AIST

Your Future, Your Super review

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AIST Submission to Treasury

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AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds from more than 30 funds.

As the principal advocate and peak representative body for the $1.6 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST advocates for financial wellbeing in retirement for all Australians regardless of their gender, culture, education or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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Executive summary

AIST supports the policy intent of the Your Future Your Super (YFYS) package of reforms. In our compulsory system, where engagement is low, members should be able to trust that super funds are being held to account for their performance. Those who wish to choose should have access to reliable and useful product information that prioritizes the most important metrics.

Workers should be able to move between jobs without accumulating costly unintended multiple accounts. More importantly, they should be able to trust that they have been connected to good quality products, and that super funds are transparent and accountable for how they use members' money.

The YFYS reforms aimed to make progress on these issues. However, since the announcement of the reforms two years ago AIST has expressed repeated concern that important aspects of the package are flawed. Welcome policy intent is being undermined by measures and metrics that fail to cover the whole system, that fail to protect many from underperforming products, and that impose unnecessary regulatory costs.

AIST therefore welcomes the decision of the Government to review important aspects the YFYS framework in light of recent experience and industry concerns. In this submission we set out a series of recommendations for how the framework can be improved in ways that will help to benefit millions of members. We discuss the relevant problems under four headings. The full list of our recommendations is contained in the next section of this submission.

Performance test

The intention of the annual performance test is to protect members from underperformance by holding trustees to account for the investment performance they deliver to members. However, the test is confined to MySuper products, letting too many poorly performing Choice products escape scrutiny. All accumulation products must be appropriately tested. In addition, performance is tested over too short a period, eight years rather than ten, and the test should assess the value added by good trustee asset choice and allocation.

YourSuper comparison tool

The objective of the YourSuper comparison tool is to assist those members who wish to make use of it to choose a good performing MySuper product. However, the tool should be improved by extending it to cover all APRA-regulated accumulation products, ranking products by net returns first rather than fees, and adding additional metrics related to product features such as insurance. While the tool should be a reliable and accessible resource for those who wish to make better choices, in a context where member engagement with super is low, public policy and regulation must continue to play the key role in acting to protect members from poor products.

Stapling

Stapling started in November last year. If a new employee does not choose a fund, then employers must check whether they have an existing ‘stapled’ fund before opening a new default account. Stapling is intended to prevent the creation of unintended multiple accounts by ensuring superannuation follows individuals as they change jobs. However, an employee can be stapled to a poor and inappropriate product, one they may remain a member of for years because they do not actively engage with their super. Eligibility to be a stapled fund must be restricted to those funds that are open to new members and are subject to annual performance/quality testing.

Best financial interests duty (BFID)

Under BFID trustees need to assess whether their spending is in the best financial interests of members and must now provide evidence to demonstrate this fact in the event of civil proceedings. This is intended to increase trustee accountability and transparency. However, there is no materiality threshold, and the reverse onus of proof is unnecessary in a context where breaches of trustee duties to members are not difficult to prove. This is generating costly and overly complicated recordkeeping that must be paid for by members. The reverse onus should be removed, and a materiality threshold introduced.

AIST Recommendations

Performance test – methodology (questions 1-4)

AIST recommends:

- Superannuation products should be performance-tested over a 10-year period.
- Investment benchmarks must reflect assets and be subject to ongoing review.
- The performance test should recognize Strategic Asset Allocation decisions and be risk-adjusted.
- The performance test methodology should be further aligned with APRA's Superannuation Heatmaps, and in common with the Heatmaps the performance assessment should be graduated rather than relying on a pass/fail dichotomy.
- The calculation of actual RAFE and benchmark RAFE should not include special consideration for non-performance related product features.
- Administration fees should be assessed over the same period as investment performance and be assessed against a benchmark for all superannuation products.

Performance test – consequences of failure and product coverage (questions 5-9)

AIST recommends:

- In dealing with the consequences of performance test failure the primary focus of reform should be on strengthening the capacity of regulators to effect changes that are in members' best interests. This should include granting powers to APRA to compel mergers of failing funds when it is in the best financial interests of members to do so.
- Extend an improved annual APRA performance test to cover all APRA-regulated accumulation products.
- Further action by ASIC to ensure trustees do not engage in communications that act to mislead or confuse members about the performance of failing products.
- APRA should issue further guidance on how it expects trustees to manage long-term ESG risks in a context where the annual performance test may incentivize investment strategies that inhibit giving effective consideration to climate, social and governance risks.
- In consultation with the industry, APRA should commence work on developing a performance test appropriate to assessing retirement income products.

YourSuper comparison tool (questions 10-12)

AIST recommends:

- Extend the YourSuper comparison tool to cover all APRA-regulated accumulation superannuation products.
- Amend the YourSuper tool to rank performance results by net returns before being ranked by fees – as indicated by the Explanatory Memorandum that accompanied the YourSuper Regulations. Reported results should be graduated rather than relying on a performing/ underperforming dichotomy.

- To help inform the further improvement of the YourSuper tool, APRA and the ATO should collect data about who is using the tool and user-test how the information provided by the tool is being interpreted and used by members.
- The regulators should commence work on integrating additional metrics into the tool including insurance, age and risk appetite, explanations of product categories, in addition to performance assessment periods beyond 8 years.

Stapling (questions 14-16)

AIST recommends:

- Eligibility to be a stapled fund should be restricted to funds that are open to new members and subject to annual performance/quality testing.

Best financial interests duty (questions 17-19)

AIST recommends:

- The reverse burden of proof should be removed, and a materiality threshold introduced.

Submission

Performance Test

1. Does the measurement of actual return using strategic asset allocation affect risk-taking behaviour by superannuation trustees?

2. Does the current set of indices used to calculate benchmark returns unintentionally distort investment decisions or reduce choice for members? If so, is there a way to adjust the benchmark indices while maintaining a clear and objective performance test?

3. Does the calculation of actual RAFE and benchmark RAFE discourage non-performance related product features that members may value (such as customer service or platform products)? If so, can this be addressed without diminishing the test's focus on performance?

4. What are the longer-term impacts of the performance test on market dynamics and composition? How will these factors impact on long-term member outcomes?

The performance test has identified underperformance amongst MySuper products, and a consequence of being named as an underperforming product has been the merger of most of these products into other – although not necessarily high-performing – MySuper products.

The Assessment Period

The current 8-year performance test period is too short and should be extended to 10-years.

