



FINANCIAL
SERVICES
COUNCIL

Treasury Laws Amendment (Your Future, Your Super) Bill 2021

FSC Submission to Senate Economics Committee

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advice licensees and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Introduction

The FSC welcomes the opportunity to comment on the *Treasury Laws Amendment (Your Future, Your Super) Bill 2021*.

The FSC has consistently advocated for reforms that will improve the efficiency of superannuation and improve outcomes for members, and we support the overall intent of the legislation.

The package will significantly alter the trajectory and purpose of the superannuation system. On balance the FSC supports the reforms, and whilst this submission only addresses technical detail arising from the Bill, we note in the broader context it is important for the Government to continue to work through issues raised by industry and ensure the measures align with the objective of our retirement system.

The FSC particularly welcomes the introduction of measures to implement the recommendations of the Royal Commission and Productivity Commission that individuals should hold a single default superannuation account. This will be particularly important as the COVID-19 economic recovery continues and people return to work. FSC analysis prepared for this submission shows that the introduction of a single default account could save individuals switching jobs up to \$1.8 billion in additional fees on unintended duplicate accounts over the first three years of the reforms.

We also note that the enabling legislation for these changes delegates a substantial amount of detail to regulations, which have not yet been released for consultation. In the absence of draft regulations, it is difficult for the FSC to comment on the actual operation and impacts of some of the measures in the Bill.

We look forward to consultation on draft regulations, and would welcome the opportunity to provide further feedback to the Committee once we have had the opportunity to examine the additional detail contained in the regulations.

3. FSC Recommendations

1. Clarify arrangements for providing updated account information to employers when a member's stapled account details change.
2. Ensure the ATO YourSuper comparison tool provides appropriate information to support consumer decision-making, including nudges in relation to insurance coverage.
3. Provide appropriate education and support to employers to ensure a smooth implementation of stapling changes.
4. Develop an appropriate methodology for applying the performance assessment to lifecycle products, in a way that reflects member experience.
5. Ensure lifecycle products are displayed on the YourSuper comparison tool in a way that provides useful information about performance to individuals.
6. Undertake further consultation on the definition of a Trustee Directed Product.
7. Specifically exclude fund mergers and other SFT processes from having performance data stitched together where one product is wound up as part of the SFT.
8. Amend legislation to incorporate funds that do not have a 7-year or longer performance history into the performance benchmarking process.
9. Ensure the YourSuper portal is designed to include new entrants to the superannuation market, with appropriate notations where necessary.
10. Ensure regulations are drafted to allow appropriate time for APRA to complete performance benchmarking and assessment after receipt of relevant data, to ensure high-quality results.
11. Provide an appropriate mechanism for review or re-issuance of a determination where genuine errors have occurred.
12. Ensure requirements for communications to members in relation to fund performance are technology neutral, and are specifically able to be provided in an electronic format where appropriate.
13. Clarify process for employers where their existing default fund is unable to accept new members.
14. Clarify the application of the best financial interests duty in relation to third party expenses through regulations.
15. Clarify that expense approvals may continue to be delegated, where the Board is ultimately accountable for expenses.
16. Clarify that long-term investment decisions, including those which incorporate ESG factors, are not in conflict with the best financial interests duty.

4. Implementation Risk

The FSC supports the objective of the Your Future, Your Super measures, and does not wish to unnecessarily delay implementation of changes that will improve member outcomes.

However, given the absence of regulations and the inability for this legislation to be passed until weeks before the current implementation date, FSC members have expressed concerns about the risks associated with implementing some of the measures in the Bill in a short space of time.

Rushed development of the ATO's consumer-facing YourSuper comparison tool could limit its utility for users, particularly if information is not able to be presented in a format that is meaningful for individuals using the tool. The ATO will be an important, impartial vehicle for the comparison of superannuation funds, and should be developed with a view towards its long-term success and credibility.

In the absence of finalised legislation and having yet to see draft regulations, it is also difficult for superannuation funds, employers or the ATO to undertake necessary activities to prepare for the implementation of stapling changes.

We are also aware that the need to implement these substantial changes on a compressed schedule means the ATO will only be able to provide a manual system for requesting stapled funds be identified for new employees by 1 July. This is not an optimal outcome for employers, particularly those who take on large numbers of new employees for seasonal work, as it creates significant new compliance requirements. It also means that additional changes to employer processes are likely to be required as ATO system changes are further refined.

