Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011

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Economics Section

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Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011

Date introduced: 3 November 2011
House: House of Representatives
Portfolio: Treasury

Commencement: Schedule 1, item 1, 1 October 2013; Schedule 1, items 2 to 13, a single day fixed by proclamation but no later than 1 January 2013.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Bill proposes to establish the framework for the establishment of a new type of superannuation (‘MySuper’) including:

• the regulatory regime for MySuper products, including disclosure requirements and approval of MySuper products by the regulator (the Australian Prudential Regulation Authority)
• the required characteristics of a MySuper product
• the rules on payment of contributions and account transfers for MySuper products, and
• the fees that can be charged and the basis on which those fees can be charged to members of a MySuper product.

Background

Under the Superannuation Industry (Supervision) Act 1993 (SIS Act) and Retirement Savings Account Act 1997 (RSA Act), superannuation funds and Retirement Savings Account (RSA) providers must meet a range of conditions to qualify for concessional tax rates on contributions and earnings.1 The Superannuation Guarantee (Administration) Act 1992 includes provisions that require employers to meet a defined process for choosing which superannuation fund/RSA account to make compulsory employer superannuation contributions.2

The Bill proposes to add to existing requirements by creating a simplified superannuation accumulation product, into which contributions are paid if the employee either nominates the product or does not express a choice about which fund their superannuation contributions are paid

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into. The product—to be called ‘MySuper’—is proposed to have specific characteristics with respect to investment strategy, administration and other fees, trustee obligations and disclosure. The Bill does not propose any changes to the regulatory regime that applies to other superannuation/RSA products.

Context of this Bill in relation to other proposed changes

The introduction of MySuper is one of several superannuation-related changes either proposed or implemented by the Government. Other significant changes include:

- progressively lifting the superannuation guarantee rate from 9 per cent to 12 per cent by 2019–20 — this measure is likely to significantly increase the flow of funds into superannuation over the next decade
- future of financial advice (FOFA) measures — a package of measures to change the obligations and remuneration structure of financial advisers. These changes intersect with the superannuation industry to the extent that many, if not most, superannuation funds provide financial advice and members can be paying for this advice in a number of different ways
- the ‘Superstream’ package of measures to improve the efficiency of backoffice administration of superannuation funds through the use of data and payments standards, automatic consolidation of low-value inactive accounts and regular information to employees on employer contributions, and
- governance measures to clarify the duties of superannuation trustees and manage conflicts of interest.

Most of the measures listed above require some legislative change to implement them. Some have already progressed into the House of Representatives and have been referred to various committees or have been passed by the House of Representatives. Draft Bills for elements of the Superstream package (relating to payslip reporting of superannuation contributions and data and payment standards) were released on 14 February 2012 and 9 February respectively. Consultation by the Australian Prudential Regulation Authority on some of the detailed arrangements relating to

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3. The Corporations Amendment (Future of Financial Advice) Bill 2011 was introduced in the House of Representatives on 13 October 2011 and has been referred to the Parliamentary Joint Committee on Corporations and Financial Services (no reporting date specified) and the Senate Economics Committee (to report by 14 March 2012). A separate Bills Digest has been prepared for this Bill. The Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 was introduced in the House of Representatives on 24 November 2011 and has been referred to both the Parliamentary Joint Committee on Corporations and Financial Services (no reporting date specified) and the Senate Economics Committee (to report by 14 March 2012). A separate Bills Digest has been prepared for this Bill. The Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 was introduced into the House of Representatives on 16 February 2012. A separate Bills Digest for this Bill will be produced shortly.

4. The Superannuation Guarantee (Administration) Amendment Bill 2011 passed the House of Representatives on 22 November 2011. A separate Bills Digest has been prepared for this Bill.


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prudential standards (including governance standards) is already underway, as is consultation by the Australian Taxation Office on data payment standards.

The Financial Services Council considers that it is difficult to comment on significant reforms, such as MySuper, in multiple phases. The Council notes that:

Many questions arise in relation to the Bill, which may be answered in later tranches. Further, subsequent tranches may give rise to additional issues with this Bill. It is therefore very difficult to properly assess the full impact of the Bill without the benefit of the related tranches of legislation, regulations and prudential standards.

Arguments about aspects of MySuper that are related to proposals contained in other legislation may be reviewed in other Bills Digests. For example, while arguments about the relative lack of disclosure required of some superannuation funds is relevant to the discussion about the merits of MySuper, disclosure requirements are not included in this Bill and are therefore not considered by this Bills Digest.

**Cooper Review**

This Bill, and the others that comprise the Stronger Super package, are largely the outcome of the Cooper Review.

The Government first announced that the Australian superannuation system would be subject to a comprehensive review on 28 April 2009. This announcement included reference to a ‘Communiqué

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of principles for superannuation’, which was to guide the Review. This Review’s terms of reference and other details were announced on 29 May 2009.

Briefly, the terms of reference included the following:

- comprehensively examine and analyse the governance, efficiency, structure and operation of Australia’s superannuation system, including both compulsory and voluntary aspects
- to be conducted around the concepts of the best interests of the member and the maximising of retirement incomes for Australians
- a major emphasis on improving the regulation of the superannuation system, whilst also reducing business costs within the system
- a systemic examination, including all superannuation fund sectors
- have regard to the ‘Communiqué of Principles’ for superannuation, and
- comparatively examine international jurisdictions and consult with experts as needed from other jurisdictions.

However, the Review (referred to as the ‘Cooper Review’) was excluded from considering the issues then before the Henry Tax Review (Australia’s Future Tax System) concerning system inputs such as the level of superannuation contributions, taxation including taxation concessions, and other incentives. It was also excluded from considering the development of a superannuation clearing house or a project addressing the consolidation of lost accounts, as these are the subject of separate and already commenced processes.

The Cooper Review was undertaken in three phases:


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• the first phase concerned the governance of the superannuation industry
• the second phase dealt with the industry’s operation and efficiency, and
• the third phase dealt with the industry structure, including the place of self managed superannuation funds (SMSF).  

The Cooper Review released a number of preliminary reports and issues papers over the period December 2009 to April 2010 covering a range of issues including governance solutions, back office arrangements for the superannuation industry and self managed super funds. The final report and recommendations were provided to the Government on 30 June 2010. The final report, together with the Government response, was released on 5 July 2010.

In making its case for further reform, the Cooper Review noted that there were a number of issues that needed to be addressed, including that members’ interests were not always paramount in system design and regulatory settings, that efficiency was left in the hands of market participants, that members perceived superannuation as too complex and opaque and that there is an overall lack of transparency and comparability of superannuation products.

The final report of the Cooper Review contained 177 Recommendations covering ten broad areas of reform including:

• ‘MySuper’ and choice of fund/default fund arrangements
• trustee governance
• investment governance
• transparency of fund operations
• insurance arrangements and fees
• prudential requirements
• retirement products and advice
• self managed superannuation funds
• ‘backoffice’ industry arrangements, and

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• regulation.20

Initial Government response to the Cooper Review

The Government response to the final report of the Cooper Review was to support, or support in principle, 139 of the 177 recommendations. Some of the recommendations that the Government disagreed with related to the composition of trustee boards21, requirements to license superannuation administrators22 and for the Productivity Commission to review the regulatory framework after five years.23

Consultation panel

The Government indicated that further consultation would be undertaken with stakeholders on the implementation of the reforms, commencing in early 2011.24 The Minister for Financial Services and Superannuation announced the membership of a consultation panel on 1 February 2011, with the panel to be supported by several working groups (covering MySuper, governance, self-managed superannuation funds, and SuperStream).25

Two key issues on which there was a level of disagreement during the consultation phase was whether a uniform price should be charged on MySuper products; and the threshold and impact on insurance policies of providing for the consolidation of multiple low-balance accounts.26

The Consultation Panel process was completed at the end of June 2011 and the Panel’s report was released by the Government on 21 September 2011.27 Key aspects of the report were:

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• that the administration fee take account of the significant investment in technology and back-office efficiencies required under the SuperStream initiatives but not extended to features which would not reasonably be utilised
• that there be a fit-for-purpose investment strategy with the trustee clearly articulating the level of risk they have deemed appropriate for default members and how the portfolio will be managed against this risk target by most members of the product
• that there was not unanimous agreement about whether a case for a discounted administration fee should be offered in larger workplaces, and
• a suggestion that there be a two-stage process for automatic consolidation between funds of inactive accounts, with initially balances of less than $1000 (with the ability for a member to opt-out) consolidated followed by an ongoing program of account consolidation triggered by a change of employment.²⁸

Final Government response

The Government announced its response to the Consultation Panel report on 21 September 2011 and indicated its decisions on key aspects of the package that were the subject of discussion and some disagreement by the Consultation Panel including:

• MySuper products — will have a single, diversified investment strategy. They will have to be offered at a standard set of fees generally available to all members. However, funds will be able to offer discounted administration fees to employees of particular employers, reflecting the administrative efficiencies for the fund in dealing with the employer. Any discounted fee will be reported to APRA and published by the fund. MySuper public offer funds will be able to be compared on fees. In addition, funds will be able to offer employers with more than 500 employees a MySuper product tailored to the needs of the particular workplace including the investment strategy, member services and fees. The details of all separately tailored MySuper products will be required to be reported to APRA
• timing of implementation — from 1 October 2013, employers must make contributions for employees, who have not chosen their fund, to a fund offering a MySuper product. All new superannuation payments will be commission free. By 1 July 2017, funds will need to transfer the existing default balances (ie: member accounts where no election of fund had been made) to a MySuper product. However, the Government will consult further on a mechanism to allow for this period to be extended in certain, limited circumstances, recognising there may be instances where existing obligations affect a trustee’s ability to transfer balances, and

²⁸ Ibid., pp. v–vi.

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• automatic consolidation — new processes will see lost and inactive accounts, with balances under $1000 and in eligible rollover funds, consolidated into the member’s current active account, unless the member opts out.29

Basis of policy commitment

In the lead up to the August 2010 election, the ALP announced that it would allow superannuation funds to offer a ‘simple, low-cost superannuation product called ‘MySuper’ from 1 July 2013’.30 The policy document noted that:

Labor will introduce tough new standards that providers of MySuper products must meet including:

- No entry fees, with exit fees limited to cost-recovery.
- A ban on commissions and conflicted remuneration structures in relation to retail distribution and advice in line with Government’s financial advice reforms.
- New duties that require superfund providers to deliver value for money or be stripped of their licence by the regulator
- A single, simple and easy-to-understand investment option designed to maximise a person’s retirement income
- Standardised reporting requirements in plain English.31

Draft legislation relating to the establishment of a framework for MySuper was released by the Treasury on 21 September 2011, with submissions due by 13 October 2011.32

On 17 October 2011, a Regulation Impact Statement for implementation of a range of Stronger Super measures, including MySuper and Super Stream, was published by the Office of Best Practice Regulation.33 The Office noted that the Prime Minister had granted exemptions from the requirements for regulatory impact analysis in relation to the ability of funds to offer tailored

31. Ibid.

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MySuper products to employees with more than 500 employees, and the extension to the date by which trustees will be required to have transferred the balance of existing default funds into MySuper products. A post-implementation review for these measures will be required within one to two years of their implementation.\textsuperscript{34}

\textbf{Committee consideration}

The Bill was referred to the Parliamentary Joint Committee on Corporations and Financial Services by the House of Representatives Selection Committee on 3 November 2011.\textsuperscript{35} The reporting date set by the Committee is 13 March 2012.\textsuperscript{36} Details of the inquiry are available on the Joint Committee’s website at the \textit{inquiry’s webpage}.

