03/06/2026

Retirement Income & Superannuation Division
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email to **superannuation@treasury.gov.au**

Dear Treasury,

AustralianSuper submission to Treasury consultations on strengthening consumer protections in the superannuation system and ensuring sustainability of the CSLR

AustralianSuper welcomes the opportunity to respond to Treasury's three consultation papers on curbing lead generation activity, enhancing member protections in the superannuation system, and the compensation scheme of last resort (CSLR).

AustralianSuper is Australia's largest superannuation fund and is run to benefit members. Our vision is to be Australia's leading superannuation fund, in the world's best system for members. AustralianSuper has over 3.6 million members and manages over $410 billion of members' assets. Australia's superannuation system is a success story, guaranteeing that more Australians can enjoy a better standard of living in retirement. This promise rests on confidence and trust.

The Shield and First Guardian collapses had devastating impacts on over 11,000 Australians, who collectively lost more than $1 billion in retirement savings. These failures undermine confidence in Australia's superannuation system and the financial services industry.

Given the complex nature of financial products and the important role they play in the lives of Australians, including in retirement, it is critical that consumers can rely on information they receive. The Government has identified widespread evidence of predatory marketing practices, as well as propositions offered at scale with inadequate attention to whether underlying offerings and fee structures are consistently putting consumers in a better financial position.

We strongly endorse the Government's commitment to address gaps in the framework so that consumers are protected, existing obligations are enforced and confidence in the system is restored. Detailed comments on the three discussion papers are provided in the **Attachments**.

Please do not hesitate to contact me or Emma Carr, Head of Government Relations and Public Policy (**ecarr@australiansuper.com**) if there is additional information that we can provide.

Regards

Steve Macmillan

Steve Macmillan
Head of Corporate Affairs

T 03 8648 3900
Level 30, 130 Lonsdale Street
Melbourne VIC 3000 Australia
australiansuper.com

Attachment 1: Curbing lead generation activity

Lead generation was a key part of the Shield and First Guardian business models, acting as an unregulated upstream mechanism for funding and sustaining unscrupulous operators.

In recognition of the harm caused to the retirement and financial security of ordinary Australians, and the misalignment of incentives and regulatory obligations that currently exists, AustralianSuper supports a legislated prohibition of the lead generation business model that was implicated in Shield and First Guardian. This should be the overarching objective of this reform process. Consumers who want to make decisions about their superannuation must be protected from bad actors gaming regulatory loopholes for profit.

In relation to the specific proposals in the consultation paper, AustralianSuper strongly supports the Government's proposals to close loopholes in the anti-hawking law, to ban conflicted remuneration practices, and to expand regulatory coverage of parties that originate, control or profit from consumer leads and distribution models in superannuation. We also support powers for ASIC to order the take down of advertisements where there is an indication of consumer harm.

As Treasury highlights, defining the scope of a ban on lead generators requires careful consideration. However, a ban on harmful lead generation practices can be achieved while still allowing for legitimate member communication activities, including financial literacy information, general advice, conventional marketing that does not amount to hawking and the provision of workplace super information. This should allow regulated providers to assist consumers with information that is informative, reliable and not an outcome of conflicted remuneration.

Assessment of reform options

Of the Treasury reform options, expanded anti-hawking laws (Options 2a and 2b) and action to address conflicted remuneration (Options 3a and 3b) are priority reforms.

Option 1b, a ban on unlicenced superannuation communications, has merit in that it reflects that lead generation business models are structured to sit outside the regulatory perimeter, so initial consumer contact occurs before obligations apply. Option 1a is also important to ensure that appropriate licensing and compliance obligations apply to communications and conduct that falls short of warranting a ban or offending an expanded hawking rule. ASIC powers to address harmful advertising (Option 4b) also have merit.

Taken together, these options address lead generation as both an upstream source of consumer harm and a conduit for downstream misconduct.

Reform 1: Enhance accountability for the conduct of lead generation activities

Recommendation: Progressed together, Options 1a and 1b will strengthen ASIC's regulatory toolkit to address communications and conduct that falls short of warranting a ban or offending an expanded hawking rule.

Option 1a – Bring prescribed lead generation activities into the regulatory framework

Currently, ASIC has limited regulatory oversight over the number of parties involved in funnelling consumers into complex, high-fee products and the role each performs. The ability to refuse, suspend or cancel licences where lead generators pose unacceptable risks to consumers under Option 1a would strengthen ASIC's ability to better identify and act on harmful activities.

