

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for a later sitting) Bill 2020: Best
Financial Interests Duty**

Commencement information

| Column 1 | Column 2 | Column 3 |
|-------------------|---|---------------------|
| Provisions | Commencement | Date/Details |
| 1. Schedule 1 | The day after this Act receives the Royal Assent. | |

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Schedule 1—Best financial interest duty
Part 1—Amendments

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Superannuation Industry (Supervision) Act 1993
1 Subsection 10(1)

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14
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Insert:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

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2 After subsection 34(2)
Insert:

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Standards relating to record keeping obligations

(2A) If standards are prescribed by the regulations for the purposes of paragraph 31(2)(n), 32(2)(g) or 33(2)(e), each trustee of a superannuation entity must ensure that those standards are, when applied to the operation of the entity, complied with at all times.

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1 Penalty: 50 penalty units.

2 (2B) Subsection (2A) is an offence of strict liability.

3 Subsection 34(3)

4 Repeal the subsection, substitute:

5 *Validity of transaction not affected by contravention*

6 (3) A contravention of subsection (1) or (2A) does not affect the
7 validity of a transaction.

8 4 At the end of Division 2 of Part 3

9 Add:

10 34AA Directors of corporate trustees to ensure that prescribed 11 operating standards are complied with

12 A director of a corporate trustee of a superannuation entity
13 commits an offence if:

- 14 (a) a trustee of the entity commits an offence against
15 subsection 34(2); and
16 (b) the offence relates to the contravention of a standard
17 prescribed by the regulations for the purposes of
18 paragraph 31(2)(n), 32(2)(g) or 33(2)(e); and
19 (c) the director of the corporate trustee of the entity was in a
20 position to influence the conduct of the trustee of the entity in
21 relation to the commission of the offence; and
22 (d) the director failed to take all reasonable steps to prevent the
23 commission of the offence.

24 Penalty: 100 penalty units.

25 5 Paragraph 52(2)(c)

26 Omit “best interests”, substitute “best financial interests”.

27 6 After subsection 52(3)

28 Insert:

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1 *Payments to third parties must be in best financial interests of*
2 *beneficiaries*

3 (3A) To avoid doubt, the obligations of the trustee under
4 paragraph (2)(c) apply in respect of payments to a third party by, or
5 on behalf of, the entity.

6 **7 Paragraph 52A(2)(c)**

7 Omit “best interests”, substitute “best financial interests”.

8 **8 After subsection 52A(2)**

9 Insert:

10 *Payments to third parties must be in best financial interests of*
11 *beneficiaries*

12 (2A) To avoid doubt, the obligations of the director under
13 paragraph (2)(c) apply in respect of payments to a third party by, or
14 on behalf of, the entity.

15 **9 Paragraph 52B(2)(c)**

16 Omit “best interests”, substitute “best financial interests”.

17 **10 After subsection 52B(2)**

18 Insert:

19 *Payments to third parties must be in best financial interests of*
20 *beneficiaries*

21 (2A) To avoid doubt, the obligations of the trustee under
22 paragraph (2)(c) apply in respect of payments to a third party by, or
23 on behalf of, the fund.

24 **11 After section 117**

25 Insert:

26 **117A Treatment of certain payments and investments by trustees—** 27 **registrable superannuation entities**

28 (1) When exercising powers or performing duties and functions as a
29 trustee of a registrable superannuation entity, the trustee of the
30 entity must not:

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- 1 (a) make a payment or investment of a kind prescribed by the
2 regulations; or
3 (b) make a payment or investment of a kind prescribed by the
4 regulations in the circumstances prescribed by the
5 regulations.
- 6 (2) Subsection (1) is a civil penalty provision as defined by
7 section 193, and Part 21 therefore provides for civil and criminal
8 consequences of contravening, or of being involved in a
9 contravention of, that subsection.

117B Treatment of certain payments and investments by directors— registrable superannuation entities

- 12 (1) When exercising powers or performing duties and functions as a
13 director of the corporate trustee of a registrable superannuation
14 entity, the director of the corporate trustee of the entity must ensure
15 that the corporate trustee of the entity does not:
- 16 (a) make a payment or investment of a kind prescribed by the
17 regulations; or
18 (b) make a payment or investment of a kind prescribed by the
19 regulations in the circumstances prescribed by the
20 regulations.
- 21 (2) Subsection (1) is a civil penalty provision as defined by
22 section 193, and Part 21 therefore provides for civil and criminal
23 consequences of contravening, or of being involved in a
24 contravention of, that subsection.

