

**SUBMISSION TO THE TREASURY:
TREASURY LEGISLATION AMENDMENT (IMPROVING
ACCOUNTABILITY AND MEMBER OUTCOMES IN
SUPERANNATION) BILL 2017**

ACTU SUBMISSION

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INTRODUCTION

The ACTU is the peak council of trade unions in Australia. It is an organisation to which registered employee organisations belong and is the public representative arm of those organisations in relation to dealings with the Australian Government on legislative change.

The ACTU was instrumental in the creation of occupational superannuation in the 1980's, a development which arose from the negotiation of Accords between the ACTU and the then Labor Governments. This development not only involved establishing both Award and Superannuation Guarantee Charge contribution regimes, but also the development of a network of industry superannuation funds into which contributions were made. Those funds remain the substantive part of default superannuation arrangements in Australia.

The ACTU therefore has a keen interest in legislation which relates to the operation of and the governance of superannuation schemes. It is in this context that we make the following submission in response to the Exposure Draft and Explanatory Memorandum on the Treasury Legislation Amendment (Improving Accountability and Member Outcomes) Bill 2017

THE CASE FOR THIS LEGISLATION

The ACTU believes that legislation which purports to improve Accountability and Member Outcomes should commence from a situation that a problem or range of problems have been identified and need to be fixed. In the Explanatory Memorandum, the context which is given for this proposed legislation is that "Australians should have confidence in the (superannuation) system and that it meets contemporary standards, and is consistently delivering the best outcomes for members" It is said the current system "is not currently consistently delivering ... (and) ...Several aspects of the regulatory framework do not meet contemporary best practice or the standards applied elsewhere in the system". Further, it is said that "A modern superannuation system ... provides for transparency and accountability around funds' activities and performance: enables regulators to hold Trustees to high standards and takes appropriate action where they fall short".

It is also said that these standards are not being observed, "to the detriment of members".

THE ACTU RESPONSE TO THE CASE FOR LEGISLATION

The ACTU takes exception with these fundamental premises for this legislation, saying the following:-

- There is no case that Australians do not have confidence in the superannuation system;
- The current system meets contemporary standards in that it delivers outcomes which have made the system amongst the best regarded systems in the world. The nature of the system means there can never be consistent outcomes for all, but where there is

underperformance it consistently emerges in a number of the new products introduced under the ill-thought through MySuper regime;

- There may be some inconsistencies with other regulatory regimes; however this argument is being used to introduce a range of regulatory practices which do not exist in any other part of the regulatory regime for the financial services sector in Australia nor in any regulatory regime we are aware of in any other country;
- There is transparency and accountability around fund activity and performance, and
- Regulators currently have the means to hold Trustees to high standards and take appropriate action when they fall short.

The ACTU says there is no consistent case, alleged or proven, to say that there are any systemic issues with the operation of the superannuation system which merit a round of legislative change such as is being proposed and that no case has been made to say such problems exist. In the absence of an attempt to make such a case, this is, purely and simply, legislative overreach.

Further, the ACTU expresses its concern that the Government is seeking to change a regime which has been established to provide for Prudential regulation to one which will now make APRA a Merit Assessor of superannuation funds. This is a role which was never intended for APRA and brings with a raft of issues which weaken the standing and confidence APRA should have and in doing so, weakens its proper role as the Prudential Regulator.

FURTHER DETAIL ON THE ACTU RESPONSE

1. CONFIDENCE IN THE SYSTEM

Australians have high levels of confidence in industry superannuation, in particular.

Research conducted by Industry Superannuation Australia has reaffirmed the high levels of confidence in industry superannuation. Industry Superannuation Australia will provide detail of this research and the findings on confidence in the system in its submission to this Explanatory Memorandum.

In addition to this, a number of independent agencies rate superannuation providers based on both research and examination of each fund's operations, but also on consumer responses to the level of Trust they have in superannuation offerings. Industry funds regularly dominate the consumer responses on which brands are most trusted.

The ACTU is unaware of any formal research which points to a lack of trust in superannuation.

2. PERFORMANCE OF THE SYSTEM

It is true to say that there have been a range of outcomes in the performance of the superannuation system. This is to be expected in any system where there is a multiplicity of providers – all managing funds differently with different asset exposures and investment characteristics. However, by and large, the system has performed in a manner which has delivered strong outcomes for participants.

An initial measure of this emerges through indices such as the Mercer Global Pension Index. An internationally recognised rating system such as this looks at the features of the retirement system but takes into account the performance of its various components. The Australian retirement incomes system consistently rates in the top two or three retirement income systems in the world.

There are clearly a number of factors which influence performance outcomes for individual funds, initially starting with the investment performance of each fund, but also taking into account issues such as fees and charges levied or deducted by providers. Performance statistics are published quarterly by APRA and have been produced since 2004. For a range of Fund groupings – corporate funds, industry funds, public sector funds and retail funds, APRA tabulates rates of returns and annualised rates of returns. These figures provide a useful guide to the overall performance of the system and participants within it.