Expanded licensing alone may not be sufficient to address the underlying harms associated with lead generation activity as it could confer legitimacy on practices that remain misaligned with consumer protection objectives.

Meanwhile, a superannuation-specific prohibition under Option 1b (see below) could potentially leave space for lead generators to reformulate their activity according to the letter of the law, while going against the spirit of the law. For example, lead generation activity could be packaged as promoting general investment product, while directing consumers to platforms that offer both superannuation and IDPS products, with superannuation transfers occurring later in the process.

Treasury should therefore assess whether progressing expanded licensing (Option 1a) alongside Option 1b would help ensure that lead generation activity repackaged as non-superannuation communications remains subject to appropriate licensing and compliance obligations.

Option 1b – Banning unlicensed communication to consumers about superannuation

At present, lead generation activity is typically structured to sit upstream of formal advice or product recommendations, which materially limits ASIC's ability to intervene and take timely enforcement action at the point where consumer pathways are first shaped.

While prohibiting unlicensed communications about superannuation would be helpful in this regard, lead generation communications could still be initiated within a licensed environment. Therefore, 1b on its own might not be sufficient to protect consumers from inappropriate conduct and, as stated above, Treasury should explore whether progressing both Option 1a and Option 1b together would be more impactful.

Option 1c – Enhance accountability of licensees for the conduct of lead generators

We think other options would be more effective in addressing inappropriate conduct.

Option 1d – Clarify and extend the application of design and distribution obligations (DDO) to lead generation

We consider that applying DDO to lead generation activities is unlikely to deliver meaningful regulatory outcomes. The wide product range and large consumer base of platforms weakens the practical relevance of product-specific target market determinations as a regulatory instrument in this context.

Reform 2: Extend anti-hawking requirements

Option 2a – Enhance the conditions around consent & Option 2b – Limit the exemption for financial advice

<u>Recommendation:</u>

Options 2a and 2b should be taken forward in combination:

- With regard to option 2a, a broad-based ban on non-consumer initiated real-time contact by lead generators should be progressed. This is preferable to upfront disclosure requirements, which could be 'screened out' by consumers as uninteresting boilerplate.
- With regard to option 2b, the financial advice exemption under the hawking provisions should be limited to product offerings made to a licensee's pre-existing clients.

Lead generation models have circumvented existing anti-hawking requirements by exploiting loopholes that 'cleanse' unsolicited, high-pressure spruiking. Treasury's proposals address the two key workarounds relied on by operators. These are procedural consent mechanisms for contact (e.g. clicking a box on a 'compare your super' advertisement) and the framing of initial interactions as an offer of financial advice rather than a financial product.

Reform 3: Target remuneration structures that may incentivise poor conduct

<u>Recommendations</u>:

Options 3a and 3b are important reform levers that should be taken forward in combination.

Any ban should extend beyond just lead generation to capture remuneration structures embedded across the value chain.

Option 3a – Capture lead generators under conflicted remuneration ban

Evidence of product issuers standing behind lead generators illustrates how incentives are being driven up the distribution chain. We support extending the conflicted remuneration ban to entities that originate, control or profit from consumer leads.

Under this approach, these entities would be subject to the same remuneration requirements that apply to licensees and advisers, including prohibitions on arrangements that incentivise sales or referrals over consumer interests.

However, an actor-based extension could be sidestepped by operators through repackaging charging models to fall outside its scope, including per-call or per-click fees and flat daily payments.

Option 3b – Clarify or expand the scope of 'benefits' captured under the conflicted remuneration ban

We support prescribing volume-based payment arrangements as conflicted remuneration and capturing these payments within the scope of a ban. This is an important and worthwhile reform.

Reform 4: Target advertisements for earlier intervention

<u>Recommendation</u>:

Option 4b should be adopted. The trigger for ASIC to exercise expanded powers should be where it is reasonably satisfied that business models using advertising are exhibiting indicators of significant consumer detriment.

Option 4a – Require superannuation advertisements to display AFS licence numbers

We consider that Option 4a is unlikely to be effective at meaningfully deterring problematic advertising practices. The display of an AFSL number may confer unwarranted legitimacy without materially mitigating consumer harm.

Option 4b – Expand ASIC's stop order power to take down financial advertisements

Extending ASIC's stop order powers is our preferred approach in this reform area.