\textbf{Policy position of the Coalition}

Prior to the 2010 election, the Coalition’s policy was to consider and respond to Cooper Review recommendations before the end of their first term of government.\textsuperscript{37} In relation to MySuper, the Coalition considered at the time that ‘there should be full discussion with the industry about the MySuper proposal’.\textsuperscript{38}

Since the 2010 federal election, Coalition shadow economic ministers have been reported as agreeing with the Financial Services Council that MySuper was ‘overly paternalistic and redundant’ and have expressed a concern that low-cost funds mandatorily available to Australian workers under MySuper would not deliver real value.\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{37} Liberal Party of Australia (LPA), \textit{The Coalition’s plan for real action on superannuation}, LPA 2010 election policy document, p. 2, viewed 9 November 2011, \url{http://www.liberal.org.au/~/media/Files/Policies%20and%20Media/Community/Superannuation%20Policy.ashx}
  \item \textsuperscript{38} Ibid.
\end{itemize}

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In responding to the Government’s final response to the Cooper Review, the Coalition spokesman on Financial Services and Superannuation noted that ‘the best way to maximise value for super fund members is by making sure there are proper competitive tensions in a transparent system across all parts of the value proposition’. 40

**Position of major interest groups**

The major superannuation industry interest groups are broadly supportive of the MySuper proposals. It should be noted that many of the groups whose views are presented below were also involved in the Cooper Review, with members as part of the review or consultation processes.

The [Association of Superannuation Funds of Australia (ASFA)](http://www.superannuation.asn.au) broadly support the Government’s Stronger Super changes, including MySuper. 41 ASFA noted that ‘these reforms protect the financial interests of those who are not engaged with their super as well as respond to the overarching need for the industry to be set up to deal with the growing pool of retirees’. 42

The [Financial Planning Association of Australia (FPA)](http://www.fpa.com.au) ‘support the principle objectives underlying MySuper to provide simple superannuation products that are easy to compare so that consumers are better able to make informed decisions about where their superannuation is invested and the costs involved’. 43 However the FPA believe that some aspects of the rules for charging fees would mean that the MySuper policy objectives will not be achieved. 44

The [Industry Super Network (ISN)](http://www.industrialsuper.com.au) broadly supports the introduction of MySuper and see the MySuper proposal as an endorsement of the industry super fund model. 45 ISN noted that:

> [T]he introduction of the first tranche of MySuper legislation was an important milestone in protecting the super savings of millions of Australian workers who are losing savings as a result of excessive fees and poor net returns. ...

> MySuper is designed to deliver a better deal to millions of Australian workers who don’t engage with their super. It is therefore vital that workplace default funds represent value for money and deliver strong net returns to members. 46

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42. Ibid.
43. Ibid.
44. Financial Planning Association of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services op. cit., p. 5.
45. Ibid.

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The **Australian Institute of Superannuation Trustees** (AIST) support the introduction of MySuper and most other aspects of the Stronger Super changes.\(^47\) The AIST consider that MySuper is not about ‘dumming-down’ superannuation and predicted that as many as four out of five working Australians would end up in a MySuper product.\(^48\)

The **Financial Services Council** (FSC) consider that the Stronger Super package represented an improvement on the original package and that the Government ‘has landed on a balanced and measured package’.\(^49\)

The **Australian Chamber of Commerce and Industry** (ACCI) broadly support the Stronger Super package of measure and have encouraged business to also back the reforms.\(^50\) The ACCI noted that:

> A more efficient and member focussed superannuation system is not only of benefit to fund members, but to the hundreds of thousands of employers who finance contributions on behalf of their employees. It should also take some pressure off the call to increase the superannuation guarantee levy.\(^51\)

The **Australian Private Equity and Venture Capital Association** (AVCAL) consider that the issue of fees in MySuper had been dealt with in a simplistic way, with trustees looking for the lowest-fee costing investment for the best outcome for their members in terms of net returns.\(^52\) AVCAL noted that ‘They are dumming down their thinking to simplistic products that don’t look exotic but equally are not delivering the net beneficial returns’.\(^53\)

### Financial implications

The Explanatory Memorandum notes that the Bill has no significant financial impact on Commonwealth expenditure or revenue.\(^54\) In the 2011–12 Budget, the Government announced that it had allocated $26.2 million (including $2.1 million in capital) over four years to the Australian

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\(^48\). Ibid.


\(^51\). Ibid.


\(^53\). Ibid.

\(^54\). Explanatory Memorandum, p. 4.

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Prudential Regulation Authority (APRA) and $3.7 million over four years to the Australian Securities and Investments Commission to introduce a simple, low cost default superannuation product called MySuper.\(^{55}\) This measure was to be funded by an increase in the levy on APRA regulated superannuation funds.\(^{56}\)

### Main issues

Arguments in favour of a prescribed default superannuation product are essentially based on two separate but related grounds:

- that the existing model based on individual choice of fund and choice of investment strategy is inappropriate because most individuals do not have the skills and interest to choose by whom and how their superannuation savings are managed, and
- that the choice model leads to significant additional investment and administration costs without demonstrably greater performance.

However, there are also a range of possible alternative policies, many of which seek to improve the exercise of choice of funds by fund members.

Some of the other major issues in relation to the Bill include the potential impact of MySuper and related Stronger Super changes on retirement savings and the structure of the superannuation industry; and concerns expressed by some industry participants about the implementation timetable for MySuper.

### Exercising choice in superannuation fund – consumer behaviour

Evidence about the lack of choice being exercised by individuals can be found in a range of surveys of attitudes to superannuation and outcomes in industry statistics of individuals changing superannuation funds. For example:

- a 2010 survey of superannuation members on behalf of the Association of Superannuation Funds of Australia found that:
  - of those who changed jobs in the past 12 months, 71 per cent stayed with the fund that they were with, 15 per cent moved to the employer’s default fund and 9 per cent moved to the employer’s default fund and let the previous fund account become dormant. Respondents who remained with their existing fund following a job change attributed the decision primarily to the fact that it was easier, and

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56. Ibid.

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only 3.5 per cent of respondents had changed their superannuation fund in the past year, with the main reasons given relating to poor returns or to consolidate their superannuation accounts.\(^{57}\)

- the rate of switching between funds has declined from around 5 per cent in 2005 to 2 per cent by the end of 2009:
  - approximately 80 per cent of super fund switches come as a result of members changing employers or employers changing default fund providers
  - of those who default into a super fund chosen by their employer, or award, roughly 80 per cent are in the default investment option, and
  - of that 80 per cent, anecdotal evidence suggests that approximately 20 per cent of default investment option members do choose to be in the default investment option. This suggests that approximately 60 per cent of members do not make active choices.\(^{58}\)

This lack of exercising choice is viewed by some as evidence of passive consumer behaviour, with low levels of financial literacy combined with complex product choices and an underlying apathetic attitude to retirement savings resulting in limited engagement and awareness by individuals about superannuation options.\(^{59}\) Other explanations for individuals choosing and/or staying with default superannuation options include a reluctance to switch funds due to the uncertainty associated with investment returns and product pricing strategies (such as the use of exit fees) that discourage switching.\(^{60}\)

**Why do we need a prescribed default superannuation accumulation product?**

While MySuper directly results from the Cooper Review, it is important to note that suggestions for a low-cost default superannuation fund as an alternative to choice of fund arrangements were raised prior to the Review.\(^{61}\)

A key finding of the Cooper Review was that the superannuation system did not adequately cater for the relatively low level of engagement and financial literacy.\(^{62}\) A further weakness of existing

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arrangements identified by the Review was that the competition-based model of superannuation funds competing for members had been relatively weak due to:

Failure to exercise choice: Often a member doesn’t choose the fund to which they belong. New employees typically simply become a member of their employer’s default fund.

Lack of price awareness - Compulsory contributions don’t come directly out of members’ pockets, nor do the fees and other costs charged by the fund (at least not until they retire). This makes people much less price aware and much less likely to make a decision based on price or cost.

Lack of interest: Members are often not engaged with their super until closer to retirement and so will not be sufficiently interested to respond to competitive behaviour on the part of funds until that time (if at all).

Agency and structural issues: There are limited opportunities for member vigilance, on the one hand, or incentives for agency vigilance, on the other, to reduce prices.

Complexity: Super is inherently complex and many consumers do not feel confident making decisions about it.

Lack of comparability: Even if members are engaged up to a point, there is a lack of contestability at consumer level because of product complexity and lack of information and transparency about fees and performance, and

Frictions: Lastly, even if someone is interested in switching funds, often the paperwork and other ‘frictions’ in changing funds become too big a disincentive and they give up.  

A key recommendation of the Review was for the adoption of a ‘member-focused choice architecture’ that is based on a spectrum of member engagement and choice. The model would classify members into three main types—‘MySuper’, choice and SMSFs— on the basis of whether or not they have made a choice about their superannuation and the nature of the choice made. In relation to the proposed ‘MySuper’ product, the Review noted that:

The MySuper component of the choice architecture model aims to provide a simple, cost effective product with a single, diversified portfolio of investments for the vast majority of Australian workers (roughly 80 per cent of members) who are in the default option in their current fund.

MySuper is designed with two large groups of members in mind: those who take no real interest in their super (at least not initially) and those who choose to be in a large, low-cost and well-managed product where the investment strategy is designed and implemented by the trustee.

