

3 November 2023

By E-mail

Wendy Hau
Director
Superannuation Access and Compliance Unit
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
Parkes ACT 2600

paydaysuper@treasury.gov.au

Dear Ms Hau,

Submission to Treasury's consultation on *Securing Australians' Superannuation*

- 1 Hostplus welcomes the opportunity to make this submission to Treasury in response to the Consultation Paper, *Securing Australians' Superannuation*.
- 2 Hostplus is a national industry superannuation fund that represents c.1.7 million members and c.\$100 billion in funds under management.
- 3 This submission responds specifically to the section of the Consultation Paper titled: "*Choice of fund, stapling and employee onboarding*".
- 4 As noted in the Consultation Paper, there has been a discernible increase in workforce management and employee onboarding software products (referred to hereafter as **Workforce Management Platforms** or **WMPs**).
- 5 The Consultation Paper observes that the proliferation of WMPs has arisen to meet the incentive and demand by employers to, in part, avoid the "*administrative burden*" of stapling, including by encouraging employees to choose a superannuation fund.
- 6 At the outset, Hostplus submits that whatever "*administrative burden*" exists on employers as a result of the government's now legislated and enacted stapling reforms, this cannot — as a matter of policy and legal framework and acting in employees' best interests — be permitted to take precedence over the employer's paramount obligation to act diligently and responsibly in connection with the selection of the employee's superannuation fund.
- 7 Employees are inherently vulnerable as to the selection of their default or choice fund, particularly when moving jobs, and where an employee elects not to exercise a choice of

fund, they rely on employers to exercise proper diligence as to those processes. Employees also continue to rely on the employer maintaining appropriate systems during the term of their employment. The stapling reforms, although creating new obligations, followed a detailed process of Parliamentary consideration which found that such obligations were both desirable and necessary in achieving important public benefits, which are addressed further below. Hostplus submits that reforms now proposed must not be framed with the primary intent of reducing an employer's "*administrative burden*" or circumventing the stapling provisions; rather, with a view to protecting the demonstrable public benefits of stapling, in the interests of employees, their retirement income objectives and outcomes and the integrity of the superannuation system.

- 8 Hostplus recognises that WMPs can deliver certain benefits for employers, in terms of employee management and onboarding functions. However, we are concerned that the way that many WMPs have operated to date, and we believe will continue to operate absent government intervention, proves that the software can and is being designed and implemented in a manner that undermines the superannuation system and harms employees.
- 9 In particular, we remain highly concerned by instances of WMPs automating the fund selection process and designing that automated system in a manner that distorts and sidesteps the critically important selection of an appropriate fund for consumers. In particular, by:
 - (a) adopting "*dark pattern*" design features that encourage employees to choose a superannuation fund from a limited cohort of "*featured*" funds, which often have undisclosed commercial arrangements with the owner of the software platform; and
 - (b) failing to appropriately inform employees of the full suite of options available to them, which critically includes the option to remain stapled to their existing fund.
- 10 These concerns have been previously expressed and explained in our detailed submissions to ASIC in recent years. Our submissions demonstrated our concerns based on actual, real-life, case examples, including instances where:
 - (a) a WMP, owned by a major vertically integrated conglomerate in the financial services sector, was intentionally designed to operate in a manner which encouraged and induced the onboarding employee to not only actively choose a superannuation fund (rather than remain stapled to their existing fund or choose the employer's default), but to choose a fund which was owned by the WMP's owner. The WMP did not disclose to the employee: (i) the commercial interest which the WMP owner had in that promoted fund, which created an inherent conflict; or (ii) the full suite of legal options available to the employee — including to remain stapled to their existing fund. The harm caused by that intentional design of the WMP was increased by the fact that the superannuation fund promoted by the WMP pursuant to the above undisclosed conflict was an under-performing and high-fee fund; and
 - (b) WMP operators have recently begun promoting "*embedded*" or "*integrated*" product solutions, which result in the superannuation fund trustee outsourcing to the WMP operator the fund selection and member engagement function. As it concerns the fund selection process, the "*embedded*" or "*integrated*" software service offering promotes intentionally selected funds which have private and undisclosed

commercial arrangements with the software operator. In addition, the service offering — which results in a uniform and concerted means of engagement by competing fund trustees — raises additional competition, privacy and other regulatory concerns.