Attachment 2: Enhancing member protections in the superannuation system

Part 1: Strengthening platform governance

Proposal 1: Strengthening governance requirements for Platform Trustees

Recommendations – defining a Platform Trustee:

Treasury's paper contemplates distinguishing platform offerings from products that provide a more limited investment menu.

A simple way to achieve this would be to exclude investment menus that only offer ASX listed securities (shares, exchange traded products (ETPs) and listed investment companies (LICs)) plus term deposits and cash, recognising the existing strict ASX listing rules that deal with governance, valuations and liquidity.

Alternatively, a risk-based definition of Platform Trustee would also achieve these objectives, in that it would target business models and features where the risk to members requires heightened oversight and obligations.

Recommendations – strengthening platform governance (options 1.1, 1.2, 1.3 and 1.4):

Recommendations 1.1 (mandatory holding limits on certain investment options) and 1.2 (codified due diligence requirements) are important and worthy of strong support. However, Treasury should only progress option 1.1 and 1.2 to the extent that proposed legislation materially improves on the existing legal obligations.

A ban on the conflicted arrangements and benefits identified in option 1.3 should be implemented.

A ban on the trustee for hire model, as contemplated under option 1.4, is worthy of consideration.

Additional recommendation:

ASIC should be tasked with regularly reviewing and reporting publicly on the due diligence and onboarding practices of platforms with large numbers of complex investment options, and its views on best practice in this space. This should be at a cadence of every 6 months for at least two years or until confidence in governance practices with respect to that model is restored.

Additional recommendation:

Platforms should be required to annually report portfolio performance to members on a Net Investment Return basis, matched against a benchmark.

The Shield and First Guardian collapses highlighted the risk to members of platform business models that diffuse accountability between a range of different parties (advisers, responsible entities, platform operators and the superannuation trustee). The paper's focus on improving governance standards for Platform Trustees is therefore essential to address critical risks to confidence in the superannuation system.

There is a compelling rationale for the regulatory proposals in this paper regarding platform governance and undertaking appropriate due diligence on investment offerings. Consumers have an expectation that the products they are offered are fit for purpose and reputable. In a supermarket setting, this means that customers assume that the retailer has confirmed the food they sell is safe to eat and is what they say it is.

The same standard should be expected for financial products. Consumers should be able to have confidence that financial products offered on a platform have undergone due diligence to ensure they are fit for purpose and that there are contingencies in place in the event that proves not to be the case.

Defining a Platform Trustee

Option 1: exclude menus offering only ASX Listed Securities

Treasury's paper recognises a distinction between wide and diverse platform offerings and products that provide more limited investment options, such as those that provide members with access to an investment menu that allow them to invest in a limited class of specific investments, including shares, ETFs and term deposits.

Our recommended way to give effect to this distinction in the definition of 'Platform Trustee' would be to exclude investment menus that only offer ASX listed securities (shares, exchange traded products and Listed Investment Companies) plus cash and term deposits. These could be excluded on the basis that the ASX has its own strict listing rules (AQUA Rules under Schedule 10A of the ASX Operating Rules) that deal with governance, valuations and liquidity.

Option 2: risk-based definition

An alternative approach would be a risk-based definition of Platform Trustee. This would target business models and features where the risk to members requires heightened oversight and obligations. Features that may trigger inclusion within a risk-based definition include:

- functionality that allows advisers to customise menus or model portfolios (which may include preferred options requested by individual advisers or dealer groups);
- options with less frequent withdrawals (e.g. monthly or quarterly), usually due to these options holding concentrated exposures to less frequently valued assets (e.g. unlisted property);
- the menu including geared options, which may exacerbate gains and losses; or
- the menu facilitating more complex strategies for sophisticated investors such as shorting, managed futures etc.

Option 1.1 – Mandatory holding limits for certain investment options

It is important that Platform Trustees be required to set appropriate holding limits based on an assessment of an option's risk profile. Shield and First Guardian demonstrated that the concentration of members' assets in high-risk options offered on platforms can have devastating effects on their retirement balances.

In many instances, such as where an option is sufficiently diversified, a holding limit is not required. These requirements should be tiered and focused on higher risk options. Factors that may indicate an option requires a low holding limit could include:

- the option allows less frequent withdrawals;

- the option is geared, which may exacerbate gains and losses; and
- structural complexity and a limited track record of performance in the product.

Many trustees already impose asset holding limits for certain options. As Treasury's paper highlights, there are several existing obligations that apply to trustees in this space. For example, sections 52(6)(a)(ii) and 52(6)(c) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) already require trustees to ensure adequate diversification when setting investment strategies and choosing investment options to be offered to members.

