CHOICE IN SUPER

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Individual participants in the Australian superannuation system enjoy the opportunity to make a variety of different types of choices in relation to their contributions. This article maps the statutory and other rules that govern the way this occurs. It does so in order to highlight the extent and intricacy of the bricolage created by repeated government reforms of the various regulatory regimes. The granular fidelity of that description provides a foundation for addressing questions about the normative underpinnings of the system, such as how the provision of different types of choice advances the pursuit of efficiency and legitimacy goals to ameliorate the paternalism immanent in a mandatory system and how recent government initiatives fit into this contest between competing regulatory objectives.

I INTRODUCTION

The overwhelming majority of adult Australians are participants in the Australian superannuation system.[1] Those in the workforce typically make financial contributions to the system, or have contributions made by their employers on their behalf. Others, such as retirees and those not currently in employment, are likely to be members of superannuation funds; in many cases actively drawing retirement or insurance benefits from their accounts. For most, there is no possibility of opting out of participation. It is therefore commonly described as a 'compulsory' system.

The opportunities afforded by the system for individuals to exercise independent choice in respect of their contributions therefore represent an important counterbalance to this imposition on personal autonomy. There are

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1 Over 80% of Australians between the ages of 15 and 65, and 48% over the age of 65, report having a superannuation balance or having received a superannuation benefit in the past two years: Australian Bureau of Statistics, *Household Income and Wealth, Australia: Summary of Results, 2019–20* (Catalogue No 6523.0, 28 April 2022) tbl 12.2. This compares with a labour force participation rate of approximately 66% for Australians over the age of 15: Australian Bureau of Statistics, *Labour Force, Australia* (Catalogue No 6202.0, July 2022).

multiple decision nodes where choice is typically available. Individuals can choose to contribute more than the statutory minimum and can also determine into which fund or funds their contributions are made. They can also typically choose the investment strategy to be applied to their contributions (at least to some extent) and the level and types of insurance cover to be purchased on their behalf out of their accounts. They can also nominate their preferred beneficiaries in the event of their dying whilst still a member.[2] There are also a variety of default arrangements in place for when individuals choose not to express a choice, recognising that in some cases the decision by an individual not to choose may itself be a deliberate, albeit implicit, choice. This 'choice architecture' is designed to facilitate but not require individuals to make choices,[3] promoting the perceived legitimacy of an otherwise 'compulsory' system by endowing individuals with personal agency.

Choice also has efficiency implications. The provision of choice is expensive. The operational functionality required to operationalise choice makes more complex the task of administering the funds, and in some cases may undermine the exploitation of economies of scale. At a deeper level, however, the provision of choice can have positive effects on efficiency. Choice can promote consumer sovereignty, providing a form of market discipline that both inspires and rewards innovation and discourages uncompetitive products and conduct. When exercised, choice can also enable the derivation of local optima that would not be possible in a homogenised solution, as for instance where individuals exercise member investment choice[4] to craft an investment strategy for their contributions that reflects not only their personal preferences, such as risk tolerance and investment horizon, but also their financial position beyond the superannuation context.

The fact that the superannuation system facilitates choice is no accident. The superannuation system is the product of public policy advanced over the past three decades by federal governments with a variety of normative pre-occupations and priorities. The complex and intricate legal bricolage that today constitutes the system is in part the product of a succession of legislative initiatives specifically designed to reform its choice architecture, including the Fund Choice initiatives in 2005[5] and 2020,[6] the introduction of the MySuper product for default members in

2 The level of discretion ceded by superannuation fund trustees in possession of such a 'binding' death benefits nomination remains problematic: see *Wareham v Marsella* (2020) 61 VR 262; *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142. See also Daniel Butler and Bryce Figot, 'Narumon Decision Provides Further Guidance on Binding Death Benefit Nominations' (2018) 30(7) *Australian Superannuation Law Bulletin* 95; Suzanne Mackenzie, 'The Oomidoodle Bird Has Landed on Binding Nominations' (2015) 27(3) *Australian Superannuation Law Bulletin* 52.

3 Treasury (Cth), *Super System Review: Part One* (Final Report, 30 June 2010) 10 ('*Super System Review Final Report*').

4 Member investment choice refers to the provision by the trustee of a facility enabling members of the fund to direct it to invest their contributions in a specified way, usually presented as distinct investment options each of which has a defined investment strategy. For a description and analysis of this functionality, see M Scott Donald, 'The Prudent Eunuch: Superannuation Trusteeship and Member Investment Choice' (2008) 19(1) *Journal of Banking and Finance Law and Practice* 5 ('Prudent Eunuch').

5 *Superannuation Legislation Amendment Act 2005* (Cth).

6 *Treasury Laws Amendment (Your Superannuation, Your Choice) Act 2020* (Cth).

2013[7] and the Your Future, Your Super initiatives of 2020.[8] This article considers the impact of those changes to the regulatory regime on the efficiency and legitimacy of the system having regard both to the empirical data available and also the growing inventory of quantitative research on individual decision-making in the system.

To that end, Part I of this article therefore identifies the main points of 'punctuation' in the evolution of the regulatory regime that shapes the superannuation system, as well as the policy drivers identified at the time to justify each of the reforms. Part II then maps the decision nodes currently available to individuals in the system and considers the empirical evidence and research accumulated in relation to each. Part III concludes with a discussion of the tension in the various reforms between the competing gravitational pulls of paternalism, consumer sovereignty and customer protection and the place of the regulatory objectives of efficiency and legitimacy in that contest.

The analysis in this article highlights the integral role played by the modality of choice in Australia's superannuation system. It also identifies the danger of accepting without question the conventional wisdom that participants in the system are not engaged with the system. Not all engagement results in empirically observable phenomena, but that does not mean that the individual has not exercised a choice, and in fact there is accumulating evidence that many participants do engage in observable ways with the system, even if that engagement is apparently not continuous.[9] Moreover, some at least of the dynamics that justify the provision of choice do not require that a majority of participants actually exercise choice; the dynamics of the system may be sufficiently catalysed by the actions of a salient minority. The affirmation of individual autonomy represented by the mere availability of opportunities to exercise choice, whether exercised or not, can contribute to the perceived legitimacy of the system, particularly when reinforced by measures designed to promote institutional transparency. In sum, the availability of choice matters even if only some of the people use it only some of the time, all the while recognising that the provision of choice is costly and that some people may make choices that may appear not to be 'rational'.

Finally, the article also identifies that the regulatory regime anchored on the *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*') supports, disciplines and, indeed, shapes the way choices are offered to participants in the superannuation system in a multiplicity of ways. It argues that the choice architecture goes well beyond the Fund Choice and Member Investment Choice decision nodes identified in much of the literature. The choice architecture also enrols a variety of economic agents, including fund trustees and financial advisers,

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7 *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012* (Cth); *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* (Cth).

8 *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Cth) ('*YFYS Act*').

9 Hazel Bateman et al, 'Just Interested or Getting Involved? An Analysis of Superannuation Attitudes and Actions' (2014) 90(289) *Economic Record* 160 ('Just Interested or Getting Involved?'); Gordon L Clark, Maurizio Fiaschetti and Paul Gerrans, 'Determinants of Seeking Advice within Defined Contribution Retirement Savings Schemes' (2019) 59(S1) *Accounting and Finance* 563.

in the process. The article also highlights the way that the variegated regulation of those actors contributes to the substance, and hence normativity, of the regulatory regime. This recognition generates a more elaborate, but ultimately more faithful, description of the way that choice operates in the system.

II THE EVOLUTION OF THE REGULATORY SCHEME SHAPING AUSTRALIA'S SUPERANNUATION SYSTEM

The past three decades have seen almost continuous change in the regulatory scheme applied to Australia's superannuation system. Reform initiatives have been frequent and often fundamental, and the industry has responded adaptively with new products, new processes, and, in some cases wholesale extinction of obsolete institutional forms, such as single-employer corporate funds and defined benefit plans.

Notwithstanding this near-constant change, it is however perhaps most accurate to characterise the process of evolution as one of 'punctuated equilibrium'[10] in which thematic commonalities underlying the multifarious changes can be seen to motivate successive waves of reform. This is the perspective taken in the description below of the evolution of the regulatory regime that shapes Australia's superannuation system. As will be seen in this Part, but more plainly in Part III below, not only do many of the waves represent political choices in a loose public-choice sense,[11] but also the technical measures within each wave affect the normativity of the regulatory scheme.

A 1993: The *SIS Act*

The national system of superannuation in Australia was created by the *Superannuation Guarantee (Administration) Act 1992* (Cth) ('*SG Act*'). This turned what had been a set of tax concessions enjoyed by a small portion of the working population into a near universal programme for accumulating retirement

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10 The notion of evolution through punctuated equilibrium is credited to paleontologists Stephen Jay Gould and Niles Eldredge and has been applied loosely to a variety of other domains. See, eg, Frank R Baumgartner, Bryan D Jones and Peter B Mortensen, 'Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policymaking' in Paul A Sabatier and Christopher M Weible (eds), *Theories of the Policy Process* (Routledge, 3rd ed, 2014) 59.

11 In this respect, it is apt to acknowledge the observation of several reviewers that industry lobbying and political factors have been very influential forces in the evolution described in this paper: Diana Olsberg, *Ageing and Money: Australia's Retirement Revolution* (Allen & Unwin, 1997) 68–119; Christine St Anne, *A Super History: How Australia's $1 Trillion+ Superannuation Industry Was Made* (Major Street, 2012) ch 10; Bernard Mees and Cathy Brigden, *Workers' Capital: Industry Funds and the Fight for Universal Superannuation in Australia* (Allen & Unwin, 1st ed, 2017); Sue Taylor, Anthony Asher and Julie Anne Tarr, 'Accountability in Regulatory Reform: Australia's Superannuation Industry Paradox' (2017) 45(2) *Federal Law Review* 257; Maged Girgis, 'Superannuation Governance: Strength in Structural Diversity' in Tony Damian and Amelia Morgan (eds), *Bootmakers, Boards and Rogues: Issues in Australian Corporate and Securities Law* (Herbert Smith Freehills, 2023) 701, 708–12. See also Emily Millane 'The Ghost of National Superannuation' (PhD Thesis, The Australian National University, November 2019).

savings. The rate of minimum contribution was set at 3% of ordinary earnings, rising annually to 12% over the succeeding nine years.[12]

The massive expansion of participation necessitated the development of a more comprehensive regulatory regime than had hitherto been provided by the *Occupational Superannuation Standards Act 1987* (Cth) ('*OSSA*') and that Act's attendant *Occupational Superannuation Standards Regulations 1987* (Cth).[13] The *SIS Act* was therefore enacted as the centrepiece of a new regime that saw complementary roles for familiar general law principles drawn from the law of trusts and contract, together with statute, regulations and bespoke forms of delegated legislation.[14]

Importantly, the regime was not designed to guarantee the safety nor underwrite the performance of superannuation funds, other than in the event of fraud.[15] Rather, the regime was designed to locate accountability for the safe and efficient administration of the funds in the office of the trustee and to empower the prudential regulator (at that time the Insurance and Superannuation Commission) to supervise trustees' conduct.[16] Like the *OSSA* legislation, it relied heavily on law concepts drawn from the law of trusts.[17] Crucially, however, it entrenched key regulatory safeguards, such as the qualitative duties required of trustees, against private derogation and provided for regulatory sanctions for entities who breached their obligations. Although it accommodated, in section 52(4), the situation where a member directed its trustee on the investment strategy to be applied to the member's account, responsibility for the investment strategies within the fund was vested in the trustee in a decidedly paternalistic manner. The trustee was expected to have regard for the circumstances of the fund and the opportunity set of investments present in the market and then to formulate and give effect to a strategy in the best interests of the members.[18] Similarly, the 'equal representation model' by which trustees (or, more commonly, their directors), would be drawn in equal numbers from representatives of the employers and the employee members, was carried over from the *OSSA* legislation, but no changes were made to the way in which those individuals were selected, meaning that their selection was governed by each

12 In fact, this progression has been punctuated on several occasions. It is currently expected that the progression to 12% will be achieved in 2025. 'Super Guarantee', *Australian Taxation Office* (Web Page, 11 September 2024) <https://www.ato.gov.au/tax-rates-and-codes/key-superannuation-rates-and-thresholds/super-guarantee>.

13 Senate Select Committee on Superannuation, Parliament of Australia, *Safeguarding Super* (First Report, June 1992).

14 M Scott Donald, 'Parallel Streams? The Roles of Contract, Trust, Tort and Statute in Superannuation Funds and Managed Investment Schemes' (2020) 14(2) *Journal of Equity* 151 ('Parallel Streams'); M Scott Donald, 'The Pension Trust: Fit for Purpose?' (2019) 82(5) *Modern Law Review* 800 ('Fit for Purpose').

15 *Superannuation Industry (Supervision) Act 1993* (Cth) pt 23 ('*SIS Act*'). See also 'Statement of Intent', *Australian Prudential Regulation Authority* (Web Page, June 2023) <https://www.apra.gov.au/statement-of-intent>.

16 John Dawkins, *Strengthening Super Security: New Prudential Arrangements for Superannuation* (Australian Government Publishing Service, 1992) 3, 6.

