



Submission to the Australian Government  
Department of Treasury

# Your Future, Your Super

**Prepared by COTA Australia**

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## About COTA Australia

COTA Australia is the national consumer peak body for older Australians. Its members include State and Territory COTAs (Councils on the Ageing) in each of the eight States and Territories of Australia. COTA Australia and the State and Territory COTAs have around 40,000 individual members and supporters and more than 1,000 seniors' organisation members, which jointly directly represent over 500,000 older Australians.

COTA Australia's focus is on national policy issues from the perspective of all older Australians as citizens and consumers and we seek to promote, improve and protect the circumstances and wellbeing of older people in Australia. Information about, and the views of, our constituents and members are gathered through a wide variety of consultative and engagement mechanisms and processes.

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## Introduction

COTA Australia welcomes the opportunity to respond to the proposed reforms to Australia's superannuation system as outlined in the Your Future, Your Super package.

As the Productivity Commission has noted, Australia's superannuation system has structural flaws with unintended multiple accounts, entrenched underperformers and inadequate competition, governance and regulation having a negative impact on many older Australians.

COTA Australia is generally supportive of the recommendations of the Productivity Commission report released in early 2019 and the general intentions behind the proposed Your Future, Your Super package. However, we have concerns about some important details in this package.

The proposed Australian Government Your Future, Your Super packages contains three broad elements. These are to amend legislation to:

- strengthen the requirements of the **'best interests' duty** by superannuation trustees to become a **'best financial interests' duty** with tighter controls
- ensure a **single default account** for employees who do not choose a superannuation fund when they start a new job
- require the Australian Prudential Regulation Authority (APRA) to conduct an annual **performance test**

As a matter of principle, COTA Australia strongly advocates for greater transparency of performance information about all superannuation products and funds to enable well informed consumer choices. This should be combined with improved measures to protect consumers from unnecessary costs and fees, poor behaviour, decisions and actions.

COTA Australia also urges the government to provide a timeframe for the implementation of reform regarding superannuation so that consumers and the industry can prepare for change.

Legislation must include a primary legislation timetable for the inclusion of:

- Administration fees
- Trustee directed products
- All other accumulation phase products
- All other retirement phase products

## Best Financial Interest Duty

### Context

The best financial interest duty is designed to ensure that all superannuation trustees make sure that decisions are in the best financial interests of the members of the superannuation fund.

The Productivity Commission review into superannuation found that superannuation entities clearly do not always act in the best interests of their members. The review found evidence of trustee misconduct including inappropriate spending that compromised member outcomes and eroded retirement incomes. It also found a lack of clarity on what is expected of trustees in fulfilling the 'best interests' duty. It recommended legislative change or regulatory guidance to make the role of trustees clearer.

## Summary of proposal

The Australian Government, through the Your Future, Your Super package, proposes to amend the *Superannuation Industry (Supervision) Act 1993* to:

- require each trustee and director of a superannuation fund, including Self Managed Superannuation Funds (SMSF), to perform their duties and exercise their powers in the best financial interests of the members/recipients. The intention is to have a greater focus on the financial interests of, and outcomes for, members/recipients.
- allow regulations to be made to specify that certain payments are prohibited or prohibited unless certain conditions are met (regardless of whether the payment is considered to be in the best financial interests of members/recipients).
- provide regulators with more options to respond to compliance issues relating to record-keeping requirements including the implementation of a strict liability offence for not meeting regulatory record-keeping obligations and naming directors of superannuation funds as potentially liable for an offence where record keeping requirements are not met.

The purpose of this amendment is to clarify the range of interests covered by the obligation solely to financial interests (not non-financial interests). The proposed new laws have a strong focus on the financial interests and outcomes of superannuation members/recipients. For investment decisions, the critical motivation for trustees and directors must be maximising the financial returns to members, having regard to an appropriate level of risk. This applies to all superannuation funds including SMSFs. Whilst superannuation trustees can take actions to provide non-financial benefits to members, this cannot compromise the best financial interests of members/recipients.

The penalty for trustees and directors not acting in the best financial interests of members/recipients is a civil penalty, and where dishonesty or an intention to deceive or defraud is involved, a criminal offence.

The prohibition of certain payments is intended to address circumstances where superannuation funds spend money for purposes that are unsuitable and not meeting the best financial interests duty. This includes all forms of payment to third parties including payments to owners or shareholders.

Making superannuation funds more accountable for their evidence gathering and record keeping is an essential element in reform particularly in providing regulators with a greater range of powers and enforcement options. Trustees and directors should ensure that superannuation funds have robust quantitative and qualitative evidence to support their expenditures and consider the appropriateness of their expenditure. Expenditure should be necessary and competitively priced, appropriate and depend on all the circumstances of the relevant case. Strong systems and processes should be in place and clear records of decision-making processes undertaken.

Evidence should enable the assessment of the costs and benefits of actions, including quantifiable metrics to demonstrate what the anticipated financial outcomes are and the reasonable basis for that expectation. This also applies to payments to third parties and the use of a related entity in which a superannuation fund owns equity in to acquire services.

## **COTA Australia Position**

The amendments regarding the best financial interest duty appear to be well intentioned. However, there is insufficient detail in explanatory material, including examples and scenarios, regarding what constitutes best financial interest and payments that should be prohibited. We believe this needs to be corrected. Clarity and certainty are important to trustees and members alike. We also believe the new provisions should apply to all funds, including SMSFs.

Regulatory standards regarding the core and discretionary expenditure of superannuation organisations and their relationship with the best financial interests duty need greater explanation including in particular the power given to the Minister to ban discretionary payments, even if they are in the best financial interests of members, which on the face of it appears to be contradictory. COTA believes any such Ministerial Direction should have to be a Disallowable Instrument so that there is accountability to Parliament.