We therefore recommend that Treasury only progresses reforms which clearly improve on existing legal obligations.

As an additional point, concentration limits should be applied at the point of acquisition of a holding. The proportion of a member's balance that an option represents will change over time as its value changes. Members should also be able to participate in corporate actions (e.g. rights issues) when they are over, or which would push them over, a security concentration limit.

Option 1.2 – Codified due diligence requirements

We strongly support reforms to enhance due diligence in relation to trustee onboarding of investment options. The Shield and First Guardian cases have indicated shortcomings in this space. Legislative reforms to address these issues are welcome.

Trustees should already be undertaking an appropriate level of due diligence before offering an investment option on a menu and monitoring the options they offer.

As Treasury's paper highlights, there are several existing obligations that apply to trustees in this space. Section 52(6)(b) of the SIS Act requires super trustees to 'exercise due diligence in developing, offering and reviewing regularly each investment option'. Trustees have multiple other obligations, including their duties to act in members' best financial interests and to act with skill, care and diligence. They also have obligations under prudential standards, including SPS 530 Investment Governance. Platform Trustees have not always consistently applied these existing rules.

As noted above, we therefore recommend that Treasury only progresses reforms which clearly improve on existing legal obligations.

As a final comment, it would be concerning if new 'codified' diligence requirements acted as a 'safe harbour' or 'checklist' for trustees who had otherwise failed to meet the existing principle-based requirements.

Option 1.3 – Limiting certain conflicted arrangements and payments

Product issuers giving financial incentives or benefits for inclusion on a platform conflicts with the Platform Trustee's obligations to undertake appropriate due diligence when selecting and monitoring investment options on their menu.

Providing such benefits to Platform Trustees should therefore be prohibited.

Option 1.4 – Restricting certain trustee operating models

As the paper notes, an outsourced trustee model can lead to a separation of the trustee from the platform's product offerings in a way that may undermine effective oversight. The tensions and limitations of this model have become apparent. Models where trustee services are provided by a third party have too often meant that the trustee is removed from providing meaningful oversight of investment options and members' interests. The trustee, and all the important responsibilities and accountability they have, is too far removed from the party that has operational control. The paper considers a ban on this model. We believe that serious consideration should be given to this option.

Additional recommendation: regular ASIC report on platform due diligence practices

We recommend that ASIC be tasked with regularly – for example, every six months for a period of two years – reviewing the due diligence and onboarding practices at platforms with large numbers of complex investment options and publishing its views on best practice in this space. These reviews should reference ASIC's learnings from recent actions following the Shield and First Guardian failures. Treasury's paper highlights a number of platform RSEs with investment offerings numbering in the thousands. Over the next year there is likely to be some rationalisation of platform offerings, with one analysis suggesting the potential closure of at least 10-20% of platform options following deep investment menu and governance reviews.[1]

Additional recommendation: Platform Trustee performance reporting to members

Transparency is limited for members in relation to many platform products. The majority of platform-based products fall outside the superannuation performance test, making comparability difficult. Opaque and layered fees, combined with a large range of highly complex options, can make it challenging for members to understand whether they are getting value for money.

Platforms should be required to annually report portfolio performance to members on a Net Investment Return basis, matched against a benchmark.

This obligation should be placed on the Platform Trustee to report to members annually. The form of this report should be prescribed to ensure simplicity and clarity.

The nature of platforms is such that the makeup of each member's portfolio will differ and may encompass a bespoke range of investment options. Therefore, there is value for the member in seeing how the portfolio has performed relative to a benchmark.

This annual report should include the member's investment return, pre and post fees for the year. This should also include past years for as long as the member has been with the trustee. This should be provided alongside an apples-with-apples industry standard benchmark comparison (specific to the amount of risk taken by that account during each period).

[1] Mercer, 'Shaping Super 2026: Analysis of the maturing Australian superannuation system', 2026, page 29.

Proposal 2: Increase penalties under the SIS Act

<u>Recommendation</u>:

Changes to penalties should be progressed in tandem with other important reforms in these proposal papers.

Option 2.1 – Double maximum penalties under the SIS Act

Option 2.2 – Increase penalties under the SIS Act to better align with the *Corporations Act 2001*

Breaches of the *Superannuation Industry (Supervision) Act 1993* should be met with appropriate penalties. On its own, it is unlikely that an increase in available penalties would have deterred the conduct and omissions that led to the Shield and First Guardian collapses. If changes are made to penalty arrangements, they must not be progressed alone, but in tandem with the other important reforms in these proposal papers.

