Maurice Blackburn Lawyers
Since 1919

Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 21
380 Latrobe Street
Melbourne VIC 3000

DX 466 Melbourne
T (03) 9605 2700
F (03) 9258 9600

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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the inquiry by the Senate Economics Legislation Committee (the Committee) into the Treasury Laws Amendment (Your Future, Your Super) Bill 2021.

Please do not hesitate to contact me and my colleagues via my Executive Legal Assistant Brooke White on [redacted], or at [redacted] if we can further assist with the Committee's important work.

Yours faithfully,

[redacted]

Kim Shaw
Principal Lawyer
Superannuation and Insurance Litigation
Maurice Blackburn Lawyers

Submission in Response to the inquiry into the Treasury Laws Amendment (Your Future, Your Super) Bill 2021

March 2021

TABLE OF CONTENTS

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Superannuation, Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years. We have the largest practice of its kind in Australia and currently have approximately 125 staff nationally working in the team. At any one time we provide legal assistance to approximately 3500 to 4000 clients.

A major part of this work involves providing comprehensive legal advice and representation in cases involving often egregious and negligent behaviours on the part of financial service providers.

We witness first-hand the ramifications and impacts of poor corporate behaviours by financial service providers which can create significant financial hardship in our clients' lives.

Our Submission

Maurice Blackburn welcomes the opportunity to have input into the Your Future Your Super Bill (the Bill) and supporting materials.

We understand the concerns which have led to the development of the Bill. There is a clear need to identify ways to reduce the occurrence of workers holding multiple superannuation accounts, and to maximise the retirement earnings of Australians.

We are concerned, however, that some of the provisions may lead to unintended consequences, such as entrenching consumers in underperforming or demographically unsuitable funds. The removal of funds that fail to 'stack up' to community expectations is a worthy ambition.

In relation to Schedule 1, we argue that no worker should be disadvantaged as a result of the proposed stapling reforms. It is vitally important that the system addresses circumstances where insurance provision within a worker's superannuation arrangements are no longer fit for purpose to a worker's current working arrangements.

In relation to Schedule 2, we argue that the processes used to rate and compare superannuation funds need to be transparent, and purposefully set out to compare like products. We believe that existing regulatory tools could be expanded to assist in this process.

We are concerned that a number of provisions outlined in Schedule 3 represent an unprecedented intervention by a government in an Australian corporate market. It is essential that the Bill does not restrict parliamentary scrutiny over these decisions.

Parliamentary scrutiny has led to the removal of some significant unintended consequences from other superannuation related legislation in the past, such as attempts to remove insurances from young people in high risk occupations.

We believe that the introduction of a ‘best financial interests’ duty (along with the proposed reversal of the onus of proof) will bring significant unintended consequences, and that trustees should be free to make judgements and decisions about what is in the best interests of their members.

We note that a number of consumer advocacy groups made significant submissions to the Treasury process when they released the exposure draft of the Bill and its supporting materials, highlighting many of these unintended consequences. We are disappointed that the Bill, as presented to the Parliament, does not reflect any adjustments in relation to those substantive issues. We trust that the Committee will be more genuine in its commitment to consultation.

Finally, we do not believe the proposed start date of I July 2021[1] for the changes detailed in Schedules 1 and 3 is realistic. There has been no consultation on the regulations which will determine much of the content, we have not seen the definitions which will be used within those regulations, and we have not seen any detail as to what criteria the ATO will use in determining the appropriateness of funds. The infrastructure to implement the Bill is simply not in place.

Our responses to the main components of the Bill appear below.

[1] EM: p.4

Responses to the Main Sections of the Bill

Chapter 1: Single Default Account

Maurice Blackburn notes the intended purpose of Schedule 1 to the Bill, as described under 'General outline and financial impact' in the Explanatory Memorandum (the EM)[2]:

> *Schedule 1 to the Bill amends the SGAA to limit the creation of multiple superannuation accounts for employees who do not choose a superannuation fund when they start a new job.*

The EM goes on to say[3]:

> *….allowing employers to make contributions on behalf of their employees into their chosen default fund has also resulted in the creation of unintended multiple superannuation accounts. This has caused a reduction in retirement savings for affected members as unnecessary duplicate fees and insurance premiums are being paid on those accounts.*

Maurice Blackburn agrees that the inadvertent creation of multiple superannuation accounts is problematic, and that the end goal must be to maximise retirement savings for Australia's workers.

