
TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING) BILL
2022: FAITH-BASED PRODUCTS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of Contents

Glossary	iii
Chapter 1: Faith-based products	5



Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<i>Abbreviation</i>	<i>Definition</i>
APRA	Australian Prudential Regulation Authority
SIS Act	Superannuation Industry (Supervision) Act 1993
SIS Regulations	Superannuation Industry (Supervision) Regulations 1994

Chapter 1: Faith-based products

Table of Contents:

Outline of chapter	5
Context of amendments.....	5
Summary of new law.....	6
Detailed explanation of new law	7
Faith-based status determined by APRA	7
Supplementary test for faith-based products.....	10
Commencement, application, and transitional provisions	11

Outline of chapter

- 1.1 Schedule [xx] amends the SIS Act to provide for a supplementary annual performance test for faith-based products. APRA may determine that a product is a faith-based product if a trustee for the product provides APRA with a valid application. Faith-based products pass the annual performance test if they pass the original or the supplementary performance test.

Context of amendments

- 1.2 The Your Future, Your Super reforms were a package of superannuation laws introduced in 2021 in response to recommendations of the Productivity Commission's report, *Superannuation: Assessing Efficiency and Competitiveness*.
- 1.3 Consistent with recommendation 4, the Schedule 2 to the Treasury Laws Amendment (Your Future, Your Super) Act 2021 and supporting regulations established an annual superannuation performance test (the test) to hold superannuation trustees to account for product underperformance. The test measures investment performance (including investment fees and taxes) and administration fees for individual products.
- 1.4 APRA is required to conduct the annual performance test every year, determining a superannuation product's performance against a benchmark. Products which fall short of the benchmark by more than 0.5 percentage points

a year, on average, over a rolling eight-year period, fail the test and the trustee must notify the product's beneficiaries by a standard letter as prescribed by the regulations. Products that fail the test in two consecutive years are prohibited from accepting new beneficiaries until they pass the test again.

- 1.5 In December 2021, the Government announced that, if elected, it would adjust the performance test to take into account the religious affiliation of a superannuation fund when applying the annual performance test.
- 1.6 A supplementary performance test for faith-based products allows investment in accordance with faith-based principles to be taken into account when assessing the performance of a product against benchmarks.

Summary of new law

- 1.7 Schedule [xx] amends the SIS Act to provide for a supplementary annual performance test for faith-based products.
- 1.8 APRA may determine that a product is a faith-based product if a trustee provides APRA with a valid application. In order to be a valid, an application must be in writing and in the approved form, and must contain:
 - certification from the trustee(s) that the product uses a faith-based investment strategy and that this is disclosed in its regulated disclosures and marketing materials;
 - one or more indices which APRA could use to assess the product's performance; and
 - any other information prescribed by the regulations or legislative instrument.
- 1.9 If a faith-based product fails the original performance test, APRA must assess the product against the supplementary performance test. The trustee of the faith-based product only experiences the consequences of a failed performance test if it fails the supplementary performance test. Faith-based products that pass the original performance test are not subjected to the supplementary test.
- 1.10 Trustees must apply to APRA between 1 February of the prior financial year and 31 January of the financial year for APRA to determine a product as having faith-based status for that financial year.
- 1.11 Trustees of a faith-based product have an ongoing obligation to notify APRA of any new information which may impact a product's faith-based status. APRA may revoke a determination that a product is a faith-based product in certain circumstances. A product will continue to be a faith-based product until APRA revokes the determination.

Detailed explanation of new law

- 1.12 The supplementary performance test will be implemented as part of the existing performance test framework as set out in Part 6A of the SIS Act.
- 1.13 Under the existing framework, APRA must run the performance test for all Part 6A products. A ‘Part 6A product’ is defined in section 60B to mean MySuper products and other products to be specified in the SIS Regulations. APRA makes a determination of the test results by 31 August of that financial year. A product either meets the requirement for assessment under section 60D (that is, it passes the test) or does not meet the requirement for assessment (that is, it fails the test).