Part 2: Superannuation switching

Proposal 3: Introduce a waiting period for inter-fund superannuation switching

<u>Recommendation</u>**:**

Should the Government proceed with the proposal for a cooling off period, the final design should consider administrative costs and be deliverable at scale.

The content of warning messages and any categorisation of receiving funds by risk level should be the responsibility of regulators, rather than the transferring fund. This is important to ensure the consistent application of the standard across industry.

<u>Additional recommendation</u>:

In instances of switching, trustees should be given greater legislated authority not only to slow or warn, but to actively identify and intervene where behavioural, transactional or adviser-linked indicators of fraud are present.

General comments

In considering this proposal, we recognise the Government's aim is to give members an opportunity to pause and reflect before switching their superannuation fund, particularly when they are switching to a higher-risk environment. Super is a long-term investment, and a decision to switch funds, particularly into a higher-risk product, should be the subject of careful consideration.

We also recognise that superannuation members who have had their life savings threatened by the Shield and First Guardian collapses report that if they had received a warning or an opportunity to consider the decision to switch their super, they may not have proceeded to transfer their super out of a safe environment.

The following principles should be considered when designing these new obligations, should the Government choose to proceed with them.

1. Any new obligation must provide clarity on:
   a. what action a trustee is expected to take between receiving a request and processing it; and
   b. what happens if a trustee receives no response to member engagement during the waiting period.
2. Any new requirements must be deliverable at scale and not require manual processing, particularly as excessive administrative costs are ultimately borne by members. Given the size of the superannuation system, the volume of switching across the system is significant. Generally, around 5% of Australians – more than 1 million people – attempt to switch funds each year.
3. For similar reasons, there should be sufficient lead time given for funds to make any necessary changes. Depending on the final design, changes are likely to be a significant administrative project.
4. Should the Government choose to limit the proposal to transfers to 'higher risk' funds, legislation and regulators should specifically identify which funds constitute a 'higher risk' fund. This would ensure consistency and clarity across the sector.
5. The content of any warning messages should be set by regulators to ensure consistency and clarity across the sector.
6. Government and regulators should be mindful of the potential for increased complaints as a result of delays from the cooling off period. This may particularly be the case where a member has their mind set on switching superannuation funds and would be frustrated by a delay in transferring their super.

Additional recommendation: trustee powers in relation to instances of fraud

Regulation 6.34A of the *Superannuation Industry (Supervision) Regulations 1993* sets out the general requirement for trustees to rollover or transfer amounts to a new fund as soon as practicable and no later than three business days.

Treasury's proposal paper represents an opportunity for legislation to clarify the powers of trustees to take action to address fraud in instances where the current three-day switching requirement is triggered. Although APRA SPG 223 Fraud Risk Management refers to these matters, they are not expressly provided for in Division 6.5 of the *Superannuation Industry (Supervision) Regulations 1993*.

Proposal 4: Limit fee deductions for switching related financial advice

Recommendation:

Recognising variations in trustee practices and the persistence of concerns first highlighted in ASIC and APRA's joint 2021 letter,[2] we support all trustees having an appropriately designed cap on the fees that can be deducted from members' superannuation accounts, and Government satisfying itself that these are not set at levels that are disproportionate relative to underlying balances.

To give effect to this, Government should legislate to give regulators the power to enforce caps, require regulators to report on the distribution of fees deducted as related to underlying balances; a requirement to record and report caps that are outliers, and for the regulator to require trustees to explain, justify and adjust these if necessary. This is discussed under 'Option 4.2(b) – fee caps on advice deductions' below.

Additional recommendation: conflicted remuneration

The Government's paper highlights conflicted payments at a number of points in the value chain. This speaks to a broader issue, as highlighted by the collapse of Shield and First Guardian, of payments and benefits that are potentially inconsistent with the spirit of the important prohibitions on conflicted remuneration. The Government should conduct a review of these payments and benefits to ensure that the existing regulation of conflicted remuneration is fit for purpose.

Option 4.1 – ban on switching fees

The paper sets out that Treasury is seeking to balance maintaining members' access to advice, where it is in their best financial interest, with the need to reduce incentives for inappropriate switching and excessive charging. The paper notes that Shield and First Guardian highlighted conduct where switching advice was provided at scale, facilitated by the availability of superannuation balances as a funding source for advice fees.