Appropriate time is also required to ensure that funds have processes in place to ensure full compliance with the new Best Financial Interests requirements and are prepared to respond to the outcomes of the APRA performance test.

The FSC recommends Government consider appropriate timeframes for commencement of each measure in the Bill, which balances the need to implement consumer protections with the importance of a smooth implementation process which does not introduce unnecessary risk to member outcomes.

5. Comments on the Bill

5.1. Single default account

The FSC strongly supports the introduction of measures to prevent the creation of unwanted duplicate accounts, and we agree that stapling members to a single, high quality fund is the most appropriate approach.

To support the implementation of the policy the FSC has conducted analysis to assess the likely fee savings that will occur as a result of stapling consumers to their accounts.

The FSC analysis uses recent data from the 2020-21 Budget forecasts to estimate the higher than usual potential savings on fees that could arise in the unique circumstances post the COVID-19 induced downturn. Not only will there continue to be Australians starting new jobs, but there will be an additional, substantial cohort of Australian's re-entering the workforce in new employment after having lost their job during shutdowns.

These two scenarios combined will likely result in a higher than usual creation of new duplicate accounts and the charging of multiple superannuation fees unless action is taken to prevent this.

The FSC's analysis shows that implementing the stapling recommendation should be a priority for Parliament as it is estimated to save consumers almost \$1.8 billion in excess superannuation fees in the next three years.

Table 1. Estimate of fee savings from the single default account reform

	FY21-22	FY22-23	FY23-24
Number of Australians forecast to change employment	1,071,700	986,700	1,100,800
Estimated fee savings	\$409.8m	\$601.8m	\$778.6m
	Total fee savings		\$1,790.2m

Clarifying practical application of stapling

The FSC supports the stapling approach outlined in the legislation and explanatory materials, which establishes a single stapled product which a member can carry with them until they make an active choice to change.

Determining a stapled account

In general, the FSC supports the use of the tie-breaker rules that form part of existing rules which are currently used by the ATO to enable pro-active consolidation of ATO-held super to a member's active account in instances where an individual holds multiple superannuation accounts.

The implementation of suitable rules for stapling purposes is particularly important given recent ASIC litigation against funds that have systemically blocked rollovers for allegedly unlawful reasons in order to retain customers and artificially bolster funds under management. It is clear that the mechanism for stapling must be fair and enforceable.

However, some variations from these existing rules may be necessary to ensure a sensible approach to determining a stapled fund. For instance:

- including the presence of active insurance cover, potentially below other signs of account activity such as contributions in the list of factors to be considered, but above the size of the account;
- prioritising accounts with recent contributions over the most recent account to receive an ATO rollover;
- considering recently opened accounts (and ensuring there is the opportunity for a member to designate a new account as their stapled account);
- ensuring accounts unable to accept contributions, such as Eligible Rollover Funds and risk-only accounts, are not able to be designated a stapled fund.

Where ATO discretion may apply, the ATO approach for exercising discretion should be transparent, and ideally subject to consultation before being finalised.

In some of these scenarios, it will be important that the ATO is able to proactively push updates to stapled fund information to employers to ensure that SG payments are made into the correct stapled account. For example, if a member closes an existing stapled account but does not notify their employer of this change, or leaves an employer and is unable to remain in an employer's default fund, it would be preferable for the employer to be notified before they attempted to make an SG contribution into the closed account.

Recommendation

1. Clarify arrangements for providing updated account information to employers when a member's stapled account details change.

Role of ATO comparison tool

Stapling members to a single default account must also be supported by a robust online tool to empower members reviewing and engaging with their superannuation. The ATO YourSuper comparison tool will play a central role in assisting superannuation members to exercise choice, particularly within the MySuper market.

Stapling could be successful in engaging members with their super, including reviewing the ongoing appropriateness of insurance benefits, but only if members are provided with the opportunity to review their superannuation arrangements regularly and at appropriate times, especially when they are changing jobs (for example through the ATO's Single Touch Payroll onboarding process). An online solution that has universal participation, as recommended by the Productivity Commission, is necessary.