The rationale for strengthening compliance provisions regarding evidence and record keeping should be to improve performance and the consistency of performance across the industry to deliver better outcomes as well as protect consumers. Increased regulatory burden should not result in additional costs being placed on consumers.

## **Single Default Account**

### **Context**

The Productivity Commission has highlighted that Australia's super system needs to adapt to better meet the needs of a modern workforce. Unintended multiple accounts were identified as a structural flaw in the system that erodes members' balances through unnecessary fees and insurance. The same issues were identified through the Financial Services Royal Commission.

Currently, if an employee is eligible to choose a superannuation fund to receive contributions and does not do so, their employer may comply with the choice of fund requirements by making contributions on behalf of the employee into the employer's chosen default fund. The purpose of this rule was to ensure that employers are able to comply with the choice of fund requirements where employees do not choose a superannuation fund when they start a new job.

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

The proposed amendments seek to address this issue by creating a 'stapled' fund for each employee and requiring employers to make contributions on behalf of the employee to the employee's existing 'stapled' fund in certain circumstances, including where the employee has not chosen a fund.

### **Summary of Proposal**

The amendments generally provide that if a new employee has an existing 'stapled' superannuation fund and does not choose a different fund to receive contributions, their employer is required to make contributions for the employee into the stapled fund. The purpose of these amendments is to increase retirement savings by ensuring unnecessary fees and insurance premiums are not paid on unintended multiple superannuation accounts.

Employers may request the Commissioner to identify whether there is a stapled fund for an employee of the employer.

### **COTA Australia Position**

COTA Australia supports the creation of the mechanism for 'stapling' an individual to a single superannuation fund - **but only if** funds are performing adequately, above a clear performance benchmark. There is no value for employees if they become stapled to an underperforming fund, indeed this would have the reverse affect to that intended.

We are aware that the Government's proposal to staple all members/recipients to their current product from 1 July 2021 contains the risks of many people remaining with poor performing products.

An approach is needed to deal with the remaining stock of unintended multiple accounts that are not covered by the Protecting Your Super measures. The Productivity Commission estimated that there about 10 million of these accounts with member/recipient savings being eroded by \$2.6 billion each year because of duplicate fees and insurance.

COTA Australia believes that a transition period of up to 3 years is needed for current members/recipients to choose to which account is stapled to.

Under these new stapling account requirements, it will also become even more important for funds to meet their obligation to ensure that they are charging premiums for insurance products that are appropriate to their membership.

COTA Australia supports the principle of industry provided insurance for at risk industries. However, we would argue that this is best achieved by communication from employers.

## **Underperformance**

### **Context**

The Productivity Commission review into superannuation and other reviews have found that persistently underperforming funds are a flaw of the system. The Productivity Commission found that:

- a significant number of products underperform, even after adjusting for differences in investment strategy
- there are excessive and unwarranted fees in the super system
- compelling cost savings from realised scale have not been systematically passed on to members as lower fees or higher returns
- members lack simple and salient information and impartial advice to help them find the best products.
- Not all members/recipients get value out of insurance in super and many see their retirement balances eroded

The Productivity Commission recommended requiring all APRA-regulated superannuation funds to be subject to annual outcomes tests for their MySuper and other offerings, with direct consequences for failing the test.

## **Summary of proposal**

The new law would require the Australian Prudential Regulation Authority (APRA) to conduct an annual performance test for MySuper products and other products specified in regulations.

Trustees of superannuation products which fail an annual performance test must notify members/recipients who hold the product, that the product has failed the performance test. The notice must meet any requirements prescribed by regulations.

If trustees fail the performance test in two consecutive years, they are prohibited from accepting new members/recipients into those underperforming products.

APRA may lift the prohibition if circumstances specified in the regulations are satisfied.

The new law provides APRA with a resolution planning prudential standard making power that allows APRA to ensure registered superannuation organisations are prepared for a range of contingencies, including the possibility that the prohibition against accepting new members/recipients into a product may lead to a material deterioration in the financial condition of the regulated superannuation fund.

## **COTA Australia Position**

COTA Australia supports the establishment of an annual performance test for all APRA regulated superannuation products not just MySuper and so-called 'Trustee-Directed Products'. The test should include pension products and 'choice' options as recommended by the Productivity Commission. All members/recipients in the superannuation system deserve to know if they are in an underperforming product.

In the development of the performance test, it is essential from a consumer perspective that it utilises measures that most accurately reflect what members/recipients actually receive, including that it incorporates the effect of administration fees, tax and dividends to owners/shareholders. As outlined in the Productivity Commission review report, a Net Returns measure is significantly more effective to meet this objective than the proposed measure of Net Investment Returns. This will be COTA Australia's position on the legislation.

COTA Australia strongly supports the development of an online comparison tool. Content should have regard to good practice principles for disclosure and be properly consumer tested. The comparison tool must be developed for all products in the accumulation phase (e.g. My Super, Trustee Directed, other Choice products) as well as those developed for the retirement phase (e.g. pensions, annuities etc). The timing of the latter may need to be linked with the introduction of the Retirement Income Covenant coming into force in 2022.

Given that the new underperformance measures require that any fund which is underperforming for two consecutive years be prohibited from accepting new members/recipients into those underperforming products, we believe that this should be communicated transparently both through the Australian Taxation Office (ATO) via the My Gov website and via a direct email message to relevant members/recipients that their fund is closed to new members due to underperformance, with options as to how they might change their fund to a new superannuation provider.

Consideration could be given to strengthening the powers of APRA to facilitate or directly resolve mergers between underperforming funds as outlined in the Productivity Commission review report.

The term 'Trustee directed products' needs to be more clearly defined and the methodology for determining lifecycle product returns should be specified.