The risk with interventions that single out certain types of fees (such as Option 4.1, which would ban deductions for switching related advice) is that they may drive behaviour that seeks to get around the restriction. For example, a ban on fee deductions from super for switching related financial advice may incentivise a reduction in fees for switching-related advice, while increasing fees for ongoing advice.

The range of fees identified in ASIC and APRA's 2021 letter[3] highlights the potential for a proposed ban to be avoided.

"We found a large number of poorly distinguished advice-related fees in relation to some products. Some trustees allow for a range of fees for advice services, or services in relation to advice, to be deducted from members' accounts. Examples are initial advice contribution fees, ongoing advice contribution fees, ongoing

[2] ASIC and APRA, 'Further guidance on oversight of advice fees charged to members' superannuation accounts', 30 June 2021.
[3] ASIC and APRA, 'Further guidance on oversight of advice fees charged to members' superannuation accounts', 30 June 2021.

and one-off advice fees, advice brokerage fees, advice fees – insurance, advice service charges and advice portfolio management fees."

Option 4.2(b) – fee caps on advice deductions

Advice is a critical service; the sector is continuing to evolve its offering so it is capable of delivering for a growing portion of Australians. AustralianSuper understands the concerns raised by the Government, ASIC and APRA that relate to instances where a lack of oversight of advice fees has seen deductions that were disproportionately high relative to underlying balances.

In pursuance of their obligations under the best financial interests duty and the sole purpose tests, trustees already typically impose annual fee caps on the amount of money a member can deduct from their superannuation to pay for financial advice. However, ASIC has found wide variations in practices between funds, in that ongoing fee caps ranged from $5,500 through to $20,000, or 2.2% to 5% on account balance terms.[4] In ASIC Report 781, ASIC suggested that trustees with high fee caps may attract licensees associated with cold calling operators seeking higher fees. ASIC also highlighted balance erosion caused by switching into unsuitable products with high fees and charges.[5]

All trustees should be required to have effective and appropriate caps. To address the issues that the Government and regulators have identified, Parliament should legislate to give regulators the power to enforce caps, a requirement for regulators to report on the distribution of fees deducted as related to underlying balances, a requirement to record and report caps that are outliers, and for the regulator to require trustees to explain and justify these, and adjust where necessary.

These steps should help to address instances where trustees are failing to demonstrate they meet the best financial interests duty, specifically as it relates to fee deductions at high levels relative to underlying balances. We believe these steps are critical so that the community can maintain confidence in the value of advice.

Option 4.2(a) – Codification of obligations on receiving funds to review advice fee deductions

Trustees are currently expected to have oversight programs as to whether deductions for advice fees are consistent with the sole purpose test.

This recommendation would require a trustee to be satisfied that a switching related advice fee is reasonable, with regard to the nature and scope of the advice, the member's circumstances and the fee relative to the member's balance. This would be a significant change and seems to approach trustees taking responsibility for personal advice provided by an external provider. There is also a concern that it sets up a potential conflict of interest, given that the receiving fund is benefiting from the action resulting from the advice (through increased FUM).

These concerns are heightened by the fact that trustees may take different approaches to applying a principles-based 'reasonableness' test. Given variations in trustee practices when responding to existing obligations regarding advice fees, which ASIC Report 781 describes, the powers we recommend in response to option 4.2(b), discussed above, may be more effective ways of ensuring the appropriateness of those fees.

---

[4] ASIC Report 781, 'Review of superannuation trustee practices: Protecting members from harmful advice charges', 2024.
[5] Ibid, page 3.

Option 4.2(c) – explicit adviser and licensee onboarding and monitoring requirements

It is important that trustees take steps to protect their members with regard to adviser and licensee onboarding and monitoring. There would be merit in a proposed requirement for trustees to have explicit onboarding and ongoing monitoring processes. The consultation paper notes that this would be focused on entity level suitability, as distinct from assessing the quality of individual advice.

Part 3: Compensation for members

Proposal 5: Requiring Platform Trustees to compensate members for eligible losses

<u>Recommendation</u>: To remove gaps in the availability of compensation for members, Platform Trustees should be required to compensate members for eligible losses.

Option 5.1 – Obligation on 'Platform Trustees' to compensate members for eligible losses

One of the most worrying features of the Shield and First Guardian collapses has been the inability, to date, of many affected members to obtain compensation. This has led to significant stress on impacted members. It also adds pressure to the Australian Financial Complaints Authority (AFCA), the CSLR and compensation mechanisms requiring Ministerial discretion.

