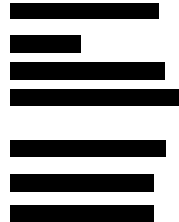
Maurice Blackburn Pty Limited



15 January 2020

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

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

Dear Sir/Madam,

We are grateful to the Senate Standing Committees on Economics (the Committee) for the opportunity to provide feedback in relation to the exposure draft for the Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 (the Bill).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, insurance and superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. 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 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. All Maurice Blackburn submissions to public policy inquiries are based around the lived experience of the clients we represent.

We agree with the Committee's view expressed in their 2017 report[1] of their review of the previous iteration of the Bill, where they say:

[1] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/SuperannuationNo2/~/media/Committees/economics_ctte/SuperannuationNo2/report.pdf; para 2.41

> *Superannuation is perhaps the most important investment that a person makes in the course of their working life. Confidence in the investment and those who manage it is paramount for the future welfare and security of millions of Australians; not to mention the reduction in reliance on the public purse.*

We also note the concerns expressed by the Labor Senators on that Committee[2], where they called for assurances that changes would not serve as an impediment to collective bargaining, and that sufficient safeguards exist for workers where they exercise choice of fund. We share those concerns.

Above all, we see the Bill as a missed opportunity to implement reforms to the existing superannuation regime, to ensure that employees are not victims of the abdication of responsibilities in relation to the payment of superannuation by unscrupulous employers.

To this end, we ask that the Committee consider where the following important matters of consumer protection could and should be embedded in the Bill.

1. A legislated right of action for damages caused by employer's failure to make on time superannuation guarantee contributions

According to the Superannuation Guarantee Cross Agency Working Group (SGCAWG), made up of representatives for the ATO, Treasury, Department of Employment, ASIC and APRA, 70% of non-compliance with superannuation payment requirements is committed by small business[3].

Worryingly, the SGCAWG research led them to note that:

> *Cash flow problems are often the major reason small business employers provide as to why they did not pay their employees' superannuation guarantee contributions*[4].

This indicates that to the majority of wrongdoers, the non-payment of superannuation is an intentional business strategy. It represents a prioritisation by employers for paying other business expenses ahead of paying their workers' superannuation.

Many of these workers will be unknowingly underinsured or uninsured as a result of these choices.

Maurice Blackburn lawyers have acted for many people whose employer has failed to make on time superannuation contributions to a MySuper or Choice fund, which has caused them to lose their default death or disability insurance.

This occurred in the case of *Woodford & Anor v. Landline Investments Pty Ltd & Ors* [2000][5]. The Estate of the deceased employee claimed the lost sum of $45,000 which would have been payable as a death benefit by the deceased's super fund, in the event if the employer had correctly paid contributions to that fund under the *Superannuation Guarantee (Administration) Act) 1992*[6].

---

[2] Ibid, p.22
[3] Superannuation Guarantee Non-compliance – A report to the Minister for Revenue and Financial Services, March 2017. https://static.treasury.gov.au/uploads/sites/1/2017/08/P2017_T200724.pdf, p.5
[4] Ibid, p.5
[5] QDC 258
[6] ss. 16, 46, 49

The Court found that whilst the super guarantee legislation imposes taxation penalties on employers who fail to make on time super contributions, in the form of a super guarantee charge (SGC), it does not provide employees with any private right of action for damages caused by such failure.

Maurice Blackburn submits that this should be rectified to provide for such a right of action for damages. Alternatively, reforms are needed whereby Awards and/or Enterprise Agreements would be required to include an obligation for employers to pay on time superannuation contributions, a breach of which would in turn confer on the employee an action for damages for breach of that obligation.

This remedy is supported by Recommendation 14 of the Committee's 2017 inquiry into the Superannuation Guarantee system[7], which reads:

> *The committee recommends that the government consider a legislated option for employees, or third parties acting on their behalf, such as unions or superannuation funds, to take private legal action in the relevant courts against their employers for unpaid SG.*

We believe this could be a worthwhile recommendation for the Committee to reconsider, in the context of the current Bill.

2. A legislated obligation on employers to conduct due diligence over any default superannuation fund

For employers who do not utilise an EBA, and have no process for collective worker input into choice of fund, we believe there should be specific requirements that inform the choice of default fund.

One of the more important roles an employer can play in the protection of his/her staff is in ensuring that the provisions within a default superannuation fund are actually beneficial to their employees.

For example, Maurice Blackburn is 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. 50% of this firm's staff were truck drivers.

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 final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[8] (the Banking Royal Commission) expressed similar concerns. Commissioner Hayne says[9]:

> *Inevitably, funds compete to be nominated as default funds. If the relevant default fund is not fixed by some industrial instrument, competition between funds will focus on securing nomination of the fund by employers.*

---

[7] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/SuperannuationGuarantee/Report/b01
[8] https://financialservices.royalcommission.gov.au/Pages/reports.aspx
[9] https://financialservices.royalcommission.gov.au/Pages/reports.aspx; p.251

> *The evidence given in the Commission showed that some large funds spend not insignificant amounts to maintain or establish good relationships with those who will be responsible for nominating the default fund for their employees. Money is spent on entertainment and sporting events at which the relevant relationships can be made and enhanced.*

In constructing his Recommendation 3.6, Commissioner Hayne indicates that there needs to be additional oversight into the decision making processes of employers in making proper decisions related to default funds. He calls for a civil penalty provision, enforceable by ASIC, to reinforce expected behaviours.

Evidence would suggest that, even where employee choice of fund is available, most employees opt for the default fund[10]. We believe, therefore, that this Bill is well placed to prescribe a legal obligation on employers to ensure any default fund they chose for their employees is appropriate to the industry and employee demographics.

3. Consumer protections when choice is available

Choice of fund, whilst a worthy goal, comes with dangers. Maurice Blackburn urges the Committee to ensure that adequate protections are in place for consumers, should a more open approach to choice be recommended.

Where choice is available, consumers are more open to the risk of targeted marketing campaigns by superannuation funds.

It is worth noting that the findings of the Royal Commission included a specific recommendation[11] aimed at prohibiting hawking of superannuation products.

The risks were also highlighted by the Labor Senators in the Committee's review of the 2017 Bill[12]:

> *Choice of fund needs to be considered in a context where decision making is not always a rational evaluation of options. Marketing, sales techniques and other messaging can influence a person's choice away from the best rational choice. There need to be adequate safeguards when choice is exercised, particularly in the case of superannuation, where the benefits of additional net returns can accrue to substantial sums of money over a long time horizon.*

A recent Federal Court case provides a useful example of what this looks like in practice. In ASIC v BT[13] the court found:

> *…that in calls to 14 of the customers, the Westpac staff did provide them personal advice, in breach of WSAL and BTFM's Australian financial services licences.*

This shows that retail funds may be willing to flout the laws which are designed to protect consumers against choosing products which are not suited to their needs. The Committee needs to be aware of this, as a potential adverse consequence of agreeing to this Bill.

---

[10] See for example https://www.smh.com.au/money/investing/steer-your-own-super-20100807-11p9u.html
[11] Recommendation 3.4
[12] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/SuperannuationNo2/~/media/Committees/economics_ctte/SuperannuationNo2/report.pdf; p.18
[13] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-293mr-asic-wins-appeal-against-westpac-subsidiaries/

Please do not hesitate to contact me and my colleagues on [redacted] [redacted] if we can further assist with Treasury's important work.

Yours faithfully,

Josh Mennen
Principal Lawyer
Maurice Blackburn