The YourSuper tool should provide information about all fees, as well as investment returns, in a format that is meaningful to consumers, allows them to assess all products against their needs, and identifies factors which are not included but which they may need to consider (such as fee discounts available to them, insurance cover etc).

Regular, appropriate nudges will also need to be provided to support decision-making and ensure good outcomes for individuals making use of the tool.

These nudges should include specific reference to insurance cover, to ensure that Australians are aware of the cover they hold, are prompted to check whether it is appropriate for their circumstances (particularly for those in high-risk occupations or moving from a high-risk to lower risk role) and understand how their cover might be impacted if they switch between products.

Recommendation

2. Ensure the ATO YourSuper comparison tool provides appropriate information to support consumer decision-making, including nudges in relation to insurance coverage.

Extension of the ATO tool to choice products

While we continue to support the introduction of a simple online comparison tool for MySuper products, the FSC also has concerns about including the broad range of available choice products in a consumer-facing tool without appropriate guidance.

Not all products are suitable for all individuals, and complex choice products are generally designed for use by a financial adviser who works with an individual to build a portfolio, often combining more than one choice investment option, that meets their specific needs and goals.

For most individuals who would be likely to utilise an online comparison tool, a MySuper product or a vanilla choice product (with similar features to a MySuper product) would be more appropriate for their needs than a platform or wrap product

For this reason, it should be a higher priority over the coming years to improve functionality in the ATO tool for MySuper and trustee-directed choice products, than to incorporate more complex choice products into a consumer-facing tool as some stakeholders have proposed.

It may also be appropriate to provide a nudge for users who are directed to the ATO tool but are currently in a more complex product, to advise them that their current superannuation account is more complex than the options provided, and that they may wish to seek financial advice before making any changes.

Employer transition

Given the role of employers in implementing the changes in this amendment for new employees from 1 July 2021, it will be vital that appropriate awareness and education programs are in place to ensure compliance.

Employers will need to be familiar with their obligations and the appropriate processes and timeframes associated with new requirements including having the ATO verify stapled fund details for new employees. If employers are not prepared for these changes then there is a significant risk of non-compliance with Superannuation Guarantee payment obligations, particularly in the first year of operation before an automated process is in place for obtaining stapled account details from the ATO.

Support for impacted employers may also be required at the point where an underperforming superannuation fund is required to cease accepting new members (see section 0 below).

We recommend that specific timeframes are included in the legislation defining when an employer is required to verify stapled fund details with the ATO following the onboarding of a new employee, as well as the timeframes by which the ATO is required to respond to an employer's request.

Recommendation

3. Provide appropriate education and support to employers to ensure a smooth implementation of stapling changes.

5.2. Addressing underperformance in superannuation

Measuring superannuation product performance

The FSC supports the introduction of objective performance testing for MySuper products.

We have concerns, however, that while funds have historically been required to set CPI-linked investment return targets, and have measured themselves against these targets in Government mandated dashboards, they will now be retrospectively assessed against a new benchmark.

Given the detail of the performance test is delegated to regulations, this submission does not include detailed views on the performance testing methodology. However, we note the flexibility provided in the legislation for the regulations to specify multiple metrics and benchmarks, and encourage the Government to make use of this flexibility to ensure the performance assessment approach remains fit-for-purpose over the long term.

Lifecycle products

The underperformance measures in the Bill as drafted specify application of the underperformance test at a product level. While this is appropriate for a MySuper product with a single investment approach (e.g. a Balanced investment option), it does not provide a meaningful outcome for individuals in lifecycle or lifestage MySuper products.

While Treasury have indicated that a weighting approach may be used to apply the performance test to lifecycle products, it is not clear how this will be applied. This is concerning for trustees, given they are not yet able to determine how the test will be applied, or prepare for

its implementation and potential impact on members despite the proposed commencement date being less than four months away.

Further work will also be needed to ensure that MySuper products with lifecycle investment strategies are presented on the ATO comparison tool in a way that is useful and meaningful for individuals comparing funds.

Recommendation

4. Develop an appropriate methodology for applying the performance assessment to lifecycle products, in a way that reflects member experience.
5. Ensure lifecycle products are displayed on the YourSuper comparison tool in a way that provides useful information about performance to individuals.

Trustee directed products (TDPs)

The Bill notes that the APRA performance assessment process will apply to classes of beneficial interest other than MySuper, as identified in regulations.