17 Donald, 'Fit for Purpose' (n 14).

18 *SIS Act* (n 15) ss 52(2)(c), (f). See also Donald, 'Prudent Eunuch' (n 4).

fund's constitutive documents. In practice this meant that members of most funds had no say in the composition of the fund's board.[19]

B 1996: The Wallis Inquiry

The generally prudential tenor of the *SIS Act* was reviewed in the Financial System Inquiry ('Wallis Inquiry') of 1996–97. The Wallis Committee was tasked with reviewing the Australian financial system as a whole in order to recommend ways to improve regulatory arrangements that would best ensure an 'efficient, responsive, competitive and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness'.[20] The modality of choice as a mechanism for economic efficiency was given centre stage. Indeed, the Final Report of the Committee specifically found that '[c]hoice should be maximised in superannuation and other steps taken to increase competitive pressures, including by simplifying regulatory arrangements'.[21]

Regulatory intervention in pursuit of financial safety was to be limited to circumstances where the promises made by product providers (ie, trustees) were judged to be 'very difficult to honour and assess, and produce highly adverse consequences if breached'.[22] Despite the low levels of financial literacy in parts of the population, superannuation was not per se such a circumstance. That said, the report noted that:

> The compulsory nature of some superannuation savings, the lack of choice for a large proportion of members, the mandatory long-term nature of superannuation and the contribution to superannuation of tax revenue forgone provide a case for prudential regulation of all superannuation funds, even where investors have knowingly accepted market risk. This rationale is complemented by the need for government to regulate the compliance of superannuation funds with retirement income policies such as compulsory preservation. However, the regulatory approach will be different, with its focus more on compliance issues and ensuring appropriate risk management practices, than securing creditworthiness.[23]

It went on to note that:

> As Australians of all ages increasingly participate in superannuation investments, it is important both for investment choice and allocative efficiency of the broader economy, that prudential regulation not diminish the risk spectrum of available superannuation investments.[24]

The focus of the Wallis Inquiry in relation to superannuation was therefore on ensuring that individuals were provided with the information they would require to make an informed decision as a 'consumer' of superannuation as a financial product.[25]

19 M Scott Donald and Suzanne Le Mire, 'Independence in Practice: Superannuation Fund Governance through the Eyes of Fund Directors' (2019) 42(1) *University of New South Wales Law Journal* 300, 315–17 <https://doi.org/10.53637/GWML7532>.

20 Treasury (Cth), *Financial Systems Inquiry* (Final Report, 18 March 1997) 707 ('*Wallis Inquiry*').

21 Ibid 27.

22 Ibid 190.

23 Ibid 305.

24 Ibid 333.

25 M Scott Donald, 'What's in a Name? Examining the Consequences of Inter-legality in Australia's Superannuation System' (2011) 33(2) *Sydney Law Review* 295, 309.

The report of the Wallis Inquiry also identified and considered the anomalous position of so-called 'excluded funds'. These were funds of less than five members that were not subject to the full suite of prudential requirements applied to larger funds. This led in 1999 to the introduction into the *SIS Act* of the concept of a self-managed superannuation fund ('SMSF').[26] The Australian Taxation Office, rather than the Australian Prudential Regulation Authority ('APRA') or the Australian Securities and Investments Commission ('ASIC'), was nominated as the primary regulator of SMSFs.

C 2010: The Cooper Review

In May 2009, the federal government established a Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System ('Cooper Review'). It was intended as a 'renovation' rather a wholesale rebuild of the system,[27] but ultimately the Committee made recommendations across a wide range of efficiency and governance issues in both its Interim[28] and Final Reports.[29]

The key recommendations adopted by the government in its *Stronger Super* response to the report in the context of this article were:

- The adoption of a 'choice architecture' model for the system overall.[30] Based on insights derived from behavioural finance and economics,[31] it aimed to provide a decision environment in which individual choice was facilitated but not imposed, and where responsibility for the outcome achieved was graduated according to the level of personal autonomy chosen by the individual.[32] The architecture therefore contained four main elements: a repository for 'lost' accounts where the identity of the contributor had somehow become detached from the account, a new 'default' product (MySuper, see below) for individuals who had not made a choice about where to have their superannuation contributes sent, Choice products in which the fund was administered by a licensed superannuation fund trustee but the member could make a variety of choices about the investment strategy to be applied to the contributions and other product

26 *SIS Act* (n 15) s 17A, as inserted by *Superannuation Legislation Amendment Act (No 3) 1999*.

27 Doorstop Interview with Minister for Superannuation and Corporate Law, Senator Nick Sherry (29 May 2009) <https://ministers.treasury.gov.au/ministers/nick-sherry-2007/transcripts/doorstop-interview-melbourne-sofitel>.

28 Treasury (Cth), *Clearer Super Choices: Matching Governance Solutions* (Preliminary Report, 14 December 2009) ('*Super System Review Preliminary Report*').

29 *Super System Review Final Report* (n 3). For more discussion on reform in the superannuation system, see Jeremy Cooper, 'Super for Members: A New Paradigm for Australia's Retirement Income System' (2010) 3(2) *Rotman International Journal of Pension Management* 8; Panha Heng, Scott J Niblock and Jennifer L Harrison, 'Retirement Policy: A Review of the Role, Characteristics, and Contribution of the Australian Superannuation System' (2015) 29(2) *Asian-Pacific Economic Literature* 1.

30 *Super System Review Final Report* (n 3) 9.

31 David Gruen and Tim Wong, 'MySuper: Thinking Seriously About the Default Option' [2010] (4) *Economic Roundup* 33; Wilson Sy, 'Redesigning Choice and Competition in Australian Superannuation' (2011) 4(1) *Rotman International Journal of Pension Management* 52.

32 *Super System Review Final Report* (n 3) 10–11.

features, and self-managed super funds in which the members established and administered the fund directly themselves.[33]

- The creation of a standardised superannuation product type (the MySuper product) into which employers had to make all contributions on behalf of any employees who had not exercised Fund Choice.
- The online publication by all Registrable Superannuation Entities ('RSE') licensees of a product dashboard summarising, in a standardised way, the return target and returns achieved by all products, as well as measures of its risk, fees and costs.[34] These were required for MySuper products from 2013 onwards but implementation for Choice products was recently deferred until October 2027 because the *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*') required to specify the content for Choice products have not been made.[35]

D 2014: The Financial System Inquiry

The next important punctuation point in the evolution of the superannuation system was the Financial System Inquiry of 2014. It was tasked with 'examining how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth'.[36] The recommendations of the report relevant here were:

- That the government legislate for a clear objective for the superannuation system.[37]
- That the government introduce a mechanism to allocate new workforce entrants to high-performing superannuation funds.[38] This proposal was considered and finetuned by the Productivity Commission,[39] but ultimately introduced in a watered-down version in the stapling legislation described below.
- The development of a 'comprehensive income product for members' retirement'.[40] Despite considerable government and industry collaboration,[41]

33 Ibid.

34 *Corporations Regulations 2001* (Cth) sub-div 2E.1. See also 'MySuper Product Dashboard Requirements for Superannuation Trustees', *Australian Securities and Investments Commission* (Web Page, 27 October 2024) <https://asic.gov.au/regulatory-resources/superannuation-funds/superannuation-guidance-relief-and-legislative-instruments/product-dashboard/mysuper-product-dashboard-requirements-for-superannuation-trustees/>.

35 *ASIC Corporations (In-use Notices for Employer-Sponsored Superannuation and Superannuation Dashboards) Instrument 2022/496* pts 2, 4.

36 Treasury (Cth), *Financial System Inquiry* (Final Report, November 2014) vii ('*FSI Report*').

37 Ibid 95–100.

38 Ibid 101.

39 Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness* (Inquiry Report No 91, 21 December 2018) 65–6 ('*Assessing Efficiency*').

40 *FSI Report* (n 36) 117–30.

41 See, eg, 'Retirement Income Covenant', *Department of the Treasury* (Web Page) <https://treasury.gov.au/programs-and-initiatives-superannuation/retirement-framework>.

this has proved elusive,[42] despite being scheduled for introduction in July 2022.

- Providing all employees with the ability to choose the fund into which their Superannuation Guarantee ('SG') contributions are paid.[43]
- Granting product intervention powers ('PIPs') for ASIC[44] and imposing design and distribution obligations ('DDOs') on financial product providers.[45]

Perhaps the most consequential recommendation in the context of this article was, however, incidental to the main recommendations; the suggestion that the Productivity Commission hold an enquiry by 2020 to determine whether the Stronger Super reforms had been effective in significantly improving competition and efficiency in the superannuation system.[46] As the next section details, that enquiry was the catalyst for a number of regulatory reforms that engage fundamentally with the way choices are made available to members in the system.

E 2018–22: 'Member Outcomes' and the Your Future, Your Super Reforms

The most recent phase of policy reform has been animated by the rhetoric of 'improving member outcomes'. The catalyst for this latest phase was two-fold: the Productivity Commission inquiry into the efficiency and competitiveness of the superannuation system,[47] and the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Hayne Royal Commission'). The first of these provided a system-wide assessment that highlighted a variety of shortcomings in the system when viewed specifically from the perspective of the members the system purported to serve, especially in relation to the costs borne by those members. The second investigated and gave publicity to a series of case studies showing specific examples where the conduct of industry participants had fallen short of their legal obligations and 'community expectations'.[48]

Successive governments have now responded to the co-incident finding of those two enquiries that reforms to the regulatory scheme applied to the superannuation system were required to improve the member experience of the system. The most pertinent reforms to the themes under investigation in this article are:

- The introduction of measures to protect small and inactive accounts from erosion by fees and insurance premiums.

42 Cf Geoffrey J Warren, 'Design of Comprehensive Income Products for Retirement Using Utility Functions' (2022) 47(1) *Australian Journal of Management* 105.

43 *FSI Report* (n 36) 131–2.

44 Ibid 206. See also *Corporations Act 2001* (Cth) pt 7.8A ('*Corporations Act*'), as inserted by *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* sch 2 ('*DDO/PIP Act*'); Australian Securities and Investments Commission, *Product Intervention Power* (Regulatory Guide No 272, June 2020) ('*ASIC RG 272*').

45 *FSI Report* (n 36) 198. See also *Corporations Act* (n 44) pt 7.8A, as inserted by *DDO/PIP Act* (n 44) sch 1.

46 *FSI Report* (n 36) 101.

47 *Assessing Efficiency* (n 39).

48 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) vol 1, 267 ('*Hayne Royal Commission Final Report*').

- A 'stapling' process whereby the default fund into which an individual's first contributions into the system are made remains the default for their contributions until such time as the individual expressly chooses a fund.[49] This measure was designed to stop individuals acquiring new superannuation fund accounts each time they started a new job. The way in which these defaults work is discussed in more detail in Part II below.
- An annual performance assessment applied initially to all MySuper Products, and more recently so-called Trustee Directed products, but with staged application ultimately to all APRA-regulated superannuation products.[50] The test compares the net return of a product to a benchmark constructed artificially to mimic (albeit imperfectly) the product's investment strategy. The trustees of products the net performance of which lags their tailored benchmark by more than 0.5% per annum over a seven-year period must notify their members of this underperformance using a prescribed letter, and must close the product to new members if it fails in the following year.[51] This intervention occurs even if the product has not lost money or has performed better than the benchmark communicated in its public offer documents. As a result, 13 MySuper products failed the performance test in its first year (2021), and five in the second year (2022). Four of the products that failed in the first year failed again in the following year,[52] and one failed three years in a row.[53]
- The provision by the ATO of an online interactive 'YourSuper' performance comparison tool that shows how APRA assessed the performance of each MySuper product for each calendar year. The tool can be populated with data specific to an individual in an application available in the government's myGov website.

In addition, there were reforms directed at the sale of financial products (including but not limited to superannuation) in the form of anti-hawking provisions,[54] amendments to the so-called 'best interests duty' imposed on superannuation trustees[55] and the introduction of a covenant into the list in section

49 *Superannuation Guarantee (Administration) Act 1992* (Cth) div 7 ('*SG Act*'), as inserted by *YFYS Act* (n 8) sch 1.

50 *SIS Act* (n 15) pt 6A, as inserted by *YFYS Act* (n 8) sch 2.

51 *SIS Act* (n 15) pt 6A; *Superannuation Industry (Supervision) Regulations 1994* (Cth) pt 9AB ('*SIS Regulations*').

52 Australian Prudential Regulation Authority, 'APRA Releases 2022 MySuper Performance Test Results' (Media Release, 31 August 2022) <https://www.apra.gov.au/news-and-publications/apra-releases-2022-mysuper-performance-test-results>.

53 A further 96 'trustee directed' products failed the test, out of 805 such products. Trustee directed products are those in which the trustee has control over the asset allocation of the investment strategy: Australian Prudential Regulation Authority, 'APRA Releases 2023 Superannuation Performance Test Results' (Media Release, 31 August 2023) <https://www.apra.gov.au/news-and-publications/apra-releases-2023-superannuation-performance-test-results>.

54 *Corporations Act* (n 44) ss 992A, 992AA, as inserted by *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) sch 5. See also Australian Securities and Investments Commission, *The Hawking Prohibition* (Regulatory Guide No 38, September 2021).

55 *SIS Act* (n 15) ss 52(2)(c), 220A, as inserted by *YFYS Act* (n 8) sch 3.

52 of the *SIS Act* to require trustees to formulate, review, give effect to and disclose a retirement income strategy.[56]

III CHOICE IN AUSTRALIA'S SUPERANNUATION SYSTEM

The process of evolution mapped in Part I represents a succession of policy choices made in the political arena.[57] It would be naïve to assume that that process has reached its conclusion. Indeed, as noted at relevant points below, even now there are policy deliberations underway that are considering reforms relevant to the analysis in this article. However, notwithstanding the possibility that some of those deliberations may prompt further evolution in the structure and operation of the system, the system as it operates today contains a number of points at which participants expressly or implicitly make choices that affect how their contributions are administered. These decision nodes have been divided below into three phases of a hypothetical participant's engagement with the system: those within the contribution phase, those within the accumulation phase, and those within the drawdown phase. This division implies a neatness in the organisation of the regulatory regime that could mislead but it is employed here for explicatory purposes.

