



**ASIC**  
Australian Securities &  
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Senate Economics Legislation Committee  
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Dear Secretary

**Senate Economics Legislation Committee  
Inquiry into Treasury Laws Amendment (Your Future, Your Super) Bill 2021  
(YFYS Bill)**

The Australian Securities and Investments Commission (**ASIC**) makes the following submission in response to an invitation by the Senate Economics Legislation Committee (**Committee**).

To assist the Committee's understanding of implementation of the YFYS Bill, this submission outlines ASIC's role in implementing the proposed reforms.

**ASIC's role in superannuation**

ASIC is the conduct regulator for superannuation. We are issues-driven and our priorities in superannuation have a consumer focus – we want to see superannuation funds operate in a way that is fair for members and promotes confidence in superannuation. Much of ASIC's regulatory work, like the stated aims of the YFYS Bill, seeks to promote efficiency and fairness in the superannuation system.

ASIC is the responsible regulator for the *Corporations Act 2001* (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**). Together, these Acts regulate the conduct and disclosure obligations of financial services providers, including superannuation trustees of registrable superannuation entities. ASIC also has regulatory responsibilities for parts of the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**), some of which are shared with APRA.

ASIC's role in superannuation expanded on 1 January 2021 as a result of the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (FSRC Act)*. The FSRC Act amended the SIS Act, the Corporations Act and the ASIC Act so that:

- ASIC now has powers to enforce provisions of the SIS Act that concern consumer protection and market integrity. Previously ASIC only had powers to enforce provisions relating to disclosure and record-keeping; and
- the scope of conduct covered by ASIC's existing consumer protection powers under the Corporations Act and the ASIC Act is broader.

The reforms enable ASIC to play a more effective role in regulating the superannuation industry without detracting from APRA's critical role as prudential regulator for superannuation. In carrying out its regulatory role in superannuation, ASIC works cooperatively with APRA to create better outcomes for Australians. Where misconduct breaches provisions that both agencies regulate, we work together to determine which regulator has the best tools to address the misconduct.

### **ASIC's role under the YFYS Bill**

#### *Single default account*

Regulatory responsibility for the stapling provisions introduced by Schedule 1 of the YFYS Bill rests primarily with the ATO.

#### *Underperformance*

The underperformance provisions introduced by Schedule 2 of the YFYS Bill will be regulated by APRA and ASIC. APRA will have primary responsibility for the core elements of the underperformance test.

ASIC will have primary responsibility as regulator for new s 60E(2) of the SIS Act, which obliges trustees to notify beneficiaries if their superannuation product has failed the underperformance test.

The YFYS Bill contemplates that ASIC will have joint discretion with APRA under s 60E(3)(b) to permit a trustee to notify beneficiaries that their product has failed the underperformance test more than 28 days after APRA notifies them of the underperformance. The agencies may only grant this extension within 28 days of APRA issuing the underperformance notice to the trustee. We expect that this discretion will only be exercised in exceptional circumstances.

### *Best Financial Interests Duty*

The changes introduced by Schedule 3 to the YFYS Bill amend the existing 'best interests' duty in s 52(2)(c) of the SIS Act to clarify that superannuation fund trustees are required to perform their duties and exercise their powers in the best financial interests of beneficiaries (**BFID**).

The regulatory responsibility for the covenants in s 52 of the SIS Act, as amended by the FSRC Act, is shared by ASIC and APRA. This means that ASIC and APRA will both have a role in monitoring and enforcing compliance with:

- new ss 52(3A) and 52B(2A), which clarify that payments to third parties must also be in the best financial interests of beneficiaries; and
- the additions to ss 52(2)(c) and 52A(2)(c) that require trustees to comply with any requirements prescribed by the regulations for the purposes of the BFID.

ASIC's expanded role under the SIS Act includes new powers to enforce civil penalty provisions in the SIS Act, including action against trustees who may be in breach of the covenants in s 52 of the SIS Act.

(For completeness, we note that the ATO has a role as a regulator in relation to the 'best interests' covenant for the SMSF sector which the YFYS Bill also amends).

ASIC and APRA will also have joint regulatory responsibility for the other provisions relating to the BFID: new s 34(2A) (an offence for trustees breaching standards relating to record keeping obligations) and new s 117A (requiring trustees to comply with regulations made prohibiting payments and investments by trustees of registrable superannuation entities).

In civil proceedings brought by a regulator for a breach of the BFID, a reverse evidential burden of proof will apply (new s 220A). This means that the onus is on the trustee to point to evidence that suggests a reasonable possibility that there was a proper discharge of its duties. If the trustee is able to do so, a regulator seeking to take enforcement action must then prove, on the balance of probabilities, that the trustee did not perform the trustee's duties and exercise the trustee's powers in the best financial interests of beneficiaries. In practical terms, a reverse onus, of itself, will not materially change the scope of an ASIC investigation because ASIC must still investigate the circumstances of a suspected breach.

We note that the reverse onus does not apply to additional BFID requirements that will be set out in regulations. Nor does the reverse onus apply where a criminal penalty is pursued by a regulator, or to class actions against trustees brought by beneficiaries or brought by the regulator on behalf of beneficiaries.

*Portfolio Holdings Disclosure*

ASIC has regulatory responsibility in relation to portfolio holdings disclosure. The YFYS Bill changes the portfolio holdings disclosure obligation of trustees by eliminating the existing disclosure exemption that applies for up to 5% of fund assets in investment option that are commercially sensitive. This change to portfolio holdings disclosure will increase transparency in the system. Details of the disclosures that must be made by trustees to comply with their portfolio holdings disclosure obligations will be set out in regulations.

We hope this information assists the Committee.

Yours Sincerely



**Danielle Press**

Commissioner

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