Law Council
OF AUSTRALIA

Legal Practice Section

Your Future, Your Super Review

The Treasury

18 October 2022

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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 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. 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
- Mr Pier D’Angelo
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Ms Christine Smyth

The Section’s administration team serves the Section nationally and is based in the Law Council’s offices in Canberra.

Executive Summary

1. The Legal Practice Section of the Law Council of Australia's Superannuation Committee (**the Committee**) is pleased to provide this submission in response to the Treasury's review of the Your Future, Your Super Measures (**Review**) and the accompanying Consultation Paper.

2. In relation to the best financial interests duty in the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**), the Committee remains of the view that the word 'financial' ought to have never been added to the covenants in paragraphs 52(2)(c) and 52A(2)(c) by the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Cth) (**Amendment Act**).

3. The Committee recommends that the word 'financial' from paragraphs 52(2)(c) and 52A(2)(c) of the SIS Act be removed, such that the covenants would revert to imposing a best interests duty, which has a well-established legal meaning. This amendment would still require financial decisions to be made in the financial interests of members, but would avoid the fallacy and the fiction of non-financial decisions being made in the financial interests of members.

4. However, if the best financial interests duty is to remain in the SIS Act, a question then arises as to whether exceptions and/or a materiality threshold are needed. Legal practitioners are divided on this issue—an unintended consequence of the previous reform, as legal practitioners were overwhelmingly aligned with regard to the traditional best interests duty, whereas the best financial interests duty has created legal uncertainty which had not previously manifested:

    - On one view, the best financial interests duty (interpreted in the way in which the Explanatory Memorandum to the Amendment Act posited and parts of industry have adopted) gives rise to anomalies which should be addressed by creating exceptions and/or a materiality threshold.
    - Under the other view, the so-called best financial interests duty should properly be construed as having a different and narrower meaning than provided in the Explanatory Memorandum to the Amendment Act (and different from how many have in practice interpreted the reform). Under that view, no exceptions or materiality thresholds are needed.

5. The Committee considers that the Treasury may find these differences in legal opinion of interest in themselves, because they indicate that legal uncertainty has been increased, not reduced, by this reform. This is the opposite of what this amendment sought to achieve, as the Explanatory Memorandum to the Amendment Act states that 'the new best financial interests duty test is intended to clarify the existing best interests duty.'[1]

6. To the extent that some might argue that no exceptions or materiality thresholds are required, it is important to note that this is not because no anomalies are being experienced in practice. Rather, it is for the more technical legal reason that the duty might not mean what policy makers think that it means. Alternatively put, the anomalies can be side-stepped by adopting a strict legal interpretation which might be different from what others (including Government) assume to be the correct interpretation.

[1] Explanatory Memorandum, *Treasury Laws Amendment (Your Future, Your Super) Act 2022* 36.

7. The Committee also does not consider the reverse onus of proof to be the most appropriate way to achieve the objective of improving member outcomes and recommends that section 220A of the SIS Act be repealed. If retained, section 220A should be clarified in order to limit its application to proceedings brought by a regulator.

8. In relation to the performance test, the Committee suggests that consideration could be given for a different regulatory outcome to apply if a trustee-directed product (**TDP**) fails the applicable performance test to mitigate some of the issues that may otherwise arise. Where a TDP fails a prescribed test (however that is framed) the consequence might be for the trustee to be required to formulate and follow a specific 'rectification plan' to address the under-performance within a reasonable period.

Background

9. On 23 December 2020, the Committee provided a submission to the Treasury on the Your Future, Your Super measures, which at the time were at the exposure draft Bill stage.[2]

10. In that submission, the Committee set out why, in its view, the word 'financial' should not be added to the best interests covenants in paragraphs 52(2)(c) and 52A(2)(c) of the SIS Act. In summary, the Committee considered that:

    - no further articulation of the existing best interests duty was required;
    - the addition of the word 'financial' would introduce a significant change to the trust law meaning of the best interests duty;
    - the change would be inapt in the face of some financial and non-financial subtleties identified in the submission;
    - the statutory law already dealt with beneficiaries' financial interests via subsection 52(12); and
    - the change would create the risk of an incorrect focus.