The regulatory scheme created by the legislative reforms described in Part I above, together with the general law of equity, contract and tort, shapes and conditions the superannuation system very directly. Although the system as a whole owes its existence to something approaching legislative compulsion, the regulatory scheme creates opportunities for individual choice at various points and supports that choice in a variety of ways. As is detailed below, that engagement can be direct; for instance, in limiting the types of products or facilities from which an individual can choose. It can also be indirect, for instance in ensuring that the individual has access to reliable information that is relevant to their decision or in requiring that those who advise individuals who are making choices are appropriately skilled and unaffected by conflicting loyalties or interests. These opportunities for choice, together with the way in which the regulatory regimes engage with those decision nodes, constitute the 'choice architecture' of the system. What emerges from the granular description of the choice architecture is the intricate complexity of the regulatory scheme in design (and in practice) and the challenge that creates in ensuring that the scheme pursues its objective of allocating accountability and responsibility appropriately.

A Choices in the Contribution Phase

There are two main types of choices available in the contribution phase:

1. Where to make contributions; and
2. How much (if any) to contribute above the minimum mandated by the SG.

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56 *SIS Act* (n 15) s 52(8A), as inserted by *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth) sch 9.

57 See, for instance, accounts listed at n 11 above.

The description below highlights that the regulatory regime offers a variety of types of support for employers and individuals in this phase.

1 Where to Contribute?

Most participants in the Australian workforce have their financial contributions to the superannuation system made for them by their employers. Although not expressed in the form of a legal duty on employers, the *SG Act* provides a strong incentive for employers to make contributions to a complying superannuation fund by imposing a financial charge on those employers who fail to comply with their SG obligations.[58] The result is that between 75% and 80% (by value) of all superannuation contributions made each year are made by employers on behalf of their workforce[59] and approximately three quarters of those employer contributions are pursuant to the SG.[60] As well as enrolling employers in the system, this effectively makes participation in the superannuation system compulsory for all employees.[61] Individuals who are self-employed[62] can elect to make contributions to a superannuation fund at their own initiative. If they do so, they will enjoy the protections afforded to those making discretionary contributions in excess of those mandated under the SG (as described below).

Employers, then, effectively do not have a choice of whether to contribute on behalf of the members of their workforce. Employers and employees do, however, face a cluster of choices in relation to where those contributions will be sent. The first decision node encountered by an employee is whether to rely on the 'default' arrangements put in place by the employer or to direct the employer where to send their contributions. To that end, part 3A of the *SG Act* requires that employees be given an opportunity within 28 days of the start of their employment to nominate a specific superannuation fund into which their superannuation contributions will be paid. The opportunity takes the form of a Standard Choice form. This is known as 'Fund Choice' in the industry vernacular. Subject to some minor exceptions,

58 *SG Act* (n 49). This is buttressed by intensification of the obligations on company directors to ensure that SG payments are made in a timely manner in 2019: *Treasury Laws Amendment (2018 Measures No 4) Act 2019* (Cth).

59 The percentage has in fact been trending down slightly in recent times. The percentages in the past five financial years (ending 30 June) are 80.1% (2019), 79.9% (2020), 77.5% (2021), 74.2% (2022) and 74.5% (2023): Australian Prudential Regulation Authority, *Statistics: Quarterly Superannuation Performance* (27 November 2024) tbl 1a.

60 This percentage has been trending up in recent times. The percentages in the past five financial years (ending 30 June) are 72.8% (2019), 73.5% (2020), 73.7% (2021), 75.7% (2022) and 79.0% (2023): ibid.

61 The minimum earning threshold ($450 per month) was removed in 2022 by *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Act 2022* (Cth) so that now all employees are effectively covered by the Superannuation Guarantee ('SG').

62 The hoary issue of businesses attempting to contract around labour regulation by characterising workers as independent contractors rather than employees is, to some extent, addressed in the superannuation context by the attachment of the SG obligation to contracts 'wholly or principally' for labour rather than employment contracts: *SG Act* (n 49) s 12(3). For further discussions of how employment and contractual relationships are characterised, see *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165; *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254. On the effect of novel institutional forms of employment relation, see Katrina Woodforde 'Workers, Apps and Fairness: Contracting in the Gig Economy' (2021) 95(6) *Australian Law Journal* 449.

the fund chosen by the employee must be a 'complying' fund or scheme.[63] The employer must then follow the directions provided by the employee, unless the employee does not provide certain prescribed information, or otherwise that the employee has chosen another fund within the past twelve months.[64] The employer's obligations in respect of those contributions are satisfied once payments are made in a timely manner into such a complying fund.[65]

Empirical research suggests that a minority of perhaps 40% of employees exercise Fund Choice (that is, direct their employer to pay contributions on their behalf to a fund that they, not their employer, nominates).[66] This has been attributed to a status quo bias inspired by the complexity of the superannuation system[67] or perhaps an implicit trust in the superior judgment of the employer.[68] Individuals making that choice may be motivated by a desire to maintain all their superannuation contributions in one or more designated funds for their own administrative simplicity, or by a belief that the fund chosen by them better suits their needs and objectives that the one chosen by the employer to be its default. Alternatively, the choice may be the product of a more sophisticated strategy. For instance, anecdotal evidence suggests that some individuals maintain small holdings in certain funds in order to be eligible to purchase insurance cover uniquely available through that fund, or because they may not be eligible coverage with the insurer of a new fund into which their contributions are being made. A desire to chase 'good' performers does not appear to be a strong factor in causing members to avoid funds that are perceived to have poor performance but does appear to have influenced some members to switch out of funds[69] and may therefore be a factor in the initial Fund Choice also. Marketing expenditure does appear to influence the flow of monies into 'retail' superannuation funds but not industry funds,[70] supporting the existence of a clientele effect that sees employees whose superannuation entitlements are governed by industrial awards (which typically flow into profit-for-member funds) as less likely to exercise independent choice than employees whose contributions arise from individually negotiated employment relations. Finally, some individuals direct their employer to direct their contributions into an SMSF (on which see further below).

63 *SG Act* (n 49) s 32D. A 'complying' fund is one where, in relation to a specific year of income, the trustee did not contravene any relevant provisions of the regulatory regime centred on the *SIS* and *Corporations* Acts: *SIS Act* (n 15) s 42.

64 *SG Act* (n 49) s 32FA.

65 Australian Taxation Office, *Choice of Superannuation Fund: Meeting Your Obligations* (Guide, June 2005) 6–7.

66 Adam Butt et al, 'One Size Fits All? Tailoring Retirement Plan Defaults' (2018) 145 *Journal of Economic Behaviour and Organization* 546, 553.

67 Tim Fry, Richard Heaney and Warren McKeown, 'Will Investors Change Their Superannuation Fund Given the Choice?' (2007) 47(2) *Accounting and Finance* 267; Xiaowen Peng, Karen Alpert and Grace Chia-Man Hsu, 'Switching between Superannuation Funds: Does Performance and Marketing Matter? (2020) 63 *Pacific-Basin Finance Journal* <https://doi.org/10.1016/j.pacfin.2020.101431>.

68 Butt et al (n 66) 555–7.

69 Tahlia Parrish and Sarath Delpachitra, 'On Selection of Superannuation Fund: Impact of Choice and Information' (2012) 31(3) *Economic Papers* 369 <https://doi.org/10.1111/j.1759-3441.2012.00181.x>.

70 Peng, Alpert and Hsu (n 67).

The regulatory regime provides some limited protection for an individual exercising Fund Choice. The DDOs imposed on Australian Financial Service licensees, including the trustees of public-offer superannuation funds, requires those licensees to determine a 'target market' of potential consumers for whom the financial product they are offering may be suitable,[71] and then put in place processes that will, or are reasonably likely to ensure 'distribution' (ie, issuance or sale) consistent with that target market.[72] DDOs are required for all superannuation Choice products and retirement products, but not MySuper products, defined benefit funds or SMSFs. Persons who suffer loss from a failure on the part of a superannuation fund trustee to satisfy the requirement to take reasonable steps to comply with its target market determination can claim damages for those losses from the trustee,[73] or have the contract voided and receive their money back.[74] ASIC can also issue a stop order to prohibit further issuance of the product.[75] Although the target markets are supposed to be formulated in a 'granular' manner, it is clear that ASIC is expecting superannuation fund trustees to have regard for the common needs of differentiable groups, not on the idiosyncratic needs of any one individual.[76] The DDO regime, then, is functionally similar to a coarse-grained form of 'suitability' test.[77]

In addition, if the fund that the individual has chosen is a public-offer fund, they will enjoy the protection afforded by part 7.9 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and the attendant *Corporations Regulations*. The individual will, for instance, be able to rely on the information disclosed in the Product Disclosure Statement ('PDS'),[78] fund website,[79] and other publicly available materials created for that purpose by the RSE licensee, such as fund booklets, in the sense that they may have an action against the RSE licensee if they incur loss due to a deficiency in one or more of those information sources.[80] The contents of such disclosures are also regulated. So, for instance, to the extent that one type of information that an individual may consider is a MySuper product (see further below), trustees are also

71 *Corporations Act* (n 44) s 994B.

72 Ibid s 994E.

73 Ibid s 994M.

74 Ibid s 994N.

75 Ibid s 994J.

76 Australian Securities and Investment Commission, *Product Design and Distribution Obligations* (Regulatory Guide No 274, September 2024) [RG274.132].

77 A suitability test is an analysis that compares the features of the investment to the circumstances and objectives of the would-be investor: Gail Pearson, 'Suitability' (2017) 35(7) *Company and Securities Law Journal* 464; Nicholas Simoes da Silva and William Isdale, 'Risk and Reform in Australian Financial Services Law' (2022) 96(6) *Australian Law Journal* 408, 420.

78 *Corporations Act* (n 44) pt 7.9 div 2. This protection is, however, undermined by the dispensation provided by section 1012F of the *Corporations Act*, permitting the PDS in certain circumstances to be provided to individuals up to 3 months after the product is issued to that individual. See also Donald, 'Parallel Streams' (n 14) 163.

79 *Corporations Act* (n 44) s 1017BB.

80 In addition to the specific protections afforded under part 7.9, the individual may also enjoy the protection of sections 1041E and 1041H of the *Corporations Act* (n 44), and the consumer protection provisions in division 2 of part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). See also Donald, 'Parallel Streams' (n 14).

required to maintain a MySuper 'dashboard' with carefully defined information fields on their website.[81] This is intended to facilitate comparison of their product against other MySuper products.[82] Plans to extend this requirement to all products offered by an RSE licensee have so far stalled due to industry pressure. More generally, section 1013D of the *Corporations Act* lists specific information that a PDS must contain, including information about the characteristics and features of the product, such as the expected benefits from investing, as well as the costs and risks of the investment. Section 1013E of the *Corporations Act* is a catch-all provision that requires that a PDS contain 'any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product'.

In a similar vein, the annual performance test applied by APRA to MySuper products also relies to some extent on the power of adverse disclosure to encourage existing members of 'underperforming funds' to reconsider their choices. That said, APRA's initial assessment of this mechanism is pessimistic. In December 2021, APRA Member Margaret Cole lamented that member engagement was 'a harder nut to crack' in response to empirical evidence that less than 7% of members in funds identified as 'underperforming' by the annual performance test had moved funds since receiving the mandatory letter advising them of their fund's underperformance.[83] By prohibiting the acceptance of new members after consecutive failed tests, the mechanism aims to protect potential members from joining underperforming funds.[84]

Implicit in the provision of the information in the PDS, website and other disclosures, of course, is the fact that members will be exposed to the risk of losses resulting from poor judgment in relation to that information on their part, or from bad luck (in the case where the loss was neither foreseeable nor derived from a deficiency in conduct on the part of the RSE licensee). On the other hand, if the fund the member has chosen is an SMSF, the member will typically have no recourse except to the other trustees or directors of the trustee in the event that they

81 *Corporations Act* (n 44) s 1017BA.

82 Cf Hazel Bateman et al, 'As Easy as Pie: How Retirement Savers Use Prescribed Investment Disclosures' (2016) 121 *Journal of Economic Behavior and Organization* 60 ('As Easy as Pie'). Their article suggests that certain information (in this case the asset allocation) enjoys unwarranted saliency in the investment decision taken in laboratory conditions (at least).

83 Margaret Cole, 'APRA's Heatmaps and the YFYS Performance Test Work Hand in Hand to Drive Change' (Speech, Association of Superannuation Funds of Australia Webinar, 17 December 2021) <https://www.apra.gov.au/news-and-publications/apra-member-margaret-cole-%E2%80%93-remarks-to-association-of-superannuation-funds-of>; Australian Prudential Regulation Authority, 'APRA Urges Super Members to Prioritise Their Own Best Financial Interests' (Media Release, 10 November 2021) <https://www.apra.gov.au/news-and-publications/apra-urges-super-members-to-prioritise-their-own-best-financial-interests>.

