



18 March 2021

Mr Mark Fitt
Committee Secretary
Senate Standing Committee on Economics
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Canberra ACT 2600

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Dear Mr Fitt

TREASURY LAWS AMENDMENT (YOUR FUTURE, YOUR SUPER) BILL 2021, SCHEDULE 3: BEST FINANCIAL INTERESTS OBLIGATION

On behalf of the Australian Council of Superannuation Investors (ACSI), thank you for the opportunity to make a submission in relation to the Treasury Laws Amendment (Your Future, Your Super) Bill 2021, Schedule 3: Best Financial Interests Obligation (the Bill).

About ACSI

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) investment issues on behalf of our members, who include 37 Australian and international asset owners and institutional investors. Collectively, our members own, on average, 10 per cent of every ASX200 company, on behalf of millions of beneficiaries. Our members recognise that ESG risks and opportunities have a material impact on investment outcomes.

Our interest is in promoting the sustainable performance and financial success of companies over the long term in the best financial interest of our members' beneficiaries.

As active owners, our members engage with their investee companies using objective standards to identify issues that may have a material financial impact on investment outcomes. We do this through research and importantly through engagement with management and the board of investee companies.

Summary of ACSI's position on the Bill

The [background materials provided](#) by the Government to explain the *Your Future, Your Super* package state that the proposed measures are intended to increase transparency and accountability in the activities of superannuation funds, in response to the recommendations of the Productivity Commission Inquiry, by clarifying what it means for a trustee to act in a members' best interests (p25).

We support the introduction of further measures to increase transparency and accountability. However, there are significant issues with the Bill in its current form.

The changes proposed in the Bill fail to establish greater clarity as the existing requirements in the *Superannuation Industry Supervision Act 1993 (Cth)* (the SIS Act) have been interpreted and applied as best 'financial' interests for many years.

Not only does the Bill fail to provide clarity beyond what was already understood within the sector, it also proposes heavy-handed 'anti-avoidance'¹ measures that go far beyond what is necessary to ensure greater transparency and accountability, and instead could impact the ability of superfunds to deliver outcomes. The Bill does this by:

¹ Cited in the background materials provided by the Government to explain the *Your Future, Your Super* package, https://treasury.gov.au/sites/default/files/2020-10/p2020-super_0.pdf, p25.

- Reversing the evidentiary burden of proof - a measure that is not common practice in similar scenarios and is unjustified in the circumstances. It will also ultimately raise compliance costs and divert resources in a way that may undermine beneficiaries' interests;
- Establishing a broad-reaching and undefined regulation making power for the government to prohibit certain payments and investments, which will create market uncertainty and undermine trustees' obligation to make decisions in the best interests of their beneficiaries; and
- Establishing a broad-reaching power for the government to enact further regulations to impose additional requirements on trustees in order to fulfill their best financial interests duty, which will generate uncertainty and is an inappropriate mechanism to ensure accountability for breaches of the trustees' duty.

We are concerned that these changes could generate significant adverse consequences that undermine the very intent of the Bill, by eroding trustees' ability to act in the best interests of the beneficiaries of their funds. The measures create a high risk of market uncertainty, with unclear policy signals that are subject to change on an ongoing basis. Such market uncertainty will undermine the ability of trustees to invest and operate most effectively and efficiently on behalf of their beneficiaries.

A broad range of market stakeholders do not support the proposed changes, as illustrated by the submissions made on the Exposure Draft. Despite this broad opposition from prominent voices including AICD, the Law Council of Australia, Ai Group, AIST and others, the Bill goes a step beyond the Exposure Draft in providing the Government even greater power to enact further regulations, with limited clarity on what these may be. The Bill is heavy handed, unnecessarily intrusive and ignores the broader implications of such wide-ranging powers. The Bill is also out of step with the recommendations of the [Productivity Commission Inquiry Report, Superannuation: Assessing Efficiency and Competitiveness](#) (the Productivity Commission) and the [Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#) (the Royal Commission).