11. In the same submission, the Committee also set out why, in its view, the burden of proof should not be reversed in relation to an alleged contravention of paragraph 52(2)(c). In summary, the Committee considered that:

    - a reversal of the burden of proof should be resisted even in civil matters;
    - there were very few precedents for reversing the burden of proof;
    - a requirement to keep applicable evidence should be sufficient; and
    - any reversal should not apply where the proceeding was brought by one or more private plaintiffs, as opposed to by a regulator.

Best financial interests duty

Unintended consequences

Question 17: To what extent has the best financial interests duty required trustees to change their processes and procedures? Has this caused any unintended consequences or impacted member outcomes in any way?

[2] Law Council of Australia, Your Future, Your Super package (Submission to the Treasury, 23 December 2020) <https://www.lawcouncil.asn.au/publicassets/019808a4-e859-eb11-9438-005056be13b5/3947%20-%20Your%20Future%20Your%20Super%20Package.pdf>.

12. The Committee considers that from a practical perspective, superannuation trustees themselves will be better placed to comment on any unintended consequences or impact on member outcomes from the introduction of the best financial interests duty. However, members of the Committee advise numerous superannuation funds and so can provide some observations about practical impacts.

13. Numerous superannuation funds have adopted policies which specifically address the best financial interests duty. Some policies require particular templates and/or business cases to be prepared for categories of expenditure. For instance, it is not uncommon for the templates which are used for board papers and board committee papers to now include a mandatory section which specifically addresses the question of whether a resolution is in the best financial interests of members and how so.

14. These templates have brought into focus how inapt the best financial interests duty can be for certain categories of decision. For example, some decisions are entirely prudent, appropriate and proper but cannot authentically be justified by pointing to any demonstrable financial benefit for members. Indeed, some decisions which are entirely prudent, appropriate and proper could even involve financial detriment to the fund, yet are abundantly in the best interests of members. An example of this is a decision to pay a disability benefit, which involves administering the fund in accordance with the trust deed (a matter which all members have a shared non-financial interest in), even though this inevitably involves financial costs (which could be avoided by rejecting claims).

15. Having observed the operation of the reforms for approximately one year, Committee members have observed trustees struggling to justify entirely appropriate non-financial decisions by reference to financial benefits which involve a level of fiction, fallacy and contrivance. This is an undesirable unintended consequence of the reform.

16. Examples of appropriate decision making (in the best interests of members) which are difficult to authentically justify on financial grounds include decisions:

    (a) on how to apportion a death benefit between beneficiaries;

    (b) on whether to pay a disablement benefit;

    (c) on whether to exercise a trustee's right to offset disability benefits from other sources to reduce the benefit payable by the fund;

    (d) on whether to exercise a discretion to allow a member to make a claim which is otherwise time-barred under the deed;

    (e) to approve policies required by the Australian Prudential Regulation Authority (**APRA**) prudential standards such as Outsourcing Policies and Fit & Proper Policies, as well as Privacy Policies, etc;

    (f) to approve charters for board committees;

    (g) to delegate certain internal authorities within a trustee entity from the board to senior managers;

    (h) to pay discretionary bonuses to staff;

    (i) to increase staff remuneration each year—for example, due to promotion, indexation or benchmarking;

(j) which involve expenditure to improve member servicing which are genuinely connected with the efficient operation of the fund, but which are not directly linked to financial benefits—for example, technology initiatives to reduce 'on hold' call waiting times by utilising new technology; and

(k) to incur costs in connection with regulatory compliance.