Throughout the development and implementation of YFYS, AIST has consistently called for a rolling 10-year performance test horizon. This approach is consistent with the Government's MoneySmart website that uses a 10-year horizon over which to present returns. It is also consistent with the product dashboard requirements for MySuper products that require funds to work out a return target for a period of ten years and the return for the prior ten-year financial years. It is not clear why the performance assessment period for YFYS should differ from established product dashboard requirements.

We also note the conclusion of Conexus Institute modelling that found using an 8-year time horizon entails a reasonable probability that for every six poor funds the present test will likely mis-identify one as a good performer. This is because over 8-year intervals a poor fund may experience annualised performance above the test threshold level.[1]

In addition, there should be no exemption from the test for products with shorter performance histories (e.g. less than five years). In the absence of being tested there is a risk that some providers may continually create and distribute new products that avoid effective public scrutiny. Given that a key aim of YFYS is to

[1] https://theconexusinstitute.org.au/wp-content/uploads/2020/11/YFYS-Detailed-Paper-20201127.pdf

increase the transparency and comparability of product performance, it would not be in member interests if newer products were omitted from view.

However, given that newer products will not have been through a complete 10-year investment cycle, AIST recommends that APRA should have the discretion to review those that fail and exclude them from the prohibition on accepting new members on a case-by-case basis. APRA should have the flexibility to consider the causes and likely endurance of poor performance with reference to relevant short-term market conditions.

Finally, and in common with other aspects of the YFYS framework discussed in this submission, this longer timeframe should be specified in primary legislation – not relegated to regulations as is presently the case. The timeframe for assessment can have significant implications for which products are judged to have passed or failed, and therefore for the financial interests of affected members. This is not merely a technical issue appropriate to regulation – it is a substantive policy matter that should be open to full parliamentary scrutiny and debate.

Recommendation 1	Superannuation products should be performance tested over a 10-year period.

Investment benchmarks

Several benchmarks do not sufficiently represent the assets in which funds invest and should be subject to ongoing review by APRA, including consultation with the super industry, with a view to replacing them.

Appropriate benchmarks in any asset class should ideally display certain qualities. In short, they should be transparent, representative, objective and investable. Investors and asset owners should be able to understand what a benchmark comprises, how representative of the relevant market it is, and be able to invest in the market without encountering significant barriers of cost and skill. A good benchmark will reflect the primary characteristics of the asset markets that performance is being measured against.

These qualities can be difficult to secure, particularly in the context of unlisted asset classes.

In the process of finalising the current performance test the Government changed the indices for unlisted infrastructure and property. They are an improvement on what was originally proposed at the time of the 2020 budget, but problems remain.

For example, in relation to infrastructure the super industry has never adopted a single specific benchmark for the asset class and there have only been limited attempts to create an unlisted infrastructure index.

At present, APRA use the MSCI Australia Quarterly Private Infrastructure Index (Unfrozen) to benchmark unlisted Australian and International infrastructure. The MSCI is the best readily available benchmark for unlisted infrastructure. However, among its problems are that the composition of the index is not fully transparent, and data contributions are voluntary – leading to severe survivorship bias.

We note that several participants in the consultation on the YFYS Regulations in May 2021 recommended that the Government consider the use of an absolute CPI+X benchmark for unlisted infrastructure, noting that CPI+4% is commonly used among leading institutional investors in other jurisdictions. AIST recommends that the use of an absolute CPI+X benchmark be considered as part of the current YFYS review.

In relation to Australian unlisted property the MSCI/Mercer Australia Core index is an improvement on the initially proposed listed index. It is the primary benchmark used by many domestic super funds and property managers in an Australian context. However, the index is also proposed for international unlisted property. Currently there is no widely recognised index for unlisted global property markets in aggregate, including the MSCI/Mercer Australia Core.

The use of this index should be subject to review with the aim of adopting a more appropriate alternative.

We further note the absence of a benchmark for emerging market equities, often considered a standalone asset allocation given their particular risk/return profile compared to developed markets. Consideration should be given by the current review to adopting one or more benchmarks for emerging market equities.

Recommendation 2	Investment benchmarks must reflect assets and be subject to ongoing review.

SAA decisions and risk-adjustment

All investment decisions made by a trustee are relevant to the performance of a fund and its products. However, the current test does not take account of the impact of decisions made by trustees to populate their portfolios with particular quantities and qualities of assets. Instead, the test measures how well the trustee is implementing its own reported Strategic Asset Allocation (SAA).

As such the test does not measure the overall level of investment returns, it does not assess whether the chosen SAA is a good one, and it does not directly measure the performance of a product against the products of other trustees.

Instead, the test is effectively an assessment of how well a trustee has implemented the asset strategy it has chosen for itself. This raises integrity issues as some trustees may feel incentivised to rebalance their SAAs from higher to lower returning indices. This can help to ensure the test is passed, but at the cost of potentially higher long-term net returns to members.

The current review of YFYS should consider alternative approaches to assessment that involve accounting for SAA decisions. APRA seeks to measure the value generated via SAA decisions in the context of its Heatmap methodology by using a simple reference portfolio comprising a mix of passive, low cost and liquid investments. Consideration could also be given the introduction of a naïve reference portfolio using for example a 70/30 per cent split between growth and defensive assets using index exposures to equities, fixed interest and cash. This may better capture both implementation outcomes as well as SAA design.

Such approaches could form the basis for an improved annual performance test.

A further problem with the current annual test is that it does not include measures of risk-adjustment – it is ‘risk agnostic.’ This is in contrast with the performance analysis undertaken by the Productivity Commission in its assessment of the superannuation system, and with how APRA calculates Heatmaps.

It is also at odds with broader superannuation policy settings. A key requirement of APRA's investment governance standard (SPS 530) is that trustees must formulate specific and measurable investment objectives for investment options, including risk objectives. And yet risk-adjustment does not feature in what has effectively become the single most important test of performance across the APRA-regulated super sector.

There is no single definitive way to measure and adjust for investment risk. Arguably, APRA's reliance on a growth/defensive classification for Heatmap purposes is too simplistic, attributing higher levels of risk to some unlisted assets than is justified by their actual characteristics. On the other hand, measures of volatility may understate risk in a context where valuations are not determined by routine trading on public markets. A careful combination of measures may be the best approach.

The current review should consider how risk-adjustment can be incorporated into a reformed test.

Recommendation 3	The performance test should recognize SAA decisions and be risk-adjusted.