Our view is that overall, the Bill does not reach its policy intent and therefore should not progress in its current form.

I trust our comments are of assistance. Please contact me or Kate Griffiths, ACSI's Executive Manager – Public Policy and Advocacy, should you require any further information on ACSI's position.

Yours sincerely



Louise Davidson AM
Chief Executive Officer
Australian Council of Superannuation Investors

Clarification of 'best financial interests'

The existing best interests test is considered across the market to be a 'best financial interests' test. Our experience is that our member funds already carefully consider whether expenditure is in the best financial interests of their beneficiaries. This view has also been expressed by a broad cross-section of participants in the market. From our experience, the culture among our members has not 'drifted away from the sole responsibility that they have as custodians of members' money'². Rather, our members take a long-term view of the best financial interests of their beneficiaries, and make their decisions with this as their core objective, including when they are incorporating financially material ESG factors into their investment decisions. Accordingly, we are of the view that the proposed change of the trustee duty to 'best financial interests' merely acknowledges a long-established position.

The Productivity Commission did not explicitly recommend that a legislative change was necessary in order to clarify the trustees' fiduciary duty. Likewise, the Royal Commission referred to a number of cases that have already clarified the trustees' fiduciary obligations, and also noted the duty of 'acting in members' best interest is not hard to understand'³. In addition, APRA provides effective guidance to participants in the market on how to interpret the trustees' covenants, which can provide more detailed context and clarity and be more easily reviewed and updated as circumstances require.

Reversed evidentiary burden of proof

The reversed burden of proof set out in the Bill could result in outcomes that conflict with the policy intent, given that there is no materiality threshold and the extent of information required to demonstrate that a payment is in the best financial interests of beneficiaries is not clearly set out in the Bill or the accompanying Explanatory Memorandum. Without greater clarity on how trustees should meet these requirements, burdensome and costly red tape will be the result, ultimately adversely impacting efficiency and diverting beneficiaries' money.

To protect beneficiaries' best financial interests, the Government should undertake an accurate regulatory impact assessment of the cost of the measures compared with their benefit, and consider alternative measures. Such an assessment should also incorporate further consultation from industry. An alternative that would meet the policy intent of transparency could be to ask trustees to disclose to beneficiaries the governance arrangements they have in place to ensure payments made and actions taken are in the best interests of beneficiaries.

As discussed in a number of submissions on the Exposure Draft from a broad range of market participants⁴, it is only in rare situations that a reversal of the burden of proof is warranted. If implemented as proposed, it would represent a significant shift to longstanding trusts law⁵. The reversal of the burden of proof appears to be founded on the assumption that trustees do not generally act in the best interests of beneficiaries. The experience of ACSI and many other industry bodies find the opposite to be true⁶.

In ACSI's view, it is fundamentally important to effectively pursue and remedy breaches of trustees' duties. However, a reversal of the burden of proof is a disproportionate mechanism to do so.

Prohibition of certain payments

The Bill proposes that additional regulations could be made to prohibit or further regulate certain payments and investments made by trustees, including in the circumstances where such payments and investments are in the best financial interests of beneficiaries.

Despite widespread criticism that the Exposure Draft provided insufficient transparency on the kinds of payments contemplated for further regulation,⁷ the Bill fails to provide much further clarity.

The Explanatory Memorandum states that 'the regulations would provide certainty to trustees of their obligations and potential liability for an offence'⁸. In fact, this provision creates uncertainty for trustees, given the potential for conflict and confusion between prohibited activities and the 'best financial interests' test. The

² Cited in the background materials provided by the Government to explain the *Your Future, Your Super* package, https://treasury.gov.au/sites/default/files/2020-10/p2020-super_0.pdf, p25.

³ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report pg. 227; 235; For example, *Cowan v Scargill* [1985] Ch 270, 29

⁴ For example, see submissions on the Exposure Draft by the [Law Council of Australia](#), [the Australian Institute of Superannuation Trustees](#) and [the Australian Institute of Company Directors](#).

⁵ See, for example, submissions on the Exposure Draft by [the Australian Institute of Company Directors](#).

⁶ See also the submission on the Exposure Draft by [the Australian Institute of Company Directors](#).

⁷ For example, see submissions on the Exposure Draft by [the Australian Institute of Superannuation Trustees](#), [Ai Group](#) and [Australian Super](#).

⁸ Explanatory Memorandum for the Bill, para 3.75.

provision also appears to contradict the Explanatory Memorandum, where it provides that the new duty does not preclude actions that also yield non-financial benefits to beneficiaries⁹.

Superannuation funds are large institutional investors, and investment favours certainty. In order to meet their fiduciary duties, trustees need consistent and clear policy signals from Government to guide long-term decisions that are carefully considered in the financial interests of their beneficiaries. A sweeping power for the Government to enact significant change to permitted payments or investments via regulation will reduce the level of certainty. The provision also opens the possibility for any Government to interfere in the decisions of trustees based on narrow, short-term positions at the expense of the long-term stability of the market.

This is at odds with the long-term approach to investment that underpins retirement outcomes for beneficiaries. It is also potentially misaligned with other policy signals that are intended to assist in unlocking private capital, for example through the [Technology Investment Roadmap](#).

Therefore, the provisions that allow for further regulation to prohibit (or prohibit unless certain conditions are met) certain payments regardless of whether or not they are considered to be in the best financial interests of beneficiaries should be removed from the Bill.

Further power to enact regulations that prescribe additional requirements

This Bill takes a step beyond the Exposure Draft, by providing the Government a further power to enact regulations that prescribe additional requirements on trustees, and that failure to comply with the additional requirements will constitute a breach of the best financial interests duty¹⁰.

Given that there has been widespread criticism of the proposed regulation-making power to prohibit certain payments, it is concerning that the Bill now takes a step further and establishes a second broad-reaching regulation-making power. Again, this provision is vaguely expressed and will create uncertainty for trustees in terms of what additional requirements might be enacted in the future. The power to prescribe 'additional requirements' is so broad that the Government could potentially restrict or control any areas of a trustee's activities and decisions. It is difficult to see any justification for such a sweeping power, which has the potential to undermine the fundamental role of trustees to determine the best financial interests of their beneficiaries.

The Explanatory Memorandum states that this provision is intended for situations 'where there is a heightened risk of trustees avoiding their obligations under the best financial interests duty'¹¹, however the provision is expressed in such broad terms that the Government would be relatively unconstrained in how it employs the provision, allowing for a vast array of potential interventions in the operations and decisions of trustees. Changes that could have such significant impacts on the investment market should be made via legislation rather than through regulation, to allow for thorough review and debate.

The stated rationale is to signal to the superannuation industry 'that the Government is ready to respond if any evidence of trustees seeking to avoid the best financial interest duty requirements is detected'¹². Given that the Regulator exists to fulfil this function, it is neither necessary nor appropriate for the Government to have an additional, broad power to enact regulations. The Royal Commission reinforced the important role and competence of APRA and ASIC to take action and respond to breaches of the trustees' covenants¹³. When the regulators are sufficiently well-equipped and resourced to identify and respond to breaches on a case-by-case basis, this operates as an effective response and deterrent to breaches of the best financial interest duty.

We therefore recommend removing the provisions allowing for further regulation to prescribe additional requirements to comply with the fiduciary duty.

⁹ Explanatory Memorandum for the Bill, para 3.32.

¹⁰ Explanatory Memorandum for the Bill, para 3.77.

¹¹ Explanatory Memorandum for the Bill, para 3.80.

¹² Explanatory Memorandum for the Bill, para 3.82.

¹³ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report pg. 260, 263.