Faith-based status determined by APRA

- 1.14 A product is a faith-based product if it is a Part 6A product which APRA has determined to be a faith-based product. A new definition of ‘faith-based product’ in relation to a financial year is inserted into the definitions section of the SIS Act.
[Schedule xx, item 1 and 2, subsection 10(1) and section 60K of the SIS Act].
- 1.15 APRA may determine that a product is a faith-based product for a financial year if a trustee provides APRA with a valid application between 1 February of the prior financial year and 31 January of the relevant financial year.
[Schedule xx, item 2, section 60L of the SIS Act]
- 1.16 APRA’s decision whether or not to determine a product is a faith-based product will not be a ‘reviewable decision’ within the meaning of the SIS Act. This is because the requirements for the faith-based status determination are clearly specified in the SIS Act (and will be further specified in the regulations) and the determination is based on whether certain information, already available to trustees, is provided to APRA or not. APRA will engage with the applicant trustee(s) on the information provided during the period between the application being submitted and 31 March.

Trustees may apply for faith-based status

- 1.17 Trustees may apply, in writing and in the approved form, for APRA to determine that a product is a faith-based product.
[Schedule xx, item 2, subsection 60L(1) and paragraph 60L(2)(a) of the SIS Act]
- 1.18 In order to be a valid application, an application must contain:
- A declaration from the trustee(s) that the product’s investment strategy accords with faith-based principles;
 - A declaration from the trustee/trustees that they have:

- Disclosed their faith-based investment strategy to members of the product in their regulated disclosures; and
- Disclosed their faith-based strategy in marketing materials;
- One or more indices which APRA could use to assess the product’s performance; and
- Any other information prescribed by the regulations or a legislative instrument.

[Schedule xx, item 2, subsections 60L(2) to (3) of the SIS Act]

- 1.19 Trustees must certify that the faith-based investment strategy has been disclosed in regulated disclosures (required under the SIS Act and the *Corporations Act 2001*) and in marketing materials so that current and prospective beneficiaries of the product can be aware of the faith-based investment strategy. Trustees do not need to prove or certify that every member has agreed to the faith-based investment strategy.
- 1.20 The index or indices which trustees provide should reflect the faith-based nature of the investment strategy and will be alternative to the assumed indices used for the original test (set out at regulation 9AB.17 of the SIS Regulations).

Regulations may prescribe application requirements

- 1.21 Regulations may specify information which trustees must include in the application. Regulations may specify this required information by reference to information specified in a legislative instrument, and regulations may empower APRA to make a legislative instrument for the purposes of specifying information.

[Schedule xx, item 2, paragraph 60L(2)(d) and subsection 60L(3) of the SIS Act]

- 1.22 For example, the regulations may provide that an application must contain:
- the trustee’s investment strategy, which includes the product’s faith-based principles;
 - the product’s Product Disclosure Statement;
 - a copy of any advertising materials disclosing the product’s faith-based investment strategy; and
 - the time at which the product adopted its faith-based investment strategy.

Timing of application and determination

- 1.23 Trustees must apply between 1 February of the prior financial year and 31 January of a financial year for APRA to determine the product is a faith-based product in respect of that financial year.

[Schedule xx, item 2, subsections 60L(4) to (5) of the SIS Act]

- 1.24 APRA must then decide by 31 March in the financial year whether or not to determine that the product is a faith-based product. This allows APRA sufficient time to consider faith-based status applications, engage with applicants, and subject the relevant products to both the original performance test and the supplementary performance test by the deadline for the test.
[Schedule xx, item 2, subsection 60L(6) of the SIS Act]

Ongoing faith-based status

- 1.25 If APRA has determined a product to be a faith-based product for a financial year, that product will continue to be a faith-based product in future financial years provided that APRA has not decided to revoke the determination that a product is a faith-based product.
[Schedule xx, item 2, section 60M of the SIS Act]

