



Law Council
OF AUSTRALIA

Legal Practice Section

16 April 2025

Superannuation Access and Compliance Unit
Retirement Income and Superannuation Division
Treasury
Langton Cres
Parkes ACT 2600

By email: paydaysuper@treasury.gov.au

Dear Sir/Madam,

Payday Super – exposure draft

This submission has been prepared by the Superannuation Law Committee of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to the **Payday Super – exposure draft**.

This submission responds to the exposure draft inserts for "Treasury Laws Amendment Bill 2025: ban on advertising super funds during onboarding".

Prohibition

In order for the prohibition in proposed new section 992AB(1) to apply, the advertisement or statement must be "targeted to the employee or to a class of employees that includes the employee" and it must also be "not accessible to the public" (section 992AB(1)(c)(i) and (ii)). The rationale for the first condition (about the advertisement or statement being relevantly targeted) is obvious. However, the rationale for the second condition (about the advertisement or statement being inaccessible to the public) is obscure.

The exposure draft Explanatory Materials (**EM**) do not clarify the position. They say, of section 992AB(1)(c) (at [2.6]):

This is intended to ensure that the prohibition does not extend to entities that do not target employees during onboarding, alongside the exception described below for businesses distributing, or enabling the distribution of, content.

The statement extracted above does not shed any light on why the advertisement or statement must be inaccessible to the public in order for the prohibition to apply. Section 992AB(1)(c)(i) deals with targeting. Section 992AB(4) (discussed below) provides an exception "for businesses distributing, or enabling the distribution of, content". The requirement that the advertisement or statement be inaccessible to the public is unexplained. More concerningly, it opens up the possibility of abuse – the prohibition could be avoided, even though the relevant targeting occurs, by also making the advertisement or statement available to the public in some obscure way. It is submitted that section 992AB(1)(c)(ii) should be removed.

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Exception - certain other MySuper products

“[S]uperannuation product” / “MySuper product”

The prohibition does not apply in relation to a "superannuation product" if "the product is a MySuper product" (section 992AB(3)(a)) and certain other conditions are satisfied. This language gives rise to technical and practical concerns.

The term "superannuation product" is defined to mean a beneficial interest in a fund, while the term "MySuper product" is defined to mean a class of beneficial interest in a fund. These definitions do not reflect how those terms are in fact used in the industry, or, indeed, what they are apparently intended to mean in legislation, including in proposed new section 992AB. When proposed new section 992AB speaks of a superannuation product it is clear enough that it is intended to embrace what a superannuation trustee would consider to be the "product" described in a product disclosure statement, rather than a beneficial interest in a fund. The technique of using the term "superannuation product", even though it is defined to mean a beneficial interest in a fund, in this more practical sense has infected many aspects of Chapter 7 of the *Corporations Act 2001* (Cth) for many years.

It is not suggested that this is the occasion to seek to abandon the technique. However, the practical fact of the matter is that no-one offers a "superannuation product", understood in the practical sense, that is co-extensive with a "MySuper product" (as also understood in a practical sense). Rather, a Product Disclosure Statement would typically describe a "product" that includes both a MySuper product and, because the "product" offers an investment menu and investment choice, a choice product (also a class of beneficial interest in a fund). For this reason, we submit that section 992AB(3)(a) should read, "the product is or includes a MySuper product". Without this change, there is a risk of a court concluding that the exception does not apply in a case in which it was in fact intended to apply – namely, where the "product" includes a MySuper product but also offers an investment menu and investment choice.

Other conditions

The other conditions that must be satisfied in order for this exception (for "certain other MySuper products") to apply include "the conditions (if any) prescribed by the regulations" (section 992AB(3)(d)). We submit that this is appropriate.

However, there is another condition, in these terms: "the person is not a connected entity (within the meaning of that Act) of the Registrable Superannuation Entities licensee (within the meaning of that Act) that is offering the product" (section 992AB(3)(c)). The rationale for this condition is unexplained. We submit that the rationale should be provided. Otherwise, section 992AB(3)(c) should be removed from the exposure draft bill. (Taking this step would not prevent this provision, or something like it, being included, in due course, in the regulations envisaged by section 992AB(3)(d).)

Further, there is yet another condition, in these terms: "the advertisement, or statement referring to the product, is accompanied by clear and unambiguous disclosures that satisfy the requirements prescribed by the regulations" (section 992AB(3)(e)). We submit that this approach – imposing a disclosure requirement which is partly prescribed in the Act ("clear and unambiguous disclosures") and partly prescribed by regulation – should not be pursued. Otherwise, a requirement to provide "clear and unambiguous" disclosure will, itself, be unclear and ambiguous. We submit that the far preferable approach would be to remove section 992AB(3)(e) and then develop and set out specific disclosure requirements, in due course, in the regulations envisaged by section 992AB(3)(d).

Exception—businesses distributing, or enabling the distribution of, content

This further exception is set out in proposed new section 992AB(4). Neither the provision itself, nor the exposure draft EM, provides any real clue as to the rationale for the exception. We submit that the rationale, and the sorts of cases where it is and is not intended to apply, should be clarified.

The first limb of the exception requires the person who intends to rely on the exception to make or cause an advertisement or statement "in the ordinary course of a business of ... distributing content (including advertising); or ... enabling such distributions" (section 992AB(4)(a)). Basic questions immediately arise – can the person carry out any other business, what does "distributing content" mean, what does "enabling such distributions" mean, must the person also distribute "content" other than "content" about superannuation products, etc? As presently drafted, the meaning of the first limb of the exception is very unclear.

The second limb of the exception requires that the person who intends to rely on the exception "did not know and had no reason to suspect that the advertisement or statement would amount to a contravention of subsection (1)" (section 992AB(4)(b)). Whatever the policy intention here, we submit that the test should incorporate an objective element, rather than being (as it currently is) purely subjective. For example, the second limb would more appropriately read, "did not know, had no reason to suspect and could not reasonably have been expected to suspect that the advertisement or statement would amount to a contravention of subsection (1)".

The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact Superannuation Law Committee Chair, Joanne Dwyer [REDACTED]

Yours sincerely



Greg McIntyre SC
Section Chair