63. Ibid., p. 7–8.
64. Ibid., p. 10.

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MySuper would have a number of features designed solely with the member in mind: specific trustee duties designed to deliver lower cost outcomes for members; increased transparency leading to better comparability, especially of costs and long-term net performance; provision of intra-fund advice; simpler communications; and an embedded retirement product. It has been designed to sit within the existing superannuation structures and is based on existing widely offered and well understood default investment options.65

Studies in behavioural economics support the view that individuals are unable, or unwilling, to behave as rational economic decision makers in managing their retirement income assets. Even when some individuals are able or try to maximise their self interest, many of the decisions they make are sub-optimal, given available information.66 These outcomes are attributed to a range of behavioural factors including:

- choice and information overload – too many investment options can cause information overload, resulting in a greater use of default options or a decline in participation rates
- unstable and undefined preferences – individuals do not arrive at decisions with firm preferences varying according to the decision to be made
- use of simple rules of thumb – also known as ‘heuristic decision making’: individuals make their decisions based on simple rules when faced with complex problems or incomplete information, such as past performance
- ‘framing effects’ and investment menu design – individuals can be easily swayed by the way in which savings and investment questions are presented or ‘framed’ for them so that if a number of different investment options are presented issues such as the numbering and the order they appear in will affect the choice made
- procrastination and inertia – when individuals face complex decisions about investment choice, inertia or procrastination affects decision making, leading to sub-optimal choices, and
- overconfidence – individuals tend to overestimate their knowledge, abilities and the precision of their information which leads to investment decisions being made on conjecture rather than fundamental value.67

A number of countries utilise mandatory individual account pension schemes, including Chile, Mexico, Sweden and the Netherlands.68 In these countries, a mix of approaches is used to provide for individual choices regarding fund and investment selection ranging from almost unlimited choice (Australia and Sweden), limited choice (Chile, Mexico) and no choice (Netherlands).69

65. Ibid., p. 11.
67. Ibid., pp. 7–9.
69. W Tapia and J Yermo, op. cit.
Superannuation fund running costs and performance — what difference will MySuper make to retirement incomes?

Running costs

One of the key objectives in implementing MySuper was to create a default superannuation product that ‘has no unnecessary fees and charges and has simple features that will make it easier to compare fund performance’. The Minister noted that:

Our independent Cooper review found that fees in superannuation are too high—I repeat: the independent Cooper review found that fees in superannuation at this point in time are simply too high—and that members may currently be paying fees for services that they neither want nor have requested.

Every dollar diverted in fees or other unnecessary overheads is a dollar less, plus the lost benefit of compound interest and dividend imputation, going towards a larger and more secure retirement.

Over a person's working life, higher than necessary fees can total tens of thousands of dollars of lost retirement income.

This is why introducing MySuper is so fundamentally important. It is important that members who work hard for the compulsory savings going to their funds are not unfairly or unjustly taxed by the people tasked with managing their funds.

One of the factors influencing the Cooper Review in recommending a universal default superannuation fund approach was evidence about the magnitude of fees charged by superannuation funds. Key pieces of evidence taken into account by the Review were research on the scale of current fees in the industry and estimates of the potential fees that could be achieved under a MySuper-type default superannuation product.

Deloitte research commissioned as part of the Cooper Review estimated that superannuation fund administration and investment costs under MySuper were in the order of between 166 basis points (bps) for a balanced portfolio under active investment in a fund with less than $100 million under management, compared to 32 basis points for a balanced portfolio passively invested in a fund with more than $20 billion under management.

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71. Ibid.


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A submission from Rice Warner Actuaries on current (2008) superannuation fees was also relied upon by the Review as the basis of cost estimates for different parts of the superannuation industry. This research found that the overall fees for the whole superannuation industry, expressed as a percentage of assets, averaged 1.21 per cent for the year to June 2008, with total fees varying across different sectors of the industry (figure 1).\textsuperscript{73}

**Figure 1  Superannuation fees and expenses, 2008**

<table>
<thead>
<tr>
<th>Sector</th>
<th>Segment</th>
<th>Administration %</th>
<th>Platform %</th>
<th>Investment Management %</th>
<th>Administration, Platform &amp; Investment Management %</th>
<th>Cost of Advice %</th>
<th>Total Fees %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wholesale</td>
<td>Corporate</td>
<td>0.24</td>
<td>-</td>
<td>0.47</td>
<td>0.71</td>
<td>0.02</td>
<td>0.73</td>
</tr>
<tr>
<td></td>
<td>Corporate Super Master Trust\textsuperscript{1} (large)</td>
<td>0.20</td>
<td>0.01</td>
<td>0.56</td>
<td>0.78</td>
<td>0.02</td>
<td>0.79</td>
</tr>
<tr>
<td></td>
<td>Industry</td>
<td>0.38</td>
<td>-</td>
<td>0.67</td>
<td>1.05</td>
<td>0.02</td>
<td>1.07</td>
</tr>
<tr>
<td></td>
<td>Public Sector</td>
<td>0.21</td>
<td>-</td>
<td>0.46</td>
<td>0.67</td>
<td>0.02</td>
<td>0.69</td>
</tr>
<tr>
<td>Retail</td>
<td>Corporate Super Master Trust\textsuperscript{2} (small)\textsuperscript{*}</td>
<td>0.41</td>
<td>0.43</td>
<td>0.81</td>
<td>1.66</td>
<td>0.46</td>
<td>2.12</td>
</tr>
<tr>
<td></td>
<td>Personal Superannuation</td>
<td>0.17</td>
<td>0.61</td>
<td>0.70</td>
<td>1.47</td>
<td>0.53</td>
<td>2.00</td>
</tr>
<tr>
<td></td>
<td>Retirement Income</td>
<td>0.20</td>
<td>0.42</td>
<td>0.69</td>
<td>1.31</td>
<td>0.53</td>
<td>1.84</td>
</tr>
<tr>
<td></td>
<td>Retirement Savings Accounts</td>
<td>0.60</td>
<td>-</td>
<td>1.70</td>
<td>2.30</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>Eligible Rollover Funds</td>
<td>2.03</td>
<td>-</td>
<td>0.47</td>
<td>2.49</td>
<td>-</td>
<td>2.49</td>
</tr>
<tr>
<td>Small Funds</td>
<td>Self Managed Super Funds</td>
<td>0.31</td>
<td>-</td>
<td>0.52</td>
<td>0.83</td>
<td>0.15</td>
<td>0.98</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td><strong>0.28</strong></td>
<td><strong>0.14</strong></td>
<td><strong>0.59</strong></td>
<td><strong>1.02</strong></td>
<td><strong>0.19</strong></td>
<td><strong>1.21</strong></td>
</tr>
</tbody>
</table>

\textsuperscript{*}Expressed as a \textit{percentage} of average assets over the year to 30 June 2008. The difference between the 2008 values and 2006 values is the result of better data.

\textsuperscript{1}Excludes employer plans with less than $5 million in assets.

\textsuperscript{2}Employer plans with less than $5 million in assets.


Treasury then used the 2008 Rice Warner fee estimates and the Deloitte analysis to project the potential benefits of a MySuper-type product. Some of the Treasury’s key assumptions and estimates of the potential benefits include:

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• at March 2010, the average fee for the funds under management in default investment options was 97 bps
• funds would price their product in the short run, on average, at around 85 bps (all up) for an account balance of $25,000, with a similar investment style to what is currently the case
• people currently paying for advice in default products are assumed, under MySuper, to rely on intra-fund advice that is already factored into the Deloitte MySuper fee
• based on default assets of $340 billion, this suggests the initial direct impact could be a saving of about $400 million per year from reduced fees in existing default investment options that convert to the MySuper framework
• 5 per cent of assets (around $35 billion) are assumed to switch to MySuper products in the short run, saving around $150 million per year in fees. The combined direct and indirect annual savings in the short term therefore could be around $550 million
• Deloitte estimate an average fee (including intra-fund advice) of around 66 bps is achievable on large scale ($20 billion plus assets) MySuper products. It is assumed that these scale benefits are fully achieved across MySuper products, yielding an aggregate saving of over $1 billion per year on existing MySuper-comparable assets
• the long-run switching rate was assumed to be around 15 per cent, that is, around $110 billion of assets would move to the MySuper segment. This is consistent with the long-run proportion of assets in default investment options increasing from around 32 to 42 per cent (excluding pension products, and
• the combined direct and indirect impacts could therefore be around $1.7 billion per year.75

The net impact of MySuper on the savings of a typical member was estimated by Treasury to be around $32,000 or 5.6 per cent, based on a fee of 66 bps (compared to current arrangements based on 97 bps).76

While supporting the introduction of MySuper, ASFA expressed their concern over some of the cost assumptions underlying the Deloitte and Treasury analysis, noting that:

In the media release distributed on 20 April 2010 accompanying the MySuper report, reference is made to an independent report commissioned from Deloitte by the Panel. In referring to the independent report, the media release states that ‘if the MySuper proposals were introduced, some default fund members could expect to pay less than half what they are paying for their super now’. This bold statement is not actually contained in the Deloitte report, and arguably is not even implied by the report. What the report does provide are estimates of administration and investment costs for funds of different sizes on the assumption that there are significant

75. Ibid., pp. 72–74.
76. Ibid., p. 74. This figure excludes the contribution of 7bps from the proposed Super Stream measures.

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economies of scale which reduce administration costs and to a lesser extent investment costs, and where there are not costs linked to comprehensive advice and associated distribution.\textsuperscript{77}

These estimates of the benefits in moving to a MySuper product arrangement were also not accepted by Chant West, who were reported as considering that a total fee of 66 basis points was unrealistic given existing fees for investment management only were in the order of 60 to 75 basis points and the administration only were in the order of 40 basis points.\textsuperscript{78}

The Investment and Financial Services Association (IFSA) (now the Financial Services Council) noted the potential for some superannuation fund members to be subject to higher fees, with a range of superannuation products available (in 2010) that provided for low fees of between 21 basis points (plus $1 per week) and 50 basis points.\textsuperscript{79}

It is important to note that there is no certainty that fees for MySuper will reach the levels used to demonstrate the benefits of MySuper for fund members. The level of fees reached will ultimately be based on the realisation of scale economies by funds, fund performance and the competitive pressures on funds to offer prices that will be attractive to members.

**Fund investment performance and other services**

While minimising costs is one of the main objectives of providing a MySuper default product, the focus on costs in delivering benefits conceals the importance in fund performance and the difference between investment performance and costs as the crucial factor in determining retirement income.

Comparisons of fund performance and ratings and other measures, such as differences between forecast and actual performance, may be used by individuals to choose their superannuation provider and investment strategy.