84 It is a bitter irony that this mechanism is fundamentally inconsistent with the requirement imposed by ASIC that all investment product advertising include a 'warning' that past performance is not a reliable guide to future performance: Australian Securities and Investments Commission, *The Use of Past Performance in Promotional Material* (Regulatory Guide No 53, July 2003) 9. The wisdom of this aphorism was noted (but ultimately disregarded) by the Productivity Commission, who initially recommended the mechanism: Productivity Commission, 'How to Assess the Competitiveness and Efficiency of the Superannuation System' (Research Report, November 2016) 56, 215.

have suffered loss as a consequence of being misled by one or more of those other individuals into contributing to the SMSF. In that case, the consumer protections in division 2 of part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) may apply.[85]

Individuals may also exercise Fund Choice pursuant to personal advice they have received.[86] Although informal sources of advice, such as family, friends, colleagues, and the internet are commonly relied upon by individuals,[87] the regulatory regime is primarily oriented towards commercial providers of information, such as financial planners, banks and accountants. In this case, the individual is protected by part 7.7 of the *Corporations Act* and the attendant *Corporations Regulations*. These provisions require the Australian Financial Services ('AFS') licensees providing the advice to provide customers with a Financial Services Guide that discloses information regarding the details of the relationship between the adviser and the customer[88] and a Statement of Advice ('SoA') that sets out not just the advice but also discloses information about the remuneration to be received by the adviser and any other relevant interests the adviser may have.[89] The level of detail to be included in the SoA is 'such as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client'.[90] The individual will also be protected by part 7.7A of the *Corporations Act* and the attendant *Corporations Regulations* that together attempt to ensure that the organisation and individual providing the advice is free from conflicting interests and is acting in their best interests,[91] as well as the licence conditions imposed on all AFS licensees, including the overarching protection afforded by section 912A of the *Corporations Act* that requires AFS licensees to 'do all things necessary to ensure that the financial services provided by the licence are provided efficiently, honestly and fairly'.[92] Importantly, these various regimes do not insure the individuals against loss in all circumstances. Rather, they are designed 'to promote confident and informed decision-making by consumers of financial products and services'[93] by regulating

85 An interest in an SMSF is a financial product for the purposes of the *ASIC Act*: *ASIC Act* (n 80) s 12BAA(7)(f).

86 Loosely phrased, personal advice is defined as advice tailored to the needs and circumstances of the individual: *Corporations Act* (n 44) ch 7. See also RP Austin and Michael Vrisakis, 'Personal Financial Product Advice Under the Corporations Act' (2017) 35(8) *Company and Securities Law Journal* 503.

87 Australian Securities and Investments Commission, *Financial Advice: What Consumers Really Think* (Report No 627, August 2019) 17; Paul Gerrans et al, 'Individual and Peer Effects in Retirement Savings Investment Choices' (2018) 47 *Pacific-Basin Finance Journal* 150. For a broader discussion of the determinants of an individual seeking advice, see Steffen Westermann et al, 'Financial Advice Seeking: A Review of the Barriers and Benefits' (2020) 39(4) *Economic Papers* 367.

88 *Corporations Act* (n 44) pt 7.7 div 2 sub-div B.

89 Ibid pt 7.7 div 2 sub-div D.

90 Ibid ss 947B(3), 947C(3).

91 For a discussion of this regime, including the likelihood that there is some, limited scope for the general law fiduciary duties also to apply, see Simone Degeling and Jessica Hudson, 'Fiduciary Obligations, Financial Advisers and FOFA' (2014) 32(8) *Company and Securities Law Journal* 527.

92 On the substance of this open-textured provision, see Leif Gamertsfelder, 'Efficiently, Honestly and Fairly: A Norm That Applies in an Infinite Variety of Circumstances' (2021) 50(2) *Australian Bar Review* 345.

93 *Corporations Act* (n 44) s 760A.

the conduct of those on whom they can be expected to rely. They thus form an important, and sometimes underappreciated, part of the choice architecture.

All that said, as noted above, most individuals do not exercise Fund Choice when they enter a new employment relationship. Then, so-called 'default' arrangements come into place. Default in this context is not intended to connote any qualitative deficiency in the conduct of the individual, merely that the absence of a direction from the individual means that a generic arrangement is required. In that situation, the employer must make the contribution required under the SG to a specific type of superannuation product, the MySuper product of a complying fund.[94]

A quick diversion to describe MySuper products is apt at this point. MySuper products are a type of superannuation product that attract greater regulation than other superannuation products. They are described in the *SIS Act* as 'simple products sharing common characteristics'.[95] The *SIS Act* regulates the types of fees that can be charged within a MySuper product (but not the level of those fees).[96] Only certain types of fee subsidisation are permitted.[97] The *SIS Act* also requires that all members within a MySuper product be entitled to access the same options, benefits and facilities (other than risk insurance where individual circumstances would make that problematic).[98] In addition to these product design regulations, the *SIS Act* and *Superannuation Industry (Supervision) Regulations 1994* (Cth) ('*SIS Regulations*') regulate the trustee's decision of how to invest the assets in the MySuper product, up to a point. The trustee must either determine a single diversified investment strategy or implement a 'lifecycle' investment strategy for members in the product.[99] A lifecycle strategy sees the strategy applied to the member's account varied according to a set of standard factors that approximate (some of the) parameters likely to be present in the calculation of an individual's optimal investment portfolio in contemporary investment strategy models.[100] In addition to the member's age, which is identified specifically as a factor in section 29TC(2) of the *SIS Act*, regulation 9.47 of the *SIS Regulations* adds the member's account balance, contribution rate, current salary, gender and estimated time to retirement. The trustee is left to determine the approach that is most appropriate to the members of the MySuper product in its fund.

Where, then, a new employee already has an account in a MySuper product,[101] the employer is required to make contributions for that employee to that account. Where the new employee does not have already have such an account, usually because they have just entered the workforce for the first time, the situation is more

94 As described in *SIS Act* (n 15) s 29R(4).
95 Ibid s 29R(1).
96 Ibid pt 2C div 5.
97 Ibid s 29TC(1)(e), pt 2C div 5.
98 Ibid s 29TC(1)(b).
99 Ibid ss 29TC(1)(a), (2).
100 Gaurav Khemka, Mogens Steffensen, and Geoffrey J Warren, 'How Sub-optimal Are Age-Based Life-Cycle Investment Products?' (2021) 73 *International Review of Financial Analysis* 1 <https://doi.org/10.1016/j.irfa.2020.101619>.
101 This is known in the industry as 'stapling' because the account follows an employee if, and when, the employee changes jobs until such time as the employee exercises Fund Choice.

complex. For the approximately 70% of employees[102] subject to Industrial Awards ('IA') or Enterprise Agreements ('EA'), the identity of that 'default' product may be identified in the IA or EA either individually (which is unusual) or on a short list of such products.[103] Where the employee is not subject to an IA or EA, the employer will have to identify a MySuper product in a complying fund into which the contributions will be made.

It has long been recognised that this initial choice of fund by an individual is a key decision node and, moreover, that it is vulnerable to corruption. The law imposes no specific obligation on the employer in relation to its choice of fund beyond the implicit duties of fair dealing that pertain between employer and employee as a matter of employment law. This is because imposing a dedicated duty in relation to this choice is widely regarded as being overly onerous on employers who would not be in a position to assess the best interests of their employees.[104] That said, there was evidence tendered to the Hayne Royal Commission suggesting that 'wining and dining' of employers to encourage them to select the hosts as their default was customary.[105] Section 68A of the *SIS Act*, prohibiting the supply of goods or services to an employer to influence the employer's choice of default fund, was amended (and tightened) in 2019 as a direct response to this finding.[106]

2 How Much to Contribute?

The superannuation system as a whole is predicated on the likelihood, whether due to myopia or some other cause, that individuals will fail to save sufficient resources themselves during their time in the paid workforce to fund their planned expenditure in retirement.[107] Empirical evidence appears to support that predicate.[108] To that end, the SG mandates a certain minimum contribution that each individual must make, or have made for them, each year, currently 11% of average weekly ordinary time earnings. There are also a complicated set of measures in the taxation system that make contributions beyond a certain level (different depending on the circumstances of the individual) less attractive. The regulatory scheme has nothing to say directly about the choice an individual has of how much (if anything) to contribute between these minimum and maximum levels.

There is, however, regulation that indirectly supports the decision of how much to contribute. It arises where the individual seeks advice from a commercial source (typically a financial planner or other representative of a financial firm) on the question. Advice on how much to contribute that has regard for the idiosyncratic

102 *Assessing Efficiency* (n 39) 338.

103 Ibid 24.

104 Ibid 454.

105 See, eg, *Hayne Royal Commission Final Report* (n 48) vol 2, 212–20.

106 For more information, see Australian Securities and Investments Commission, *Prohibition on Influencing Employers' Superannuation Fund Choice* (Information Sheet No 241, August 2021).

107 George A Akerlof, 'Procrastination and Obedience' (1991) 81(2) *American Economic Review* 1, 6–7, cited in VW FitzGerald, *National Saving: A Report to The Treasurer* (Report, June 1993) 23–4; Treasury (Cth), *Retirement Income Review* (Final Report, July 2020) 100 ('*RIR Report*').

108 See, eg, Paul Ali et al, 'No Thought for Tomorrow: Young Australian Adults' Knowledge, Behaviour and Attitudes about Superannuation' (2015) 9(2) *Law and Financial Markets Review* 90.

circumstances of the individual would constitute 'personal' advice, and hence enliven the requirements of division 3 of part 7.7 (SoA) and division 2 of part 7.7A (the adviser's best interests duty) of the *Corporations Act.* The SoA is designed to give the individual the information the individual would need to make an informed decision, including the basis of the advice and information about the incentives (such as remuneration or other benefits) to be enjoyed by the provider of the advice, at such a level of detail 'as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client'.[109] The duty of the adviser to act in the best interests of the client[110] is designed to encourage the adviser to provide advice that is relevant to that client. A proposition advanced by ASIC that the advice be measured against the benchmark that it was likely to improve the position of the client[111] is controversial, and so far, untested in the courts.

If there is no attempt to tailor the advice to the circumstances of the individual (and no contextual factors that would imply that such attention had been given)[112] it would be regarded as 'general advice,' in which case the adviser may still be subject to a general law duty of care.[113]

There is relatively little recent empirical research on how individuals decide how much to contribute to superannuation and the extent to which they do in fact make additional contributions.[114] Empirical research into the attitudes and motivations of contributors by Gerry Croy, Paul Gerrans and Craig Speelman found that individuals felt strong pressure from the government, from their superannuation fund and from financial advisers to contribute more than the SG minimum.[115] That perceived pressure was however less motivating than spousal attitudes, perhaps because of the vested interests perceived to be at play with funds and financial advisers in particular.[116] Research by Jun Feng and Paul Gerrans based on a survey of members of a large, multi-employer superannuation fund found that age and income were positively correlated with additional contributions, and personal budget constraints were the dominant reason for those not making contributions.[117] Research cited by Jun Feng, Paul Gerrans and Gordon Clark found that of those

109 *Corporations Act* (n 44) ss 947B(3), 947C(3).

110 Ibid s 961B.

111 Australian Securities and Investments Commission, *Licensing: Financial Product Advisers: Conduct and Disclosure* (Regulatory Guide No 175, November 2017) [175.254]–[175.261]. Specifically, ASIC proposes that the benchmark is that a reasonable advice provider would believe that a client is likely to be in a better position if the client follows the advice: at [175.255].

112 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* [2018] FCA 2078.

113 Ibid. See also Austin and Vrisakis (n 86).

114 For exceptions to this observation, see Jun Feng and Paul Gerrans, 'Patterns of Voluntary Contributions to Superannuation: A Longitudinal Analysis' [2016] (2) *JASSA: The Finsia Journal of Applied Finance* 63; Jun Feng, 'Voluntary Retirement Savings: The Case of Australia' (2018) 39(1) *Journal of Family and Economic Issues* 2.

115 Gerry Croy, Paul Gerrans and Craig Speelman, 'Normative Influence on Retirement Savings Decisions: Do People Care What Employers and the Government Want?' (2012) 64(2) *Australian Journal of Psychology* 83, 88–9 <https://doi.org/10.1111/j.1742-9536.2011.00029.x>.

116 Ibid 89.

117 Feng and Gerrans (n 114). See also Jun Feng, Paul Gerrans and Gordon Clark, 'Understanding Superannuation Contribution Decisions: Theory and Evidence' (Working Paper, 28 February 2014).

who didn't nominate budget constraints, approximately one third reported that they had never thought about the issue.[118]

3 Deciding to Establish an SMSF

There are approximately 600,000 SMSFs currently managing over $878 billion on behalf of a little over 1.1 million members.[119] Although there are commercial services available to facilitate the establishment of an SMSF, it is reasonable to characterise the decision to establish an SMSF as being one that would only occur after some level of consideration by the individual. Research by Ron Bird et al found that a desire to take personal control over the investment strategy and to finetune the individual's tax position were the most common reasons for establishing an SMSF.[120] Inertia and the prospect of assuming personally the administrative burden of self-management were the factors most commonly cited for preferring to remain in an APRA-regulated fund. The research also found that the individuals who had established an SMSF had usually sought professional advice.[121]

Apart from some threshold requirements that a trustee be fit and proper,[122] there is very little direct regulation of an individual's decision to establish an SMSF. Various proposals to require would-be SMSF trustees to demonstrate a minimum level of competence have been aired but been rejected.[123]

Advice on the decision whether to establish an SMSF is regarded as advice relating to a financial product, and as such, subject to the requirements of chapter 7 of the *Corporations Act*. Moreover, the licensing exception granted to accountants by regulation 7.1.29A of the *Corporations Regulations* was repealed in 2016 meaning that the advice by accountants on whether to establish an SMSF is now subject to the same regulatory safeguards for individuals as advice received from other commercial sources.

B Choices in the Accumulation Phase

There are two main types of choice available to members in the accumulation phase of their participation in the superannuation system: the choice of investment strategy and the choice of insurance cover. As with the choices available in the contribution and drawdown phases, the regulatory scheme conditions and supports those choices in a variety of ways.

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118 Feng, Gerrans and Clark (n 117) 18.

119 Australian Taxation Office, *Self-Managed Super Fund: December 2023* (Statistical Report, 23 February 2024).

120 Ron Bird et al, 'Who Starts a Self-Managed Superannuation Fund and Why?' (2018) 43(3) *Australian Journal of Management* 373.

121 Ibid.

122 Specifically, not having been convicted of a criminal charge involving dishonesty or a civil penalty under the superannuation legislation or a bankrupt, or having been disqualified from being a trustee by the Australian Taxation Office: *SIS Act* (n 15) s 120. For more information, see *Hart v Federal Commissioner of Taxation* (2018) 107 ATR 966.