The proposal for Platform Trustees to be required to compensate members for 'eligible losses' is likely to drive a change in practices in the way platforms conduct due diligence when onboarding and monitoring investment options. In our view this is more likely to drive change than Recommendation 1.2, which proposes a codification of onboarding requirements.

This requirement for pre-funding should apply in circumstances where the risk and complexity of the investment options offered by a trustee warrant it. In our comments on the definition of a 'Platform Trustee' we include some indicators of such risk and complexity.

A pre-funded amount should be principles-based and supported by regulatory guidance and supervision. It should be set based on the extent to which a Platform Trustee offers high risk options. Careful consideration would need to be given to the circumstances in which a trustee is liable for eligible losses.

There is merit in Treasury's proposal for the obligation to compensate members to be activated by an independent third party, which could include a regulator.

Option 5.2 – ASIC directions power (remediation)

We see merit in an ASIC directions power to direct a Platform Trustee to commence a remediation process where ASIC has reason to suspect that a trustee has engaged in conduct that would constitute a contravention of a financial services law and may have led to member losses. Consideration would need to be given to the detail of this power, its scope and the circumstances that would allow for its use.

Attachment 3: Compensation Scheme of Last Resort – reform options to support ongoing sustainability

AustralianSuper supports the CSLR. Consumers who suffer genuine misconduct and are left with unpaid determinations should have a pathway to redress. However, the policy intent must be that the scheme is called upon less over time. This means that upstream policy settings should work to protect consumers from the harms of misconduct in the first instance. The proposals we support from the concurrent consultation papers will help achieve this.

Upstream policy should also, as much as possible, require perpetrators of misconduct to fund compensation. Where this cannot occur, and other parties are called upon via the CSLR, compensation must be fairly funded. To the greatest extent possible, compensation costs should fall on the sectors connected to the underlying misconduct. This incentivises sector leaders to improve standards and practices. The elevated cost of the CSLR has been driven overwhelmingly by financial advice failures involving self-managed superannuation funds (SMSFs) and managed investment schemes (MISs).

The practical reality is that members of APRA-regulated superannuation funds derive limited benefit from the scheme, as there is little prospect that an AFCA determination against a fund would go unpaid.

For these reasons, we consider that APRA-regulated superannuation fund trustees should not be included in the CSLR special levy framework. The CSLR's funding should instead be met consistently by contributions from the sub-sectors connected to the relevant compensation liability. However, our submission proceeds based on the options Government has presented.

Strengthening scheme integrity and recovery (Proposals 1, 2, 3, 7 and 8)

AustralianSuper supports the package of reforms aimed at reducing scheme costs through stronger recovery powers and better administration.

Proposal 1: Deducting offsetting payments

The CSLR should be able to deduct payments a claimant has already received from other sources before calculating compensation. This is consistent with the scheme's intended role as a mechanism of last resort.

Proposal 2: Expanding subrogation rights

We support both options. Subrogation should extend to the full AFCA determination amount, and recovery should be available against a wider range of sources. Stronger recovery powers reduce costs and reinforce the principle that wrongdoers should pay.

Proposal 3: Technical improvements

We support the full package.

Proposal 7: Broad-based levying of MISs

We support Option 1 – a broad-based levy on all MISs as connected sub-sectors within the waterfall framework. MIS product failures are a significant driver of CSLR costs. The consultation paper frames broad cost sharing as a continuing characteristic of the CSLR. Further, grouping by risk can only go by what information is available, which generally pertains to investment risk and not misconduct risk.

Proposal 8: Improving recovery within corporate groups

We support both options. They are complementary. Option 1 should strengthen existing insolvency frameworks to deter asset shifting. Option 2 creates a new mechanism to pursue related entities that walked away with value while leaving AFCA liabilities behind.

Revising the treatment of counterfactual loss (Proposal 4)

We support Option 1 – limiting CSLR-eligible compensation to capital losses only, assessed at the portfolio level.

The question is what a *last resort* scheme should be expected to underwrite. Outside parties should not be compelled to make consumers whole in the way a successful claim against the wrongdoer does (and will continue to). Rather, ensuring consumers are not left permanently out of pocket for direct losses they incurred is a more reasonable ask.

That said, if benchmarking were to proceed, CPI is superior to the 10-year government bond yield. CPI benchmarking cleanly maintains an investor's real purchasing power. Using a different counterfactual return maintains the underlying concept of the 'but for' test and invites ongoing debate over what an investor might otherwise have done. For example, a savings account is arguably a more realistic risk-free counterfactual investment than government bonds.