Several research firms conduct annual reviews of superannuation fund performance. Outcomes of these reviews take the form of ratings or rankings of funds/products.\textsuperscript{80} The industry regulator, the Australian Prudential Regulation Authority (APRA), provides annual superannuation fund performance comparisons based on fund rates of return, and industry participants, such as the

\begin{itemize}
\end{itemize}

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industry fund-aligned Industry Super Network, have also commissioned fund performance comparisons.81

These reviews and ratings of fund performance reveal that fund investment performance and the breadth and quality of services provided by superannuation funds (such as financial planning services, insurance and shopping discounts) can vary significantly. For example, comparisons of fund-level performance by APRA for the largest 200 funds for the financial year ended 20 June 2010 showed that one-year rate of return for 2009–10 varied between -11.4 per cent and 14.5 per cent, with the seven-year rate of return varying between -0.5 per cent and 10.8 per cent.82

Some superannuation industry participants assert that the focus on low fees is misguided, as maximising net returns should be the most important factor in assessing the performance of a superannuation fund.83 In seeking to reduce costs, Chant West argue that the industry is likely to move away from active management strategies at a cost of reducing investment returns:

Our view, based on the performance data we collect and analyse, is that any such saving [from reducing costs] is likely to be eclipsed by the reduction in benefits resulting from reduced returns. If we adopt Treasury’s 37 year working life model, it would take a loss of 0.31 per cent per annum in returns to wipe out the $33 000 gain it forecasts from management cost savings (ie administration and investment fees). We believe the MySuper model is likely to reduce returns by more than that over the long term. ...

Super is not a homogeneous product, and there are qualitative differences between funds. The better quality funds, in terms of investment performance, tend to have higher investment fees because of how they invest and what they invest in. But there is strong evidence that those higher investment fees pay off because they produce better net returns. In other words, the additional return is greater than the additional fee incurred to achieve it. ...

A loss of return of 0.5 per cent per annum may not sound like a lot, but over 37 years in the workforce (again using Treasury’s modelling timeframe) it adds up to about $53 000 for the...

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average member’s account. ... That’s why we say that the cost savings forecast for MySuper are very likely to be eclipsed by the investment returns forgone. 84

Further, Chant West argue that in seeking to reduce funds’ costs, funds will be under pressure to reduce their expenditure on member communications and education, further entrenching member disengagement and financial illiteracy:

MySuper is supposedly for the benefit of members who are disengaged with their super, and Cooper doesn’t want them to bear the cost of what he calls ‘bells and whistles’. But isn’t it better to try to get them engaged and taking control of their retirement savings? We know this is a slow process, but surely it’s better than perpetuating apathy and financial illiteracy.

Members who are disengaged and poorly educated about their super are more likely to make bad decisions – or no decisions – not just about investment but also strategies such as co-contributions, salary sacrifice, insurance and transition to retirement. These are issues that members need to understand if they are to get the best out of their super. If funds pull back on education and communications, members will be the poorer for it. 85

Alternative policy approaches

There are a number of alternative policy proposals to address the relative lack of interest and engagement shown by superannuation fund members in choosing a superannuation fund and investment strategy.

Some of these proposals are based on a view that a universal default superannuation arrangement represents a ‘paternalistic’ approach that leads to further member disengagement, while others seek to address concerns over costs and member engagement.

Measures proposed to remove the barriers to choice and improve member engagement include:

• simplifying portability by allowing trustees to consolidate upon members’ request
• making super more transparent by allowing the use of TFNs as an identifier and having the ATO list an individual’s super fund and account balance on their tax statement
• educating people about super with a Government-sponsored education program
• enabling access to cost effective superannuation advice by extending the ASIC Class Order on intra-fund advice to financial advisers, and making superannuation advice tax deductible, and
• simplifying disclosure by introducing PDS standards, and legislating to allow for interactive web-based disclosure of product disclosure statements. 86

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84. Chant West, ‘Research papers: MySuper may be cheap, but can we afford it?’, op. cit.
85. Ibid.

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Choice and default fund arrangements

In general terms, the allocation of superannuation contributions is made according to the following process:

- employer notifies employee of the default fund and provides employee with the standard choice of fund form, and
- a fund is chosen by the employee.

If no fund is chosen by the employee, the employer chooses a superannuation fund according to a range of criteria including:

- if an enterprise agreement or award applies, then the nominated superannuation fund is to be chosen – if more than one fund is specified then the employer chooses from the nominated funds, and
- if no enterprise agreement or award applies, then a superannuation fund that the employer was contributing to or any other regulated superannuation fund.  

Part of the choice regime also includes, for superannuation funds which offer more than one investment strategy, the nomination of an investment strategy.  

For individuals who are aware of the investment options that are offered by their chosen fund, or the default fund specified by the employer, the choice of investment strategy can be specified on a standard choice of fund form. Where individuals do not specify a particular investment strategy on the standard choice of fund form, superannuation funds generally place the individual in a default investment strategy (usually a ‘balanced’ option but the option chosen by the trustee may also be based on the member’s age)—with individuals then able to change their investment preference after they become members by directly applying to the fund.

While the ‘choice of fund’ provisions in the Superannuation Guarantee (Administration) Act 1992 effectively give most employees a choice about what fund their superannuation guarantee and other contributions are paid into, around 80 per cent of superannuation payments are made into the default fund nominated by the employer.

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88. According to the Australian Prudential Regulation Authority, 70 per cent of superannuation entities in 2010 offered a choice in investment strategy and of these, industry funds offered on average 7 investment choices and retail funds offered 219 investment choices (Australian Prudential Regulation Authority, Statistics: Annual Superannuation Bulletin, June 2010 (issued 19 January 2011), op. cit., p. 39.

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The Bill proposes that a MySuper account becomes the default superannuation fund where an individual who commences with a new employer does not exercise choice. The current policy (although not specified in this Bill) is that current members of a default fund be moved into MySuper accounts with the same superannuation provider by 1 July 2017.\(^90\)

Under current arrangements, the listing of default funds in existing awards and those that are included in modern awards is subject to agreement between employers and employee representatives during the award negotiation process.

Recent analysis by the Productivity Commission found that there is considerable variation in the number of funds named in the 122 modern awards:

- 13 do not name a default superannuation fund
- 16 name one default fund
- 66 name between two and six funds, and
- 27 name seven or more funds.\(^91\)

Of the funds listed in modern awards, the Productivity Commission identified industry funds (both public offer and non-public offer) as accounting for over 70 per cent of the funds mentioned:

- 47 per cent are industry public offer funds
- 24 per cent are industry non-public offer funds
- 14 per cent are retail funds
- 11 per cent are public sector funds, and
- 5 per cent are corporate funds.\(^92\)

The Financial Services Council (FSC) argues that this arrangement favours industry superannuation funds, with reduced competition inhibiting choice by employees.\(^93\) The FSC noted that:

> The Cooper Review recommendations recognised that presently, at the wholesale or employer level, competition is restrained. Employers operating under a Modern Award have particular superannuation funds prescribed by name for each industry or sector of the economy. There are

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92. Ibid.

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150 Modern Awards stipulating particular funds. Modern Award coverage can be as high as 45 per cent in certain industries; it has been estimated that as many as 80 per cent of Australians do not select a non-default fund.

Further, just 104 of the 196 APRA regulated “public offer” superannuation funds are listed in Modern Awards. Accordingly almost 50 per cent of the regulated industry is prevented from competing and operating in certain workplaces covered by Modern Awards.

The combination of these factors highlights the restriction preventing regulated superannuation funds from competing with each other in the default superannuation market. Ultimately, the individuals who default in these circumstances lose out as they are less likely to benefit from price efficiency and innovation because of this captive market.94

The Industry Super Network supports the need for strict criteria to be established in default funds, noting that in its view industry funds have outperformed retail superannuation funds over the short, medium and long term.95

The Cooper Review acknowledged the issue of choice under current award arrangements and supported a review by the Productivity Commission, noting:

Naming a particular fund in an award when there has been no transparent, formal selection process would appear to inhibit competition and delivers a significant advantage to the fund named. However, one cannot overlook the fact that the selection of the fund named in modern awards has been the subject of negotiation between employee and employer representatives. Also, the selection of default funds by employers outside the industrial relations system is not perfectly competitive and transparent either.

As it is logical that there be a reasonable transition period before MySuper would apply generally, there seems to be no reason why the default funds in modern awards should not continue for the time being. They are due for comprehensive review in 2014. In order to prepare for the 2014 review, the Panel considers that, in 2012, the Productivity Commission should examine the way default (MySuper) funds are nominated under the awards system, with a focus on whether the procedures are the most open, transparent and competitive means by which members are given access to the most favourable default (MySuper) offerings.96

94. Financial Services Council, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 4.

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In 2010, a retail superannuation provider (AMP) sought to list one of its funds as a default fund in an occupational award. This was rejected by Fair Work Australia on the basis that AMP did not have standing under the Fair Work Act to make an application to vary an award and it was not supported by the main employer group.\footnote{Fair Work Australia, [2010] FWA 2475, viewed 6 March 2012, http://www.fwa.gov.au/decisionssigned/html/2010fwa2475.htm} Controversy about the choice of default superannuation funds was also raised in 2011 in association with the performance of the MTAA Superannuation Fund, which is listed as the default fund in a number of awards.\footnote{R Gluyas, ‘Default funds face PC review’, The Australian, 10 June 2011, p. 24, viewed 28 November 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F833516%22}


**Industry structure and need for capital gains tax relief?**

At 30 September 2011, the superannuation industry was responsible for the management of around $1.3 trillion of assets.\footnote{Australian Prudential Regulation Authority (APRA), ‘Statistics: quarterly superannuation performance’, APRA website, September 2011 (issued 8 December 2011), p. 7, viewed 10 January 2012, http://www.apra.gov.au/Super/Publications/Documents/Super%20Quarterly%20Performance%2020110930.pdf} The number of superannuation member accounts and level of assets and allocation between industry sectors has changed significantly over recent years, with small self managed superannuation funds in particular increasing in importance in terms of both assets and members (table 1).
Table 1  
Superannuation fund assets and membership, by type of fund, June 1998 to June 2010

<table>
<thead>
<tr>
<th>Fund type</th>
<th>Jun-98</th>
<th>Jun-00</th>
<th>Jun-02</th>
<th>Jun-04</th>
<th>Jun-06</th>
<th>Jun-08</th>
<th>Jun-10</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate</td>
<td>1 247</td>
<td>1 197</td>
<td>890</td>
<td>774</td>
<td>605</td>
<td>661</td>
<td>624</td>
</tr>
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<td></td>
<td>64</td>
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<td>56</td>
<td>51</td>
<td>52</td>
<td>60</td>
<td>57</td>
</tr>
<tr>
<td>Industry</td>
<td>5 807</td>
<td>7 017</td>
<td>8 049</td>
<td>8 946</td>
<td>9 948</td>
<td>11 266</td>
<td>11 516</td>
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<td>65</td>
<td>94</td>
<td>150</td>
<td>201</td>
<td>226</td>
</tr>
<tr>
<td>Public Sector</td>
<td>2 640</td>
<td>2 527</td>
<td>2 477</td>
<td>2 707</td>
<td>2 891</td>
<td>3 002</td>
<td>3 131</td>
</tr>
<tr>
<td></td>
<td>73</td>
<td>102</td>
<td>94</td>
<td>112</td>
<td>153</td>
<td>171</td>
<td>173</td>
</tr>
<tr>
<td>Retail</td>
<td>8 252</td>
<td>10 039</td>
<td>12 039</td>
<td>13 764</td>
<td>14 970</td>
<td>16 308</td>
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<td>170</td>
<td>208</td>
<td>299</td>
<td>337</td>
<td>340</td>
</tr>
<tr>
<td>Small</td>
<td>284</td>
<td>389</td>
<td>436</td>
<td>537</td>
<td>602</td>
<td>724</td>
<td>821</td>
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<td>75</td>
<td>93</td>
<td>133</td>
<td>209</td>
<td>326</td>
<td>393</td>
</tr>
</tbody>
</table>

Note: “Small” includes superannuation accounts in Self Managed Superannuation Funds (SMSF) regulated by the Australian Taxation Office and single-member approved deposit funds and small superannuation funds (those with less than five members) regulated by the Australian Prudential Regulation Authority. This category is dominated by SMSFs.