The information paper released on 6 October 2020 indicates that the Government intends to extend the performance test to 'trustee directed products' in 2022, and defines these as choice superannuation products where the investment strategy is designed and controlled by the trustee, and where the investment strategy covers multiple asset classes.

The FSC welcomes acknowledgement that performance assessment is not suitable for all choice products. Products such as wraps and master trusts, which allow members to combine investments to construct their own superannuation portfolio, cannot be meaningfully performance tested.

Importantly, though, these more complex products are generally accessed by individuals through a financial adviser, who is required to act in the best interests of their client and make appropriate investment decisions which align with their retirement goals. These products are also subject to the incoming Design and Distribution Obligations (DDO) regime, so providers will be required to identify the appropriate target market for the investment options offered.

It should also be noted that the SIS Act definition of 'choice' products includes not just accumulation products but all products which do not meet the definition of MySuper or Defined Benefit products. This includes retirement, risk-only insurance and transition-to-retirement products, which are unlikely to be suitable for performance testing.

The FSC recommends the Government undertake further consultation on the definition of TDPs to be included in the performance assessment.

Recommendation

6. Undertake further consultation on the definition of a Trustee Directed Product.

Re-entering the market after two failed tests

The legislation proposes that a trustee who fails the performance test for two years in any eight-year period will be prevented from accepting new members.

It would be appropriate for trustees that have received ‘two strikes’ against the new benchmarking methodology to be able to apply for a second test to demonstrate that their performance is improving on a risk-adjusted basis.

This will address instances where:

- a good fund has been unfairly penalised by the benchmarking methodology; or
- a fund has proactively sought to address issues that were impacting performance, but historical underperformance is impacting their ability to pass the test.

A second test would enable trustees to either:

- avoid being prohibited from receiving new members after the second strike; or
- be permitted to start receiving new members if they have previously been cut off and taken time to improve their performance.

Several models have been proposed for a secondary test to allow funds to re-enter the market. The FSC proposes that a second test should require funds to pass a risk-adjusted returns test over a shorter, specified timeframe.

This will demonstrate that while the fund may have had prior issues with performance, it is currently delivering good outcomes for its members.

The detailed work undertaken by the Conexus Institute in relation to a risk-adjusted performance test could be used to inform the development of a secondary test.

Merging performance

Section 60F of the bill specifies that, in certain circumstances, two or more products may be treated as one and have their performance ‘stitched together’ for the purpose of the performance test.

While we understand that this section is intended as an anti-avoidance measure, stitching together performance histories of products could have an impact on potential product simplification and merger activity where trustees have concerns about historical underperformance.

The current drafting of proposed section 60F is quite broad, and allows APRA to exercise its discretion in terms of the circumstances in which multiple products may be treated as one product for the purposes of the annual performance test.

This means that following a merger of funds, or products, the investment performance history of both products may be considered for the purposes of the annual performance test. It will be

important that the approach taken to merging historical reforms provides appropriate and meaningful outcomes, including in scenarios where:

- a new MySuper has been established for the purposes of facilitating a merger;
- a MySuper product is wound up as part of an SFT process;
- internal fund consolidation results in MySuper products being merged or wound up.

High performing funds are less likely to absorb poor performers if there is a possibility that the underperforming product may be taken into account in the high performing fund's next assessment. Under these circumstances, it would be difficult to justify merging with an underperforming fund as being in the best interests of current members. Given the fund merger requirements of member best interest and member equivalency, Trustee's may be precluded from voting in support of mergers where previously product history is included to determine the product performance. This may result in reduced fund mergers and consolidation which is not aligned to Government policy intent.

To send a clear signal to trustees that consolidating with a poor performing product will not affect investment performance, the legislation should specifically exclude such cases for the purposes of proposed section 60F.

The application of the test should also ensure that, where a fund makes improvements to one or more existing products in response to a performance benchmark result, this would not constitute an attempt to by-pass the consequences of future performance benchmark tests.

Recommendation

7. Specifically exclude fund mergers and other SFT processes from having performance data stitched together where one product is wound up as part of the SFT.

New market entrants

A key consideration for the promotion of healthy competition within the superannuation system is the application of the proposed performance test to new and recent industry entrants.

This will be particularly important if the ATO comparison tool is only open to funds which have been subject to the performance assessment process.