123 See, eg, John Wasiliev, 'Trustees' Skills Next in Line for Reform', *Australian Financial Review* (online, 10 May 2008) <https://www.afr.com/wealth/trustees-skills-next-in-line-for-reform-20080510-jcri1>.

1 Member Investment Choice

The trustees of most APRA-regulated superannuation funds make available to their defined contributions members a range of what are customarily termed 'investment choice' options. The number of investment options varies from fewer than thirty in the case of most profit-for-member funds to many thousands in the case of fund platforms.[124] Members can typically direct trustees to allocate their contributions across multiple investment options in order to finetune their investment strategy, or to pursue some other objective.[125] Although those options may have quite narrow, targeted investment strategies, members can also typically choose from amongst options that contain exposure to a variety of asset classes. In so doing they, in effect, may allow the trustee to make tactical asset allocation decisions[126] on their behalf.

The law does not require that members make an investment decision. Where an individual does not provide a direction to the trustee on how its contributions are to be allocated to the options, the trustee will place the contributions into the option it has designated as its 'default' option. If the trustee offers a MySuper product, that product must serve as the default.[127] The regulatory measures designed to protect the members of MySuper products were described above.

The law does, however, regulate and support the provision of member investment choice in a variety of ways. Not only is the trustee required by the covenant in section 52(6) of the *SIS Act* to formulate and give effect to an investment strategy for each investment option, crucially, it is also required to exercise due diligence in developing, offering and reviewing regularly those options[128] and to ensure that the investment options available to each beneficiary allow adequate diversification.[129] Although the substance of these covenants has never been tested in the courts, APRA interprets the requirement on the trustee to formulate and give effect to an investment strategy for the fund as a whole to extend to the trustee having a 'plan for determining the collection of investment options to offer to beneficiaries'.[130] This allocation of accountability is intended to offer members a degree of protection in

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124 Australian Prudential Regulation Authority, 'Annual Fund-level Superannuation Statistics Back Series: From 30 June 2014 to 30 June 2023' (Statistics, 13 December 2023) tbl 2a.

125 One strategy commonly attributed to pension fund members is the 1/n heuristic that sees members divide their assets evenly across the available options: Shlomo Benartzi and Richard H Thaler, 'Heuristics and Biases in Retirement Savings Behavior' (2007) 21(3) *Journal of Economic Perspectives* 81, 86–8 ('Heuristics and Biases'). In the superannuation context, the relatively larger number of options sees an adapted version of this adopted, whereby options that are perceived themselves to have an even distribution of investment exposures are favoured over those with greater concentrations in one or investment types: Bateman et al, 'As Easy as Pie' (n 82).

126 A tactical asset allocation decision is a decision, usually temporary, to diverge from the long-term 'strategic' asset allocation expressed in the investment strategy for the option: John Y Campbell and Luis M Viceira, 'Strategic Asset Allocation for Pension Plans' in Gordon L Clark et al (eds), *The Oxford Handbook of Pensions and Retirement Income* (Oxford University Press, July 2006) 441, 451<https://doi.org/10.1093/oxfordhb/9780199272464.002.0003>.

127 *SIS Act* (n 15) s 29WA.

128 Ibid s 52(6)(b).

129 Ibid s 52(6)(c).

130 Australian Prudential Regulation Authority, *SPG 530 Investment Governance* (Prudential Practice Guide, November 2013) 5 [5].

that the choices available for members to make have implicitly been assessed by the trustee as suitable for at least some members in some role, and that the menu as a whole serves the needs of members.[131] Importantly, however, it seems that the trustee does not, other than in very exceptional circumstances,[132] owe a duty to individual members to ensure that the particular choices made by the member are suitable for that member.[133] In that sense, members bear much of the responsibility for the investment choices that they make.

Exactly how many members do, in fact, choose to craft their own investment strategy from amongst the investment options available is hard to estimate precisely. Adam Butt et al report that almost half of the respondents to their survey of fund members chose an investment strategy other than the default.[134] However, that potentially understates the number of members making a choice because members can elect to invest their contributions in the MySuper default option. Problematically from the perspective of measuring this propensity, they can do so without providing an express direction to the trustee. Although this deference to the judgment of the trustee may occur because those members trust the trustee's judgment of the optimal investment strategy ahead of their own,[135] it may also reflect a member deciding that the strategy formulated by the trustee for the MySuper product coincides most closely with the strategy they would choose for themselves.

Empirical research suggests that financially literate members are more likely to exercise investment choice.[136] Importantly, then, members derive further support for their decision making from the disclosure regime imposed by part 7.9 of the *Corporations Act*. As noted above, PDSs are required by the disclosure regime of the *Corporations Act* to contain such information as might reasonably be expected to be relevant to such a decision. Fund websites also typically contain substantial amounts of information that would be relevant to existing members considering whether to change their investment strategy. Financial advisers, also, may be involved in assisting members to make investment choices. As noted above, the advice provided by such advisers is intensively regulated because it almost inevitably amounts to personal advice. Finally, some trustees are authorised under their AFS licence to provide personal advice to members. Where that advice is generic in nature it may be deemed 'intra-fund' advice and be paid for generally

131 Donald, 'Prudent Eunuch' (n 4).

132 In *Perpetual Trustees Australia Ltd v Wallace* [2007] FCA 527 ('*Perpetual Trustees*'), the trustee applicant specifically chose not to appeal a finding of the Superannuation Complaints Tribunal that an investment strategy placing 98% of the portfolio in especially risky equity investments was a contravention of section 52(2) of the *SIS Act* (n 15) as being unsuitable for a 70-year-old member, notwithstanding the member's instructions at the time. The Court's view had the Tribunal's conclusion been questioned is a matter for conjecture, but clearly counsel for the applicant was not optimistic: *Perpetual Trustees* (n 132) [28] (Edmonds J).

133 Donald, 'Prudent Eunuch' (n 4).

134 Butt et al (n 66) 553.

135 Ibid 557.

136 Chrisann Palm and Laura de Zwaan, 'Financial Literacy and Investment Choice Decisions: Evidence from Australian Superannuation Fund Members' (Proceedings, Accounting and Finance Association of Australia and New Zealand Conference, 3–5 July 2016).

out of the fund, but where it pertains to an individual member the costs of the advice must be levied directly against that member's account.[137]

As noted above, there is also some evidence for members engaging in a conditional variation of a 'naïve' strategy suggested in the behavioural literature, known as the 1/n heuristic, in which the number of investment options chosen is chosen arbitrarily (but not 1).[138] This is a form of uninformed diversification that perhaps responds to the prospect of 'regret' on the part of the member.[139]

Investment choice might reasonably be expected to occur not just when contributions are initially made to a superannuation fund. Indeed, standard investment theory suggests that it would be rational for an individual's strategy to evolve over time and also in response to changes in the individual's circumstances.[140] It is in this context that it is commonly asserted that most superannuation fund members are 'disengaged', as evidenced by the low level of 'switching' activity typically found in empirical studies of member behaviour.[141] This assertion needs to be viewed with care, however, because common sense suggests a member will typically only 'switch' from one investment strategy to another within the same fund when his or her degree of dissatisfaction with the current strategy exceeds some threshold, inertial value. That change in satisfaction may arise when the member achieves some pertinent age (often around 50),[142] or there is a catalyst in investment markets, such as a market crash.[143] Otherwise the rhetoric of long-term investing and the perceived complexity of superannuation is likely to suppress ongoing finetuning by most members.

137 *SIS Act* (n 15) s 99F.

138 Paul Gerrans and Ghialy Yap, 'Retirement Savings Investment Choices: Sophisticated or Naive?' (2014) 30 *Pacific-Basin Finance Journal* 233.

139 Shlomo Benartzi and Richard H Thaler, 'Naive Diversification Strategies in Defined Contribution Saving Plans' (2001) 91(1) *American Economic Review* 79, 80. Cf Benartzi and Thaler, 'Heuristics and Biases' (n 125) 93, which speculates that 'regret' is more likely to affect decisions about subsequent rebalancing than the initial allocation. No evidence is provided by Benartzi and Thaler for this subsequent qualification.

140 Jingjing Chai et al, 'Optimal Portfolio Choice over the Life Cycle with Flexible Work, Endogenous Retirement, and Lifetime Payouts' (2011) 15(4) *Review of Finance* 875.

141 See, eg, John Evans and King Tan, 'Drivers of Investment Choice: Some Evidence from Australian Superannuation Participants' [2006] (4) *JASSA: The Finsia Journal of Applied Finance* 18.

142 Bateman et al, 'Just Interested or Getting Involved?' (n 9) 173–4; Evans and Tan (n 141). However, analysis by Gerrans et al found that the percentage of members who exercised investment choice in the period under examination increased monotonically across each sequential age decade, from 20s to 50s, with almost 25% of members over 50 exercising choice: Paul Gerrans et al, 'Investment Strategy on Retirement Savings: An Analysis of the Experience of Fund Members' [2016] (2) *JASSA: The Finsia Journal of Applied Finance* 54, 57.

143 However, Gerrans found that less than 7% of members changed their investment strategies between October 2006 and March 2009, a period commonly colloquially termed the global financial crisis: Paul Gerrans, 'Retirement Savings Investment Choices in Response to the Global Financial Crisis: Australian Evidence' (2012) 37(3) *Australian Journal of Management* 415 <https://doi.org/10.1177/0312896212450041>.

2 Member Insurance Choice

The trustees of most APRA-regulated superannuation funds also provide choices in relation to the insurance cover available to members. This likewise occurs pursuant to a covenant on the part of the trustee, expressed in section 52(7) of the *SIS Act*, to formulate and give effect to an insurance strategy for the fund. The insurance strategy is to have regard for the kinds and levels of insurance offered, the basis on which that decision is to be taken and the method by which the insurer is to be determined. The trustee is required to have regard for the cost of acquiring the insurance, but is also required only to offer the insurance if the cost of the insurance 'does not inappropriately erode the retirement income of beneficiaries'.[144] This latter assessment is designed to protect members but has yet to be formally litigated, so it is unclear precisely what the covenant requires in practice. It does however complement the reform that turns off the payment for default insurance cover on small and inactive accounts.

The regimes regulating disclosure and advice in relation to investment choice, described above, apply also to insurance choice.

C Choices in the Drawdown Phase

There are no rules specifically requiring individuals to take particular steps in relation to withdrawing money from the superannuation system during their lifetime. However, there are rules that govern when an individual can withdraw money. From these derive the description below of three types of choices available to individuals in the drawdown phase. There are two that relate to withdrawing money prior to the standard retirement age; one generic and one related to COVID-19. There is also a decision to be made upon retirement about the form of retirement benefit to be drawn, within which consideration is also implicitly a decision about the timeframe for withdrawal.

Perhaps the most concerning aspect of this phase of the life cycle of a superannuation fund members is that the complexity of the decisions and the specialised terminology coincide with a point in people's lives when they have limited opportunity to recover from a poor decision and, in some cases, diminishing intellectual capacity.[145] The size of their accumulated superannuation balances also makes them a prime target for predatory service and product providers. As emerges below, the regulatory regime is arguably underdeveloped in respect of these peculiar challenges.

1 Early Release on Welfare Grounds

There are limited circumstances in which individuals can withdraw money early without penalty, such as on the basis of severe financial hardship, compassionate

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144 *SIS Act* (n 15) s 52(7)(c).

145 Joanne K Earl et al, 'Financial Literacy, Financial Judgement, and Retirement Self-efficacy of Older Trustees of Self-managed Superannuation Funds' (2015) 40(3) *Australian Journal of Management* 435, 438 <https://doi.org/10.1177/0312896215572155>.

grounds and incapacity.[146] This limited qualification to the general principle of ‘preservation’ (of the monies remaining within the system until retirement) is crucial to the legitimacy of the system. Balanced against this, however, are reports that the mechanism is sometimes employed for the purpose of releasing money for expenditure on medical treatment that is not necessary to treat a ‘life threatening illness or injury’, or to ‘alleviate acute or chronic pain’ or ‘mental disturbance’, such as beauty-oriented cosmetic surgery.[147] There are also ongoing concerns about the potential for this mechanism to be employed in frauds perpetrated on individual members.[148]

2 The COVID-19 Early Access Scheme

The widespread financial hardship caused by the coronavirus lockdowns in 2020 inspired the government to take the unprecedented step of permitting members to make withdrawals of up to $10,000 (twice) from their superannuation balances without penalty.[149] The member needed to demonstrate that they were adversely financial affected by COVID-19, for instance because they had been forced to accept a reduction in working hours or had become unemployed. Just over 3 million individuals applied, withdrawing a combined $37.8 billion.[150] The facility was lauded by many in the broader community, but criticised by some in the industry on the basis that the withdrawals would compromise individuals’ long term financial position.[151]

In some senses, then, the initiative represents a natural experiment, albeit one where the preference for drawing down on the accumulated superannuation balance was given additional weight by the exceptional and exigent financial hardship many individuals were facing. Empirical research has found evidence that the scheme was mostly used as intended, as a means of ameliorating the financial

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146 *SIS Regulations* (n 51) reg 6.19A.

147 For a discussion on one application of the mechanism, see Neera Bhatia and Lily Porceddu ‘Emptying the Nest Egg to Fill the Nursery: Early Release of Superannuation to Fund Assisted Reproductive Technology’ (2021) 44(2) *University of New South Wales Law Journal* 513.

148 See, eg, Marlene Hewer, ‘Fraud and Super: The Regulatory Tensions’ (2009) 21(4–5) *Australian Superannuation Law Bulletin* 68.

149 *SIS Regulations* (n 51) sub-reg 6.19B, as inserted by *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) sch 13.

150 ‘COVID-19 Early Release of Super’, *Australian Taxation Office* (Web Page, 1 August 2023) <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/super-statistics/early-release/covid-19-early-release-of-super>.