Within the superannuation industry there has also been a trend towards consolidation rather than the entry of new participants. The number of superannuation funds has decreased in all industry sectors, with the exception of Self Managed Superannuation Funds (SMSFs), which have continued to grow over recent years (table 2).

Table 2  
Number of superannuation funds, by type of fund (June 2000 to June 2010)

<table>
<thead>
<tr>
<th></th>
<th>Corporate</th>
<th>Industry</th>
<th>Public Sector</th>
<th>Retail</th>
<th>Small</th>
</tr>
</thead>
<tbody>
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<td>3389</td>
<td>155</td>
<td>81</td>
<td>293</td>
<td>212 538</td>
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<tr>
<td>June 2002</td>
<td>2484</td>
<td>134</td>
<td>76</td>
<td>254</td>
<td>235 626</td>
</tr>
<tr>
<td>June 2004</td>
<td>1405</td>
<td>106</td>
<td>42</td>
<td>232</td>
<td>281 438</td>
</tr>
<tr>
<td>June 2006</td>
<td>555</td>
<td>80</td>
<td>45</td>
<td>192</td>
<td>315 517</td>
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<td>June 2008</td>
<td>226</td>
<td>70</td>
<td>40</td>
<td>169</td>
<td>382 866</td>
</tr>
<tr>
<td>June 2010</td>
<td>168</td>
<td>65</td>
<td>39</td>
<td>154</td>
<td>432 170</td>
</tr>
</tbody>
</table>


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The introduction of MySuper and other Stronger Super measures is expected to lead to continued consolidation and merger activity to maximise the benefits of economies of scale to deliver lower administration costs and investment costs.  

There are a number of projections and estimates about the growth of the superannuation system in Australia and the industry structure that may be in place:

- Deloitte research estimates that by 2030 there will be around $6 trillion of assets within the superannuation system, with continued growth in SMSFs and more moderate growth in the value of assets under management in the industry and retail fund sectors;
- KPMG/Australian Centre for Financial Studies estimate that by 2015 the number of SMSFs will increase to around 579,000 but all other sectors of the industry will experience a reduction in the number of funds, with an expected 109 corporate funds, 53 industry funds and 120 retail funds, and
- research undertaken for the Cooper Review by the Treasury projected that total superannuation assets would grow to about $3.2 trillion in 2035. Small funds, including SMSFs and small APRA funds, will grow to slightly more than a third of total superannuation assets and the number of APRA-regulated superannuation funds will reduce from 447 in 2009 to 74 in 2035. These projects assume that the number of funds in the industry and retail sectors continue to decline at the same average rate (around 7 per cent per annum) as they have since 1996 and a slowing in the average 20 per cent each year from 1996 to 2009 for the corporate sector.

It is likely that the trend to consolidation will result in lower administration and investment costs but there may be a limit on the size of funds (measured by value of assets or membership) beyond which economies of scale are insignificant or where costs start to increase:

- recent Australian research (commissioned by ASFA) on the size of funds and per-member costs found that fund size has a notable impact on per-member administration costs but that costs relating to trustees, general management support and compliance/risk management did not

vary with the size of the fund. Further, the research found that many of the benefits from increasing scale appear to be achieved for operating costs at a level of around 500,000 members and for investment expenses at around $10 billion of funds under management.

- research on the relationship between the size of funds and fund performance (also commissioned by ASFA) found that increased scale allowed larger funds to deliver, on average, performance which is measurably superior over the long term but that large funds do not always outperform small funds.

- research on the relationship between fund size and performance for investment fund managers in Australia suggests that the relationship can be negative—that is, that fund size can detract from performance. The reason for such a relationship is based on the impact of transaction costs once a fund reaches a certain size threshold, and

- research on the economies of scale and scope for the largest 200 Australian superannuation funds in 2009 found evidence of economies of scale in both investments and operations but that after a point there is some evidence that diseconomies of scale in operations may arise.

Some international studies have found a positive relationship between size of retirement funds and increasing returns for larger funds, largely deriving from the capacity to allocate more amounts to alternative assets. However, other studies have made the opposite finding, with a negative relationship between fund size and investment performance due largely to organisational diseconomies and investing in lower performing equities.

Some superannuation industry participants have argued that in order to facilitate changes to a more efficient structure that is based on fewer but larger superannuation funds, the Government should provide for capital gains tax (CGT) relief to allow merging funds to carry forward tax gains and losses. The Association of Superannuation Funds of Australia noted that:

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105. Association of Superannuation Funds of Australia (ASFA), Superannuation fund expense analysis, Research undertaken for ASFA by Rice Warner Actuaries, October 2011, p. 5.

106. Ibid., p. 4.


Some funds currently are carrying deferred tax assets equivalent to 1.5% or more of member account balances, which given the volatility of the market may well increase, that would be lost if a merger were to go ahead without CGT relief. For a member with an average account balance of approximately $70,000 this could represent a reduction in the value of their superannuation account of approximately $1,050.

Accordingly, the absence of CGT roll-over relief may cause the costs to members, through the extinguishment of deferred tax assets, to outweigh the benefits of any proposed merger.  

Such measures were provided for during industry restructuring between 2004 and 2006 due to changes in the regulatory regime and then in a more limited way from November 2008 until June 2011 as a response to the global financial crisis.

The Cooper Review supported the retention of CGT relief for both gains and losses on a permanent basis as a way of allowing for mergers that would result in medium to long-term benefits to members and the industry more broadly (recommendation 10.11). However, the Government did not support the recommendation, noting that:

The Government does not support an extension of the existing capital gains tax (CGT) rollover relief, however, [it] does support in principle, appropriate relief for superannuation funds which are required by APRA to merge in order to meet MySuper licence conditions and will consult with relevant stakeholders on implementation aspects.

The Government indicated that it would continue to consult key stakeholders on CGT consequences that may directly arise from transitioning to MySuper and to what extent, if any, CGT rollover relief is appropriate.  

Given the Government’s response, it is possible that further measures will be considered to facilitate mergers between superannuation funds. However, continuing uncertainty on this issue is seen by the Australian Institute of Superannuation Trustees as hampering decisions over several proposed mergers.
Related legislation and proposed commencement

As previously noted, the introduction of MySuper is associated with a range of other superannuation-related measures. Legislation for these associated measures is at various stages. While the proposed commencement dates are designed to support the implementation of MySuper, delays or changes to commencement have the potential to impact on the timing of future changes.

The proposed commencement for these measures is outlined in Table 3.

Some industry participants argue that implementation of MySuper should be delayed. Participants arguing for a delay include:

- the Financial Services Council – who consider that there is a risk of employer and member disruption with the proposed three month period from 1 July 2013 to 1 October 2013 where superannuation guarantee contributions may continue to be paid into existing default funds prior to compulsory MySuper contributions. The FSC support extending the compliance transition period for employers until 1 July 2014 and a limited extension beyond 1 October 2013 for funds which have lodged an application prior to 1 July 2013

- Mercer – support a deferral of the implementation of MySuper from 1 October 2013 on a number of grounds including implications for trustees, employers and employee/members and clarity relating to defined benefit issues, and

- the Association of Superannuation Funds of Australia support a delay in employer compliance from 1 October 2013 to 1 July 2014 in order to mitigate the risks involved in making the changes proposed by the Stronger Super package.

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122. Association of Superannuation Funds of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 2.

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### Table 3  Implementation timetable for MySuper and related measures

<table>
<thead>
<tr>
<th>Proposed commencement</th>
<th>Measure</th>
<th>Legislative basis</th>
</tr>
</thead>
</table>
| 1 July 2012            | • require providers of financial advice to obtain client agreement to ongoing advice fees  
                          • enhance the requirement for disclosure of fees and services associated with ongoing fees, and  
                          • enhance the ability of the Australian Securities and Investments Commission (ASIC) to supervise the financial services industry, through proposed amendments to its licensing and banning powers for financial advisers. | Corporations Amendment (Future of Financial Advice) Bill 2011 |
| 1 January 2013         | • applications to offer a MySuper product can be lodged from this date unless proclaimed earlier. | Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011 |
| 30 June 2013           | • applications for tailored MySuper products must be lodged by 30 June 2013 if applicants wish to rely on transitional arrangements that provide relief from 1 October 2013 requirements. | Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011 |
| 1 October 2013         | • employers must make contributions for employees who have not made a choice of fund to a fund that offers a MySuper product. | Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011 |
| January 2014           | • commencement of auto-consolidation of accounts on the Lost Members Register and accounts that have not received a contribution or rollover in the previous two years and where the account balance is less than $1000. | Not yet covered. |
| July 2014              | • data standards and use of e-commerce becomes mandatory for large and medium employers making contributions and enrolling new members in default funds. | Exposure draft issued 9 February 2012 |
| July 2015              | • proposed application of data standards and use of e-commerce to small employers. | Exposure draft issued 9 February 2012 |
| 1 July 2017            | • trustees of superannuation funds offering MySuper products will need to transfer the existing balances of default members to a MySuper Product. | Not yet covered. |

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Mercer note that:

It is becoming increasingly clear the date of 1 October 2013 specified in the Bill as the date by which all default contributions must be made to a MySuper product is unlikely to be achievable. The October 2013 date leaves insufficient time for trustees to analyse as yet unavailable legislative requirements

- design and implement the necessary modifications to fund designs
- amend trust deeds and other governing rules
- appropriately modify administration systems
- renegotiate insurance, administration, investment contracts etc
- lodge an application with APRA and receive the relevant approval to offer a MySuper product
- develop internal controls and processes and train staff, representatives and financial advisers to accurately represent the product features and benefits to consumers
- prepare and issue relevant communication material to members.