Alignment with APRA's Heatmaps

APRA publishes Heatmaps to increase the transparency and scrutiny of performance delivered by superannuation product offerings. The Heatmaps use a graduating colour scheme to provide clear and simple insights into superannuation products across investment returns, fees and costs, and - for MySuper products - sustainability of member outcomes.

While the focus of performance assessment should be on long-term performance, the use of different time horizons and account balances provides a more detailed view of performance across a range of membership circumstances.

The APRA superannuation Heatmaps Frequently Asked Questions includes "*How do APRA's heatmaps support the annual performance test*?" With the answer being:

> *"The heatmaps support the performance test by providing additional insights across multiple dimensions and by providing a detailed data set for users to explore. The performance test is a single metric, whereas the heatmap provides a range of metrics over a range of time periods so that users can compare the performance relative to a number of benchmarks and over different time horizons."*[2]

The 2021 MySuper Heatmap included the results of the first YFYS performance test, and the APRA technical paper on the MySuper Heatmap[3] concluded that the primary reason for MySuper products failing the performance test is poor investment performance relative to benchmark. All of the MySuper products that failed the performance test would have failed based on their investment performance results alone.

[2] https://www.apra.gov.au/superannuation-heatmaps-frequently-asked-questions FAQ 5.

[3] https://www.apra.gov.au/sites/default/files/2021-12/Technical%20paper%20-%20MySuper%20Heatmap.pdf p.7

However, eleven of the thirteen MySuper products that failed the test also charged administration fees higher than the median fee performance test benchmark.

These are all useful insights, but the performance assessment should be directly referable to and consistent with the Heatmap methodology, and not just the subject of subsequent commentary. In particular, the results of the assessment should be graduated rather than relying on a pass/fail dichotomy. This would help to better inform and protect consumers, enhance competition and place downward pressure on fees.

The YFYS performance test, the YourSuper comparison tool, superannuation product dashboards and the APRA Heatmaps all provide valuable information to assist consumers and commentators to understand and assess superannuation products. This value would be enhanced by the explicit and testable alignment of key metrics, and a clearer articulation of the purpose of each tool.

Recommendation 4	The performance test methodology should be further aligned with APRA's superannuation Heatmaps, and in common with the Heatmaps the performance assessment should be graduated rather than relying on a pass/fail dichotomy.

Calculation of RAFE

AIST continues to support consideration of administration fees in the determination of product performance.

Inclusion of administration fees in the performance test means that it aligns more closely with the net return received by super fund members.

Given that the sole purpose test requires super funds to operate solely for the purpose of providing retirement benefits to their members, and each trustee is required to perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries, all features of a product must relate to the performance of the product, either directly or indirectly.

This can include features such as customer service but must not distract from performance.

Member Outcome Assessment requirements, Design and Distribution Obligations and the forthcoming Financial Accountability Regime set out requirements for funds to regularly assess the outcomes provided to members, the target market for each product and accountability for delivery; all tied to prudential requirements to ensure that fund expenditure is in the best interests of members. These additional requirements serve to reinforce the sole purpose test and BFID and support the conclusion that product features must either directly or indirectly support members best financial interests.

While it is acknowledged that different products offer different types and levels of service, there is no strict dichotomy between MySuper products and choice products in relation to services. For example, while the provision of intrafund advice (the cost of which is incorporated in administration fees) may be more prevalent in MySuper products, intrafund advice is also a feature of some choice products.

AIST recommends that the calculation of actual RAFE and benchmark RAFE should not include special consideration for non-performance related product features, and any such features should be separately offered to prospective members to consider as part of their decision making.

Recommendation 5	The calculation of actual RAFE and benchmark RAFE should not include special consideration for non-performance related product features.

Administration Fees

Period for assessment

AIST strongly disagrees with the way in which the current regulations benchmark administration fees on the basis of the fees for the previous financial year.

This can be readily remedied within the context of the existing benchmark formula.

The benchmark defines BRAFE_t as “the Benchmark RAFE for the Part 6A product in relation to the quarter” (that is, BRAFE_t is defined as the median product of RAFE for either MySuper or Trustee Directed Products (TDPs) within that particular quarter t).

BRAFE_t is thus part of the benchmark formula:

$$\left\{\boxed{\prod_{t=1}^{4n}}\left[1+\sum_{j=1}^{J}\left(\sum_{a=1}^{A}\left\{\mathrm{SAA}_{a,j,t-1}\times\left[\frac{\left(1+\mathrm{index}_{a,t}\right)}{\left(1+\mathrm{fee}_{a,t}\right)^{\frac{1}{4}}}-1\right]\times\left[1-\mathrm{ART}_{a,t}\right]\right\}\times\left\{\mathrm{lifestage\ weight}_{j,t}\right\}\right)-\boxed{\mathrm{BRAFE}_t}\right]\right\}^{\frac{1}{n}}-1$$

The formula can be applied to a 10-year period. If the formula calculates rolling 10-year benchmark 2012 Q2 - 2022 Q2: n=10 years, 4n = 40 quarters, the median RAFE for each of the 40 quarters can be calculated, and the 40 BRAFE_t can then be applied in the formula.

No separate benchmark for MySuper and Choice products

The performance test assesses the administration and advice fees, costs and taxes charged to a representative member with a $50,000 account balance over the last financial year (actual RAFE), using the data reported to APRA in Reporting Form SRF 702.0 Investment Performance. This is compared to the median RAFE (benchmark RAFE) which is to be calculated separately for MySuper products and Trustee Directed Products.

The regulations define the investment performance standard as relating to the Financial Sector (Collection of Data) determination No. 40 of 2015, or an analogous legislative instrument.

AIST recommends that the regulations be revised to ensure it is clear that all APRA superannuation reporting standards are included in the definition of investment performance standard, to ensure that administration fees reported to APRA can be taken into account for the purposes of performance assessment.

The benchmark administration fee should be the median of all APRA-regulated accumulation superannuation products, and there should not be separate administration fees for MySuper products, Trustee Directed Products, and other choice products. The policy aim should be to avoid having higher benchmarks for non-MySuper products that will act to entrench higher fees across the choice sector.

Recommendation 6	Administration fees should be assessed over the same period as investment performance and be assessed against a benchmark for all superannuation products.

Consequences of failure

5. Is there evidence to indicate that the notification and website publication requirements have been effective at encouraging members to consider, and switch to, alternative products?

There is no conclusive evidence that the notification and website publications are effective at encouraging members to switch to alternative products. The notification process is problematic for reasons set out below.