We believe, however, that the process of 'stapling', as described in Schedule 1, may create a number of negative unintended consequences for workers.

Our main concern is the potential impacts on workers of being tied to a poorly performing superannuation fund, or one which provides insufficient or inappropriate insurance coverage.

Trustees of industry superannuation funds currently have a legislated duty to ensure that the best interests of their fund members are paramount in their decision making. Part of the exercise of this duty within industry superannuation funds is to source tailored insurance products that reflect the potential insurance needs of their members, based on the particular risks generated within the industries in which they work.

Retail funds do not do this. Often, the decision making in relation to insurance offerings is driven by their relationship with an affiliated group life insurer, and thus may offer inappropriate or poor value insurance as part of their package.

The Australian Lawyers Alliance (the ALA), in their submission in relation to an earlier version of the Bill[4] noted the following case example:

> *We are aware of a logistics firm which entered into an agreement with a retail superannuation fund, whose death and TPD insurance coverage contained a specific 'hazardous occupation exclusion' for truck drivers. Around 50% of this firm's staff were truck drivers.*

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[2] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6672_ems_55ca2b32-39d1-4534-93a1-b99763fbcef4/upload_pdf/JC001267.pdf;fileType=application%2Fpdf: p.3
[3] Ibid: para 1.10
[4] https://www.lawyersalliance.com.au/documents/item/2028: para 23

> *The employer, in this example, had numerous other funds he/she could have opted for which could have provided affordable insurance cover for its transport workers, such as TWU Super. Evidently, the wellbeing of his/her staff was of secondary importance to whatever other considerations were weighed up during the decision making process.*

The ALA goes on to note that this is a further example of the 'fee for no-service' issue, which featured heavily in the outputs of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission):

> *Workers in the above example are paying premiums for an insurance product they will never be able to benefit from which means the default insurance arrangements have failed them*[5]*.*

Maurice Blackburn urges the Committee to satisfy itself that Schedule 1 contains sufficient safeguards to ensure that these inappropriate decisions by trustees cannot occur as a result of the stapling process.

Central to the purpose of the Bill is ensuring that when someone changes jobs, an unnecessary new superannuation fund is not created for that worker. This is a worthy goal. However, it is important that no worker is left worse off – that is, left in an underperforming fund or a fund with inadequate or inappropriate insurance coverage – due to changing jobs.

Many workers start their working lives working in part time or casual roles in an industry such as hospitality. While the insurance provisions contained in a fund aimed at, say, hospitality/bar staff may be entirely appropriate for the risks associated with that work, they may not remain appropriate if the worker then moves into a role in the transport or construction industries.

In this example, the insurance offerings in the hospitality/bar-work related fund may limit or exclude high risk occupations, or apply inappropriate and harsh clauses such as Activities of Daily Living (ADL) requirements[6], vastly limiting eligibility. Once again, this would constitute a diminution of value for members and risk a 'fee for no service' arrangement.

It is worth considering that the members of the original fund (in the above example, the members of the hospitality based fund), may find themselves in the position of having to cover claims for higher risk occupations down the track. This would undoubtedly impact premium costs for its lower risk members.

It is simply implausible to expect workers to consider their changed insurance needs when changing occupations, when stapled to the superannuation fund associated with their first job. Member disengagement data would indicate that worryingly few consumers consider their insurance arrangements at all. PWC found that 71% '*were not engaged when considering life insurance [within super]*', and that 66% of 25 to 34 year olds do not read their annual superannuation statement[7]. The new system must be sufficiently intelligent to ensure that consumers are equipped to make informed decisions about the adequacy of their stapled fund.

Maurice Blackburn submits that the Bill must require that, when a worker is changing employers:

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[5] Ibid: para 24

[6] With at least five times the decline rate to standard TPD cover: https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-633-holes-in-the-safety-net-a-review-of-tpd-insurance-claims/

[7] https://www.pwc.com.au/publications/assets/superannuation-data-risks-insurance-superannuation-jun16.pdf

- Clear communications are sent to people who are changing roles, notifying them that the insurance provisions in their current/stapled superannuation fund may not be appropriate to their new role,
- No worker is worse off due to their stapled superannuation fund providing inadequate or inappropriate insurances.

