

Your Future, Your Super Bill introduced into Parliament

Legislation Update, 23 February 2021

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On 17 February 2021, the Government introduced and read a first time *Treasury Laws Amendment (Your Future, Your Super) Bill 2021* (Bill). The Bill was then referred to the Senate Economics Legislation Committee with a report due on 22 April 2021.

The Government originally announced the Your Future, Your Super reforms in the 2020-21 Budget in October 2020. Treasury's consultation on exposure draft legislation and explanatory materials followed in November 2020.

The reforms are scheduled to commence 1 July 2021.

While the Bill does not differ substantially from the exposure drafts, the Bill includes the following key changes. Further changes are also included in the explanatory memorandum.

Schedule 1 - Stapling

The **key substance** of this part of the Bill **remains unchanged**. It seeks to amend the *Superannuation Guarantee (Administration) Act 1992* to limit the creation of multiple superannuation accounts through the introduction of a "stapled fund." The substantive definition of "stapled fund for an employee" will be prescribed in regulations.

The following changes to the Bill are worth noting:

- **Employment that began on or after 1 July 2021:** Clarification that the choice of fund rules are not complied with where an employee has a stapled fund and started employment **on or after 1 July 2021** relating to contributions made to a default fund chosen by the employer; or fund specified under workplace determination or enterprise agreement.
- **Successor Funds:** Clarification that an employer can make contributions to a successor fund where the employer has been making contributions to the fund as a stapled fund and the employee's interest in the stapled fund is transferred to a successor fund without the employee's consent. The employer will not be required to make a further request to the ATO about whether the employee has a stapled fund.
- **Reduction of SG Shortfall:** The ATO will have discretion to reduce an employer's shortfall where the employer was notified of a stapled fund by the ATO, the fund did not accept the contributions and the employer makes a late contribution to any fund on behalf of the employee.

Schedule 2 – Annual Performance Test

The **key substance** of this part of the Bill **remains unchanged**. The Bill seeks to amend the SIS Act to require APRA to conduct an annual performance test for MySuper and other products. Of particular importance is that the Bill, like the Exposure Draft, leaves details related to the Annual Performance Test to be prescribed in regulations.

The following changes to the Bill are, however, worth noting:

- **Part 6A Product:** "Part 6A product" is defined in a new section 60B of the SIS Act as "(a) a MySuper product; or (b) a class of beneficial interest in a regulated superannuation fund, if that class is identified by regulations made for purposes of this paragraph."
- **APRA Publication:** APRA must publish on its website (or a website controlled by it) any notification relating to its determination of whether a Part 6A Product has met the test.
- **Returns:** A new provision in the new section 60D of the SIS Act provides that requirements specified in respect of investment returns may relate to investment returns net of fees and/or tax.
- **Methods and assumptions:** Regulations on the methods and assumptions of the test to be made.
- **Family Law:** Where a product fails the annual performance test for two consecutive years and the trustee is prohibited from accepting new beneficiaries into that product, the prohibition will not apply in relation to a person who becomes a beneficiary as a result of a payment split within the meaning of the *Family Law Act 1975*. As stated in the Explanatory Memorandum this ensures a trustee can create a new interest for a non-member spouse in a product to give effect to a payment split.
- **Notification date:** While the requirement that a notification to beneficiaries is given within 28 days of APRA's notice of test results, the Bill now gives both ASIC and APRA the ability to extend this deadline.
- **Notification details:** The Bill prescribes the method required for notification to beneficiaries in event of a failed performance assessment. The notice be sent by both "pre-paid post or by courier" and an electronic communication.
- **Fair Work Commission:** APRA must notify the Fair Work Commission of a determination that a MySuper product is prohibited from accepting new beneficiaries, and of its determination that a prohibition is lifted.
- **APRA resolution powers:** Includes the facilitation of the resolution of a connected entity as a prudential matter for APRA where it is reasonably necessary to facilitate resolution of the RSE; or to protect the interests of the beneficiaries of the RSE; or to meet the reasonable expectations of the beneficiaries of the RSE.

Schedule 3 – Best Financial Interests

Key changes relating to **directors and the best financial interests duty** are introduced in this part of the Bill. The Bill generally seeks to amend the SIS Act to require each trustee and director to act in the best financial interests of beneficiaries.

The following **key changes** are worth noting:

- **Directors:**
 - (1) **Removal** of proposed section 34AA which provided that a director commits an **offence** where there has been **non-compliance with operating standards** and the director was in a position to influence the conduct of the trustee and the director failed to take reasonable steps.
 - (2) **Removal** of proposed section 220A which applied a **reversed evidential burden of proof to an alleged breach of the best financial interest duty** – applying a presumption that a director did not perform their duties and exercise their powers as director in the best financial interest of beneficiaries, unless the director adduces evidence to the contrary (the reversed evidential burden still applies to trustee).

(3) **Removal** of proposed section 117B which placed an obligation on directors **to ensure** that the corporate trustee **does not make a payment or investment** prescribed by the regulations.

- **Best financial interest regulations:** Regulations can be made that prescribe requirements related to the best financial interests duty. *Note that the evidential burden is not reversed in relation to any best financial interests requirements that will be prescribed in the regulations.*
- **Contracts:** The amendments related to the best financial interests duty do not apply in relation to the performance of duties, or the exercise of powers, under a contract entered into before the commencement of the amendment. They do apply, however, in relation to a decision to renew or vary, where the decision is after commencement; if the contract is renewed on or after commencement; and if the contract is varied on or after commencement.

New provision is added to the Bill which seeks to **amend the Corporations Act to remove the exemption** in section 1017BB(5A) allowing trustees to choose not to disclose up to five percent of investment items related to investments that are commercially sensitive and making the information public would be detrimental to members' interests under the **Portfolio Holdings Disclosure** rules.

CONTACT US

If you have any questions or need assistance, you can contact us directly via the details below:



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