The special levy framework (Proposal 5)

As noted above, AustralianSuper's primary position is that APRA-regulated superannuation fund trustees should not be required to fund CSLR costs arising from the misconduct of others. However, the consultation paper proceeds on the basis that super funds will remain within the framework. On that basis, we recognise the value of a rules-based mechanism for allocating special levy costs.

The sustainability of any such mechanism will turn on how often unconnected entities are asked to contribute. Therefore, it must be explicitly designed to ensure the cap for each tier is fully exhausted before proceeding to the next tier, and 'connectedness' must be consistently assigned based on evidence. The mechanism must be designed such that calls on unconnected entities are extraordinarily rare and capacity-to-pay does not become a normalised driver of contributions. Otherwise, it will not sustain broad-based support across the financial system.

Finally, we recognise that the sustainability of the CSLR cannot be addressed through special levy design alone. We support the Government's broader reform direction across the related consultation papers. A number of these proposals will reduce the incidence and scale of CSLR-eligible losses upstream. Without some of the effective preventative reforms proposed in the three linked consultations, superannuation trustees – particularly large profit-to-member funds – will continue to operate as financial shock absorbers for system failures they did not cause.

The treatment of SMSFs (Proposal 6)

The treatment of SMSFs is the most consequential structural question in this consultation. SMSF complainants account for approximately 93 per cent of all paid and pending CSLR cases, representing around $154 million in compensation. The average SMSF claim ($130,186) is materially higher than the average non-SMSF claim ($75,980). Financial advice misconduct involving SMSF investments accounts for 87 per cent of all financial advice cases before the CSLR. Yet, SMSFs currently do not contribute to CSLR funding.

Principle of tying levies to beneficiaries

As a principle, sectors whose members benefit from the CSLR should be the ones who pay into it. Conversely, those sectors whose members do not benefit from the CSLR should not be required to fund it. With that in mind, and given that APRA-regulated superannuation members will not be able to draw on the CLSR, our starting position remains that APRA-regulated superannuation trustees should not be included in the special levy framework. However, if these funds continue to be part of the levy, a fair and symmetric treatment for SMSFs is full mandatory inclusion. We note this is not under consideration.

Opt-in and opt-out models (Option 1)

If full inclusion is not pursued, we are open to the opt-in and opt-out variants presented in the paper. This is because they can preserve SMSF trustee agency and are consistent with the principle that those who contribute to the scheme should be those who can claim. Of the two, we believe opt-in is the superior option.

An unknown is how frequently advisors would recommend to their clients that they participate. Doing so could possibly be seen as acknowledging they may leave their client with unpaid claims for remediation. Alternatively, it would also allow them to demonstrate good faith.

Opt-in would perform better than opt-out on this front. If advisers tend towards directing their clients to opt-out, the scheme would be left with a pool of unwitting contributors who are predominantly unadvised and, therefore, unable to claim. This outcome undermines SMSF trustee agency and is not consistent with the principle that those who contribute to the scheme should be those who can claim.

Opt-in could be implemented to ensure those under advice understand that opting-in is likely to be in their interests, and conversely for those not under advice. This would require some regulation of the decision point. For example, requiring any advice on the decision to be in writing and defended against the clients' interests, as well as presenting clear information regarding CSLR eligibility to those not under advice. A more forceful option would be to simply disallow the unadvised from opting-in, although this would require the Government to essentially pre-determine eligibility by ascribing advice status. This undermines SMSF trustee agency and comes with the risk of uncompensated harm if advice status is misidentified.

A complication of opt-in is how periodic decision-making could amplify adverse selection. Trustees could opt in if red flags arise in advance of the scale of misconduct becoming clear. Restricting the option to a one-off, irrevocable opt-in at fund inception would address this.

Full exclusion (Option 2)

Exclusion is the simplest option. It eliminates adverse selection and sends a clear signal: SMSF trustees who choose to operate outside APRA regulation accept the responsibilities and risks that come with self-management.

However, exclusion removes last-resort compensation for SMSF trustees who are genuine victims of misconduct. If pursued, it should be accompanied by stronger upstream protections to ensure those starting an SMSF understand the nature of being an SMSF trustee.

Importantly, SMSF trustees would retain access to AFCA. Exclusion removes the backstop where a determination goes unpaid, not the ability to obtain a determination.