As of 30 June 2022, over 600,000 members were in underperforming MySuper products. Of these members, 550,000 were in products that failed twice.

Of the 13 funds that failed in 2021:

- Four failed for a second time in 2022 – representing over 550,000 accounts
- Four merged – representing approximately 195,000 member accounts
- Five passed the test – representing 289,000 member accounts.

Only 100,000 members rolled out of underperforming products following receipt of the mandated letter. It cannot be assumed all or most of these rollouts were a result of the letter. Approximately 3.1% of members change superannuation funds each year regardless of their fund's performance. Most members (578,000) are no longer in underperforming products due to either fund mergers or improved fund performance.

This lack of member action is unsurprising given the content and structure of the mandated letter. Using the Flesch-Kincaid Grade Scale analysis, a person would need to have at least grade 11 reading skills to fully understand the content of the letter. Given 44% of adult Australians have a reading level of year 10 or below[4], it is reasonable to assume that a large proportion of over 1.1 million members receiving the letter simply did not understand it well enough to take action.

Even where a consumer was able to comprehend the letter, it is unsurprising that levels of response were low in light of *ASIC's Report 632: Disclosure: Why it shouldn't be the default* which found that disclosure and warnings can be ineffective in influencing consumer behaviour. In addition, ASIC's *Report 729: Review of*

[4] Australian Government Style Manual Literacy and access | Style Manual accessed on 14 October 2022.

trustee communications about the MySuper performance test (REP 729) notes that some communication that included specific retention strategies for members to consider had the potential to "*risk breaching financial advice and anti-hawking laws*."[5]

If a mandated written communication to members remains it must be thoroughly consumer-tested for comprehension and revised accordingly.

Even so, given the low rates of members proactively switching as a result of receiving the letter, AIST strongly recommends that the responsibility for exiting an underperforming product should not rest with members.

Impact of member disengagement

In providing feedback on question 5, AIST notes that it is impossible for a fund to obtain evidence that determines whether a member had considered the notification letter, and then proactively decided to switch products. In the early consultation phase of the Your Future, Your Super framework, AIST advised that notification requirements for underperforming funds were problematic for three reasons:

- Notification to members of underperformance is important but consumer choice should not be the mechanism to solve underperformance.
- Disclosure has been shown to be ineffective in disciplining product providers.
- The responsibility to achieve best member outcomes should not be placed back on the consumer.[6]

AIST reiterates these points in this submission and considers that the low numbers of members who have proactively switched to alternative products demonstrates that notifications by themselves do not encourage the large majority of members to switch.

Impact of misleading or confusing letters

In terms of the effectiveness of the letter, AIST notes the outcomes of REP 729 concerning the performance test communications by the 12 trustees of the 13 products that failed the 2021 performance test.

The review found that the communication strategies adopted by some trustees may have confused or mislead members about their product's performance. These strategies included:

- Publishing the MySuper product's failure of the test on a webpage less likely to be visited by persons interested in the product.
- Highlighting other performance measures that were more favourable, such as recent positive past performance figures.

[5] ASIC, Report 729 Review of trustee communications about the MySuper performance test p. 18 https://download.asic.gov.au/media/k1chrsc4/rep729-published-24-june-2022.pdf

[6] AIST, Submission Your Future Your Super Exposure Draft Legislation, December 2020, aist.asn.au/getattachment/Media-and-News/News/2020/AIST-Submission-to-Your-Future,-Your-Super-Package/AIST-Submission-YFYS-exposure-draft-legislation-online.pdf.aspx

- Criticising aspects of the test to suggest it was not relevant.

Given ASIC's concerns regarding the potential for notifications to mislead or confuse, it is reasonable to conclude that these measures may have had an adverse impact on the willingness of some members to move to different products.

5. (continued) Are there ways this could be improved?

"Confident regulators that champion the member are essential in a compulsory super system." [7]

Given REP 729, AIST cautions policy makers to be realistic about the extent to which consumer disclosure will drive members to better funds. AIST recommends greater regulatory oversight on communications to avoid the potential for fund responses to obscure the message or inadvertently mislead members. In addition, consideration should be given to a mechanism to notify employers if a default fund is underperforming but still open to new members.

AIST also continues to advocate that notification by itself is not a sufficient means of addressing underperformance. As noted in our previous submission, members should not be responsible for ensuring that their fund is performing. The superannuation system is compulsory, and benefits are preserved until retirement, meaning that there is a higher level of responsibility for government, regulators, and funds to ensure the proper operation of the system.

Once a fund is assessed as underperforming, APRA should take a greater regulatory role to ensure members do not continue to be exposed to that underperformance.

As per the Productivity Commission:

> *"APRA is best placed to focus on licensing and authorisation to promote high standards of system and fund performance."*[8]

This includes taking decisive action to oversee or direct transfers of members to a better performing fund.

Recommendation 7	In dealing with the consequences of performance test failure the primary focus of reform should be on strengthening the capacity of regulators to effect changes that are in members' best interests. This should include granting powers to APRA to compel mergers of failing funds when it is in the best financial interests of members to do so.

[7] Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness – Inquiry Report, 2019* pc.gov.au/inquiries/completed/superannuation/assessment/report/superannuation-assessment.pdf (p.43)

[8] Ibid.

Recommendation 8	Further action by ASIC to ensure trustees do not engage in communications that act to mislead or confuse members about the performance of failing products.

6. Have the consequences been effective at encouraging trustees to improve their performance or merge with better performing funds? Are there ways this could be improved?

Passing the test versus performance

Data shows that the consequences of failure have been effective at encouraging trustees to improve performance or merge (but not necessarily with a performing fund). Mergers were already increasing in number prior to the performance test, and while APRA has engaged with funds that failed the test, there is no policy solution that considers, incentivises or compels mergers of funds that have failed the test with those that have passed.

In addition, passing the test is not necessarily equivalent to improving outcomes for members as the performance test is limited to certain benchmarks and may be at the expense of longer-term performance. If the objective of the test is to reduce members in underperforming products, then the performance test has partially achieved this by way of either mergers or funds passing the performance test in the subsequent year.

Performance test and other APRA Guidance

AIST has some concerns that the short-term tracking of backward-looking benchmarks may undervalue the performance of ESG products. These products generally offer longer-term investment outcomes. AIST notes that APRA Prudential Practice Guide CPG 229 encourages APRA-regulated institutions to consider climate change and risks in investment strategies. As a part of reviewing SPG 530, APRA has acknowledged that additional clarity is required to assist APRA regulated entities to better reflect ESG considerations and the impact of investment decisions and risk management on the investment portfolio and the broader market. Given this acknowledgement by APRA, the performance test appears to be in tension with active consideration of long-term ESG risks in portfolios.