151 See, eg, Jeremy Cooper, ‘Don’t Tap Your Super … Unless You Really Have to’, *The Sydney Morning Herald* (online, 31 March 2020) <https://www.smh.com.au/money/super-and-retirement/don-t-tap-your-super-unless-you-really-have-to-20200330-p54fb9.html>; Duncan Hughes, ‘Don’t Let the Virus Deal a Savings Blow’, *Australian Financial Review* (online, 8 May 2020) <https://www.afr.com/companies/financial-services/how-to-cushion-the-coronavirus-impact-on-super-and-savings-20200507-p54qrn>; Michael Read, ‘Early Access to Super Cost Australians Thousands’, *Australian Financial Review* (online, 30 July 2021) <https://www.afr.com/companies/financial-services/early-access-to-super-cost-australians-thousands-20210722-p58c6v>. For research indicating that some members may have misunderstood the impact of their withdrawal on their retirement savings, see Hazel Bateman et al, ‘Determinants of Early-Access to Retirement Savings: Lessons from the COVID-19 Pandemic’ (2023) 24 *Journal of the Economics of Ageing* 1 <https://doi.org/10.1016/j.jeoa.2023.100441>.

hardship caused by the economic dislocations of the pandemic.[152] At the same time, empirical and anecdotal reports suggest that a not inconsiderable portion of the money withdrawn under the schemes was spent on immediate discretionary consumption, such as gambling, alcohol and furniture.[153] This latter evidence has been used in the public discourse to discredit the mechanism. Whether or not that criticism is warranted, the evidence of the extent of the drawdown (almost 15% of all members withdrew), together with evidence of short-term consumption by some at least of those members, suggests that accumulating assets within the superannuation system, is, for many individuals, not how they would choose to express their intertemporal consumption preferences if left to their own devices.

3 When to Retire? Transition to Retirement

Of more relevance to the question of choice, however, once the individual has attained the 'preservation age' (currently between 55 and 60, depending on the individual's date of birth), he or she can withdraw money upon their retirement or if they start a 'transition to retirement' income stream.[154] This is one of the decision nodes that traditionally has been served by the financial planning industry, and the protections described above in relation to the expectation that the advice will be suitable and not influenced by the personal interests of the advisers will apply here also. Trustees, also, will often provide online tools, publications and seminars for members approaching and negotiating this decision node. These will typically be of a 'general advice' nature but may function as a mechanism for encouraging members to seek personal advice either from the trustee, if the trustee is appropriately licensed, or some other source.

4 Structuring Choices

There are choices for an individual to make other than the decision of when to retire. The most important of these is how to structure the withdrawal. Benefits can be withdrawn from the superannuation system as a lump sum, as an income stream or as a combination of lump sum and income stream.[155] The individual can also choose when those drawdowns are to happen. There are complicated tax and social security considerations that apply to withdrawals and would reasonably be expected to be incorporated into the decision taken by most individuals.[156] It is typically also open for the individual to leave their accumulated balance within the system

152 Nathan Wang-Ly and Ben R Newell, 'Allowing Early Access to Retirement Savings: Lessons from Australia' (2022) 75 *Economic Analysis and Policy* 716 <https://doi.org/10.1016/j.eap.2022.07.002>.

153 See, eg, Steven Hamilton, Geoffrey Liu and Tristram Sainsbury, 'Early Pension Withdrawal as Stimulus' (Working Paper, Elliott School of International Affairs, George Washington University, February 2023) <www2.gwu.edu/~iiep/assets/docs/papers/2023WP/HamiltonIIEP2023-02.pdf>; Matt Wade, 'Super Bender: Retirement Nest-Egg Withdrawals Used to Boost Spending on Non-essentials', *The Sydney Morning Herald* (online, 1 June 2020) <https://www.smh.com.au/business/the-economy/super-bender-retirement-nest-egg-withdrawals-used-to-boost-spending-on-non-essentials-20200531-p54y5q.html>.

154 For a detailed definition of 'transition to retirement income stream', see *SIS Regulations* (n 51) reg 6.01. Arrangements satisfying that definition are eligible to be considered as a condition of release: at reg 6.18.

155 Ibid reg 6.18.

156 *RIR Report* (n 107) 17.

indefinitely. Again, as might be expected, this a fertile ground for financial advisers. The complexity of the rules and the fear of making a poor decision in a situation from which the individual has little opportunity to recover create a demand for advice. The size of the assets accumulated at this point, typically at or close to the maximum for that individual of his or her lifetime, facilitate payment for those services.

Once again, the rules regulating the provision of financial advice apply in these situations to facilitate the creation of a decision space in which the decision-maker can be in possession of the relevant information and quarantined from the interests of those providing advice. Importantly, however, the regulatory regime does not purport to engage directly with what has come to be known as 'elder abuse' by family members or other associates of the individual, although there is increasing appreciation for the threat to individual autonomy that pressure from those close to a retiring or retired person can represent. As the Law Reform Commission identified in 2017,[157] this threat would seem to be particularly present in the SMSF sector, but clearly it can arise across the entire range of choice nodes in the drawdown phase, including binding death benefit nominations.

The *SIS Act*, too, aims to create a decision environment that supports decision-making for members close to retirement. The covenant in section 52(8A) of the *SIS Act* requires each RSE licensee to formulate, review regularly and give effect to a retirement income strategy that will assist members approaching retirement to achieve and balance three objectives: the maximisation of expected retirement income over the period of retirement, the management of risk (including but not limited to longevity, investment and inflation risk) and flexible access to the funds.[158] A summary of the strategy must be made available on the fund's website.[159] Notwithstanding multifarious deficiencies in the way the covenant is drafted, its general import seems clear. Importantly for present purposes, it is expressed specifically in terms of the trustee assisting the member to make choices. Although this assistance could be limited to the provision of products within the fund that have investment characteristics tailored to these objectives, the way in which the term 'strategy' is now used through the other parts of section 52 encourages the possibility that a wider range of types of assistance, including the provision of retirement calculators and financial advice, might form part of a trustee's 'strategy'.[160] Those additional features would each be regulated under the existing framework.[161]

157 Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, May 2017) ch 7.

158 For specifics on the objectives and other definitional matters, see *SIS Act* (n 15) s 52AA.

159 Ibid s 52(8A)(e).

160 See, eg, Letter from Australian Prudential Regulation Authority to RSE Licensees, 7 March 2022, 5–6 <https://download.asic.gov.au/media/4b1jkqso/letter-to-rse-licensees-implementation-of-the-retirement-income-covenant.pdf>. On the limitations of standardised calculators in this context, see Nathan Wang-Ly et al, 'Defaults, Disclosures, Advice and Calculators: One Size Does Not Fit All' (2022) 35 *Journal of Behavioral and Experimental Finance* 1 <https://doi.org/10.1016/j.jbef.2022.100690>.

161 For instance, retirement calculators enjoy relief from the financial product advice regime in the *Corporations Act* (n 44) by virtue of *ASIC Corporations (Superannuation Calculators and Retirement Estimates) Instrument 2022/603*, but are still subject to the prohibitions on misleading or deceptive conduct found in the *Corporations Act* (n 44) and *ASIC Act* (n 80). For more information, see Australian Securities and Investments Commission, *Superannuation Forecasts: Calculators and Retirement Estimates* (Regulatory Guide No 276, 13 September 2024).

5 The Decision Whether to Annuitise

Fewer Australians purchase annuities for retirement income than economists believe is rational.[162] This is consistent with experience overseas but may also reflect the availability of the Commonwealth Age Pension as a longevity-risk mitigant and a financial safety net.[163] It may also reflect financial incentives for advisers and other industry participants that favour approaches other than annuitisation.[164]

As is the case in the accumulation phase, empirical research finds some support for the default and 1/n heuristics, especially where the risk of the individual running out of money is lower.[165] It also finds that annuitisation is positively associated with higher education but negatively associated with self-assessed financial literacy.[166]

IV PATERNALISM, CONSUMER SOVEREIGNTY AND CUSTOMER PROTECTION

The Australian superannuation system is, in the first instance, a creature of public policy. The move to universal participation in 1992 was originally justified as a federal government intervention to promote the individualised accumulation of assets for use in retirement in the face of an ageing population.[167] The initiative also promoted domestic capital consolidation in an era in which Australia generated persistent current account deficits[168] and was seen by some as a nascent form of industrial democracy.[169]

Deeper values are, however, implicit within these headline objectives. Fairness and efficiency are the obvious examples. They recur in the rhetoric surrounding each wave of regulatory reform. Although fairness and efficiency not antithetical to each other, most regulatory initiatives implicitly embody a carefully balanced trade-off between them, their relative priority being determined largely by contemporary political preferences and imperatives.

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162 Hazel Bateman and Inka Eberhardt, ‘How Fact Sheets Affect Retirement Income Product Knowledge, Perceptions and Choices’ (2022) 49(2) *Australian Journal of Management* 119, 120; *RIR Report* (n 107) 458–9.

163 Hardy Hulley et al, ‘Means-Tested Public Pensions, Portfolio Choice and Decumulation in Retirement’ (2013) 89 (284) *Economic Record* 31; Fedor Iskhakov, Susan Thorp and Hazel Bateman, ‘Optimal Annuity Purchases for Australian Retirees’ (2015) 91(293) *Economic Record* 139; Anthony Asher et al, ‘Age Pensioner Decumulation: Responses to Incentives, Uncertainty and Family Need’ (2017) 42(4) *Australian Journal of Management* 583 <https://doi.org/10.1177/0312896216682577>; Johan G Andréasson, Pavel V Shevchenko and Alex Novikov, ‘Optimal Consumption, Investment and Housing with Means-Tested Public Pension in Retirement’ (2017) 75 *Insurance: Mathematics and Economics* 32.

164 *RIR Report* (n 107) 58.

165 Hazel Bateman et al, ‘Default and Naive Diversification Heuristics in Annuity Choice’ (2017) 42(1) *Australian Journal of Management* 32, 34.

166 Ibid.

167 Dawkins (n 16) 1. See also Social Security Review, Department of Social Security, ‘Towards a National Retirement Incomes Policy’ (Issues Paper No 6, 1988) 119 ff; FitzGerald (n 107). For accounts of the political background to the compulsory superannuation system, see the sources cited at n 11 above.

168 FitzGerald (n 107) xiii.

169 Olsberg (n 11).

Individual autonomy, manifested in the opportunity given to individuals to exercise choice, is another important value. In the right circumstances, individual autonomy can promote fairness. Individual autonomy can also promote economic efficiency. But, as John Stuart Mill argued over 150 years ago, individual autonomy has value in and of itself.[170]

Three distinct approaches to individual autonomy have impelled the evolutionary process described in Part I over the past three decades: paternalism, consumer sovereignty and customer protection. All three are approaches that ostensibly protect the interests of members of the subject population. However, they differ in where they locate responsibility for assessing what is in the best interests of members of the subject population. Before proceeding to discuss the presence of each in the policy mix shaping the superannuation system it is worth being clear what is meant here by each.

Paternalism involves positioning an authority figure, often but not necessarily the state, to make decisions loyally on behalf of that subject population.[171] It is often justified on the basis that the decision-maker possesses attributes (such as expertise, wisdom, or independence from personal interest) that promote the achievement of superior outcomes for members of the subject population, where the superiority of those outcomes is defined not by those whose interests are being safeguarded but some other authority (who may or may not be the person in whom decision-making authority is vested). Consumer sovereignty, in contrast, involves positioning individual members of the subject population to make decisions for themselves, which they will presumably do in accordance with their subjective assessment of their personal needs and preferences. Customer protection is in some ways a hybrid of the two; individuals being free to choose for themselves from amongst a set of alternatives that is defined to include only those choices that an external authority (usually the state) deems 'safe' on some basis.[172] This is sometimes referred to in lay terms as 'swimming between the flags'.

1 Paternalism

Paternalism is writ large in most accounts of the policy settings surrounding the introduction and design of the SG. At the most basic level, the policy of formally requiring people to save for their retirement in the superannuation system is commonly perceived as paternalistic,[173] in so far as it purports to counter

170 John Stuart Mill, *On Liberty* (Electric Book, 1871).

171 This approximates Dworkin's oft-quoted definition of paternalism as 'the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm': Gerald Dworkin, 'Paternalism' in Edward Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University, Summer 2014) <https://plato.stanford.edu/archives/sum2014/entries/paternalism/>.

172 It is distinct from the notion of 'libertarian paternalism' (see discussion attached to n 184 below) in that it does not attempt to influence a subject's behaviour espoused by Sunstein and Thaler.

173 See, eg, Croy, Gerrans and Speelman (n 115) 90; Rami Hanegbi, 'Compulsory Superannuation Laws: Are Forced Retirement Savings Really for People's Own Good?' (2022) 37(1) *Australian Tax Forum* 147; Paul M Secunda, 'The Behavioral Economic Case for Paternalistic Workplace Retirement Plans' (2016) 91(2) *Indiana Law Journal* 505.

a posited behavioural bias (a ‘myopia’) towards present consumption.[174] There is also paternalism in the choice architecture within the system, including, and most prominently, in the positioning of MySuper products as the default for those participants who do not communicate a choice to their trustee of their fund. The paternalism runs deeper than this, however.

The simplicity of a flat rate system has a paternalistic dimension because it mandates behaviour that might be subjectively suboptimal for individuals. Put simply, some individuals may want to contribute less than the mandated minimum at various points in their working life, but they cannot. Less recognised is the likelihood that it is also likely to be sub-optimal for individuals on an objective, rational basis. Because mandated contributions are set at a flat and unconditional rate under the SG, they amplify the mismatches between earnings and consumption that occur predictably over different phases of an individual’s life cycle. This puts pressure, for instance, on the ability of younger Australians to purchase a home, to invest in tertiary education or to purchase private health insurance, all potentially rational uses of the money that are not characterizable as purely current consumption. It also arguably inspires a false sense of financial wellbeing in those at the other end of their career, when earnings from work typically outstrip essential consumption, opening the possibility for additional savings. The SG’s flat rate also largely ignores the fact that those on lower incomes require a greater percentage of their income to satisfy more ‘basic’ needs, meaning that it potentially represents an even greater departure from individual rational behaviour (to say nothing of individual preference) for those on lower incomes.[175] The flat rate design of the SG, then, has the undoubted virtue of being simple to understand and implement, but it deliberately distorts individuals’ financial decision-making across their life cycle in ways that go beyond the simple intertemporal preference between present and deferred consumption that are commonly identified with it.