Not only will trustees need to implement MySuper arrangements at the same time as coping with the other three major areas of reform, there are still many significant details of the legislative requirements around MySuper which are not yet available. Until most details are available, it will be impossible for many funds to properly develop their MySuper products and non-MySuper (Choice) products.¹²³

Key provisions

Amendments to the Superannuation Guarantee (Administration) Act 1992

Item 1 repeals existing paragraph 32C(2)(c) and inserts proposed paragraph 32C(2)(c) which provides that a MySuper product can be nominated by an employer—in addition to existing requirements—to comply with the ‘choice of fund’ requirements established in the Act.¹²⁴

Comment – MySuper as a product, investment option or fund?

The Australian Institute of Superannuation Trustees and the Association of Superannuation Funds of Australia consider that further clarity is required regarding the definition of ‘class of beneficial


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interest’ and how it relates to the MySuper and Choice ‘products’. These organisations also raised this issue on the draft legislation which was released in September 2011.\textsuperscript{125} The AIST note that:

While the Explanatory Memorandum states (in paragraph 3.18) that a MySuper product is not a separate financial product under the Corporations Act, this is not reflected in the Bill.

Paragraph 3.18 of the Explanatory Memorandum states (in part): “The class of beneficial interest is simply the rights and obligations that attach to that part of the member’s interest in the superannuation fund. It most cases, the interest in the superannuation fund will be the relevant financial product.”

However, the Bill does not provide a definition of this ‘interest’ that supports the statement in the Explanatory Memorandum. A definition within the Bill is critical if funds are to be given comfort and surety to approach the development of MySuper products.\textsuperscript{126}

The Association of Superannuation Funds of Australia suggest that consideration be given to replacing references to the word ‘product’ throughout the Bill with the word ‘offering’. ASFA consider that the word ‘offering’ ‘is sufficiently flexible to cover the possible different structures under which MySuper may be offered, without creating the impression that it must be offered as a separate product’.\textsuperscript{127}

\textit{Amendments to the Superannuation Industry (Supervision) Act 1993}

\textbf{Item 2} inserts MySuper into section 4, which summarises the provisions of the Act.

\textbf{Item 3} adds MySuper to the list of provisions in section 6(1)(a)(i) subject to regulation by the Australian Prudential Regulation Authority.\textsuperscript{128}

\textbf{Items 4 to 7} insert new definitions into subsection 10(1) relating to ‘choice product’, ‘fees rules’, ‘MySuper product’ and ‘reviewable decision’.

\textbf{Item 8} amends section 29E—which relates to the conditions imposed on all Registrable Superannuation Entity (RSE) licensees\textsuperscript{129}—by inserting \textit{proposed subsection 29E(6A)} that requires


127. Association of Superannuation Funds of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services op. cit., p. 22.

128. The Commissioner for Taxation, Chief Executive Medicare and the Australian Securities and Investments Commission are also responsible for the administration of parts of the Act.

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RSE licensees to ensure that the governing rules of the fund comply with the characteristics of a MySuper product established by proposed section 29TC.

Comment

The Association of Superannuation Funds of Australia consider that proposed paragraph 29E(6A)(b) should be amended to the effect that an RSE licensee have processes in place to ensure the government rules of the fund relating to that class of interest are not contravened, rather than the proposed wording that the licensee ensure that the governing rules of the fund relating to the class of interest are not contravened.\textsuperscript{130} This reflects ASFA’s belief that inadvertent errors and immaterial breaches do occur and that there is increasing concern and unease among trustees and their insurers that their potential liability is being increased significantly.\textsuperscript{131}

Item 9 inserts proposed Part 2C into the Act which covers the substantive provisions of MySuper products including those relating to the regulation, characteristics, fees and charges.

Applications for authority to offer a MySuper product

To obtain authority to offer a MySuper product, an entity must be an existing RSE licensee (proposed section 29S). The Australian Prudential Regulation Authority (APRA) must decide an application within 60 days after receiving the application (or within 60 days of receiving requested information) although APRA may extend this application period by a further 60 days if the applicant is informed in writing within the original 60 day period. If APRA has not decided an application within the original 60 period or any further 60 day extension then APRA is taken to have decided to refuse the application (proposed section 29SB).

One outcome of the Stronger Superannuation consultation process was that two years from 1 July 2013 ‘should be sufficient for a trustee to seek approval for their licence to be amended in order to offer a MySuper product’.\textsuperscript{132} APRA has noted that it expects to commence the authorisation process in the second half of 2012 for RSE licensees wishing to offer MySuper products, with the expectation that APRA will have power to authorise MySuper products from 1 January 2013.\textsuperscript{133}

Comment

\textsuperscript{129} A ‘Registrable Superannuation Entity’ (RSE) is a regulated superannuation fund or an approved deposit fund or a pooled superannuation trust but does not include a self managed superannuation fund.

\textsuperscript{130} Association of Superannuation Funds of Australia (ASFA), Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 9.

\textsuperscript{131} Ibid.


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The Financial Services Council consider that the authorisation process is unclear, with uncertainty over whether the application relates to a variation of its RSE license or a variation of the terms of registration.\textsuperscript{134} The FSC consider that the parameters of the application process should be clearly defined.\textsuperscript{135}

The Australian Institute of Superannuation Trustees consider that proposed subsections \textit{29SB(3) and 29SB(4)} appear to be inconsistent with proposed subsection \textit{29SB(3)}, which in the AIST’s view requires APRA to decide on authorisation applications within a defined period, whereas proposed subsection \textit{29SB(4)} deems APRA to have refused an application where it has not made a decision within a defined period.\textsuperscript{136} AIST also considers that the Bill should be amended to require APRA to provide the reasons where it does not make a decision on MySuper authorisation within the required period.\textsuperscript{137}

**Authority to offer a MySuper product**

APRA must authorise an RSE licensee to offer a MySuper product if a number of conditions are satisfied including:

- if the fund is a registered RSE
- if the fund has five or more members or APRA is satisfied that the fund will have five or more members within a period specified, and
- APRA is satisfied that the RSE licensee is likely to comply with enhanced trustee obligations and fee rules in relation to MySuper products (\textit{proposed section 29T}).

In general, an RSE licensee will only be able to offer one MySuper product. There are two cases where RSE licensees will be able to offer more than one MySuper product:

- RSE licensees who currently offer superannuation products under different corporate brands will be able to offer more than one MySuper product if several conditions are satisfied including:
  - there is ‘material goodwill’ in the original superannuation fund and the goodwill cannot be maintained unless the RSE licensee were authorised to offer the proposed MySuper product as an additional product, and
  - it would be in the interest of members of the fund, and those persons whose benefits are transferred to the fund, to maintain the distinction between the proposed MySuper product and other MySuper products within the fund (\textit{proposed section 29TA}).

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{134} Financial Services Council, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 8.
\item \textsuperscript{135} Ibid.
\item \textsuperscript{136} Australian Institute of Superannuation Trustees, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 11.
\item \textsuperscript{137} Ibid.
\end{itemize}
\end{footnotesize}

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• RSE licensees will also be able to apply to APRA to offer a tailored MySuper product to the employees of large employers—defined as an employer, or associate of the employer who contributes (or APRA expects to contribute) for 500 or more members (proposed section 29TB).

Comment – 500 member threshold for a large employer

Several submissions to the Parliamentary Joint Committee on Corporations and Financial Services have highlighted issues in the Bill associated with the threshold for determining a large employer:

• the Financial Services Council consider that the 500 member threshold is not consistent with the 500 ‘employees’ threshold as was contained in the Government’s final response to the Cooper Review.138 The FSC believe that under proposed section 29TB, it will be difficult for trustees to determine whether more than 500 members are contributing to any one fund and that the threshold should be determined by the number of employees, as was originally proposed.139 The FSC consider that the definition of large employer does not properly capture corporate group arrangements and that the definition should be based on the total employees in the group, acknowledging that employees for whom no superannuation guarantee contributions are made need not be counted towards this limit140

• the Industry Super Network presumed that the definition of ‘associate’ includes an entity which is a related body corporate and/or substantial shareholder or controlling entity and considered that the definition of ‘associate’ of an employer sponsor should receive greater clarity in the Explanatory Memorandum.141 ISN propose that the Bill should clarify the intention to mean that a large employer-sponsor is one where a single employing entity is responsible for the payments of at least 500 persons including, but not limited to, direct employees of the large employer-sponsor142

• the Australian Institute of Superannuation Trustees consider that the definition in proposed subsection 29TB(2) is ‘imprecise and complex’.143 AIST proposed that this could be based on a definition based on the number of employees for whom a superannuation guarantee contribution has been received from the employer in the past 12 months, and who have not terminated their employment with the employer144

• the Association of Superannuation Funds of Australia consider that if a numerical measure of 500 is to be used, then regulation 3.01 of the SIS Regulations, which is the class of members,

138. Financial Services Council, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 10
139. Ibid.
140 Ibid.
142. Ibid., p. 10.
143. Australian Institute of Superannuation Trustees, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 11.
144. Ibid.

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other than standard employer members, which non-public offer funds are allowed to have without having to become public offer, should be used, and 145

- Mercer consider that the methodology for determining the number of members who count towards the 500 member test is too complex and propose that the test should be amended to be based either on the number of employees of the larger employer and its associate or the number of members in the employer’s plan. 146

**Comment – goodwill**

The Industry Super Network consider that the requirements of proposed paragraph 29TA(b) that APRA is satisfied that the maintenance of the product distinction is desirable to beneficiaries is inconsistent with clause 3.12 of the Explanatory Memorandum which appears to limit these circumstances to those where there is goodwill in a brand within a fund as a result of a pre-existing merger or takeover of another fund. 147 Industry Super Network propose that section 29TA should be amended to reflect the limited circumstances envisaged within the Explanatory Memorandum. 148

The Association of Superannuation Funds of Australia consider that it is unclear what is meant by ‘material goodwill’ noting that:

> We take it that the material goodwill is in the intellectual property rights in a particular brand and the inherent commercial value to the trustee as a consequence of the awareness of that brand. If so then why is this a necessary criteria (i.e. essential that it be demonstrated in all cases), as opposed to merely being a sufficient criteria (i.e. existence of criteria is sufficient to warrant exemption in that instance but does not preclude other cases)? Why cannot other criteria be taken into consideration in determining whether an exemption should apply? A “one size fits all” approach to the superannuation industry does not work due to the vastly different structures of providers.