17. The Committee considers that the best financial interests duty has also rendered the justification of compliance costs more difficult. Under the previous best interests duty, such costs could have been justified on the grounds that a failure to comply could give rise to fines and penalties, and therefore compliance is in the best financial interests of members. However, now that fines and penalties must predominantly be borne personally by trustees, this particular justification is no longer feasible. As a matter of business ethics, it is not ideal that trustees are encouraged to justify 'doing the right thing' in the context of non-financial decisions, not because it is the 'right thing' per se, but in order to avoid a detriment for not doing so or in pursuit of indirect and contrived financial benefit.

18. As to any unintended consequences (or impact on member outcomes) from a legal perspective, the Committee points to the risk of the best interests duty, as amended to include the word 'financial', increasing the incidence of trustees seeking legal advice regarding their decision-making, with its own cost implications. Further, the Committee has observed an increase in the number of applications made by trustees for judicial advice (or applying for other forms of judicial intervention), which in turn has time and cost implications that could be relevant to member outcomes.

Materiality threshold

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

19. Given the purpose of the Committee, it has confined its response to the question of whether there should be a materiality threshold. It considers that superannuation trustees are better placed to respond to remaining subsidiary questions within question 18.

20. The Committee notes that the Consultation Paper does not include information regarding how a materiality threshold might operate. Having regard to the terms of question 18 and its discussion with Treasury representatives on 10 October 2022, there would seem to be two possibilities:

- first, a materiality threshold could operate as an exception to paragraphs 52(2)(c) and 52A(2)(c) of the SIS Act.
  - this possibility is dealt with immediately below; and
- second, a materiality threshold could operate as an exception to the reversal of the onus of proof;
  - this possibility is addressed further below, as part of the response to question 19.

The argument in favour of exceptions and materiality thresholds

21. As noted above, there are competing views within the legal profession in respect of what the best financial interest duty requires.

22. On one view, the duty focuses on the inputs into a decision-making process (rather than focusing on the outputs after the event), but requires a consideration of the anticipated outputs (as opposed to actual outputs) and requires there to be some sort of financial benefit arising from the proposed decision. Under this view, the anomalies referred to above are real in practical terms and industry grapples with them, regardless of what the technical legal position might be.

23. To address these anomalies, exceptions and/or materiality thresholds could be utilised, noting the Committee's preference for the word 'financial' to be removed from the covenant altogether as the preferred solution.

24. Under this approach, the exception and/or materiality thresholds would apply to the covenants themselves and not just to the reversal of the onus of proof. Adopting this perspective, exceptions would, ideally, be created. However, if the Treasury is confined to utilising a materiality threshold, this could be made to work.

25. The Committee considers that at the very least, it is the non-financial decisions which should be exempted from the best financial interests duty. This could be conditioned upon the decision being in the best interests of members instead. For example, the exercise of a power or discretion could be deemed to be below the materiality threshold if it does not pertain to expenditure and/or involves the exercise of a power or discretion which was not conferred for the purposes of furthering the financial interests of the fund (provided the power or discretion was exercised in the best interests of members).

26. If dollar-based materiality thresholds were to be adopted, they should focus on categories of expenditure (and not individual instances of expenditure). This would better align with the practical reality and the current legal position that trustees can approve annual budget in the aggregate if they are satisfied the budget is in the best financial interests of members. Trustees and trustee directors are rarely involved in incurring expenses which are provisioned for in a budget that the trustee and trustee directors have already approved. In light of this, any dollar-based materiality thresholds should focus on either percentage of funds under management or, say, percentage of annual operating expenditure or capital expenditure (as the case may be) to allow for funds of different scale and means.

The argument against exceptions and materiality thresholds

27. Other legal practitioners hold the view that the best financial interests duty ought not be interpreted in the manner alluded to in the preceding section.

28. The Committee notes that there is a considerable body of opinion to the effect that, prior to the insertion of the word 'financial' by the Amendment Act, paragraph 52(2)(c) of the SIS Act embraced little if anything more than the 'no unauthorised conflict' and 'no unauthorised profit' rules applicable to a fiduciary.