Recommendation 9	APRA should issue further guidance on how it expects trustees to manage long-term ESG risks in a context where the annual performance test may incentivise investment strategies that inhibit giving effective consideration to climate, social and governance risks.

7. Are the measures in place to resolve underperformance sufficient given the potential for members to be stapled to these products? How can the system best support members in underperforming products?

The Productivity Commission found that the difference between being in an outperforming MySuper product and an underperforming one is estimated be over $500,000 more in super at retirement.[9] Given the financial impact of underperformance to a member, AIST recommends that APRA take a greater proactive regulatory approach to assist funds to resolve underperformance. As per the Productivity Commission report, "*APRA should take decisive action to oversee or direct a transfer of members to a better fund*."[10]

To this end AIST recommends that APRA be granted powers to compel mergers of failing funds.

Product coverage

8. Are there any significant issues to be expected when the test is extended to TDPs? If so, how could these issues be addressed?

AIST's long held position is that all APRA regulated accumulation products should be subject to the performance test. APRA has estimated that more than one dollar in every three invested in an APRA regulated superannuation funds is in a product that is not captured by either the MySuper or Trustee Directed Product definition. The exclusion of such a large portion of the members superannuation from scrutiny should be addressed by the extension of performance testing to all APRA regulated accumulation products.

In reviewing the application of the performance test and any unintended consequences for MySuper products any insights gained should be taken into consideration when finalising the approach for non-MySuper products, including TDPs.

Specifically in relation to TDPs, it is unclear how the performance test will apply for TDPs for merged funds.

TDPs for merged funds

In August 2021, APRA issued its information paper *Combining MySuper product performance histories – APRA's approach*. This paper discussed how merging super funds should consider performance history. This information paper does not include a discussion on TDP products for merging funds. AIST recommends that

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[9] Productivity Commission Report '*Superannuation: Assessing Efficiency and Competitiveness- Overview'* P.13

[10] Productivity Commission Report P.495

APRA amend this guidance paper to include clarity on how TDP products should be treated for those funds that merge.

Recommendation 10	Extend an improved annual APRA performance test to cover all APRA-regulated accumulation products.

9. What would be the impact of extending the current performance test to other Choice products (such as single sector or retirement products)? How could any issues be addressed?

As per AIST's previous submission to Treasury, for the purposes of best member outcomes, all APRA regulated products should be subject to performance assessment.

As noted in that submission, the annual performance assessment should be extended to incorporate all APRA regulated superannuation products in the legislation. Without this, the members of products not included in the YourSuper comparison tool and performance assessment will be unable to compare the performance of their fund.

In October 2021, APRA published an analysis of the performance of choice superannuation products titled *Choice sector performance: improving outcomes for superannuation members*. APRA's analysis highlighted underperformance in the choice sector showing:

- *Administration fees for choice products are materially higher on average than they are for MySuper products. The median disclosed administration fee as of 30 June 2020 for MySuper members with a $50,000 representative balance is $173, compared to $242 for choice members (40 per cent higher).*
- *There was considerable variation in investment performance for choice investment options with similar allocations to growth assets. For example, for investment options with 70 to 80 per cent growth allocation, investment performance ranged between 1.05 per cent p.a. to 8.60 per cent p.a. over the five years to 30 June 2020.*
- *Approximately 15 per cent of choice investment options underperformed a risk-adjusted, peer-derived benchmark7 by more than 75 basis points compared to 7 per cent of MySuper investment options 8 (based on analysis of data from the 2020 MySuper Product Heatmap).*[11]

As per the Productivity Commission report:

[11] APRA, Information paper: Choice sector performance: improving outcomes for superannuation members, October 2021, p. 5, apra.gov.au/sites/default/files/2021-10/Choice%20sector%20performance%20-%20improving%20outcomes%20for%20superannuation%20members.pdf

> *"while product heterogeneity in the choice segment makes product-level comparisons challenging, there is revealing evidence of material underperformance within this segment*."[12]

As superannuation is a compulsory system, it must perform and provide the best outcomes for all members.

A performance test tailored to the range of APRA regulated retirement income products would ensure that retired members could accurately assess the performance of their retirement investments. Significant consultation is required to determine the appropriate methodology and metrics to support assessment of retirement products, reflecting the differing objectives of managing retirement incomes compared to accumulation.

Recommendation 11	In consultation with the industry, APRA should commence work on developing a performance test appropriate to assessing retirement income products.

[12] Productivity Commission, p.107

YourSuper comparison tool

10. Does the comparison tool adequately inform members and prompt a behavioural response? Is the tool effective at informing new employees of their options when entering the workforce, including those who do not have an existing superannuation account?

The comparison tool should allow members to easily compare data and be developed using best practice principles on functionality and user experience. Greater insight on who is using the YourSuper tool and how they use the data will inform best practice functionality of the tool.

In preparing a response to this part of the review, AIST notes that fund feedback and suggestions for improvements to the comparison tool apply across all three questions. For instance, feedback regarding the exclusion or inclusion of certain metrics in the tool goes towards adequately informing members and eliciting positive consumer behavioural responses.

Lack of information regarding who is using the tool and how that information is used

As per the Productivity Commission Report:

> *"the regulators need to confidently and systematically collect more data relevant to assessing member outcomes, make these data public, and analyse the data to inform and prioritise their regulatory activities."*[13]

ASIC and the ATO are best placed to conduct consumer testing and assess who is using the comparison tool and how they are using that information. These metrics are important to understand consumer motivations and behaviours. AIST strongly recommends that the regulators should collect and analyse appropriate data if they are not already doing so.

This data collection will inform changes to the comparison tool that will prioritise member interests first and ensure that the data presented in the comparison tool can assist a member to make positive financial decisions. AIST recommends that once this data is collected, regulators should work with industry experts to modify the tool to balance functionality with consumer needs and sophistication. This may require a 'layered approach to the provision of information.'[14]

Prompting a behavioural response

AIST reiterates its previous advice that a comparison tool should not be relied upon solely to help minimise fund underperformance. The comparison tool should assist those Australians who want to use it to assess superannuation data from an impartial source, providing a simple and cost-effective way to educate and inform decision-making. AIST acknowledges that it is a challenge to increase informed member

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[13] Productivity Commission Report, p.44

[14] Ibid. p. 277.

engagement when it remains persistently low across the superannuation sector. However, there is an opportunity to provide a tool that is both flexible, comprehensive and user friendly.