In a general sense these performance numbers – and particularly the superior performance numbers of industry funds point to a system which is generally regarded as quite healthy.

The returns from the funds have been the basis of considerable research to determine whether the system is meeting its general objectives in providing sufficient retirement savings to ensure retired Australians enjoy a quality of life consistent with that which they enjoyed during their working life. One such measure of this adequacy is the ASFA Comfortable Retirement standard; a measure which in many ways has become a form of target for what the retirement benefit needs to be for the average participant. Whilst a number of factors contribute to whether this target is able to be achieved in the future, there is little concern that the investment performance of funds (particularly industry funds) will be a barrier to achieving this type of target.

Investment performance, whilst it is a significant factor, is only one factor in determining which funds will be most effective in working towards the achievement of the objectives of the system. It was for this reason that the Federal Government, in 2012, commissioned an Expert Panel to advise Fair Work Australia on the appropriateness of which funds should be default funds within the Award system to receive SGC contributions. That Panel has the ability to investigate a wide range of features which contribute to overall effectiveness and efficiency – including the employer/employee support for funds (which promotes confidence in the overall regime), but also other issues such as collection regimes for unpaid superannuation, hidden operational charges and the like.

This Panel has not been allowed to complete the work with which it was charged. The ACTU maintains it is an appropriate and critically important body in determining the appropriate default funds to which SGC contributions should be made.

3. HARMONISATION WITH REGULATION IN OTHER AREAS OF THE FINANCIAL SYSTEM

The Explanatory Memorandum, in its introduction, asserts that a reason for this legislation being proposed is that the current regulatory does not meet standards applied elsewhere in the financial system. This rationale is then used to introduce a range of specific powers from powers to grant or cancel RSE licences (which is said to be consistent with APRA powers in other areas) but also to introduce a range of roles and functions for APRA (including outcomes assessments and regulation of annual meetings) which are not consistent with the manner in which APRA regulates other areas of the financial system.

What the Explanatory Memorandum fails to do is to provide a comprehensive overview of those areas where harmonisation of powers is occurring and where the new and far reaching powers are being introduced. This leaves open a series of questions of inconsistency in relation to proposed APRA powers over Directors and in reporting Standards areas. The Explanatory Memorandum should be clear in respect of these areas – that is, what are the harmonisation of powers areas and what are the areas in which APRA is to be given new and extended roles.

4. TRANSPARENCY AND ACCOUNTABILITY

The Explanatory memorandum asserts that a modern system should provide for transparency and accountability around funds' activities and performance, with the implication being that a lack of transparency and accountability currently exists and would be fixed by this legislation.

The ACTU commends the industry for the generally high level of accountability which currently exists. Almost without exception (industry) Funds have clear websites which give significant detail on fund activities and performance. APRA currently has powers to ensure Funds report in clear and unambiguous means.

The industry is subject to significant public commentary on investment performance and league tables are reported on in the public media on a regular basis. APRA also collects fund data and whilst it currently publishes aggregate data for industry sectors, could also publish more detail on fund performance (from the material it currently collects). APRA also publishes Annual Reports, makes public contributions on matters of significance and regularly appears before the Senate to report on its activities and comment on contemporaneous issues. Such appearances are well reported in the public media.

The question is whether APRA, in whatever manner it saw fit, undertaking Outcomes assessments would further add to the public's knowledge on superannuation or superannuation outcomes. It is our assertion that it most probably wouldn't. It is therefore the case that this ground is more about a generic call for more transparency than any real attempt to improve transparency in superannuation.

5. THE ROLE OF APRA AS A MERITS ASSESSOR

The ACTU's view is that the Government should not move to make the Prudential Regulator a Merits assessor. The reasons for refraining from such a step are as follows:-

- APRA becoming a Merits Assessor is a conflict with its role as Prudential Regulator and inhibits the role it needs to play as the Prudential Regulator. APRA is required to act objectively and independently in its dealings with Funds to ensure the Funds meet appropriate governance standards. That role involves a level of guidance on governance matters and a formal relationship in which the Funds to disclose information and to accept recommendations on aspects of governance. In assessing the approach a Fund takes to its operational matters, APRA conducts a full review of fund operations, including gaining an understanding of how Funds approach those operational matters. Those operational matters are integral to the outcomes Funds achieve.

If these operational aspects are going to become a substantial part of what an Outcomes assessment is, there are obvious conflict of interest issues as to the position APRA puts itself in as having been a type of auditor of Fund processes and then ultimately the arbiter of the Fund's outcomes under those processes. Can APRA be in a position where it makes recommendations to a Fund and then be objective in whether that Fund delivered on outcomes based on or irrespective of the recommendations made.

Given that Fund performance is essentially a relative outcome between Funds, how can APRA put itself in a position in which it may offer different levels of recommendation on operational matters from Fund to Fund, yet essentially judge the outcomes of those Funds based on their relative performance rankings.