Finally, it is of concern that, in addition to the trustee formulating an opinion, APRA must also be satisfied as to the existence and maintenance of material goodwill. In our view it is not within the role of a prudential regulator [to make] such legal and commercial assessments. This is the duty of the trustee as fiduciary. 149

**Comment – separate applications for each large employer MySuper offering**

The Association of Superannuation Funds of Australia and the Financial Services Council note that there is some uncertainty about the need to make a separate application for each large employer

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145. Association of Superannuation Funds of Australia (ASFA), Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 5.
146. Mercer, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 27.
148. Ibid.
149. Association of Superannuation Funds of Australia (ASFA), Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., pp. 4–5.
MySuper offering.\textsuperscript{150} ASFA propose that a trustee only be required to make a single application to offer one or more large employer offerings and simply advise APRA of the details of each offering.\textsuperscript{151} The FSC propose a similar arrangement, but with additional requirements relating to reporting to APRA and a specific disallowance process in the event that a tailored plan does not meet the licence conditions set by APRA.\textsuperscript{152}

Characteristics of a MySuper product

\textbf{Proposed section 29TC} covers the specific requirements and characteristics of a MySuper product which APRA must be satisfied are met before an RSE is authorised to offer the product. Some of the key features include:

- there is a single, diversified investment strategy for those assets attributed to the MySuper product
- the same options, benefits and facilities must be available to all members of a MySuper product—the Explanatory Memorandum notes that this covers services such as call centres and member education and that later tranches of legislation will clarify that access to insurance cover may differ for members as a result of their age, medical status, occupation or other factors\textsuperscript{153}, and
- the attribution of investment returns and fees must generally be made without giving preference to certain members.

One exception to the single diversified investment strategy for a MySuper product is for a single lifestyle strategy to be offered. Under this option, RSE licensees may vary the method of crediting investment returns to a member’s account on the basis of a member’s age or other factors (which will be specified in regulation)—although the strategy must be the same for all members of the product.

\textbf{Comment - lifecycle strategy}

A ‘lifecycle’ strategy usually refers to a superannuation product in which the mix of assets (which will include a range of return and risk profiles) changes with the age of the member so that as the member approaches retirement the mix of assets becomes more conservative.\textsuperscript{154} The underlying

\begin{itemize}
\item \textsuperscript{150} Ibid., p. 12; Financial Services Council, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., pp. 8–9.
\item \textsuperscript{151} Association of Superannuation Funds of Australia (ASFA), Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 12.
\item \textsuperscript{152} Financial Services Council, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., pp. 8–9.
\item \textsuperscript{153} Explanatory Memorandum, pp. 33–34.
\end{itemize}

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rationale is that as a member approaches retirement, there is less time available to rebuild assets should there be a decline in value in risky assets, such as property and shares.\(^{155}\)

While a reduction in exposure to riskier assets as retirement approaches may appeal to some individuals, this may lead to a reduction in retirement incomes, particularly as much of the accumulation in a member’s superannuation fund occurs in the last few years when account balances are at their highest.\(^{156}\) There can also be significant differences in retirement outcomes under lifecycle strategies depending on the ‘glide path’ chosen (the timing of changes in the mix of assets)\(^{157}\), so returns can be expected to differ depending on the glide path chosen by trustees. Factors other than age that could be expected to be included as part of lifecycle strategies in the regulations include account balance and the reliance on superannuation by a member in retirement compared to other assets.

The Financial Services Council of Australia note that, as drafted, the Bill does not appear to provide for different fees to be charged to members to reflect the cost of managing a member’s asset portfolio at different ages.\(^{158}\) This view is supported by the Association of Superannuation Funds of Australia, who consider that:

> If trustees are compelled to charge the same investment fee to all cohorts of members this will result in members who are in a more conservatively invested portfolio (generally older members) cross-subsidising those whose portfolio is invested more aggressively (generally younger members).

> Given that one of the overarching principles of MySuper is that investment fees should be borne by members on a “cost recovery” basis it would appear anomalous that this should occur.

> Accordingly, we submit that a trustee should be able to recover a different quantum of investment fees with respect to each portfolio. Importantly, once these cohorts are defined, all members within the same cohort of age and other similar characteristics, who are invested in the same portfolio, will have the same investment fee.\(^{159}\)

**Comment – ‘flipping’**

The Industry Super Network consider that the transfer of interest provisions in **proposed section 29TC**, in conjunction with proposed provisions of the Superannuation Legislation Amendment

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155. Ibid.
158. Financial Services Council, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 18.
159. Association of Superannuation Funds of Australia (ASFA), Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., pp. 5–6.

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Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011

(Trustee Obligations and Prudential Standards) Bill 2012, do not adequately protect members from the practice of ‘flipping’—a practice of a trustee transferring a member into another (high priced) product when a member of a commercial fund leaves the employ of the employer-sponsor. ISN consider that the Bill should be amended to require express consent from a beneficiary before a member’s interest can be transferred, noting that:

The default treatment of a beneficiaries’ interest in a fund must not permit unforeseen and unjustified increases in fees. The simplest and fairest approach to deal with this is to allow the beneficiaries’ interest to remain in the former fund.

The Australian Institute of Superannuation Trustees also expressed concern that the proposed Bill does not provide a protection against flipping, and in some instances actually requires it. AIST proposed an alternative that incorporated the Government’s proposed actions on account consolidation and the reduction in unnecessary account proliferation to protect members against flipping and limiting the cost of maintaining accounts for former employees:

- employees leaving employment with the specified employer who have not elected to transfer to another superannuation fund may maintain their membership in the large employer-sponsored MySuper product, but may not receive contributions from other employers into the account, nor tag the account for exclusion from account consolidation
- these accounts to be included in automatic account consolidation processes when they meet the consolidation criteria of two years’ inactivity
- in the event that the account consolidation process does not result in the account being transferred in to the member’s active superannuation account, the fund may transfer the account to an eligible rollover fund (ERF), and
- the ERF trustees (with heightened trustee obligations) will include the account in their processes to assist members to locate and consolidate their unclaimed and inactive superannuation.

Comment – other

The Industry Super Network also consider that the term ‘process’ in proposed section 29TC(1)(d) needs to be defined so that the intent of treating beneficiaries fairly, rather than treating beneficiaries according to the same process, is clarified.

160. Industry Super Network, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 3.
161. Ibid.
162. Australian Institute of Superannuation Trustees, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 9.
163. Ibid.

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Cancelling authority

**Proposed section 29U** sets out the conditions under which APRA will be able to cancel the authorisation of a MySuper product. These include if:

- it ceases to be satisfied that the governing rules of the fund meet the required characteristics of a MySuper product
- the RSE licensee was authorised to provide a tailored MySuper product to a large employer and that large employer either no longer meets the requirements to be offered this product on the last day before the annual reporting period or did not meet the 500 member test by the end of the period specified in the authority
- it ceases to be satisfied that the RSE licensee is likely to comply with the enhanced trustee obligations in relation to MySuper products (these are contained in the Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012)
- it ceases to be satisfied that the RSE licensee will satisfy the fee rules in relation to MySuper products
- it ceases to be satisfied that the RSE licensee is not likely to represent a product as a MySuper product when they are not authorised to do so
- the fund no longer has five or more members, or was granted authorisation on the basis that the fund is expected to have five or more members within a time period specified by APRA and that fund does not have five or more members by the end of that time period
- it ceases to be satisfied that the fund is not an eligible rollover fund
- the RSE licensee contravenes a governing rule of the fund in relation to the MySuper product, or
- the fund ceases to be registered.

APRA will be required, under **proposed section 29UA**, to consult with the Australian Securities and Investments Commission before deciding to cancel an authorisation to offer a MySuper product for an RSE licensee that is also a financial services licensee if it believes that the cancellation will affect the RSE licensee’s ability to offer one or more financial services. Further, if APRA cancels the licence of an RSE licensee that is also a financial services licensee, it is required to notify ASIC of the cancellation within one week of the cancellation.

**Proposed section 29UB** allows APRA, upon cancelling an authorisation to offer a MySuper product, to allow the licensee to continue in effect. The Explanatory Memorandum notes that for example, APRA may allow a MySuper authorisation to continue for a specified period of time for a tailored MySuper product if the authorisation is cancelled due to the employer no longer meeting the specified requirements, to allow sufficient time to transfer member interests to another MySuper product.

**Comment**

The Industry Super Network consider that it would be appropriate that **proposed section 29U(2)(c)** be amended so that instead of APRA no longer being ‘satisfied’, APRA should no longer be
‘reasonably satisfied’ that an RSE licensee is likely to comply with the enhanced trustee obligations for MySuper products. ISN note that:

The proposed amendment seeks to do no more than impose a duty on APRA that APRA be reasonably satisfied. It could in any case be argued that APRA already has this duty. It is submitted that the explicit introduction of the reasonableness standard would be both appropriate and add to clarity.

The reasonableness standard is an adaptation of the civil standard of proof of "on a balance of probabilities," or "on the preponderance of the evidence" and is synonymous with the phrase "more likely than not." The duty to act reasonably is satisfied when the relevant decision meets an objective standard of reasonableness.166

The Association of Superannuation Funds of Australia noted that there were limited provisions in the Bill to guide what would occur in the event of a licence being cancelled. ASFA noted that:

At a minimum, the Bill should prescribe what is to occur with contributions received after the notice of cancellation has been received and the period of time in which the trustee must transfer the members’ benefits to another MySuper offering.

Furthermore, the nature and design of the Superannuation Guarantee ("SG") system is such that employers must make “default” contributions to a MySuper offering by the 28th day of the month following each quarter and face significant financial penalties if they fail to do so. Given this, it is essential that a fund whose MySuper authorisation is cancelled be under an obligation to advise this to contributing employers, along the lines of sub-section 63(9) of SIS, within a reasonable timeframe.167

Fee rules for MySuper products

Proposed section 29V sets out specific requirements for the areas that a superannuation trustee may charge fees in relation to a MySuper product and defines the activities that relate to each of the fees. Fees that are able to be charged include:

- an administration fee
- an investment fee
- a buy–sell spread168
- a switching fee
- an exit fee, and

165. Ibid., p. 8.
166. Ibid.
167. Association of Superannuation Funds of Australia (ASFA), Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 15.
168. A ‘buy–sell spread’ is the difference between the issue or withdrawal price of a unit and the unit price which may be due to transaction costs, including brokerage, stamp duty, settlement and other costs, which are incurred by a fund when buying and selling fund assets.
• an activity fee.

All fees, with the exception of an administration fee, are defined by nominating specific activities that are covered by the definition. The definition of an administration fee provides for expenses that do not fall into the other categories, relating to ‘the administration or operation of the fund and includes costs incurred by the trustee, or the trustees, of the fund (that are not otherwise charged as an investment fee, a buy-sell spread, a switching fee, an exit fee or an activity fee’ (Proposed subsection 29V(2)).