As per the Productivity Commission Report:

> *"to engender optimal and well-informed decision making by members in a competitive and complex market such as superannuation, a range of consumer aids is required. These could include:-*
>
> - *readily comparable information on products and services;*
> - *easy access to the key metrics that matter in making decisions; and*
> - *access to affordable and impartial advice.'* [15]

We have set out methods that may assist in the comparison tool achieving these outcomes below at questions 11 and 12.

11. To what extent would altered or additional metrics, or improved functionality, make the tool more effective while ensuring it remains simple and clear? What more can be done to ensure that new employees are able to choose high-performing superannuation product that are appropriate for their needs?

Overly complex information and/or advice will adversely affect members' financial wellbeing and the system's efficiency.[16] The tool must balance simplicity in use and assist people to make fiscal choices, relative to their situation that result in better member outcomes. AIST notes that the tool links to the MySuper Dashboards of funds, and that this dashboard will have different figures for returns and fees as it is based on a different timeframe. This is likely to confuse consumers and may discourage them from taking further action.

As mentioned above, consumer testing is important to securing positive member outcomes. AIST considers the following changes will make the tool more effective for consumers to effectively assess superannuation products relevant to their needs.

Product comparisons by net returns

AIST reiterates the findings of the Productivity Commission report that products should default in order of best net returns and not fees charged.

AIST acknowledges that there can be a benefit to comparing products based on fees, particularly as there is a correlation between higher-fees and lower returns.[17] But low fees should not be the metric that products are sorted by in the first instance. Fees are only one factor amongst several important factors that may

[15] Ibid. p.249

[16] Ibid.p.266

[17] Productivity Commission report, pp. 187-188

influence consumer choice. Defaulting the tool to products based on overall net returns will provide consumers with the simplest comparative metric that incorporates fees into the overall net benefit. This would result in the simplest depiction of product performance and capture both fees and performance returns.

In addition, reported results should be graduated rather than relying on the current dichotomy between 'performing' and 'underperforming' products. This will better inform members about the comparative performance of their products, increase competitive pressures, and help place downward pressure on fees.

Include insurance offerings

The inability to use the comparison tool to consider insurance products may potentially result in consumer harm. Insurance is an integral part of the superannuation system and provides Australians with affordable life and TPD cover. Insurance is only briefly mentioned on the comparison tool page, and is not mentioned at all in the letter sent to members of funds that have failed the test. The importance of insurance in retirement outcomes is not explained in the comparison tool. AIST strongly recommends that the regulators include insurance in the comparison tool and explain its role in income protection.

For those in high-risk industries, net return or fees on products may not be the only factor when assessing the appropriateness of a superannuation product. For a consumer that may be new to the work force and operating in a high-risk industry, there is a risk that the choice of a super product based on only returns or fees may be to the exclusion of appropriate insurance cover. This is a heightened risk for those working in high-risk industries and are also under 25 years of age or with a balance below $6,000. Those members may want to ensure they have insurance coverage by a superannuation product as they are not automatically covered.

Explaining or extending categories to assist members to make better informed choices

Better information is needed to help members compare products. This includes ensuring that the comparison tool considers a member's specific circumstances:

Account balance: AIST acknowledges that there is a personalised comparison tool available in MyGov. However, new employees to the workforce would be required to use the non-personalised version, as may those who prefer to use that version. Given 4.66 million Australians have a superannuation balance of $37,000 or less, the comparison tool's default figure is an inappropriate metric which may result in less well-informed decision-making.

Age and risk: Although there is capacity to input age into the comparison tool, this does not factor in risk-appetite. Age, lifestyle, and investment goals will all influence risk-appetite. Older investors may prefer to be more cautious with investment strategies given the likelihood of recovering from loss in a short timeframe. AIST recommends that the comparison tool consider risk-appetite as a metric in the tool. This may assist a consumer to consider appropriate investment strategies to suit their super balance and their lifestyle.

More explanations and member education: The comparison tool should also explain the different product categories. We know that member engagement in superannuation can be low. A lower-engaged member using the tool may only consider net returns without understanding the categories of product. For instance, members may not understand that lifecycle products are designed for those wanting to generate income over the long-term with strategies changing depending on age. Filtering the comparison tool on pure performance without explaining product types may lead a person to choose the wrong product for their needs.

Performance metrics beyond eight years: Given the default nature of superannuation and the length of time that a typical Australian will be invested in a super product, consumers should be able to access as much information as possible on super fund performance. As the performance test and comparison tool continue to evolve, regulators have an opportunity to extend the comparison tool beyond its current shorter-term metric of eight years. Just as consumers can choose to compare funds through the tool by investment performance of three-year, five year or eight-year net returns, AIST recommends that the comparison tool continues to be extended beyond eight years as this data is accumulated. This means that if consumers choose to, they could compare fund performance over the long term. This will provide a meaningful outlook for a consumer to track performance of their superfund during their lifecycle. Given that this data is available and tracked in its current form, it is incongruous that it is not available as a metric for consumers to consider in superfund long-term performance.

12. As the test is applied to more superannuation products, should the comparison tool also be extended? Considering the volume and complexity of Choice products, how could the tool be extended in a way that is meaningful and digestible to members?

All choice super products should be included in the comparison tool.

The annual performance assessment and YourSuper comparison tool should cover all APRA regulated superannuation products in the legislation. Without this, the members of products not included in the YourSuper comparison tool and performance assessment will be unable to compare the performance of their fund.

AIST acknowledges that complexity with using the tool may increase with additional metrics. That is why we stress the importance of consumer testing, layering of the tool, and explaining filters and products (consumer education). Regulators must look to industry experts to modify the tool to ensure that it is optimised for simplicity and effectiveness.

As per the Productivity Commission report:

> *"a significant body of evidence has emerged through the Royal Commission and work by ASIC that conflicted and unsuitable advice pervades the super system."* [18]

Consumers must be able to compare a Choice product with a MySuper product, particularly if they have received advice to move. The comparison tool can assist in forming an independent view when a consumer has received financial advice to leave MySuper product. Given the majority of Australians have MySuper

[18] Productivity Commission (p.39)

products, these should be given primacy in the YourSuper comparison tool, with the ability to compare non-MySuper products if selected.