In our experience as legal practitioners, clients will often only find out that the insurance provided through their superannuation is inappropriate or inadequate when they become disabled and have their claim denied. In such circumstances, they have been paying for insurance that provides no value. The regulations need to contain safeguards to ensure workers are not disadvantaged by a change in employment.

It is evident in the Bill and supporting materials that the ATO will have a major role to play in determining whether a worker has an existing/stapled superannuation fund, when changing employers. Maurice Blackburn argues that the Bill should contain specific requirements of the ATO in relation to ensuring the appropriateness of insurance coverage for all members of regulated superannuation funds. They should, at the very least, be required to provide a warning to the worker that their fund potentially provides an inappropriate insurance coverage for their new role. With the availability of live data, it is important that all stakeholders (including the ATO) have a responsibility to ensure that the worker's best interests are served.

One potential mechanism for achieving this would be the establishment of a series of centrally agreed industry role classifications which could be applied to each member across the ATO database. This would change when there is a change in the worker's employment situation.

Above all, in considering Schedule 1 of the Bill, the Committee should keep in mind the original purpose of insurance in superannuation – that is, to insure against the loss of contributions to retirement income that occurs when someone becomes unable to work[8].

In that regard, the provision of insurance through superannuation funds is consistent with the 'sole purpose test' described in the *Superannuation Industry (Support) Act 1993* (the SIS Act)[9], as its purpose is to insure or mitigate against the loss of continuity of contributions.

In addition, the current superannuation scheme provides an offset against Australia's well documented underinsurance problem[10]. A study by Rice Warner found that[11]:

> *Within group schemes, there is a large affinity to occupation; for many individuals, group insurance is their only means of viable access to insurance (especially for individuals with risky occupations). In the absence of group life insurance (for example if group life insurance were to become opt-in in nature, and take up rates dropped to an expectedly low single-digit rate), many individual's only recourse would be to seek retail type insurance, individually rated insurance with medical, financial and lifestyle underwriting required, which would act to reduce their access to insurance or make it only available at unaffordable premium rates.*

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[8] See for example:
https://www.superannuation.asn.au/ArticleDocuments/359/1709_Insurance_through_superannuation.pdf.aspx?Embed=Y
[9] Ref SIS Act, s.62
[10] Rice Warner Underinsurance in Australia 2015 found the median level of life cover met just 61 per cent of basic needs and 37 per cent of the income replacement level. See also *http://www.ricewarner.com/australias-relentless-underinsurance-gap/*
[11] Rice Warner: Underinsurance in Australia, 2017.

It is important that any changes to the way workers become members of a certain superannuation fund do not leave workers under-insured and exposed to reliance on the public purse in later life.

We urge the Committee to seek reassurances that the Bill, and the ATO processes which would come into action as a result of it, will not leave any worker worse off. Maurice Blackburn see this as a major potential unintended consequence of this legislation.

Chapter 2: Addressing Underperformance in Superannuation

Maurice Blackburn notes the intended purpose of Schedule 2 to the Bill, as described under 'General outline and financial impact' in the Explanatory Memorandum (the EM)[12]:

> *Schedule 2 to the Bill amends the SIS Act to require APRA to conduct an annual performance test for MySuper products and other products to be specified in regulations (such as 'trustee-directed products' where the trustee has control over the design and implementation of the investment strategy). A trustee providing such products will be required to give notice to its beneficiaries who hold a product that has failed the performance test. Where a product has failed the performance test in two consecutive years, the trustee is prohibited from accepting new beneficiaries into that product. APRA may lift the prohibition if circumstances specified in the regulations are satisfied.*

Maurice Blackburn agrees with the need for APRA to conduct an annual performance test for superannuation products, but questions why that test should be restricted to MySuper products. Media commentary around this suggests that failure to make the regime applicable to all regulated superannuation funds would leave millions of Australians in unscrutinised funds[13].

Maurice Blackburn agrees with the ALA's assessment that[14]:

> *….the information currently collected to populate ASIC's Heatmap[15] for My-Super products could easily be expanded to capture data that would identify persistently underperforming funds across the superannuation spectrum.*
>
> *The main headings used in the current Heatmap are appropriate:*
> *• Investment Performance*
> *• Fees and Costs*
> *• Sustainability of Member Outcomes*
>
> *It is important that, in adapting this model to be fit for purpose, the metrics include:*
> *• Annual returns, nett of fees (net return benchmark)*
> *• Management Expense Ratio (MER)*
> *• Fee disclosure practices to avoid hidden fees such as performance fees paid to investment managers and multiple investment fees being bundled[16]*
> *• Managing conflicts of interest including through robust procurement/tender practices by trustees*

It is worth noting that the heatmap clearly shows that those that would be classified as 'persistently underperforming funds' are, almost without exception, for-profit retail funds.