- 11 A uniform fact in each of the above examples, and a fundamental tenet of our concerns, is that the WMP operator has promoted and implemented the platform in a way that was intended to benefit employers as the target consumer, by reducing the claimed burden of superannuation fund selection. This has occurred without proper or sufficient regard to the obligations of those employers to act with diligence and primacy towards their employees in connection with the selection and management of superannuation.
- 12 The *Your Future, Your Super* stapling reforms were introduced to help protect and grow Australians' all-important retirement savings. Specifically, by reducing the occurrence of duplicate superannuation accounts, thereby minimising unnecessary fees and maximising the benefits of compounding returns. In seeking to serve the interests of employers over employees by circumventing and thereby devaluing the stapling reforms and their intended consumer benefitting outcomes, WMP operators undermine the primary intent and demonstrated public benefit of the Government's stapling reforms.
- 13 In this respect, we agree with Treasury's view, as expressed in the Consultation Paper, that this issue *"can lead employees to make uninformed decisions, open inappropriate products and unintentionally create duplicate accounts"*. We submit that the use of WMPs raises additional important concerns — including the complete outsourcing of the employee superannuation fund selection and management process, which is inherently contrary to the obligations of diligence imposed on the employer and results in a pro-forma, automated and often manipulated approach to employee superannuation.
- 14 That view is consistent with the Government's public response earlier this year (in April 2023) as part of its review of the *Your Future, Your Super* reforms that deficiencies had been identified in employers' implementation of the stapling reforms, and that the Government had specific concerns regarding WMPs which bypass stapling requirements. The Government also stated that the manipulation of employees to funds associated with WMPs *"should cease voluntary"* and that, if it does not cease, that it would *"explore changes to law or regulation to prevent it continuing"*.
- 15 It is clear from the increasing proliferation of WMPs targeting the superannuation sector through intentional design features, which steer and facilitate superannuation fund choice in a manner contrary to the intention of stapling, that such conduct has not ceased. Indeed, we believe it has amplified since the Government's *Your Future, Your Super* review earlier this year. We therefore welcome Treasury's timely consultation on *Securing Australians' Superannuation* as a means to explore legal and regulatory solutions to the problem.

Reform

- 16 The proposed reforms to streamline choice of fund and address stapling concerns set out in the Consultation Paper are steps in the right direction. We agree that:
 - (a) the establishment of a new digital ATO service that employees and employers can use to confirm the right superannuation fund would simplify and assist in maintaining integrity in the choice of fund process;

- (b) the introduction of a new requirement for employers to offer stapling as an option for employees during onboarding would encourage compliance with and increase the effectiveness of stapling reforms, and would also serve to better ensure that employees are made aware of their legal right to remain stapled to their existing fund, which is a fact often undisclosed by current WMPs; and
- (c) a ban on software providers advertising superannuation in WMP onboarding products would reduce WMPs' ability to manipulate and exert pressure on employees' selection of superannuation fund.

17 However, in our respectful submission, the proposed reforms do not go far enough. We believe there is an opportunity to further strengthen the legal and regulatory framework to prevent inappropriate behaviour by WMPs continuing. We set out our proposals for further reform as follows.

