify any defect in the existing provisions for enforcing standards which would create barriers for the Regulator in pursuing a trustee which

has failed to maintain records as prescribed in the regulations, nor explain why record-keeping requirements justify additional enforcement powers that do not apply to other standards.

42. Therefore, the Committee submits that proposed new sections 34(2A) and 34AA should be abandoned.

Transitional provisions for prohibited expenditures

43. Proposed section 117A seeks to prohibit trustees from making payments or investments that are prescribed by the regulation. Unlike the other provisions under this measure, Part 2 of the draft Treasury Laws Amendment (Measures for consultation) Bill 2020 does not provide for commencement of the application of proposed section 117A and so it will take effect after Royal Assent. To the extent of any pre-existing contractual arrangements, the Committee notes that clear and comprehensive transitional provisions will be required such that trustees are not faced with either contravening the new provisions upon commencement or breaching pre-existing contractual obligations.

Self-managed superannuation funds

44. The Committee notes the new 'best financial interests' duty covenant is also proposed to be introduced in respect of self-managed superannuation funds (**SMSFs**) by amendments to section 52B. If the impetus for the new duty was the Productivity Commission recommendations concerning trustees being 'accountable for how they operate the fund and expend members' money' – referencing the extent of expenditure of discretionary items like 'advertising, sponsorships and corporate entertainment' and noting that trustees do not 'always act in the best interests of members' – the Committee questions whether those recommendations were directed to trustees of SMSFs. The Committee suggests that changing the duty for trustees of SMSFs is likely to have no behavioural impact on those trustees (or directors of those trustees) who are also the members of the funds in whose interests they are bound to act. In view of those matters and the aforesaid concerns of the Committee about changing the 'best interests duty', the Committee submits that the proposed amendment to section 52B should be abandoned.

Trustee director indemnity

45. The Committee wishes to draw attention to an earlier submission it made to the Treasury on 27 March 2020,[9] in relation to the need for clarification of the indemnity provisions under sections 56 and 57 of the SIS Act as a consequence of the decision of Jagot J in *Australian Prudential Regulation Authority v Kelaher*.[10] The Committee suggested a simple amendment to section 55 of the SIS Act by the addition of a new subsection 55(8) in the following terms:

> (8) This section does not limit the operation of sections 56 and 57.

46. Those concerns of the Committee are now heightened by the amendments proposed to the 'best interests' covenant. The Committee urges the legislature to consider bringing forward amendments to address such matters to form part of this package of reform measures.

---

[9] Law Council of Australia, Legal Practice Section, *Superannuation Regulator Roles - Amendments to Sections 56 And 57 of the SIS Act*, Supplementary Submission to the Treasury, 27 March 2020.
[10] [2019] FCA 1521 [20]-[22].

Single default account

47. The Committee notes the policy intent of this aspect of the package is to limit the creation of multiple superannuation accounts for employees by requiring employers to make contributions into an employee's existing fund, if new employees have one and do not choose a fund to receive contributions.

48. The Committee's comments are as follows (where references in this part to 'sections' and to the 'Act' are references to the *Superannuation Guarantee (Administration) Act 1992* (Cth) unless otherwise stated.

Consultation on regulations

49. The substantive definition of 'stapled fund' is to be contained in regulations (proposed section 32Q), so it is not possible to make comment on the definition. The Committee expects that the regulations will also be released as an exposure draft for consultation. The Committee would expect the definition to fully deal with the varied circumstances in which a person's existing superannuation fund account cannot accept contributions from a non-associated employer (whether because of an RSE licence limitation or the governing rules of the fund).

Standard employer-sponsor provisions:

50. There are certain aspects of the SIS Act pursuant to which it is relevant to identify 'standard employer-sponsors', 'standard employer-sponsored funds' and 'standard employer-sponsored members' (see section 16 of that Act for relevant definitions). The provisions which correlate to these concepts relate to the public offer superannuation fund conditions (section 18), the equal representation rules (sections 90-92), in-house asset rules (section 71) and prohibitions on payments to employer sponsors (section 117). The Committee notes that a number of these provisions may be unintentionally affected by the new stapled-fund requirements and should therefore be reviewed with a view to consequential amendments also being made.

51. There are also provisions under the Corporations Act affected by these definitions which should be similarly checked.

52. In view of the short time given for consultation the Committee has not been able to conduct such review, but merely draws attention to the need for this to occur.

Interaction with *Fair Work Act 2009* (Cth)

53. The new measures introduce fundamental change to the operation of default fund arrangements for new employees by amendments to the Act. However, the measures will operate indirectly to circumscribe the application of default fund provisions under modern industrial awards and enterprise agreements as regulated under the *Fair Work Act 2009* (Cth) (**FWA**) (refer sections 149C, 149D and Division 4A dealing with periodic expert panel review and determination of approved default funds for respective modern awards) by significantly expanding the application of what will be regarded as a 'chosen fund' for an employee.

54. The Committee also notes that the FWA expert panel regime for periodic review and determination of default super funds in respective modern awards has been in abeyance since 2013, pending Government policy review of the default superannuation regime as a whole.