Paternalism was arguably also present in the practice of employers to establish and maintain ‘corporate’ funds to serve the needs of their employees.[176] There is

174 M E Drew and J D Stanford, ‘Why is Superannuation Compulsory?’ (2004) 37(2) *Australian Economic Review* 184; Hazel Bateman and John Piggott, *Private Pensions in OECD Countries: Australia* (Occasional Paper No 23, 1997) 59 <https://dx.doi.org/10.1787/774368522640>.

175 There is, however, a low-income superannuation tax offset for incomes below $37,000 per annum, a level below the 10th percentile of full-time employees, but above approximately one third of part time employees: Australian Bureau of Statistics, *Employee Earnings*, *August 2023* (Catalogue No 6337.0, 13 December 2023). The measure is called the low income superannuation tax offset. It was established by *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) pt 2A.

176 Michael E Drew and Jon D Stanford, ‘Principal and Agent Problems in Superannuation Funds’ (2003) 36(1) *Australian Economic Review* 98, 103. Cf Pamela McAlister who argues that, by making employer contributions compulsory, the introduction of the SG actually reduced employer paternalism: Pamela McAlister, ‘The Changing Winds of Superannuation: Relief for Employers?’ (2000) 11(2) *Journal of Banking and Finance Law and Practice* 100, 100.

also a strong paternalistic tenor in the rhetoric surrounding the role of the trustee,[177] upon which fulcrum much of the regulatory regime depends.[178]

The paternalism narrative deserves even closer attention, however. The lived experience of the system presents a more nuanced and conditional picture. Although participation in the system created by the SG is often described as compulsory, there is ample evidence that many individuals and enterprises have reconfigured their arrangements, for instance by contracting as independent contractors, to sidestep participation in the system.[179] Moreover, the deliberate enrolment of private market actors in the system, and the prevalence of defined contribution schemes (which reduces the system's mutuality compared either to a system comprising defined-benefit schemes or a publicly-administered system),[180] in many ways conforms as well to a neoliberal rhetoric of individualised responsibility as it does to a paternalistic model.[181] It is also true that very few employers maintain 'corporate' funds for their employees today.[182] The costs and the reputational risks from non-compliance grew over the 1990s and early 2000s to the point where most employers could no longer justify their ongoing involvement. The notable exceptions almost all involve substantial defined benefit obligations for the employers, suggesting that their involvement may reflect self-interest rather than paternalism. And, finally, the actual accountability of superannuation fund trustees and their agents to members is far more contingent, and indeed porous, than the rhetoric of trusteeship might suggest.[183]

Similar reservations should be considered in relation to the practice of describing aspects of the superannuation system as informed by 'libertarian paternalism'. Libertarian paternalism is said to be a form of paternalism that argues for the design of systems expressly to encourage participants to make 'better'

177 Companies and Securities Advisory Committee, Law Reform Commission, *Collective Investments: Superannuation* (Report No 59, 1992) xxxiii–iv; Donald, 'Prudent Eunuch' (n 4). A similar point is made in relation to the analogous Employee Retirement Income Security Act system in the United States: John H Langbein, 'Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA' (2007) 101(3) *Northwestern University Law Review* 1330; Gordon L Clark, 'Expertise and Representation in Financial Institutions: UK Legislation on Pension Fund Governance and US Regulation of the Mutual Fund Industry' (2007) 2(1) *Twenty-First Century Society* 1, 6.

178 Donald, 'Fit for Purpose' (n 14).

179 Brett Freudenberg and Scott Sargent, 'Not So Guaranteed: Superannuation Guarantee and Australian Small Businesses' (2015) 30(1) *Australian Tax Forum* 89.

180 Adam Creighton, 'We Must All Be Capitalists Now: The Strange Story of Compulsory Superannuation in Australia' in William Coleman (ed), *Only in Australia: The History, Politics, and Economics of Australian Exceptionalism* (Oxford University Press, 2016) 188, 199–200. For the notion of mutuality and intra-generational risk-sharing in occupational pension provision more generally, see Johan J De Deken, Eduard Ponds and Bart van Riel, 'Social Solidarity' in Gordon L Clark, Alicia H Munnell and J Michael Orszag (eds), *The Oxford Handbook of Pensions and Retirement Income* (Oxford University Press, 2006) 141 <https://doi.org/10.1093/oxfordhb/9780199272464.003.0008>.

181 Claire Parfitt, 'Contradictions of Financialised Neoliberalism: The Contemporary Practice of Responsible Investment' (2018) 54(1) *Journal of Sociology* 64, 66–7.

182 *Assessing Efficiency* (n 39) 446.

183 See, eg, JC Campbell, 'Some Aspects of the Civil Liability Arising from Breach of Duty by a Superannuation Trustee' (2017) 44(1) *Australian Bar Review* 24.

choices.[184] Upon close examination, and despite the expectations expressed in the Cooper Review, the superannuation system today is only superficially consistent with this approach. It has a 'choice architecture' that to some extent frames individual decision-making, but with a few exceptions,[185] it does not employ the more subterranean 'nudges' to influence decisions that are sometimes advocated by libertarian paternalists.

That said, it is important not to underestimate the importance of the defaults present in the choice architecture of the superannuation system. Choices involving deferred enjoyment, credence goods,[186] complexity, ambiguity or existentially confronting considerations (such as death or senescence) are notoriously more challenging than simple consumer decisions. Choices in the superannuation context often manifest a number of these features.[187] Inertia, whether it arises from one or more of those factors, or from disengagement, implicit trust or some other source, elevates the importance of the default above all other sites in the architecture. Not surprisingly, therefore, much has been written in other jurisdictions and contexts about the design of defaults.[188] There is also a considerable body of literature addressing the normative dimensions of defaults,[189] which is a reminder that the

184 See Richard H Thaler and Cass R Sunstein, 'Libertarian Paternalism' (2003) 93(2) *American Economic Review* 175; Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism is Not an Oxymoron' (2003) 70(4) *University of Chicago Law Review* 1159. Sunstein and Thaler's thinking has been delivered to a wider audience: Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, 2008); Cass R Sunstein, *Why Nudge?: The Politics of Libertarian Paternalism* (Yale University Press, 2014). For a relatively recent and wide-ranging review of the research on liberally paternal 'nudges', see Luca Congiu and Ivan Moscati, 'A Review of Nudges: Definitions, Justifications, Effectiveness' (2022) 36(1) *Journal of Economic Surveys* 188.

185 One example is the product dashboards designed to orientate individual decision-making towards 'rational' decision factors. For an analysis of the utility of the dashboard, see Susan Thorp et al, 'Flicking the Switch: Simplifying Disclosure to Improve Retirement Plan Choices' (2020) 121 *Journal of Banking and Finance* 105955 <https://doi.org/10.1016/j.jbankfin.2020.105955>. The APRA Heat Maps and Annual Performance Test are other recent manifestations of this desire to influence rather than force behaviour.

186 A credence good is one whose quality it is hard to assess even after purchase.

187 Benartzi and Thaler, 'Heuristics and Biases' (n 125). For a positive recommendation to use the default to achieve a normative end, see Robert Hoffmann, Marie-Anne Cam and Adrian R Camilleri, 'Deciding to Invest Responsibly: Choice Architecture and Demographics in an Incentivised Retirement Savings Experiment' (2019) 80 *Journal of Behavioral and Experimental Economics* 219.

188 Jacob Goldin and Daniel Reck, 'Optimal Defaults with Normative Ambiguity' (2022) 104(1) *Review of Economics and Statistics* 17; B Douglas Bernheim, Andrey Fradkin and Igor Popov, 'The Welfare Economics of Default Options in 401(k) Plans' (2015) 105(9) *American Economic Review* 2798; Nicholas Chesterley, 'Defaults, Decision Costs and Welfare in Behavioural Policy Design' (2017) 84(333) *Economica* 16; Brigitte Madrian and Dennis Shea, 'The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior' (2001) 116(4) *Quarterly Journal of Economics* 1149; Alistair Byrne, 'Employee Saving and Investment Decisions in Defined Contribution Pension Plans: Survey Evidence from the UK' (2007) 16(1) *Financial Services Review* 19; James J Choi et al, 'Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance' (2002) 16 *Tax Policy and the Economy* 67. In relation to the extent to which defaults can provide systemic benefits beyond those accruing to individual decision-makers, see Bruce Ian Carlin, Simon Gervais and Gustavo Manso, 'Libertarian Paternalism, Information Production, and Financial Decision Making' (2013) 26(9) *Review of Financial Studies* 2204.

189 See, eg, Robert Baldwin, 'From Regulation to Behaviour Change: Giving Nudge the Third Degree' (2014) 77(6) *Modern Law Review* 831, 844 ff; Colin Camerer et al, 'Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"' (2003) 151(3) *University of Pennsylvania Law Review* 1211.

elevation of 'rational' decision-making over subjective satisfaction, for instance, often has an epistemic, and ultimately normative, dimension.[190]

2 The Quest for Legitimacy

Paternalism has come under attack from a number of quarters in recent decades. Put simply (and simplistically), in many situations people don't want decisions being made for them, or as Begon puts it, being treated 'like a child'.[191] Measures to buttress the legitimacy of the superannuation system against adverse reactions to the rhetoric of paternalism have therefore been crucial to ongoing public acceptance of the system. As Peter John, Aaron Martin and Gosia Mikołajczak observe:

> In the study of public policy, popular acceptance of policies has been considered to be a critical factor behind their success, as few policies work without the active cooperation of the people who are their intended targets … Policy makers need then to adopt policies that the public deem to be legitimate and acceptable, not least from fear of electoral punishment if they get it wrong.[192]

Two types of measure have been most important in this regard.

The first type of measure has been those designed to promote individual participation in the governance of the pivotal institutions[193] in the superannuation system; the trustees of the funds. So, for instance, the *SIS Act* requires that trustees of 'employer sponsored funds' (the legislative definition of which comprises corporate and profit-for-member funds) be governed by a board with an equal number of representatives of employers and employees.[194] The involvement of member representatives was justified by the Treasurer of the day on the basis that '[o]ne of the most important ways in which members are able to participate in the management and protection of their retirement savings is through representation on the board of trustees'.[195]

190 For consideration of the role of subjective measures of objectives satisfaction, see Jochen Ruß, Stefan Schelling and Mark Benedikt Schultze, 'What to Offer if Consumers Do Not Want What They Need? A Simultaneous Evaluation Approach with an Application to Retirement Savings Products' (2023) 13(2) *European Actuarial Journal* 607 <https://doi.org/10.1007/s13385-022-00337-x>. For the proposition that subjective preferences can themselves be influenced by public policy, see Johannes Kniess, 'Libertarian Paternalism and the Problem of Preference Architecture' (2022) 52(2) *British Journal of Political Science* 921 <https://doi.org/10.1017/S0007123420000630>.

191 Jessica Begon, 'Paternalism' (2016) 76(3) *Analysis* 355, 355 <https://doi.org/10.1093/analys/anw040>. See also Julian Le Grand and Bill New, *Government Paternalism: Nanny State or Helpful Friend?* (Princeton University Press, 2015).

192 Peter John, Aaron Martin and Gosia Mikołajczak, 'Support for Behavioral Nudges Versus Alternative Policy Instruments and Their Perceived Fairness and Efficacy' (2023) 17(2) *Regulation and Governance* 363, 364 <https://doi.org/10.1111/rego.12460>.

193 For the proposition that the trustees act as pivotal nodes in the superannuation system, see Scott Donald et al, 'Too Connected to Fail: The Regulation of Systemic Risk within Australia's Superannuation System' (2016) 2(1) *Journal of Financial Regulation* 56, 59–61.

194 *SIS Act* (n 15) pt 9.

195 Dawkins (n 16) 12.

The inclusion of an equal number of employer representatives on profit-for-member boards was justified pragmatically by the unions as necessary for public confidence.[196]

It is easy three decades later to underestimate the importance to the acceptance of mandatory superannuation contributions of this structural governance measure in the political milieu leading up to the introduction of the SG.[197] Equal representation is described by some as a nascent form of industrial democracy[198] and by others as a manifestation of neoliberal corporatism.[199] Again, however, the reality is more nuanced than the rhetoric. For a start, the representatives are more likely to be nominated by organisations (such as trade unions and employer bodies) representing those constituencies than directly by the constituencies themselves, a process that is far from transparent.[200] It can also be questioned whether the nominating entities are themselves genuinely representative of all constituencies in the fund,[201] and whether the legitimacy of the institutions would be improved by having at least some of the members of the board elected by a democratic process. All that said, however, there can be no doubt that the messaging of not-for-profit funds and the trade union movement over the past three decades has been directed towards the objective of inspiring trust in the members (and prospective members) that their interests are being pursued by their representatives on the trustee boards.[202]

Annual Members Meetings are perhaps the most recent example of a governance measure intended to promote the legitimacy of the system. Section 29P of the *SIS Act* now requires each APRA-regulated superannuation fund trustee to convene a formal members' meeting annually. Regulation 2.10 of the *SIS Regulations* sets out in detail the information that is to be included in the notice of meeting sent to members (including the trustee's annual report on the fund and information about remuneration, marketing and promotional expenses and political donations). The meeting does not, however, have any decision-making role in relation to the fund analogous to the role played by the General Meetings of members in corporate law. Although the forum typically contains introductory comments from officers of the trustee, review of the 'minutes' of recent meetings involving Australia's largest funds identifies that much of the time is given over to canvassing questions posed by members about the administration of the fund.[203] Indeed, the 'responsible

196 Bernard Mees, 'Employee Representation and Pension Fund Governance in Australia' (2021) 42(1) *Economic and Industrial Democracy* 75, 78 <https://doi.org/10.1177/0143831X17752265>; St Anne (n 11) 44.