Advertising ban

- 18 As stated above and subject to the matters further outlined below, we support a ban on WMP operators advertising and/or promoting superannuation products within the WMP, and especially as an element of a new employee's initial onboarding.
- 19 However, it should be remembered that financial product and service advertising is already heavily regulated. This includes the obligation not to make false or misleading statements or engage in misleading or deceptive conduct in connection with such products or services. It also includes the requirement for persons to hold an Australian Financial Services Licence (**AFSL**) to provide financial product advice (which we discuss in greater detail below).
- 20 We consider that the conduct of WMPs in presenting employees with a limited cohort of funds to choose from, without stating that those funds have paid to be advertised or prioritised in the WMP's superannuation decision triage process, contravenes these aspects of the existing regulatory framework. It does so, firstly, by suggesting that those funds represent the entirety of the legal options available to the employee and, secondly, by failing to disclose the private commercial interests which destroy any objectivity as to the presentation of those funds on the platform.
- 21 Further, we submit that inappropriate behaviour by WMPs is not only restricted to the onboarding process. As is evident in the case example set out above, it can also unfold in respect of ongoing member engagement and related processes. There is a risk that WMPs may seek to advertise superannuation products once an employee has already been onboarded — for example, to prompt an employee to switch to a "*featured*" fund in order to make use of certain services on the platform. To prevent this manipulation of employees, we consider that it would be more effective to impose a blanket ban on WMP operators advertising, promoting or else favouring superannuation products as part of a choice framework.
- 22 In addition, in order to ensure that the reforms operate effectively and to remove the prospect of debate, updated laws should expressly list (without being exhaustive) the forms of conduct that would constitute "*advertising*" "*promoting*" or "*favouring*" in the above context. In particular, that should include any selective listing of a superannuation fund on a WMP other than the default fund of the employer, as well as any reference to a superannuation fund as being a "*sponsor*", "*partner*" or "*preferred supplier*" of the WMP. The laws also should not have the unintended consequence of inhibiting the

communication to the employee of the employer's default fund, or from superannuation funds accurately, responsibly and legitimately informing employees of the benefits of choosing their particular fund.

- 23 A proposed form of wording of the new law that we respectfully consider achieves the above objectives is outlined as follows:

WMP operators must not advertise superannuation products.

- (1) A workforce management platform must not be operated in a manner that advertises, promotes or favours a superannuation product to its users.*
- (2) For the purposes of subsection (1):*
 - (a) "workforce management platform" means a software platform or product used in desktop, mobile or other electronic applications to onboard employees to an employer organisation or to assist an employer organisation in managing employee data and/or obligations; and*
 - (b) "advertise", "promote" and "favour" means any manner of operation that is intended to or which could reasonably be expected to influence the employee's choice of superannuation fund in which to pay their superannuation contributions, and includes the listing of any particular superannuation fund or funds on the workforce management platform.*
- (3) Despite subsection (1), a workforce management platform can inform the employee of the:*
 - (a) employer's selected default superannuation fund; and*
 - (b) ability of the employee to choose to remain stapled to their existing fund.*

Transparent commercial arrangements

- 24 As we have noted, WMPs often have undisclosed commercial arrangements with the superannuation funds they present to employees.
- 25 As a means of promoting transparency and ensuring that consumers are able to make informed decisions based on proper facts, we submit that WMPs should be required to prominently disclose any private commercial sponsorship or partnership arrangements they have in place with superannuation funds.

Requirement for an AFSL

- 26 An AFSL is generally required to provide a financial service — including to provide financial product advice or deal in a financial product.
- 27 We submit that, by offering services in connection with the selection by an employee of a superannuation fund, WMPs have an important involvement in the chain of events leading to the acquisition of a financial product and are therefore providing a financial service. We submit that operators of WMPs should therefore be required to hold an AFSL.
- 28 The requirement to hold an AFSL will impose important legal and regulatory standards on the operator of the WMP — including to avoid conflicts and to act diligently — which will further act to prevent the types of inappropriate practices outlined in this submission.

Moreover, it will provide an additional means of regulatory oversight and, if necessary, enforcement by ASIC.

- 29 At a minimum, we submit that for the reasons stated above, WMPs that embed superannuation fund choice within their platform should be identified as a distributor of a superannuation fund's product(s) pursuant to ASIC's Regulatory Guide 274 - Product design and distribution obligations. As an identified distributor, WMPs would be required to notify the issuers of superannuation products featured or offered by the WMP when they identify a significant dealing that is not consistent with the issuer's Target Market Determination related to the relevant product (refer Corporations Act s.994F(6)).

Conclusion

- 30 We are available to speak to any aspect of, and expand upon, this submission at the convenience of Treasury.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D. Elia'.

David Elia

Hostplus Chief Executive Officer