For new (and recent) market entrants, the key risk is not that they may be reported as an "under-performer" but rather that they will simply not be visible if the YourSuper portal is solely comprised of funds that have the requisite performance history.

This would cause considerable commercial detriment to new entrants, in particular those that do not have the right to act as a default product in the workplace default market and attract all their members based on positive switching decisions by consumers.

From a competition policy perspective, not allowing new or recent market entrants to participate on a reasonably equal footing could be anti-competitive, and in effect lock new entrants out of the large-scale superannuation market for up to the next 7 years. Accordingly, the legislation should incorporate an appropriate mechanism to include them in the performance testing regime and YourSuper portal.

One possible solution for new entrants would be to include them in the portal with a shorter performance history, subject to an acceptable minimum (such as 3 years), and noted as being a new entrant as of the applicable date.

Importantly though, prior to that minimum threshold, all registered MySuper products should still appear on the YourSuper portal, with appropriate notations as to commencement dates where applicable.

Recommendation

8. Amend legislation to incorporate funds that do not have a 7-year or longer performance history into the performance benchmarking process.
9. Ensure the YourSuper portal is designed to include new entrants to the superannuation market, with appropriate notations where necessary.

Performance test timing

While we understand the importance of efficiently identifying and responding to poor performance in superannuation funds, we have concerns about the proposed timeframes for the activities associated with the performance test and consequences for underperformance.

APRA assessment timing

The timing for APRA to complete performance assessments is not specified in the legislation, however the roadmap in the Your Future, Your Super Treasury paper (page 34) indicates that APRA will complete the first performance test in September 2021 and trustees of underperforming products must notify members by 1 October 2021.

Asset allocation and net return data for the quarter ended 30 June 2021 is required to be reported to APRA by 28 July 2021. This means the proposed timeline provides only 9 weeks for APRA to construct SAA benchmark portfolios and complete performance tests for all MySuper products and for trustees of underperforming products to prepare and issue notices to members. The FSC supports APRA making use of the new, more granular data to be collected as part of the Superannuation Data Transformation project, as it will improve the integrity of the performance assessment process. However this will not be available until 30 September 2021, making it impossible to complete the first performance tests in September.

It currently takes almost 4-5 months for APRA to construct benchmark portfolios and publish results in the MySuper Heatmap.

While the MySuper heatmaps have additional data points around performance, fees and scalability, the detailed nature of the YFYS performance test and the implications for the

industry mean that sufficient time should be provided to APRA to safely implement and test the changes before undertaking performance assessments.

Further consultation with industry and APRA should be undertaken to determine a more reasonable timeframe for completing the performance tests and notifying members.

Recommendation

10. Ensure regulations are drafted to allow appropriate time for APRA to complete performance benchmarking and assessment after receipt of relevant data, to ensure high-quality results.

Review of decisions

The EM is clear that an APRA determination in relation to failing an underperformance test is not a reviewable decision, and as such there does not appear to be a mechanism for review or correction of performance test results.

The FSC is concerned that there is no mechanism to correct or re-issue a determination, even where there is a genuine data error. Given the short timeframes involved in the data collection and assessment process, it is likely that some errors will occur which may not be identified or rectified before a determination is made, particularly in the initial assessment periods.

Given the scale of consequences for failing the performance test, it is concerning that there is no formal mechanism to correct determinations.

Recommendation

11. Provide an appropriate mechanism for review or re-issuance of a determination where genuine errors have occurred.

Member communications

The legislation also explicitly requires notices to be both posted and provided electronically to members where the trustee has both types of contact detail. This is the case even where, for example, a valid email address is the usual method of communicating with a member or the fund knows that the last known mailing address for a member is no longer correct but has not been able to obtain a current address.

Where the member has an active email nominated as their primary form of contact, it should not be necessary to provide a paper letter. Given the Government's focus on modernising business communications processes, we recommend this legislation take a more technology-neutral approach to communications.

Recommendation

12. Ensure requirements for communications to members in relation to fund performance are technology neutral, and are specifically able to be provided in an electronic format where appropriate.

Employer impact

Appropriate processes, timeframes and support will need to be in place to ensure the impact on employers and individuals is minimised in circumstances where a fund is required to cease accepting new members.