Comment – ‘intra-fund’ advice

‘Intra-fund’ advice (also referred to as ‘scaled advice’) generally refers to personal financial advice that is provided without conducting a full ‘know your client’ process, provided that the advice relates only to the member’s account within the superannuation fund. Intra-fund advice can be provided over the phone, via email or face-to-face.\textsuperscript{169}

The Explanatory Memorandum notes that an administration fee may include recovering costs of intra-fund advice but that this will be defined in more detail in a later tranche of legislation.\textsuperscript{170} The provision of ‘intra-fund’ financial advice is a service provided by some superannuation funds, with payment for this service ranging from user pays at one end to a general charge for all members at the other.\textsuperscript{171}

In December 2011, the Minister for Financial Services and Superannuation clarified that there would be new restrictions on the types of advice that can be provided under intra-fund advice rules, with specific exclusions relating to:

• advice relating to whether the member should consolidate their existing superannuation accounts
• advice to switch the member away from the superannuation fund into another superannuation fund except to the extent the advice relates to moving the member from an accumulation product into a retirement product offered by the same registrable superannuation entity
• advice that contains recommendations in relation to financial products that the member holds outside of superannuation, and


\textsuperscript{170} Explanatory Memorandum, p. 40.


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• advice in relation to investment choice outside of the trustee-prescribed investment options.\textsuperscript{172}

The Financial Service Council and the Financial Planning Association of Australia consider that the fee definitions should omit personal intra-fund advice as an element which can be cross-subsidised through the MySuper administration fee.\textsuperscript{173} This view is based on the position that some members will pay for advice that they do not receive and that, rather than unbundling advice costs, such a move sanctions hiding advice costs inside the total cost of the product.\textsuperscript{174} The Financial Planning Association of Australia note that:

MySuper members should be permitted to access information (including general advice) about their superannuation interest as part of the administration fee but not access personal financial advice which is paid for by all members. The FPA completely supports the facilitation of factual information and general advice services to super fund members. Indeed many FPA members, such as corporate superannuation advisers specialise in providing general advice services to employer groups and other default group schemes ... 

... the provision and payment of ‘personal’ intra-fund advice services, which the legislation and in particular the explanatory memorandum has made it very clear that these fees will be able to be bundled within the ‘administration fee’ category.

The FPA has a number of concerns with this, not least the hypocrisy that underlines this position, especially in the context of the catalyst for the reform agenda underway as part the future of financial advice (FOFA) reforms. Hidden fees, commission, lack of transparency and paying for services not received are all problems FOFA is trying to rectify in respect to the provision of financial advice. To paraphrase Government’s justification for FOFA, it is designed to protect disengaged clients from paying financial advice fees where they are receiving little or no service. For those that are not disengaged, the transparency will allow those clients with an opportunity to consider whether the service they are receiving equates to value for money.\textsuperscript{175}

Comment – administration fees

The Industry Super Network consider that the Bill does not provide adequate guidance and protections to ensure only administrative fees are discounted. ISN propose that the Explanatory Memorandum should be amended to provide greater clarity on the components of administration costs to include:

\begin{itemize}
  \item...
\end{itemize}


\textsuperscript{173} Financial Services Council, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 16; Financial Planning Association of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 3.


\textsuperscript{175} Financial Planning Association of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 3.

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• marketing & communications costs
• non-investment related product development
• information technology expenses
• employer interface – contribution acceptance services
• member education
• payment of benefits/claims
• intra-fund advice, and
• any other cost which is not an investment fee; a buy-sell spread cost; switching fee or an exit fee.\textsuperscript{176}

The Association of Superannuation Funds of Australia propose changes to the differences in the definitions of investment fee (\textit{proposed subsection 29V(3)}) and switching fee (\textit{proposed subsection 29V(1)}) so that:

• the definition of investment fee be in accordance with the Global Investment Performance Standards and if this definition is not adopted consideration be given to the definition utilised by the Financial Services Council. Should neither of these be adopted the proposed definition in \textit{proposed subsection 29V(3)} is ‘An investment fee is a fee that relates to the investment of the assets of the investment option or offering and includes any investment costs incurred by the trustee, or the trustees, that are not otherwise recovered by means of an administration fee, a buy-sell spread, a switching fee, an exit fee or an activity fee’. ASFA also consider that reference reference could be made to performance-based fees by inserting the words ‘including performance based fees’ after the words ‘investment costs’ and that provision should be made to recognise that there may be different ‘investment fees’ for different cohorts within a lifecycle investment option, and
• the definition of switching fee be confined to circumstances where the transfer is initiated by the member.\textsuperscript{177}

\textbf{Proposed section 29VA} establishes a requirement that a fee may only be charged during a period if it satisfies one of three charging rules, including fees that apply to specific activities such as a switching fee:

• all members are charged the same flat fee
• all members are charged the same percentage of account balance, and
• all MySuper members are charged the combination of the same flat fee and same percentage of account balance.

An exemption to these charging rules is established in the case of administration fees only for employees of an employer-sponsor by \textbf{proposed section 29VB}, which provides that the same three

\begin{itemize}
\item[176.] Industry Super Network, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, \textit{op. cit.}, p. 9.
\item[177.] Association of Superannuation Funds of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, \textit{op. cit.}, p. 16.
\end{itemize}

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charging rules identified in proposed section 29VA also apply in the case where an employer has secured a discounted administration fee in that product.

Comment – charging rules

The Association of Superannuation Funds of Australia consider that the proposed wording of proposed subsections 29VA(2), 29VA(3) and 29VA(4) does not achieve the intent of minimising the extent to which cross subsidisation occurs and that the Bill should be amended to allow the trustee to charge different investment fees to members in a lifecycle investment option depending on their cohort.\(^\text{178}\)

The Association also note that proposed subsection 29VA(3) which requires all members to be charged the same percentage of balance does not allow for the practice of using tiered scales, where the charge varies (usually declining) over different asset thresholds with a cap applying to asset fees. In ASFA’s view, abolishing tiered scales and fee capping could potentially lead in some funds to an exodus of high account balance individuals from MySuper products into choice products or even into SMSFs and propose that one percentage fee scale should apply.\(^\text{179}\)

The Financial Services Association of Australia consider that the option to apply different charging rules, particularly the flat fee option and flat fee and percentage based option ‘do[es] not accurately reflect the true cost of investing within the MySuper fund and as a result could mean that those with lower balances could inadvertently be subsiding those with higher balances where they are both paying the same flat fee.\(^\text{180}\) The FPA propose that for comparability purposes, MySuper funds should only be permitted to charge fees as a fixed percentage and that it is mandatory that examples be provided by MySuper funds to illustrate to members (and prospective members) what fees they will pay in dollar terms for their superannuation balance.\(^\text{181}\)

Comment – discounted administration fees

The Industry Super Network consider that there should be an obligation to quantify the level of employer subsidy and/or differential fee arrangement that is applied or arranged with a particular employer and propose that proposed section 29VB be amended to require the level of any subsidy be quantified.\(^\text{182}\)

The Australian Institute of Superannuation Trustees also consider that the link between discounted administration fees and administrative efficiency should be strengthened, suggesting that proposed paragraph 29VB(1)(c) be amended to require that ‘demonstrable administrative efficiencies for the

\(^{178}\) Ibid., pp. 16–17.

\(^{179}\) Ibid., p. 17.

\(^{180}\) Financial Planning Association of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 4.

\(^{181}\) Ibid.

\(^{182}\) Industry Super Network, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 5.
fund and cost savings of the efficiencies are passed on as lower administration fees for the employee members’ as a pre-condition for charging a lower administration fee for employees of an employee-sponsor.\textsuperscript{183}

The Association of Superannuation Funds of Australia note that proposed subsections 29VB(2), 29VB(3) and 29VB(4) require the same administration fee for all employee members and question why, in the case where it is the employer who is subsidising all or part of the fee, there should be restrictions as to for whom the subsidy can be paid.\textsuperscript{184} The Association consider that this should be amended to allow for former employee members and relative and dependant members to be charged the same fee, but that this should not be mandatory, providing that trustees and employers should be free to decide whether they will offer this fee to former employees and relatives and dependant members.\textsuperscript{185}

**Offences**

Two new offences for RSEs are introduced into the *Superannuation Industry (Supervision) Act 1993* to regulate MySuper products. These relate to an offence for offering a MySuper product without being authorised (proposed section 29W) and an offence for not making payments into a MySuper product when this has been nominated by the member (proposed section 29WA).

The Bill proposes that these offences are strict liability offences.\textsuperscript{186}

The justification for making these offences strict liability offences provided in the Explanatory Memorandum is that the consequences of each offence can be detrimental for the member or employer and that in the case of not making payments into a MySuper product when this has been nominated by the member it can be reasonably be expected that RSE licensees have appropriate administrative measures in place to prevent such an occurrence.\textsuperscript{187}

The Senate Standing Committee for the Scrutiny of Bills noted that the penalty for offering a MySuper product without being authorised (60 penalty units) is consistent with the approach to strict liability offences set out in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{183} Australian Institute of Superannuation Trustees, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 12.
\item \textsuperscript{184} Association of Superannuation Funds of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 18.
\item \textsuperscript{185} Ibid.
\item \textsuperscript{186} That is, the offence that does not require the prosecution to prove any fault elements. However, a defence of mistake of fact will apply (Criminal Code, subsection 6.1).
\item \textsuperscript{187} Explanatory Memorandum, pp. 13 and 28.
\end{itemize}

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Comment

ASFA consider that proposed section 29WA should be amended so as to not refer to elections being:

- into a “specified choice product or products” – which confines the election to having occurred after the MySuper / Choice regime has come in. The election should have been able to have been made at any time
- with respect to “the contribution” which is to be paid – this confines the “election” to a specific contribution, and
- “in writing” – this precludes investment choice instructions being received over the telephone.\(^{189}\)

Concluding comments

The Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011 is one of several inter-related Bills that are currently before the Parliament or are about to be introduced into the Parliament that relate to superannuation and financial planning services. The main change proposed by the Bill, to introduce a low-cost superannuation product (‘MySuper’) into which default superannuation benefits must be paid unless the employee nominates otherwise, are significant and will directly impact on superannuation fund members and the superannuation industry.

The proposal to introduce MySuper seeks to obtain better value for superannuation fund members who have a low level of engagement in making choices about where to direct their superannuation contributions. Such a solution has been preferred by the Government to other policy responses, most of which are aimed at improving the competitive pressures on superannuation funds or increasing employee engagement and knowledge about their superannuation.

The Parliamentary Joint Committee on Corporations and Financial Services is considering the Bill. Industry groups have identified a range of issues in the drafting of the Bill which relate to areas where they consider that the drafting of the Bill does not match the policy intent or are proposing alternatives to simplify implementation or modify the application of the policy intent. Several industry groups are advocating a delay of the 1 July 2013 implementation of MySuper.

\(^{189}\) Association of Superannuation Funds of Australia (ASFA), Submission to the Parliamentary Joint Committee on Corporations and Financial Services, op. cit., p. 9.

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Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011

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