APRA also puts itself in a position in which its level of relationship with Funds, and the confidence they have to accept recommendations is changed in that a Fund will feel if it doesn't accept APRA's recommendations then it would influence any possible determination under a later Outcomes test. Further would a Fund be in a position to say it had adopted APRA's recommendations, only to find that Fund performance didn't improve. Would APRA be able, in such a case, to be an objective arbiter of Outcomes?

- APRA's senior representation are Government appointments and in an environment when a Government has particular political imperatives, there will be a question as to whether APRA is sufficiently Independent to be able to act as an arbiter when its decisions are effectively measured against the Government's political objectives. Whilst it will be often said that APRA would act in a professional and independent manner, the ACTU foresees the following sorts of scenarios which would call into question the independence of APRA, namely
 - That APRA's representatives might make public commentary about performance when that commentary does not report fund performance in a consistent or independent manner;
 - That APRA might engage itself in debates about the merits of legislation in such a manner that it causes friction with leading sponsors of superannuation funds;

- That APRA might give evidence on performance of superannuation funds which is open to question on its authoritativeness.

If such scenarios were to exist, then it should not give confidence to the Parliament to allow the arbiter of fund performance and fund outcomes to be in a position where their independence was not clear.

This, of course, could happen under any Government and as such the Parliament should be particularly cautious of establishing a principle in which partisanship, in the future, might be a factor in the administration of Merit Assessment

In the ACTU's view, the benefit of the framework already established for Merit Assessment – that is the Fair Work Assessment Panel reporting to a Full Bench of the Fair Work Commission which provides an additional check and balance in the system and helps minimise the possibility of a lack of independence in the Merit Assessment processes.

FEATURES OF THE OUTCOMES TESTS

The ACTU also wishes to make a number of comments on the Outcomes Test and in doing so express a concern that whatever Merit Assessment is made, it should be by a body which can look more rigorously into a variety of factors which both affect investment performance but also can look at ensuring the right decision about a potential default fund selection is made.

The ACTU says that short-term performance alone may not be a reason on its own to question the sustainability of a superannuation offering. By way of example, the ACTU cites the developments of recent years as a means of understanding why short term performance alone might not be the only factor on which a Merit Assessment might be made.

The advent of MySuper has seen significant changes to the manner in which superannuation has been distributed. In the past five years, substantial marketing and cross-promotional campaigns have seen a substantial rise in the number of Australians utilising retail MySuper products. Industry estimates are that around 5-6% of Australians now use a Retail Mysuper fund as their superannuation product. A number of issues flow from this.

An outworking of this change in distribution is that the number of members entering mid-size funds has changed relatively significantly. Whether those funds can react to this change in circumstances or whether they can evolve their operational situation to deal with changed membership dynamics is an unknown at the moment, given that this is a relative recent event. It could not be expected that a fund would embark on the sorts of structural changes it might need to in such a short time horizon. Funds need some time period to respond to substantive structural shifts in markets, to understand the likely longer-term operating environment they face and how they can build a business plan to cope with such a model. In such times, investment performance might be quite variable. But it might also be that a fund weathers such a storm and that its long-term support from industry groupings and members is such that it can not only remain a well-respected and effective default fund, but that it might be able to re-establish an operating structure which restores long-term investment performance to the upper levels of relative performance amongst funds. The current proposals for the Outcomes Tests do not appear to allow for the Merit Assessor to be able to consider such factors.

Under normal circumstances, it would be expected that the continuing underperformance of retail MySuper products (in comparison to industry funds) would mean that APRA would find those funds as failing to meet a sustainability test. However, even on an issue as clear as this has been, APRA has shown itself to be less than a rigorous commentator on this continued underperformance. This gives rise to a lack of confidence that APRA would adopt an even handed approach in its assessment of outcomes across all types of funds.

The Exposure Draft fails to give appropriate guidance on how long term factors should be assessed. An example of the need to consider long term factors can be seen in looking at the relatively short period since the introduction of MySuper in which advertising and promotional promises have distorted distribution arrangements across the superannuation sector - retail MySuper products have "taken" a market share, often based on the promise that their investment performance would match industry funds. As that promise continues not to play out, there would be an expectation that there would be some normalisation of distribution - workers, seeing this investment promise is unfulfilled, may well return to better performing Industry MySuper products. Even the continued operation of retail funds can't be guaranteed if they fail to maintain a target market share or deliver an appropriate profit margin to their promoters.

Swings in distribution trends such as this need to be carefully considered and not simply judged based on an annual outcomes test. The Exposure Draft doesn't give clear guidance on how longer term trends are to be taken on board by the Assessor and given APRA's confused reporting on performance, the ACTU has a lack of confidence in how an outcomes test, overviewed by APRA should and would be applied.

These longer term factors are another reason that, initially, more care needs to be taken in framing the Outcomes test. And secondly, it is why it is appropriate that a body, other than APRA, with greater expertise and independence and an ability to properly consider a wide range of factors, should be the Merit Assessor.

PUBLIC SUBMISSIONS

The ACTU would welcome the opportunity to address the Department on this submission.

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