Recommendation 12	Extend the YourSuper comparison tool to cover all APRA-regulated accumulation superannuation products.
Recommendation 13	Amend the YourSuper tool to rank performance results by net returns before being ranked by fees – as indicated by the Explanatory Memorandum that accompanied the YourSuper Regulations. Reported results should be graduated rather than relying on the current dichotomy between 'performing' and 'underperforming' products.
Recommendation 14	To help inform the further improvement of the YourSuper tool, APRA and the ATO should collect data about who is using the tool and user-test how the information provided by the tool is being interpreted and used by members.
Recommendation 15	The regulators should commence work on integrating additional metrics into the tool including insurance, age and risk appetite, explanations of product categories, in addition to performance assessment periods beyond eight years.

Stapling

14. To what extent are employers putting into practice processes to seek stapled fund details from the ATO?

Superannuation funds do not have look-through to employer onboarding processes.

Completion of a choice form or nomination of choice via payroll software is a human-resources matter between the employer and their new employee. Funds are not directly exposed to the staff-onboarding procedure and do not receive copies of completed nominations to allow any meaningful assessment of employer practices.

A new member can now only default into a fund if they do not hold a stapled account, but they can actively choose to join the default fund. Funds' new member data does not draw a distinction between these two scenarios.

AIST compared the consultation paper statement that *"The ATO received nearly 290,000 stapled fund requests from the commencement of stapling on 1 November 2021 to 30 June 2022"* with ABS job mobility data to the end of February 2022[19]. Based on these figures, roughly 233,333 workers are onboarded, and 36,250 stapling requests are made per month, pointing to a 15.5% stapling request rate. This figure will exclude employees who knowingly nominate an existing fund, consciously nominate the default fund despite having an existing fund and those who knowingly do not have an existing fund so choose the employer default. It will only capture employees who do not complete or return a choice nomination or decline to provide details of accounts they are aware of.

Anecdotally, employer-servicing staff have reported that more new employees are bringing existing super accounts to their new roles, but it is unclear whether this is a result of stapling or an amplified focus on choice during onboarding.

A direct survey of employers via the ATO or various employer associations would provide a more robust and qualitative response to this question, but we note that in order for the assessment to be meaningful additional time should be allowed for the stapling measure to be embedded in processes, for example at least 12 months from its introduction on 1 November 2021.

14. (continued) How has the implementation of stapling changed onboarding, software and payroll processes for new employees?

While not a direct result of stapling measures, there is increasing infiltration of technology providers introducing onboarding and payroll solutions that act as paid distribution channels for financial product providers on a commercial basis.

[19] https://www.abs.gov.au/statistics/labour/jobs/job-mobility/latest-release

There are examples of HR/Payroll software providers which are free to employers, and earn a revenue stream from the delivery of financial services and products, such as superannuation, insurance and advice. They offer a menu of superannuation offerings but it is often unclear who the third parties are.

Employer-users of the software are thus encouraged to default job market entrants into potentially poor performing products that have been selected for their providers' willingness to back the technology system with referral payments rather than the application of quality filters such as performance or industry-appropriate insurance. This approach staples hundreds of thousands of young Australians to products that are not tailored to their employment, ignores relevant target market considerations and compromises member outcomes.

The ATO website notes that it is illegal for a super fund to give benefits to employers as an incentive to use them as their default fund. It would be valuable to consider whether such distribution models operate within the spirit of the law as there is still paid inducement, albeit via a backed third-party technology provider offering 'free' onboarding services. It is possible that in using these services employers may be breaching their obligations.

15. Are there any barriers in the current framework to achieve the intent of the stapling reform?

The professed intent of the Your Future Your Super legislation is to *"implement a number of key recommendations from the Productivity Commission [PC] review into superannuation and the 2019 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry [Hayne Royal Commission]"*, one of which is the single default account.

The stapling legislation as implemented fails to adequately deliver on either of the PC or Hayne recommendations when considered in the context in which they were made.

Productivity Commission

The Productivity Commission considered default arrangements and multiple account proliferation in detail, recommending that:

> *"RECOMMENDATION 1: Default superannuation accounts should only be created for members who are new to the workforce or do not already have a superannuation account (and who do not nominate a fund of their own)."*

They then went on to recommend a "Best in Show" shortlist that would ensure that default products had been independently assessed and "*judged as likely to deliver the best outcomes for members over the long term, with high weight placed on investment strategy and performance."*

In combination, these recommendations point to a need to protect default MySuper members from poorly performing products rather than locking them into them. This is borne out by the demonstrably low rates of members actively moving away from underperforming funds of their own volition. Disengagement should not be a barrier to good outcomes in a default system and consumer protections must be embedded in the default settings.

AIST and numerous other stakeholders repeatedly raised the issue of sequencing of the YFYS legislation as it contains no protections against stapling a new employee to an underperforming fund. A fund may be closed to new members due to failing a performance test yet still be permitted to receive contributions on behalf of existing members. Stapling should not be used as a mechanism to extend the lifespan of products that should by rights be exiting from the market.

17A (2) of the SIS Regulations set out the requirements for a fund to be a stapled fund. These should be amended to ensure that features of an eligible stapled fund include that

- it is open to new members;
- it is subject to annual performance testing; and
- it can provide appropriate insurance coverage for the member's current employment circumstances, including consideration of occupational and industry risk.

Recommendation 16	Eligibility to be a stapled fund should be restricted to funds that are open to new members and subject to annual performance/quality testing.

Hayne Royal Commission

Hayne backed the Productivity Commission's recommendation on single default accounts, coining the term 'stapling' in the process:

> *"Recommendation 3.5 – One default account. A person should have only one default account. To that end, machinery should be developed for 'stapling' a person to a single default account."*

While declining to comment on the assessment or quality of default accounts, Hayne emphasised that default arrangements for members who do not make informed choices about their superannuation were essential and that the employers' selection of default funds should be *"guided only by a proper assessment of what would be in the best interests of their employees"*.

While his comments were aimed at conflicts of interest arising from the treating of employers to gain or maintain default fund status, they do not discount the importance of the employer in ensuring their employees' industrial rights are respected.

The stapling reforms overrule the right of workers to collectively negotiate their default superannuation arrangements through workplace agreements and industrial awards, many of which nominate a default fund that is aligned with and tailored for the circumstances of their industry. They also overrule corporate plans that have been developed for the specific needs of a particular large employer or group of employers and may feature unique benefits such as discounted fees or employer-sponsored insurance premiums.