117C Treatment of certain payments and investments—self managed superannuation funds

- 27 (1) When exercising powers or performing duties and functions as a
28 trustee of a self managed superannuation fund:
- 29 (a) the trustee of the fund must not:
- 30 (i) make a payment or investment of a kind prescribed by
31 the regulations; or
32 (ii) make a payment or investment of a kind prescribed by
33 the regulations in the circumstances prescribed by the
34 regulations; and
- 35 (b) if the trustee of the fund is a body corporate—when
36 exercising powers or performing duties and functions as a

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1 director of the corporate trustee of the fund, the director must
2 ensure that the corporate trustee of the fund does not:

- 3 (i) make a payment or investment of a kind prescribed by
4 the regulations; or
5 (ii) make a payment or investment of a kind prescribed by
6 the regulations in the circumstances prescribed by the
7 regulations.

- 8 (2) Subsection (1) is a civil penalty provision as defined by
9 section 193, and Part 21 therefore provides for civil and criminal
10 consequences of contravening, or of being involved in a
11 contravention of, that subsection.

12 **12 After paragraph 193(k)**

13 Insert:

- 14 (ka) subsection 117A(1);
15 (kb) subsection 117B(1);
16 (kc) subsection 117C(1);

17 **13 Before section 221**

18 Insert:

19 **220A Burden of proof—civil proceedings relating to duty to act in** 20 **best financial interests of beneficiaries**

- 21 (1) In civil proceedings for a contravention of subsection 54B(1) in
22 relation to a covenant set out in paragraph 52(2)(c), it is presumed
23 that a trustee did not perform the trustee's duties and exercise the
24 trustee's powers in the best financial interests of beneficiaries,
25 unless the trustee adduces evidence to the contrary.
- 26 (2) In civil proceedings for a contravention of subsection 54B(2) in
27 relation to a covenant set out in paragraph 52A(2)(c), it is
28 presumed that a director of a corporate trustee of a registrable
29 superannuation entity did not perform the director's duties and
30 exercise the director's powers as director of the corporate trustee in
31 the best financial interests of beneficiaries, unless the director of
32 the corporate trustee adduces evidence to the contrary.
- 33 (3) If, in such proceedings:
34 (a) a trustee or director of a corporate trustee wishes to adduce
35 evidence to the contrary—the trustee or director of the

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- 1 corporate trustee bears an evidential burden in relation to the
2 matter; and
- 3 (b) in the case that evidence to the contrary is so adduced—the
4 Regulator must prove, on the balance of probabilities, that:
- 5 (i) the trustee did not perform the trustee’s duties and
6 exercise the trustee’s powers in the best financial
7 interests of beneficiaries; or
- 8 (ii) the director did not perform the director’s duties and
9 exercise the director’s powers as director of the
10 corporate trustee in the best financial interests of
11 beneficiaries.

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1 Part 2—Application provision

2 **14 Application—offence for directors of corporate trustees** 3 **and compliance with record keeping requirements**

4 Section 34AA of the *Superannuation Industry (Supervision) Act 1993*,
5 as inserted by item 4 of this Schedule, applies in relation to a
6 contravention of subsection 34(2) of that Act that occurs on or after
7 1 July 2021.

8 **15 Application—duty to act in best financial interests of** 9 **beneficiaries**

10 *Registrable superannuation entities and self managed*
11 *superannuation funds*

- 12 (1) The amendments made by items 5, 6, 9 and 10 of this Schedule apply in
13 relation to duties that are performed, or powers that are exercised, by a
14 trustee on or after 1 July 2021.

15 *Directors of corporate trustees of registrable superannuation*
16 *entities*

- 17 (2) The amendments made by items 7 and 8 of this Schedule apply in
18 relation to duties that are performed, or powers that are exercised, by a
19 director of a corporate trustee on or after 1 July 2021.

20 **16 Application—burden of proof in proceedings relating to** 21 **duty to act in best financial interests of beneficiaries**

22 The amendment made by item 13 of this Schedule applies to the
23 following contraventions of the *Superannuation Industry (Supervision)*
24 *Act 1993* that occur on or after 1 July 2021:

- 25 (a) contraventions of subsection 54B(1) of that Act in relation to
26 a covenant set out in paragraph 52(2)(c) of that Act;
27 (b) contraventions of subsection 54B(2) of that Act in relation to
28 a covenant set out in paragraph 52A(2)(c) of that Act.