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Senate Economics Legislation Committee

Inquiry into the Treasury Laws Amendment (Your Future, Your Super) Bill 2021

Prepared by:

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Authorisation

This submission has been authorised by the NFAW Board

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Inquiry into Treasury Laws Amendment (Your Future, Your Super) Bill 2021

This submission is being made by The National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

It is now widely acknowledged that the different elements of the retirement income system affect women differently to men. The design of the superannuation guarantee system is inherently flawed as it is based on lifetime income. This has always limited the superannuation accrued by casual and part time workers, of which a high proportion are women, and this will be exacerbated by current trends in the "gig economy".

One of our criticisms of the design of the superannuation system is that does not meet the needs of women, having been designed at a time when men worked at one career throughout their life, while women were less likely to participate in the workforce.

This submission responds to the terms of reference through a gender lens.

To the extent that the proposed measures are likely to increase superannuation balances for lower paid workers we would support those measures; however we do have some significant concerns over the need for some of these measures and the potential effects depending on how they are implemented.

Recommendations

Recommendations:

1. NFAW supports, in principle, ensuring that a person has one default superannuation account that accompanies them throughout their working life.
2. An education campaign with appropriate decision making tools should be made available to people to encourage people to review their superannuation options when they make a career change, and at other significant life events.
3. The performance benchmarks established in the regulations should also have regard to the effect that they may have on reducing competition and diversity in the superannuation market.
4. NFAW does not support the best financial interests test. The legislation already requires superannuation funds to act in the best interests of their members; and the best financial interest test is effectively a gag on superannuation funds holding companies accountable for their actions.

Discussion

This Bill implements three measures. The measures introduced in the Bill are to:

1. Limit the multiplication of accounts by stapling the account to the member, ensuring that the becomes the default account for superannuation
2. Require APRA to conduct an annual performance test in respect of MySuper and other prescribed products
3. Establish a “Best Financial Duty” test that imposes obligations on superannuation trustees to act in the best financial interests of members of the fund.

Each of these will now be discussed in turn.

Schedule 1: Single Default Account

In its 2018 report¹ The Productivity Commission identified multiple accounts as a significant factor in reducing superannuation balances, as fees and duplicate insurance policies reduce superannuation retirement balances.

Overall the policy of stapling a superannuation account to an individual when they enter the workforce is an appropriate measure to address multiple accounts. However it is important that members are sufficiently well informed about their options to be able to choose to transfer their superannuation into an appropriate fund as their circumstances change. Very few young people start and finish their working life in the same industry. Young women are likely to commence their working life in hospitality or retail while at school or undertaking post-secondary education, but will often move into professional or administrative positions as they complete their education.

MySuper funds operate within certain constraints in respect of their insurance and investment strategies, however these policies are designed with a view to the needs of the majority of their members. For example, the terms of the group insurance that is included in the strategy for a fund that primarily serves the hospitality industry is likely to be different from the terms of a group insurance policy that serves an industry where the members have a different risk profile, such as the health industry. In the context of insurance, we note that if a person under the age of 25 is stapled to a MySuper fund with inappropriate insurance the exclusion from default insurance expires when the member turns 25², resulting in their inclusion under the default policy whether it meets their current needs or not.

The provisions of the legislation provide do ensure that where a person has a chosen fund the stapling measures are not relevant, however the data also shows that the majority of Australians are in default funds nominated by their employer³.

The legislation should be accompanied by an education campaign with appropriate decision making tools should be made available to people changing their job to encourage people to review their

¹ Productivity Commission (2018), *Superannuation: Assessing Efficiency and Competitiveness*, Report no. 91, Canberra.

² Section 68AAC Superannuation Industry Supervision Act 1993

³ Productivity Commission (2016), *How to Assess the Competitiveness and Efficiency of the Superannuation System*, Research Report, Canberra; at 200.

superannuation options when they make a career change, as well as at other significant life events including turning 25, marriage and becoming a parent.

Recommendations:

1. NFAW supports, in principle, ensuring that a person has one default superannuation account that accompanies them throughout their working life.
2. An education campaign with appropriate decision making tools should be made available to people to encourage people to review their superannuation options when they make a career change, and at other significant life events.

Schedule 2: Annual Performance Testing

The second structural flaw identified by the Productivity Commission in its 2018 report⁴ was underperforming funds. The current Bill requires that the relevant benchmarks for an annual performance test be established by regulation, and administered by APRA. Funds that do not meet the benchmarks must advise their members that the fund is an underperforming fund, and if it does not meet the test for two successive years the fund must not accept new members.

The difficulty with this proposal is that it depends on the parameters established in the test, which is to be administered by APRA. APRA will have flexibility in how the test is designed and applied. There is some scrutiny provided through the requirement that regulations must be tabled in Parliament.

The regulations are expected to address the following matters:

- specifying requirements in respect of investment returns (which may be net of fees and taxes); and
- specifying requirements that depend on the exercise of a discretion by APRA; and
- specifying matters that APRA may or must take into account in exercising such a discretion; and
- allowing APRA to make specified assumptions in exercising such a discretion.

Failing this test will have major implications for a superannuation fund, as it will lead to members leaving that fund. The transfer of member accounts to other funds will further weaken the viability of the original superannuation fund: for example the fund may find it necessary to retain higher levels of cash holdings, which will contribute to a weak result in the subsequent year; rendering it unable to accept new members to rebuild its investment base.