To this end, Maurice Blackburn strongly endorses the provisions in Schedule 2 which facilitate the development and implementation of a comparison tool.

Paragraph 2.83 of the EM tells us:

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[12] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6672_ems_55ca2b32-39d1-4534-93a1-b99763fbcef4/upload_pdf/JC001267.pdf;fileType=application%2Fpdf: p.3
[13] See for example https://thenewdaily.com.au/finance/superannuation/2020/12/11/performance-check-leaves-members-short/
[14] https://www.lawyersalliance.com.au/documents/item/2028: paras 42 to 44
[15] https://www.apra.gov.au/mysuper-product-heatmap
[16] https://thenewdaily.com.au/finance/superannuation/2019/01/09/super-fund-fee-disclosure-asic/

> *The Schedule amends the SIS Act to allow APRA to share information about Part 6A products with the ATO, which the ATO may make available on a website maintained by the ATO, without breaching secrecy provisions. If the disclosure of information is for the purposes of the new SIS Act provisions then subsection 56(3) of the Australian Prudential Regulation Authority Act 1998 provides an exception to the secrecy offence in subsection 56(2) of that Act. In giving information to the ATO, APRA may take into account the regulations specifying formulas and methods. [Schedule 2, item 9, subsections 60J(1), (2), (3) and (4) of the SIS Act]*

Maurice Blackburn applauds the commitment to transparency embedded in this process.

We also endorse the ALA's analysis[17] that for a ranking/comparison process to be useful:

- It must be thorough,
- It must be robust,
- It must be equally administered across the industry – with retail and industry products included in the same comparison (if retail funds are not subject to the same comparison methodologies, it is estimated that the holders of 8.4 accounts will not be made aware that they are in an underperforming fund[18]), and
- It must compare 'apples with apples', ensuring that things like fees and charges are measured and reported equally.

Above all, the comparison/ranking tool on the ATO website must be easily accessed and understood by consumers. Communications notifying a consumer of the existence of the tool, when that consumer's superannuation arrangements are being assessed by the ATO, should be mandatory.

[17] Ibid: para 46
[18] See for example: https://thenewdaily.com.au/finance/superannuation/2020/12/11/performance-check-leaves-members-short/

Chapter 3: Best Financial Interests Duty

Maurice Blackburn notes the intended purpose of Schedule 3 to the Bill, as described under 'General outline and financial impact' in the Explanatory Memorandum (the EM)[19]:

> *Schedule 3 to the Bill amends the SIS Act to:*
>
> *• require each trustee of a registrable superannuation entity and each trustee of a SMSF to perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries;*
> *• require each director of the corporate trustee of a registrable superannuation entity to perform the director's duties and exercise the director's powers in the best financial interests of the beneficiaries;*
> *• allow regulations to be made that prescribe additional requirements on trustees and directors of trustee companies of registrable superannuation entities where failure to comply with these additional requirements would be a contravention of the best financial interests duty;*
> *• allow regulations to be made to specify that certain payments made by trustees of registrable superannuation entities are prohibited, or prohibited unless certain conditions are met (regardless of whether the payment is considered by a trustee to be in the best financial interests of the beneficiaries);*
> *• reverse the evidential burden of proof for the best financial interests duty so that the onus is on the trustee of a registrable superannuation entity. The reverse onus does not apply to additional best financial interest duty requirements prescribed by regulations; and*
> *• allow contraventions of record-keeping obligations specified in regulations to be subject to a strict liability offence to provide regulators with an additional option to respond to compliance issues relating to record-keeping requirements.*

Maurice Blackburn notes the shift in language/focus here, from "Best Interest" to "Best Financial Interest". We believe that one is an essential subset of the other. In order for a fund to operate in the best interests of its members, it must operate in the best financial interests of its members.