55. The changes as drafted will introduce additional complexity for employees, employers and the community to navigate to ensure compliance with all Commonwealth laws and industrial awards or enterprise agreements affecting default super fund arrangements. Accordingly, the Committee submits that consideration be given to complementary amendment or indeed repeal of the FWA provisions dealing with default super, consistent with the intended Government policy and outcomes sought, to simplify participants' compliance with all existing laws.

Addressing underperformance in superannuation

56. The Committee notes the intention of this aspect of the package is to require APRA to conduct an annual performance test for MySuper products and other products specified in regulations. Trustees will be required to give notice to members when a product fails the test. Where a product has failed the performance test in two consecutive years, the trustee is prohibited from accepting new beneficiaries into that product. This reform is also intended to provide certainty and transparency about the basis on which superannuation products will be ranked and published on a website maintained by the ATO.

57. The Committee's comments are as follows.

Concept of 'product'

58. Proposed subsection 60B(5) and all the associated provisions are drafted on the basis that the assessment requirements will apply to 'products'. This includes 'MySuper products' and 'any other class of beneficial interest in a regulated superannuation fund'. Similarly, paragraph 1.41 of the EM states that the prohibition on accepting new beneficiaries where there have been two underperformance assessments 'operates at the product level'.

59. In practice, the distinctions within a fund between different *products* is not always as clear as the distinction between *investment options*. For example, in some funds a member may choose an investment option that is also the 'MySuper product', and a 'choice product' may comprise very many investment options among which a member can choose. Consistent with a focus on investment options as being part of the core architecture of a superannuation fund, it appears that the regulations contemplated in new subsection 60C(3) will specify requirements in respect of investment returns as a fundamental aspect of the performance assessment – and investment returns are yielded and reported distinctly by reference to each investment option.

60. Accordingly, with these matters in mind, the Committee submits that the 'product' language employed in the legislation (and associated regulations) which may have profound consequences for funds should be precise and carefully crafted so as to avoid unintended consequences or ambiguities.

Successor fund transfers

61. Proposed section 60B deals with performance assessments in relation to a product which exists for a financial year. Proposed section 60F deals with circumstances where two products (presumably within the one superannuation fund) may be combined to avoid new but substantially similar products being established for the purpose of avoiding the consequences of an underperformance assessment continuing with the original product. However, the quite common situation of a

successor fund transfer (**SFT**) does not seem to be contemplated at all. That is, in the context of an SFT, one product in one fund may effectively be replaced by another product in another fund. The prospect that underperformance in one product can be attributed to another product could be a significant barrier to fund mergers (which presumably the proposed amendments are supposed to encourage) unless the regulations clearly 'carve out' SFTs.

Consultation on regulations:

62. The substantive requirements for the matters against which the performance assessment will be made are to be contained in regulations (proposed section 60C), so it is not possible to comment on that aspect. The Committee hopes that the regulations will be released as an exposure draft for consultation, particularly given there will be requirements which depend on the exercise of a discretion by APRA.

Reviewable decision

63. No amendment to the definition of 'reviewable decision' in section 10 is proposed (as acknowledged in paragraph 1.20 of the EM). The importance of the definition is that per section 344 '[a] person who is affected by a reviewable decision of the Regulator may, if dissatisfied with the decision, request the Regulator to reconsider the decision.' The Committee submits that given:

    - the assessments will be conducted by APRA as against requirements that may depend on the exercise of a discretion by APRA and may involve assumptions made by APRA in exercising that discretion (see proposed subparagraphs 60C(2)(b)-(d)); and

    - the fund-ending consequences of two failed assessments,

    a determination made by APRA under proposed subsection 60B(2) should be a 'reviewable decision' so that there can be appropriate administrative law checks on APRA's power.

64. There are no fewer than 70 circumstances in which APRA can make a decision under the Act which are currently specified as 'reviewable decisions' in section 10, and the Committee does not understand why APRA's significant new proposed power under subsection 60B(2) would not also be included.

Timing for beneficiary notification

65. Proposed subsection 60D(2) states that trustees will have only 28 days after APRA gives the performance assessment to notify all beneficiaries. Unless the format for that notification is completely prescribed, the Committee anticipates trustees will likely need a longer period of time to properly comply with the notification requirement; allowing time for processes such as drafting, internal review, approval, design, mailhouse, dealing with delivery failures/returned mail etc.

Content of notification

66. Proposed subsection 60D(3) states that the notification must be in the form specified in the regulations. The Committee requests that it be clear whether discretionary additional content will be allowed. That is, the question arises whether the notification must only contain information which will be prescribed in the regulations, or will additional explanatory commentary or information from the trustee on the assessment also be permitted if the trustee would like to include such information.

Formulas for ranking products

67. Proposed subsection 348B(2) states that the regulations may allow APRA to choose between two or more alternative formulas that relate to the same class of product. Whilst it is difficult to comment comprehensively in the absence of the regulations, at first reading it is not immediately apparent why there would be an option to choose between two formulas when presumably the notion of comparability on the basis of uniform assessments should be important when examining products.

Contact

68. The Committee would be pleased to discuss this submission with Treasury. In the first instance, please contact Dr Lisa Butler Beatty, Chair of the Committee, on (03) 9910 6145 or beattyli@cba.com.au.