Trustees must inform APRA of new information

- 1.26 If a trustee that offers a faith-based product has information which relates to the extent to which:
- the product's investment strategy accords with faith-based principles;
 - the disclosure requirements have been complied with; or
 - the index or indices used to assess the product's performance align with the faith-based investment strategy,
- the trustee must provide this information to APRA as soon as practicable.
[Schedule xx, item 1, subsections 60Q(1) to (2) of the SIS Act]
- 1.27 Failure to do this is a civil penalty provision attracting a penalty of 2,400 penalty units (which is equivalent to \$532,8000 as of 1 July 2020). This penalty is the same as the penalty for other civil penalty provisions of the SIS Act and has the same the purpose to secure deterrence.
[Schedule xx, item 2, subsection 60Q(3) of the SIS Act and item 3, paragraph 193(ac) of the SIS Act]

APRA may revoke faith-based status

- 1.28 APRA may revoke a determination that a product is a faith-based product, at any time, if APRA reasonably considers that:
- the product's investment strategy does not accord with faith-based principles;
 - the disclosure requirements have not been complied with; or
 - the trustees have failed to provide information as required by section 60Q (provision of information).
- [Schedule xx, item 2, section 60N of the SIS Act]*

- 1.29 For the revocation to apply to a financial year, APRA must revoke the determination no later than 31 August in the following financial year. For example, APRA must revoke a 2023-24 determination by 31 August 2024.
[Schedule xx, item 2, subsection 60N(3) of the SIS Act]

Supplementary test for faith-based products

- 1.30 If a faith-based product fails the original performance test, it will be assessed against the supplementary performance test.

No consequences if a faith-based product fails only the original performance test

- 1.31 Under the existing Part 6A framework, if a product fails the performance test, a number of consequences will apply for APRA and trustees. These include:
- APRA must publish the fail result on a website maintained by APRA (see section 60C(5) of the SIS Act);
 - trustees must notify beneficiaries of the fail result using a notification letter prescribed by regulations (see section 60E of the SIS Act); and
 - for two consecutive fail results, trustees are prohibited from accepting new beneficiaries into the relevant product (see section 60F of the SIS Act).
- 1.32 If a faith-based product fails the original test, none of the above consequences will apply. The above consequences will only be triggered for faith-based products depending on the result of the supplementary test.
[Schedule xx, item 2, subsections 60O(1) to (2) of the SIS Act]

Regulations may prescribe a supplementary performance test

- 1.33 If a faith-based product fails the original performance test, APRA must assess it against the supplementary performance test.
[Schedule xx, item 2, subsection 60O(3) of the SIS Act]
- 1.34 For the original test, APRA is required to calculate a benchmark return for a product using assumed indices set out at regulation 9AB.17 of the SIS Regulations. For the supplementary test, APRA may use alternative indices for faith-based products.
- 1.35 Regulations may specify requirements relating to the supplementary performance test. This may include requirements relating to APRA determining appropriate indices for a faith-based product, and discretion to account for a product not having been a faith-based product for the whole period of performance history (generally corresponding to a product's 'lookback period' as defined in the regulations).
[Schedule xx, item 2, section 60P of the SIS Act]

- 1.36 In deciding on alternative index or indices, APRA will consider whether an alternative index or indices reflects the faith-based investment strategy. It is anticipated that APRA will consider the indices included in the application for faith-based status.
- 1.37 Regulations may also specify the timing of APRA performing the supplementary test and the timing of any notifications which APRA must give trustees in relation to the original and supplementary performance tests.
[Schedule xx, item 2, subsection 60O(5) of the SIS Act]

Consequences of failing the supplementary performance test

- 1.38 If a product fails the supplementary performance test, the consequences set out in the existing performance test framework will apply (see subsection 60C(5), and sections 60E and 60F of the SIS Act).
[Schedule xx, item 2, subsection 60O(4) of the SIS Act]

Commencement, application, and transitional provisions

- 1.39 Schedule [xx] commences on the day the Act receives Royal Assent.
- 1.40 The amendments made by this Schedule apply on and after the commencement of this item.
- 1.41 This means the faith-based status may be taken into account for the purposes of the 2022-23 performance test and any performance tests in future financial years.