Under the current stapling regime, an employer is prevented from applying a quality outcomes assessment to their employees' super arrangements unless the employee holds no other account. Disengaged workers entering new industries with inappropriate stapled accounts are placed at a significant disadvantage as a result.

The Stapling Bill

The stapling legislation was introduced as a standalone Bill uncoupled from the operation of the rest of the YFYS provisions. Its Explanatory Memorandum states that its purpose is to

> *"stop the creation of, and payment of unnecessary fees and insurance premiums on unwanted multiple superannuation accounts that reduce retirement savings of members."*

If multiple account proliferation is to be the sole measure against which the success of the reform is to be measured, the multiple account data held by the ATO[20] should be scrutinised. Published data is currently to 30 June 2020, 16 months earlier than when the reform commenced in November 2021. It would also be valuable to interrogate the impact of the 2019 Protecting Your Super and 2021 Reuniting More Super reforms on the stock of legacy multiple accounts.

The stapling Bill declined to introduce any additional mechanisms to consolidate existing accounts. It can be argued that if an employee is disengaged enough from their superannuation to warrant a search for a main stapled fund, options to expose and encourage consolidation of other held accounts or to auto-consolidate non-stapled accounts (with appropriate opt-outs), should exist. While fee caps, default insurance restrictions and auto-consolidation provisions were introduced in the Protecting Your Super reforms, these only apply to low balance accounts.

16. What is the actual, or likely, impact of stapling on insurance coverage?

The ABS data cited above states that 1.6 million people were new entrants to employment during the year and 36% of these were in the 15 to 24 age group. This immediately points to more than half a million young people per year who will be setting up their first super account and can only receive default insurance through that account if:

- they actively opt into insurance while they are under 25 years old and their balance is under $6,000, or
- the fund they start with has a dangerous occupation exclusion that permits default insurance to apply regardless of the member's age or balance if they work in an occupation that is certified in the riskiest quintile of Australian occupations.

As stapling locks a likely disengaged person to their first account, there is no consideration given to the evolution of their career path and the specific relevance of the product they have become stapled to. Financial service providers are obliged to define their target markets and tailor their products appropriately but stapling works counter to these aims as products do not evolve as members do.

[20] https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Multiple-super-accounts-data/

Individuals changing roles into industries with different levels of risk are not prompted to consider their financial situation and whether any previously applied opt-ins or -outs should be carried over to new roles. Insurance coverage linked to a stapled account is not exposed in stapling results.

Industry-based protections were previously embedded in default settings through the negotiated inclusions or exclusions in MySuper group insurance offerings. As previously stated, the provision of insurance is an integral feature of the default MySuper system. Its importance was recognised in the creation of the Putting Members' Interests First legislation that permitted funds operating in high-risk industries to apply occupational exclusions to automatically extend coverage to young and low balance members.

With the advent of stapling, such protections now require active interventions to nudge stapled individuals into choice, which risks employers or funds stepping into the financial advice arena.

Government should weigh whether there is greater risk of consumer harm from holding multiple fee-charging products or holding one product that is inappropriate to the holder's situation.

Best financial interests duty

17. To what extent has the BFID required trustees to change their processes and procedures? Has this caused any unintended consequences or impacted member outcomes in any way?

AIST members have indicated that prior to the introduction of the Best Financial Interests Duty where material amounts of members money was being spent, there were robust assessment processes in place. This included business cases, including quantification of expected outcomes, cost–benefit analysis, statement of risks and mitigation strategies. This was in light of the duty to act in the best interests of members.

The introduction of BFID led to some refinement of these processes for significant expenditure. However, the main impact has been on expenditure that in insolation would be considered not material such as expenditure on office kitchen supplies or stationery. Undertaking business cases and enhanced legal and compliance reviews (due to the reverse onus of proof) for such items is time consuming and costly and does not appear to be in the spirit of overall package or measures.

In addition, the combination of a lack of materiality threshold with the reverse onus of proof means the starting point for each expense is a defensive position for each expenditure. This may be stifling innovative approaches to products and communications as new ideas may not have the weight of historical data and trends to support them in the same way 'tried and true' approaches do.

18. Are there certain types of expenditure or activity that trustees are particularly concerned about being able to prove compliance with the BFID in respect of? Why is it difficult to demonstrate compliance? Should there be a materiality threshold?

Having no materiality threshold combined with a reverse onus of proof, means that the possibility exists that an RSE could be prosecuted by the regulator for not having a robust business case for tearoom supplies. While it is unlikely the regulator would undertake such an action, the strict interpretation of the law means that it could occur. Therefore, prudent trustees dedicate time and resources putting together evidence for such expenditure. It is difficult to directly link such expenditure to the best financial interests of members but in order to maintain a professional work environment such expenditure is necessary.

A materiality threshold could be implemented that aligns with other legislative obligations, for example aligning the requirement to support a decision with the most robust analysis to the significant expenditure requirements as described in APRA's SPS 515

19. Is the reverse onus of proof the most appropriate way to achieve the objective of improving member outcomes?

While trustees rightly undertake rigorous business cases in line with the current interpretation of the need for expenditure to be in the best financial interests of members, AIST has concerns about the scope and application of the reversal of the evidential burden of proof.

A reversal of the evidential burden of proof is usually confined to offences that are serious, and where there are difficulties of proof, such as terrorism offences. While a breach of the duty would certainly be serious in the context of the superannuation sector, it is unlikely that a breach would be difficult to prove.

Trustees currently undertake detailed business cases to ensure expenditure is in line with trustee duties to members, however, there are concerns that the legislated civil penalty, paired with lack of guidance around what is required to satisfy a reverse burden of proof, has resulted in costly and overly complicated recordkeeping. This is heightened by the absence of a materiality threshold.

Without clear guidance around an appropriate materiality threshold, it is unclear whether or not trustees would need to conduct full analysis on every item of expenditure incurred within a fund. This can impact the proper functioning of the superannuation fund, particularly if such analysis is required on nominal expenditure items such as stationary orders or travel expenditure.

Neither the PC nor the FSRC recommended a reversal of the evidentiary burden of proof in the SIS Act.

It would be more appropriate align the approach with other civil penalty regimes and remove the reverse burden of proof. This would also align the approach with other regulated entities and reflect the risk profile of the superannuation industry.

Recommendation 17	The reverse burden of proof be removed, and a materiality threshold introduced.