29. If this position is correct, then adding the word 'financial' was misconceived, in that it proceeded on a misunderstanding of the duty that was being amended. According to this school of thought, the question of *financial* interests was already dealt with in subsection 52(12) of the SIS Act, which provides that:

If the entity is a regulated superannuation fund (other than a regulated superannuation fund with no more than 6 members), the covenants referred to in subsection (1) include a covenant by each trustee of the entity ***to promote the financial interests of the beneficiaries of the entity*** *who hold a MySuper product or a choice product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes).* (emphasis added)

30. The Committee submits that practitioners holding this view (and even some who do not) would have considerable reservations about any proposal to create exceptions to paragraphs 52(2)(c) and 52A(2)(c) of the SIS Act. They, including some members of the Committee, are concerned about the prospect of these provisions being amended further, as now discussed in more detail.

31. Firstly, creating an exception to a covenant to exercise powers and perform duties in the best financial interests of fund beneficiaries would, on the face of it, seem odd to some. It may seem odd in the same way that creating a new exception, today, to conflicted remuneration, would seem odd. It is not a duty which, by its nature, suggests any need for express exceptions. On the other hand, limiting the exception to non-financial decisions, and conditioning the exception on the decision nevertheless being in the best interests of members, may mitigate that concern.

32. Secondly, it is unclear how the terms of the exception would be formulated. Under one approach, superannuation trustees could, as invited by question 17 of the Consultation Paper, identify a number of 'unintended consequences', which the Treasury could assess the legitimacy of and then seek to reflect these in the terms of the exceptions.

33. However, the Committee considers that this approach would be effectively the same as the approach underpinning the creation of the various exceptions to conflicted remuneration. Some of those exceptions have, obviously enough, resulted in retail clients receiving conflicted advice. Similarly, in this case, exceptions could result in trustees not exercising their powers in the best financial interests of beneficiaries.

34. In the Committee's view, if there are to be any exceptions, they must be narrowly drawn, clear and compelling. On the other hand, the sorts of exceptions and thresholds referred to in the previous section might be accepted as narrow, clear and compelling enough.

35. Thirdly, the very creation of exceptions would have the potential to colour the meaning of the covenants themselves. It is possible that the very existence of narrowly drawn exceptions could lead to a court to infer that the residual effect of the covenants is broader than it would otherwise be. This is why removing the word ‘financial’ from the covenants altogether would seem to be the preferred solution.

36. Fourthly, if it is assumed (for the moment) that any such exception was limited to setting a 'materiality threshold', the idea would seem to be that the duty would not apply if the decision or action at hand had financial implications below a specified threshold. The Committee considers that if that was the idea, then some would have reservations about it, such as:

    - specifying a particular threshold would be arbitrary, in the same way that the exception to conflicted remuneration for non-monetary benefits under $300 was (and remains) arbitrary; and
    - a threshold that might otherwise be considered suitable in the circumstances of a relatively small fund could easily be considered not to be suitable in the circumstances of a relatively large fund.

37. As noted in the preceding section, there is nothing in the current law that precludes trustees and trustee directors from approving expenditures in aggregate (for example, at the budget level). Having a materiality threshold which focuses on individual expenses is out of line with commercial practice (since those decisions are not made in the board room) and inconsistent with what is permitted by the current law.

38. Fifthly, the practical question arises: if a materiality threshold is set at a reasonably low level, is there really any need for it in the first place? Again, the Committee considers the exception to conflicted remuneration for non-monetary benefits under $300 to be illustrative. Indeed, it can be difficult to imagine a situation in which a non-monetary benefit worth less than $300 could reasonably be expected to influence any financial product advice or recommendation that might be given to a retail client. Similarly, in this case, it might be difficult to imagine a situation in which a decision with a genuinely immaterial impact on members' financial interests could be held to involve a contravention of the applicable covenants. It might also be difficult to imagine anyone, whether a private plaintiff or a regulator, taking the step of commencing proceedings in respect of any such decision.