It is necessary to address circumstances where a provider fails the performance test in two consecutive years and the employer is required to change default providers. Changing default service providers is a long process that may include a tender. While the number of new entrants into an employer default will be very small for most employers going forward, the SG Act requires employers to pay default contributions to a fund within a specified timeframe, which may not be possible for new employees without a stapled fund if a tender is underway.

We also note that while the legislation prevents funds from accepting new members, it does not prevent these underperforming products from continuing to be listed as default products in particular Awards.

Recommendation

13. Clarify process for employers where their existing default fund is unable to accept new members.

5.3. Best financial interests duty

General comments

The FSC supports the intent of the proposed changes to sections 52(2)(c) and 52A(2)(c) of the SIS Act, to clarify the duty of a trustee of a superannuation fund, and its directors, is to exercise their powers and perform their duties in the best financial interests of beneficiaries.

The impact of this provision has been subject to considerable debate.

Overall, the combined effect of these changes should be to provide clarity and certainty to trustees on what activities are permissible under the law. These changes should also encourage the regulator to take action in relation to breaches of these provisions.

The FSC understands the intent is for these reforms to operate in a way that is agnostic to different corporate structures and apply evenly to all superannuation funds to ensure consumers across the industry are protected from misuse of their savings.

However, it remains unclear how this change will operate in practice, and how it will interact with trustees' existing duties.

In the absence of regulations, and additional information from the regulator in relation to its intended approach to implementing these changes, the FSC reserves judgement on these provisions.

For example, more detail is required to clarify:

- how the application to third-party payments is intended to apply in practice; and
- whether the amendments require the trustee board to explicitly approve all expenditure - given the Board will ultimately be accountable for all expenses (and consistent with existing practice) it would be appropriate for expense approvals to continue to be approved through delegations.

Recommendations

14. Clarify the application of the best financial interests duty in relation to third party expenses through regulations.
15. Clarify that expense approvals may continue to be delegated, where the Board is ultimately accountable for expenses.

ESG investing

There has been some discussion of the impact of the Best Financial Interests duty and the reversal of the onus of proof on the ability of trustees to invest with regard to environmental, social and governance (ESG) risks and opportunities.

While the FSC and our members consider that considering ESG factors is an important aspect of long-term investing, there are some concerns that the impact of the best financial interests duty will be to discourage trustee engagement in this space due to a perception that there is a conflict between incorporating ESG factors and the duties of the trustee.

In addition to evidence that incorporating ESG considerations into investment decisions has led to stronger long-term financial performance over most asset classes and most investment horizons, we also note the increasing focus from financial regulators on the need for superannuation trustees to consider systemic risks of climate change.

The scope of the duty should be explicitly clarified to ensure that long-term investment decisions, including those which incorporate ESG factors, are not in conflict with the best financial interests duty, particularly given the long-term nature of superannuation investments and the need to consider retirement outcomes for members in future decades.

Recommendation

16. Clarify that long-term investment decisions, including those which incorporate ESG factors, are not in conflict with the best financial interests duty.

6. Detailed feedback on the Bill

Reference	Issue	Recommended solution
Single default account		
32R	No timeframe is specified for ATO compliance with employer requests for stapled fund information regarding an employee. Without clear timeframes for this information to be provided, there is a risk of employers struggling with SG payment timeframes.	Regulations should specify: <ul style="list-style-type: none"> • an appropriate timeframe for ATO notification to ensure employers can appropriately manage SG obligations, unless instant online verification is available for employers. • a timeline for employers to make a request, to ensure obligations to determine the correct stapled fund are met prior to the employer making the first SG contribution. • process for employers if they do not receive a response from the ATO before they are required to make contributions.
32Q EM 1.22	The legislation specifies that tie-breaker rules for establishing a stapled fund where a member has multiple active accounts will be similar to existing USM rules. While consistency with these existing rules is preferable, we note these rules do not consider active insurance policies within superannuation as one of the factors – if this is not used, then members could lose insurance cover as a result of the account they hold insurance through becoming inactive.	Consider varying existing ATO rules, by: <ul style="list-style-type: none"> • including the presence of active insurance cover, potentially below other signs of account activity such as contributions in the list of factors to be considered, but above the size of the account; • prioritising accounts with recent contributions over the most recent account to receive an ATO rollover; • considering recently opened accounts (and ensuring there is the opportunity for a member to designate a new account as their stapled account); • ensuring accounts unable to accept contributions, such as risk-only accounts, are not able to be designated a stapled fund.
	Changing jobs may impact an individual's default insurance cover which is connected to their stapled super account, particularly if they are moving to a higher risk occupation. This may result in loss of cover if the default insurer does not provide coverage for higher risk occupations.	Ensure appropriate prompts and nudges to support individuals to consider insurance cover when they are changing jobs.