197 Girgis (n 11).

198 Mees (n 196).

199 See Elizabeth Humphrys, 'Simultaneously Deepening Corporatism and Advancing Neoliberalism: Australia under the Accord' (2018) 54(1) *Journal of Sociology* 49.

200 Donald and Le Mire (n 19) 316–17.

201 Treasury (Cth), *Super System Review: Part Two* (Final Report, 30 June 2010) 54. A similar sensibility was expressed by Sir Robert Megarry MR in a seminal United Kingdom pensions case, *Cowan v Scargill*, which related to a fund governed by a trustee board that was also equally divided between employer and union representatives: *Cowan v Scargill* [1985] Ch 270, 292.

202 Mees and Brigden (n 11) 188.

203 M Scott Donald, 'Annual Super Fund Members' Meetings: The Evidence So Far' (2025) 40 *Australian Journal of Corporate Law* (forthcoming).

officer' to whom a question is asked is under a qualified duty to respond either at the meeting or within one month.[204] That said, it would be wrong to assume that the meetings are purely performative. The prospect of facing questions directly from members on contentious issues related to the administration of the trust (to the extent those are observable to members) can reasonably be expected to influence both the decisions actually taken by the trustee and the way in which information about those decisions is communicated to members prior to each members' meeting. The fact that trustees routinely make available written answers to the questions (posed by members on the public parts of the fund website, when disclosure to members is all that is required by section 29(6) of the *SIS Act*, also sends a powerful signal to stakeholders of a desire to appear transparent, an attribute arguably crucial to the perceived legitimacy of the institution (the trustee) making the disclosures.

The second type of measure designed to promote legitimacy are those, detailed painstakingly in Part II above, devoted to providing and supporting individual choice. By providing the opportunity for choice, even if that choice is not always widely exercised, these measures aim to inject a degree of individual agency into the system. The availability of an opportunity to exercise choice has a social value in itself from this perspective because it enables the individual to exercise autonomy.

The proposal to create a bespoke form of the Annual Performance Test specifically for faith-based superannuation products[205] is a recent example of such an autonomy-enhancing measure. Under the proposal, the trustee of a fund employing a faith-based approach to investing could apply to APRA to subject itself to a version of the test that used faith-sensitive performance indices rather than the generic indices applied to other superannuation products. Although ultimately withdrawn over concerns about the drafting of some of the provisions and design of the mechanism, the exception for faith-based products that the government sought to grant was self-evidently motivated by a desire to safeguard an individual's right to choose not to have their accumulated superannuation balance managed in ways inconsistent with their religious beliefs.

The libertarian ideals of autonomy and agency are, however, not the only reason one might support the provision of choice. The provision of choice can also be justified on more instrumental grounds in that individuals who engage constructively with the choices available to them provide a disciplining dynamic in the market; a dynamic that might loosely be termed 'consumer sovereignty'. That arises because the 'consumers' so engaged signal in a very granular way the nature of their needs and objectives (and the price they are prepared to pay to have those needs satisfied and objectives pursued). Would-be providers can then tailor their product offerings, informed by those preferences and conditioned on their own objectives and constraints. This 'discipline' can be expected to propel the 'market' towards product specifications and a clearing price that promotes allocative

204 *SIS Act* (n 15) s 29PB(2). The exceptions to the duty are specified in sub-section (3) as being, in summary, questions on irrelevant matters, questions the answer to which would either result in detriment to members or constitute a contravention of the Act, and other matters prescribed in the *SIS Regulations* (n 51). There are, as yet, no pertinent regulations.

205 Treasury Laws Amendment (2022 Measures No 3) Bill 2022 sch 5.

efficiency. The more granular the specification of demand, the less that individual preferences are homogenised and individual utility thereby lost. The existence of Fund Choice and Member Investment Choice in the Australian superannuation system provides mechanisms for precisely this type of dynamic. This is in contrast to countries where, for instance, members are restricted to the plans offered by their employers or the state, or are contained within defined benefit plans in which their needs are expressed solely in terms of a prescribed financial formula that has no sensitivity to their individual, subjective needs.

It should be noted that efficiency in this sense is slightly different than the sense in which the term has mostly been employed in the policy discourse accompanying the succession of legislative initiatives outlined in Part I. References to efficiency objectives in that policy discourse have largely been directed in three directions: the reduction of explicit costs, the reduction of rent-extraction by product providers, and the removal of 'inefficient' actors (typically dubbed 'underperforming' funds).[206] Like measures designed to promote consumer sovereignty, these sorts of regulatory initiatives can impel the system towards allocative efficiency. On the other hand, however, the administrative machinery required to operationalise the various forms of choice being made available across the sector, and also to comply with the regulatory regimes supporting those choice nodes, is significant. Just how much higher is difficult to estimate with any degree of precision. The Productivity Commission, in particular, has identified that the provision of choice is a driver of unnecessary costs in the system. Indeed in its 2018 report into the efficiency and competitiveness of the superannuation sector, it found that:

> The proliferation of little-used and complex investment options (tens of thousands in 2016) in the choice segment of the market collectively appear to increase fees and reduce net returns (by about one percentage point) … Excess variety (as distinct from 'virtuous' variety) also obscures people's capacity to find the products and funds that deliver good returns in the choice segment.[207]

The Commission recognised that these inefficiencies were compounded by the costs of regulatory compliance and concluded that they had proven resistant to competitive pressure because of mechanisms for price competition between funds were sclerotic and ineffectual.[208] There is however a risk that this important finding is given too much weight. The structural issues identified by the Productivity Commission are important and appropriately targeted regulatory measures to address them are warranted. However, there is a risk that an overly zealous pursuit to minimise costs on the part of regulators could result in market conduct (including fund mergers) that reduce the diversity of choice available to participants. This would reduce the allocative efficiency gains derived from the

206 See, eg, *Assessing Efficiency* (n 39).

207 Ibid 195.

208 Ibid 335–9. Regulation in the financial sector is subject to the legislative requirement that it be subject to formal cost benefit analysis. However, those analyses are often quite superficial: Sue Taylor, Julie-Anne Tarr and Anthony Asher, 'Australia's Flawed Regulatory Impact Statement (RIS) Process' (2016) 44(5) *Australian Business Law Review* 361.

more granular expression of consumer demand facilitated by the opportunities for choice in the system and reduce its robustness to certain types of systemic risk.[209]

3 Consumer Protection

The elevated attention given to the pursuit of systemic efficiency in the narrative surrounding regulatory initiatives in recent years has distracted attention from the resurrection in the superannuation system of a number of the regulatory initiatives inspired and informed by an older regulatory objective: consumer protection. Consumer protection can be defined as 'the protection of buyers of goods and services against low quality or dangerous products and advertisements that deceive people'.[210]

Consumer protection regulation is, for most sectors of the economy, the province of the Australian Competition and Consumer Commission ('ACCC'). However, the financial services sector was specifically carved out from this oversight by the ACCC by the Wallis Committee in 1996. As a result, specific consumer protection measures can be found in both the *ASIC* and *Corporations* Acts. Crucially, however, the notion of consumer protection that animates these provisions is of a peculiar type. The Wallis Inquiry report described it thus:

> Consumer protection refers to the forms of regulation aimed at ensuring that retail consumers have adequate information, are treated fairly and have adequate avenues for redress. There are close links and no clear dividing line between consumer protection and market integrity regulation in retail markets since both use the same regulatory tools, namely disclosure and conduct rules.[211]

ASIC's regulatory regimes directed towards product disclosure (including misrepresentations) and the provision of financial advice respond to this notion of consumer protection.[212]

More traditional 'consumer protection' sensibilities lie behind a number of recent initiatives. The annual performance test applied to MySuper products by APRA was discussed in both Parts 1 and 2 above and the anti-hawking provisions strengthened by the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) were alluded to in Part I.

The PIP is also inspired by a consumer protection sensibility. The PIP was introduced by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth). It enables ASIC to order that 'a specified person must not engage in specified conduct' where it is satisfied that a financial product 'has resulted in, or will or is likely to result in, significant detriment to retail clients'.[213] As section 1023A of the *Corporations Act* clarifies,

209 For a discussion of the nature and potential for systemic risk in the superannuation system, see Donald et al (n 193).

210 *Cambridge Dictionary* (online at 14 March 2024) 'consumer protection'.

211 *Wallis Inquiry* (n 20) 188.

212 See, eg, Pearson (n 77).

213 *Corporations Act* (n 44) s 1023D. For a more complete discussion of the scope of the regime, see Marina Nehme, 'Product Intervention Power: An Extra Layer of Protection to Consumers' (2020) 31(1) *Journal of Banking and Finance Law and Practice* 88; Lucinda O'Brien, Ian Ramsay and Paul Ali, 'Australia's Product Intervention Power and Protection from Consumer Harm: An Evaluation' (2022)

this is to provide ASIC with powers that it can 'use proactively to reduce the risk of significant detriment to retail clients resulting from financial products'. Notably, the Act does not define nor limit the nature of the conduct that ASIC can prohibit, although ASIC has listed some examples of the types of orders it believes it may, depending on the circumstances, make.[214] These include ordering that a product (or class of products) only be offered to specific classes of consumers or in specific circumstances, or ordering the amendment, restriction or banning of marketing, 'choice architecture', promotional or disclosure material relating to a product, or even banning issuance of the product altogether.[215]

The PIP is a weak form of consumer protection. Notwithstanding the way section 1023D is drafted, the PIP is in practice a reactive regulatory device. Unlike the regulation applied to MySuper products,[216] or indeed unit trusts prior to 1991,[217] for instance, it does not require AFS licensees to submit product specifications or documentation to ASIC for authority to distribute the product. ASIC may become aware of a product's potential to cause significant detriment prior to any sale of the product occurring, and could act in anticipation of such a sale pursuant to section 1023D, but there is no process that would bring that about as a matter of course. That said, the anticipatory potential of PIP marks a departure from the essentially remedial and punitive modes of regulation available to ASIC and its predecessors over the past 30 years.

The superannuation system rests, then, on a variegated normative foundation. There are elements of the regulatory regime that are overtly paternalistic, and there are parts that reflect a concern with efficiency and parts that reflect a concern with consumer protection. Participant (largely, but not exclusively, member) choice in its many manifestations is a key modality by which these objectives are pursued. However, recognising the way in which various choices are supported and regulated is crucial to understanding the extent to which each of these competing objectives are influential in the system in a practical sense.

V CONCLUDING COMMENTS

This article has argued that the regulatory regime that actively constitutes the superannuation system, shaping and regulating its structure and the conduct of key participants, manifests a contested normativity.

29(1) *Competition and Consumer Law Journal* 32. For a comparative analysis, see Christopher Chiam, 'A Comparative Analysis of Product Intervention Powers in Australia and the United Kingdom' (2021) 38(4) *Company and Securities Law Journal* 220.

214 *ASIC RG 272* (n 44).

215 Ibid 10 [272.26].

216 *SIS Act* (n 15) pt 2C div 3.

217 Prospectuses were generally required to be registered under the *Companies Code* and its predecessors, the uniform *Companies Acts* of the states. In 1991, the *Corporations Law* abolished the requirement for the then ASC to pre-vet prospectuses before they could be registered: R P Austin and I M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 1453 [22.220].

Requiring that participants in the workforce contribute more than 10% of their salaries and wages to the superannuation system represents a major imposition on the individual autonomy of those affected. The unpalatability of that imposition is however offset somewhat by the way that opportunities to exercise individual agency are embedded into the structure of the system. Individuals can exercise Choice of Fund and Member Investment Choice. Alternatively, they can set up their own, bespoke, SMSF. They can tailor the insurance arrangements also, and they can exercise some discretion over how they receive benefits upon retirement. They can also choose not to exercise some or all of these choices and instead permit the default arrangements to govern their contributions and accumulating balances. The fact that they are aware that they have these choices arguably contributes (amongst other factors) to their perception of the legitimacy of the system.

At the same time, as the Productivity Commission noted, the provision of the modality of choice is expensive. The cost of building and maintaining the infrastructure that permits the various types of choice to be given effect to is considerable. The cost of providing information and education to support the exercise of choice is also considerable. And the cost to the economies of scale of permitting heterogeneous arrangements in the form of differentiated products and services are considerable. All of these costs have efficiency implications. That said, the provision of various types of choice can narrow the mismatch between the heterogenous needs and objectives of individuals and the products available to them, addressing a hidden inefficiency at a granular, local level and therefore offsetting, at least to some extent, the explicit cost economies that can be derived from homogenised products. Providing opportunities for individual choice in the superannuation system matters, then, for both legitimacy and economic efficiency.

The analysis in this article suggests that these normative considerations are embedded in the regulatory scheme in ways that are deeper and more conditional than the political rhetoric surrounding recent regulatory reforms might suggest. It also argues that the bricolage of rules assembled over the past three decades of repeated reforms lacks a coherent and consistent normativity as reforms, particularly over the past decade, have attempted to reform specific parts of the regime without regard for the impact of those changes on the normativity of the regime as a whole. Few commentators, and even fewer industry participants, would welcome the wholesale reform to the regulatory regime that would almost certainly be required to resolve this issue comprehensively, but it is to be hoped that the authors of future reforms might have greater regard for the impact of any changes on the overall normative coherence of the regime.