Reversal of the onus of proof

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

39. The Committee does not consider the reverse onus of proof to be the most appropriate way to achieve the objective of improving member outcomes. As noted above, the Committee considers that the onus of proof should not have been reversed, and that the provision giving effect to the reversal – section 220A of the SIS Act – should be repealed.

40. In the event that the Minister is not minded to repeal section 220A, the Committee submits that it should nevertheless be narrowed.

41. At present, section 220A of the SIS Act applies in 'civil proceedings for a contravention of subsection 54B(1) in relation to a covenant set out in paragraph 52(2)(c)'. Section 54B(1) provides that a person must not contravene a covenant that is to the effect of a covenant set out in section 52 and is contained or taken to be contained in a fund's governing rules.

42. According to subsection 54B(3), subsection 54B(1) is a civil penalty provision, with the consequence that Part 21 of the SIS Act provides for civil and criminal consequences of a contravention as follows:[3]

- Under Division 2 of Part 21, provision is made for applications for, and the imposition of, civil penalty orders, when a civil penalty provision has been contravened, in which:
  - an application for a civil penalty order may only be made by a regulator or their delegate;[4] and
  - an application for a civil penalty order is deemed to be a civil proceeding.[5]

[3] See also *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*') para 193(aa).
[4] Ibid s 197.
[5] Ibid s 199.

- Under Division 3 of Part 21, provision is made for criminal proceedings in respect of a civil penalty provision.
- Under Division 5 of Part 21, provision is made, on an application for a civil penalty order, for the Court to order that the superannuation fund be compensated in respect of loss or damage suffered as a result of the contravention.

43. There may be a perception that, because section 220A is contained in Division 6 (Miscellaneous) of Part 21, the reversal of the onus of proof only applies in a civil penalty proceeding brought by a regulator. If so, the Committee is concerned that this perception is wrong and that the reversal of the onus of proof may also apply in a proceeding for the recovery of loss or damage under section 55.[6]

44. Under subsection 55(3), a person who suffers loss or damage as a result of conduct of another person that was engaged in contravention of subsection 54B(1) may recover the amount of the loss or damage by action, provided the action is commenced within 6 years after the cause of action arose.[7]

45. An action for loss or damage brought under subsection 55(3), where the ultimate allegation is an allegation of contravention of paragraph 52(2)(c) is a 'civil proceeding for a contravention of subsection 54B(1) in relation to a covenant set out in paragraph 52(2)(c)'. In other words, an action brought by one or more private plaintiffs under subsection 55(3) is one that falls within the literal terms of section 220A. The Committee notes that the express reference to ‘the Regulator’ in paragraph 220A(2)(b) may indicate an intention that the provision is to apply more narrowly, however that construction is not clear.

46. The Committee considers it is inappropriate for the reverse onus of proof to apply in a private civil proceeding under subsection 55(3). If retained, section 220A should be clarified in order to limit its application to proceedings brought by a regulator. In any event, the Committee submits that section 220A should be amended to expressly state that it has no application in respect of any proceeding commenced under any regime, or on any basis, other than Part 21 of the SIS Act.

47. The second narrowing of section 220A suggested by the Committee is that, if the reversal of the onus of proof is retained, it should only apply to a proceeding by a regulator *for compensation*. It should not apply to a proceeding where a regulator is seeking a pecuniary penalty under Division 2 of Part 21.

48. The Committee considers that the rationale for this second proposed narrowing is simple. In the same way that it is unjust to reverse the onus of proof in a criminal proceeding, so too is it unjust to reserve the onus of proof in a proceeding for a pecuniary penalty. Both kinds of proceeding are penal, even though section 199 of the SIS Act deems (contrary to the true state of affairs) the second category of proceeding to be civil (for the specific purpose of making it easier for the regulator to obtain the outcome sought).