Reference	Issue	Recommended solution
Addressing Underperformance		
	<p>It is unclear how the proposed timings associated with the assessment will be achieved in practice, given:</p> <ul style="list-style-type: none"> • APRA will receive data shortly before being required to issue determinations • Underperforming funds will have 28 days from APRA's determination to contact all impacted members • Underperforming funds will also cease to be able to take new members on the day APRA notifies of a second failed assessment, which will require employers to tender for a new default provider 	<p>Ensure appropriate time is allowed for undertaking test and implementing consequences for poor performance to ensure integrity of each stage of the process.</p>
60F	<p>It is not clear how products will be combined in order to derive an 8 year return, particularly in the case of an SFT.</p>	<p>Specifically exclude performance of a fund that is being wound up as part of an SFT process, to avoid disincentivising mergers. Provide additional context for other scenarios where multiple products will be stitched together.</p>
60F	<p>It is not clear how performance will be assessed for new entrants where 8 years of data cannot be stitched together.</p>	<p>Specify an alternative test in regulations to ensure new entrants are able to be assessed at an appropriate time, particularly in order to be represented in the ATO online tool.</p>
60B	<p>This section refers to application to “other classes of beneficial interest” which are to be defined in regulations. Expanding to all choice products is not practical and would not provide a meaningful improvement to member outcomes, particularly given this includes retirement products and products where members (usually with the help of an adviser) control their own investments.</p>	<p>Ensure the definition of TDPs applies only to appropriate products.</p>
EM 2.25	<p>The EM is clear that a determination is not a reviewable decision, and as such there does not appear to allow for review or correction of performance test results, even where there is a data error – given the short timeframes involved in the data collection and assessment process, it is likely that some errors will occur.</p>	<p>Provide appropriate avenues for review or issuance of a new determination where appropriate.</p>

Reference	Issue	Recommended solution
60E(2)	<p>Underperforming funds are subject to a blanket prohibition on accepting new members, however there may be some situations where a new account is required in addition to family law splitting.</p> <p>In these circumstances, trustees are often required to create new accounts for individuals who are typically not existing members of the fund. Where this occurs, investments are generally defaulted to the MySuper offering, where applicable.</p>	<p>Consider providing exemptions for the creation of new accounts in specified circumstances, or develop a solution that allows funds to be transferred without creating a new account.</p> <p>While the Government has legislated to allow funds to transfer accounts to the ATO voluntarily where the trustee considers it is in the members best interests to do so, this does not fully resolve the issues.</p> <p>From a practical perspective, an account may need to be established on a fund's administration systems in order for any amounts to be transferred to the ATO. In the absence of a direction provided by the account holder, trustees will be required to specify a default investment allocation.</p> <p>Secondly, trustees may determine that transferring certain amounts to the ATO voluntarily may not be in the best interests of the beneficiaries in certain cases.</p>
60E(5)	<p>The legislation explicitly requires notices to be both posted and provided electronically to members, even where for example a valid email address is the usual method of communicating with a member or the fund knows that the last known mailing address for a member is no longer correct but has not been able to obtain a current address.</p>	<p>Ensure communications to members are able to be provided in electronic format.</p> <p>Where the member has an active email nominated as their primary form of contact, it should not be necessary to provide a paper letter.</p>
Best Financial Interests		
	<p>The legislation does not make clear the level of look-through required on expenses, particularly in relation to corporate groups and expenses paid by parent companies rather than trustees. E.g. what happens when a service provider is paying for 'fund promotion' as it's an outsourced activity.</p>	<p>Clarify the look-through requirements for expenses and investment decisions.</p>
	<p>It is not clear whether it is necessary for Board to approve all expenditures, or whether this can continue to be handled via delegations.</p>	<p>Clarify the level of approvals for expenditure, noting that the Board will be ultimately accountable for all expenses anyway per existing practice.</p>