In short, a failure to meet benchmarks in one year could become a self-fulfilling prophecy with the fund continuing to perform badly until it fails. The outcome would be even more catastrophic for remaining members than the original underperformance.

While well intentioned, the outcome of this measure will reduce competition and diversity in MySuper funds and other nominated products.

Recommendation:

3. The performance benchmarks established in the regulations should have regard to the effect that they may have on reducing competition and diversity in the superannuation market.

⁴ Above n1

Schedule 3: Best Financial Interests Duty

This measure requires superannuation funds to act in the best **financial** interests of members of the fund. NFAW has some concern about the ability for superannuation funds to represent the views of their members in matters that are not financial.

We note that there are already very strict sanctions imposed on trustee who do not act in the best interest of members. The sole purpose test⁵ requires that the sole purpose of the fund is to provide benefits to members in prescribed circumstances, and the superannuation deed is required to include covenants that include the requirement that the trustee act in the best interests of the beneficiaries (members)⁶. The proposed change limits the best interest tests to being in the best **financial** interests of members.

It seems that this provision is based on a perception that superannuation funds are misusing member's funds, or acting beyond their purpose. In the course of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry there was criticism of the industry funds for sponsoring an advertising program. We note the comments of Commissioner Kenneth Hayne who said in responding to the suggested ban on political advertising:

*"I consider that the existing rules, especially the best interests covenant and the sole purpose test, set the necessary standards. Those standards should be applied according to their terms and without more specific elaboration."*⁷

In addition to the example of advertising that was examined at the Royal Commission, superannuation funds now have substantial influence as shareholders of Australian companies. Members of superannuation funds are increasingly placing pressure on their funds to adopt ethical investment practices.⁸

The most notable example is the trend for superannuation funds to reduce their holdings in fossil fuels in favour of renewable energy investments. Investment in fossil fuels is a complex issue: there is financial risk in retaining the investment as global demand decreases; but it can also be argued that retaining investments in fossil fuel companies allows investors to scrutinise and work from within to reduce carbon emissions.⁹ The point is that this is only partly a financial issue; and members of superannuation funds have a right to expect that their funds are invested in a way that meets their ethical requirements. In fact, there is evidence that ethical investing can result in better returns than conventional investment.¹⁰

⁵ Section 62 Superannuation Industry Supervision Act

⁶ Section 52 (c) Superannuation Industry Supervision Act

⁷ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry *Final Report* at page 235

⁸ Mark McVeigh v Retail Employees Superannuation Pty Ltd (settled)
<https://equitygenerationlawyers.com/cases/mcveigh-v-rest/>

⁹ Stefan Andreasson (2019) Fossil fuel divestment will increase carbon emissions, not lower them – here's why The Conversation, 26 November 2019 <https://theconversation.com/fossil-fuel-divestment-will-increase-carbon-emissions-not-lower-them-heres-why-126392>

¹⁰ Gariet WS Chow, Robert B Durand, SzeKee Koh (2014) Are ethical investments good? *Australian Journal of Management* Vol 39 Issue 4 pages 645 - 665

Other non-financial matters where a superannuation fund may legitimately represent the views of their members include:

- The destruction of the Juukan Gorge indigenous site by Rio Tinto;¹¹
- Gender balance on the Boards of ASX listed companies;¹²
- Applying a gender lens choosing investments;¹³ and
- The use of non-disclosure agreements in respect of sexual harassment matters.¹⁴

There is some evidence that women are generally more socially conscious in their investment patterns than men¹⁵; and that younger people are more aware of social concerns than previous generations.¹⁶ This is likely to be reflected in investment patterns.

In order to represent members' views appropriately, superannuation fund managers must have the right to reduce holdings in companies and change their investment policies to take account of ethical concerns without being limited to financial grounds.

Further, we note that the mechanism to enforce this is through regulations. The legislation already allows regulations to be made to prescribe operating standards, including the investment of assets of funds and the management of the investment.¹⁷ The Bill goes further to include the making of payments: apparently based on matters raised before the Royal Commission in respect of advertising and sponsorships.

Overall this measure would have the effect of gagging a substantial group of investors from speaking on issues of concern to their members and would have the effect of fettering the trustees managing the fund in the best interests of their members.

Recommendation:

4. NFAW does not support the best financial interests test. The legislation already requires superannuation funds to act in the best interests of their members; and the best financial interest test is effectively a gag on superannuation funds holding companies accountable for their actions.

¹¹ <https://acsi.org.au/rio-tinto-statement-130820/>

¹² <https://acsi.org.au/media-releases/board-gender-diversity-balance-is-shifting-but-is-the-power/>

¹³ <https://theconversation.com/introducing-gender-lens-investing-its-more-than-pink-washing-112291>

¹⁴ <https://www.afr.com/work-and-careers/management/companies-should-come-clean-on-sexual-harassment-ndas-super-funds-20200820-p55njs>

¹⁵ Tippet, J. and Leung, P. (2001), Defining Ethical Investment and its Demography in Australia. Australian Accounting Review, 11: 44-55. <https://doi.org/10.1111/j.1835-2561.2002.tb00389.x>

¹⁶ Housley, Delaney J., "The Effect of Gender on Ethical Investing" (2020). Honors Theses and Capstones. 487 <https://scholars.unh.edu/honors/487>

¹⁷ Section 31(l) *Superannuation Industry Supervision Act 1993*