49. Whatever the merits or otherwise of deeming a proceeding for a pecuniary penalty to be civil, the fact of the matter is that it is unjust to go further and reverse the onus of proof. The Committee submits that no-one says that a motorist should be liable to pay a fine for speeding unless they can prove they were not speeding. Similarly, it is one

[6] This appears to have been presumed by Burnett J in *Steer v AMP Life Limited & AMP Superannuation Ltd* [2021] SADC 109, [92], though ultimately his Honour concluded that section 220A did not apply to the proceeding because it concerned pre-1 July 2021 conduct.
[7] *SIS Act* s 55(4).

thing to put the trustee at a fundamental disadvantage if the question is (merely) whether a declaration of contravention should be made,[8] or whether the fund should be compensated.[9] It is another to put the trustee at a fundamental disadvantage where the question is whether the trustee should be penalised.[10]

50. The Committee suggests that one way of giving effect to this narrowing would be to expand subsection 196(4) to provide that a pecuniary order must not be made if section 220A has been relied on, to any extent, in establishing the contravention of paragraph 52(2)(c).

51. Finally, the Committee returns to the idea of a materiality threshold and, this time, whether it could operate as an exception to the reversal of the onus of proof. While, as set out above, there are differing practitioner views with respect to the idea of a materiality threshold operating as an exception to the primary covenants, the Committee is in broad agreement as to the idea of a materiality threshold that operates as an exception to the reversal of the onus of proof.

Performance test

Notification requirements

Question 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? Are there ways this could be improved?

52. The Committee offers suggested changes to the prescribed regulatory notice at **Annexure A**, aimed at ensuring:

- factual information and objective language are used;
- a past performance warning is included;
- possible adverse insurance impact is considered; and
- the member considers what is appropriate in their circumstances before making a decision.

Extension beyond MySuper

Question 8: Are there any significant issues to be expected when the test is extended to trustee-directed products? If so, how could these issues be addressed?

Question 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?

53. For MySuper products that failed the performance test, the Committee has previously canvassed the option of a prescribed 'rectification plan' response and reporting as an alternative to the legislative outcome adopted in the SIS Act.[11]

[8] Ibid s 196(2).
[9] Ibid pt 21 div 5.
[10] Ibid s 196(3).
[11] Law Council of Australia, Exposure Draft Regulations to support Treasury Laws Amendment (Your Future, Your Super) (Submission to the Treasury, 25 May 2021) <https://www.lawcouncil.asn.au/publicassets/fdded65f-8f16-ec11-9440-005056be13b5/4008%20-%20Treasury%20Laws%20Amendment%20-%20Your%20Future%20Your%20Super%20Measures.pdf>.

54. Given that TDPs are not default MySuper products – meaning that they have been actively selected by members – consideration could be given for a different regulatory outcome to apply if a TDP fails the applicable performance test to mitigate some of the issues that may otherwise arise. While this is a matter of policy for the Government, the Committee seeks to raise it to inform Government of other options that may be available and it does not take a view as to whether any options are appropriate or preferable.

55. Essentially, rather than two strikes forcing the closure of a TDP to new entrants, where a TDP fails a prescribed test (however that is framed) the consequence might be for the trustee to be required to formulate and follow a specific 'rectification plan' to address the under-performance within a reasonable period (e.g., one to three years).

56. The Committee envisages that such rectification plans would be required to be lodged with APRA; notified to relevant members (and designated on disclosures for that investment option); and periodically reported on to APRA. If the trustee fails to implement the rectification plan to the satisfaction of APRA, it would have the express power to direct the closure of the TDP to new members upon reasonable prior notice.

57. The Committee notes that in a different context, in relation to trustees who breach the in-house asset rules, section 82 of the SIS Act adopts a similar rectification approach which requires trustees to prepare a written plan setting out steps to rectify the breach.