We share the concerns of a number of consumer advocates that the narrowing of the focus to 'best financial interest' may lead to elements that currently make up the member's best interest being lost, as they are not specifically of a financial nature. For example:

- Funds which conduct campaigns and initiatives aimed at reducing gender inequality,
- Funds which implement strategies aimed at environmental sustainability,
- Funds which implement strategies aimed at increasing the financial literacy of their members.

We urge the Committee to remain aware that there are circumstances where trustees will make decisions which are not directly quantifiable in a financial sense, but are still in the members' best interest. If this Bill stops these beneficial activities, then surely that is an unintended consequence of the legislation.

More alarmingly, however, the Bill seek to implement a system where the government may dictate through regulation what is and what is not appropriate expenditure by superannuation

[19] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6672_ems_55ca2b32-39d1-4534-93a1-b99763fbcef4/upload_pdf/JC001267.pdf;fileType=application%2Fpdf: p.3

funds. This is an extraordinary government intervention into a free market in Australia, made all the more extraordinary by the fact that it is being proposed by a conservative government.

The outline of Schedule 3 tells us, for example that[20]:

> *Schedule 3 also amends the SIS Act to allow regulations to be made that prescribe additional requirements on trustees and directors of trustee companies of registrable superannuation entities where failure to comply with the additional requirements constitutes a breach of the best financial interests duty.*
>
> *Schedule 3 also amends the SIS Act to allow regulations to be made to specify that certain payments made by trustees of registrable superannuation entities are prohibited, or prohibited unless certain conditions are met (regardless of whether the payment is considered to be in the best financial interests of the beneficiaries).*

Maurice Blackburn sees this as an unprecedented example of government over-reach. With the ‘certain payments’ being documented in regulations, the government of the day has free reign to decide (or to change their previous decisions about) what is and what is not acceptable expenditure for these Australian businesses.

Importantly, these decisions can be made without parliamentary scrutiny. Parliamentary scrutiny has led to the removal of some significant unintended consequences from superannuation related legislation in the past, such as attempts to remove insurances from young people in high risk occupations.

The proposed provisions, as they are currently written, invest significant power in the executive and the relevant Minister, and exclude the Parliament. If the Committee recommends that the Bill be passed, it is accepting this undemocratic over-reach as appropriate.

The EM goes on to say:

> *Schedule 3 also amends the SIS Act to reverse the evidential burden of proof for the best financial interests duty so that the onus is on the trustee of a registrable superannuation entity. The reverse onus does not apply to additional best financial interest duty requirements prescribed by regulations.*

As legal practitioners, we find this reversal of the burden of proof to be extraordinary. Surely if a regulating body wishes to deem certain expenditure as outside the members’ best financial interest, it is up to that body to demonstrate how and why.

The EM also notes that:

> *With respect to expenditure associated with generating investment returns for members, the determinative motivation for trustees must be maximising the financial returns to beneficiaries having regard to an appropriate level of risk. As indicated above, this does not preclude investments that also yield non-financial benefits, but such investments must still be in the best financial interests of members.*

Further, in the section of the EM entitled ‘Prohibition on certain payments and investments’[21], we learn that:

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[20] EM: p.35
[21] EM: p.48

> *…. This ensures that regulations can be made to prohibit certain payments and investments where they are considered to be unsuitable expenditure by trustees in any circumstance. Consistent with standard practice, the Government will consult before making any regulations under this power.*

This means that the government can unilaterally decide what is and what is not an appropriate investment strategy for a superannuation fund. Given that once again this is written into regulations, the government may decide at a whim what they decide to be appropriate and inappropriate investment decisions.

We are unable to identify any other example of a law which gives the government the power to override corporate investment decisions.

We can find no reference to the need for government to '*consult before making any regulations under this power'* in the legislation.

It is difficult not to perceive Schedule 3 of the bill - alongside a determination to free up early access to superannuation for anything from buying a house to expecting women to fund their own way out of domestic violence - as anything other than an ideological attack on superannuation.

The Royal Commission was scathing in its assessment of the degree to which retail superannuation funds satisfy member best interest duties – yet the Bill's response to this is to attack industry super funds - the part of the sector that is working well.

When considered in parallel with other responses to the Royal Commission – such as the rolling back of consumer protections in lending – this appears to be little more than another appeasement to the corporate banking sector.

Recommendation:

Maurice Blackburn recommends that Schedule 3 of the Bill be abandoned.