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Superannuation trustee obligations - the scope of the covenant under s 52(12) of the *Superannuation Industry (Supervision) Act 1993* (Cth) to "promote" the financial interests of MySuper and choice product beneficiaries

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Superannuation trustee obligations - the scope of the covenant under s 52(12) of the *Superannuation Industry (Supervision) Act 1993* (Cth) to "promote" the financial interests of MySuper and choice product beneficiaries

Dr Allison Silink*

The scope of the statutory obligation upon trustees of a registrable superannuation entity whose beneficiaries hold a MySuper product or choice product under s 52(12) of the Superannuation Industry (Supervision) Act 1993 (Cth) to "promote" the financial interests of those beneficiaries is underexplored. There are questions as to the extent of any overlap between s 52(12) and the more well-known duty to act in the best financial interests of members under s 52(2)(c), the proper construction of which is controversial and has long occupied the attention of practitioners, scholars, and courts. However, this association may serve to unnecessarily obscure, rather than illuminate, the scope of the duty under s 52(12). The s 52(12) covenant needs to be seen as an independent obligation with a different scope and history; enacted with a specific purpose twenty years after the best interests duty. This article argues that s 52(12) is a positive duty upon trustees and an available and ready tool for action against trustees managing underperforming MySuper and choice products for breach of a positive duty. Section 52(12) has not been considered by the courts to date, but it ought to be firmly on the radar for superannuation trustees.

Introduction

It is now a decade since the Government introduced the so-called "MySuper" superannuation product. It followed the recommendations of the *Super System Review,*[1] which identified that that a significant proportion of working Australians simply lack the financial literacy or engagement to make decisions with respect to their superannuation.[2] The presumption that members 'have the tools at their disposal, and the necessary regulatory protections in the market place, to enable them to make optimal decisions about their investment strategies, about when to enter and exit the market, and about what to do with their super on reaching retirement', and even the requisite interest in the process, was not the reality. The research conducted as to the level of financial literacy among working Australians was sobering. The

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[1] On 29 May 2009 then Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry, announced the Super System Review to inquire into the governance, efficiency, structure, and operation of Australia's superannuation. That review was led by Mr Jeremy Cooper and tabled its final report on 30 June 2010. See Commonwealth, *Super System Review* (Final Report, 30 June 2010).

[2] Ibid.

report found that 46 percent of 15 to 74-year-olds would struggle to understand documentation such as job applications, maps, and payroll forms; 70 per cent were only able to progress to level 2 in a series of problem-solving exercises where level 3 was regarded 'as the minimum required for individuals to meet the complex demands of everyday life and work in the emerging knowledge-based economy.'[3]

The Review concluded that a form of 'libertarian paternalism' was warranted in relation to the management of the retirement balances of many working Australians.[4] This was the idea that 'outcomes experienced by inert or disengaged consumers should have inbuilt settings that most closely suit those consumers' objective needs, as assessed by the expert providers of the product or service in question.'[5] A new default superannuation product into which most Australians would have their funds invested would be established known as MySuper; designedly simple and easy to understand, and managed by means of investment choices made on their behalf by superannuation trustees.

This responsibility for the investment of MySuper funds came with an "additional,"[6] "enhanced",[7] obligation upon those trustees of registrable superannuation entities offering this newly minted MySuper product. At the same time as MySuper was introduced in 2012, a specific obligation upon these trustees to "promote" the financial interests of relevant beneficiaries was enacted under s 29VN of the *Superannuation Industry (Supervision) Act 1993* ('*SIS Act*').[8] It provided that each trustee of a regulated superannuation fund which included a MySuper product, must promote the financial interests of the beneficiaries of the fund who hold the MySuper product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes). In 2019, the Division in which s 29VN was located was repealed, but the obligation was re-enacted by the same legislation in substantially identical form as another of the s 52 covenants, in s 52(12).[9] This was in identical terms but for the extension of the duty to the holders of Choice products.

The obligation to promote the financial interests of beneficiaries with funds in MySuper and Choice products has never been tested in the courts, although one of the case studies discussed in the final report of the *Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry* ('Hayne Report'),[10] considered a possible breach of s 29VN(a). Despite a decade of operation, the scope of this obligation upon trustees of MySuper and Choice products remains underexplored and uncertain. Yet with approximately $885 billion now held on behalf of beneficiaries in MySuper products,[11] and

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[3] Ibid.
[4] Ibid, 10.
[5] Ibid.
[6] Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2017 (Cth); Commonwealth, Hansard, Senate, 14 September 2017, 7310-15 (James McGrath).
[7] Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth) 13 [1.14].
[8] *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*').
[9] *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Act 2019* (Cth).
[10] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 4 February 2019).
[11] As at 30 June 2022: See 'Super Statistics', *Association of Superannuation Funds of Australia* (Web Page, August 2022) <https://www.superannuation.asn.au/resources/superannuation-statistics#:~:text=Superannuation%20assets%20totalled%20%243.3%20trillion,of%20the%20June%202022%20quarter>.

approximately $859 billion in Choice products,[12] - representing over half the $3.3 trillion now invested in superannuation by Australians - and increasing regulatory attention to their performance, the obligations upon trustees in respect of returns in these funds are in the spotlight.

This article examines the history, amendment and scope of the obligation under s 52(12). It argues that, despite the lack of judicial consideration, it is not uncertain in scope and forms a positive obligation upon trustees to act in ways that will support or further financial interests, in particular returns, to these beneficiaries. One of the issues also considered is the extent of overlap between s 52(12) and the "best interests duty" under s 52(2)(c). As a practical matter, the persistent lack of clarity as to the scope of the best interests duty under s 52(2)(c) may mean that even if there is some overlap between them, s 52(12) is a more direct path by which to enforce this obligation. Section 52(12) is an available and ready tool for regulatory enforcement action against trustees managing underperforming MySuper and Choice products, and ought to be firmly on the radar for these trustees.

This article is in three parts. Part A considers the principles of statutory interpretation that apply to determining the meaning of s 52(12). Part B traces the statutory development of the introduction of the duty to promote financial interests and its subsequent amendments. It also examines a case study of the application of the duty to promote financial interests of MySuper members. Part C considers the scope of s 52(2)(c) and the question of any overlap between the two sections, and the implications of any such overlap.

PART A: STATUTORY INTERPRETATION PRINCIPLES

The starting point for ascertaining the meaning of a statutory provision is the text of the statute whilst, at the same time, having regard to its *context* and *purpose*.[13] It is now uncontroversial that context should be taken into account at this first stage, and not at some later stage, and it should be regarded in its widest sense.[14] Recently in *Hill v Zuda Pty Ltd*[15] the High Court had recourse to the Explanatory Statement in construing reg 6.17A(1) of the SIS Act Regulations.

Pursuant to s 15AA of the *Acts Interpretation Act 1901* (Cth),[16] in interpreting a provision of an Act, the interpretation that would best achieve the *purpose* or object of the Act (whether or not that purpose or object is expressly stated in the Act), is to be preferred to each other interpretation. Accordingly, determining the purpose or object of the provisions is central to the process of interpretation.[17] The purpose of a statute is not always singular or straightforward, as Gleeson CJ observed in *Carr v Western Australia*.[18] However, where such a purpose is evident, its guiding role is clear. It is submitted here that one of the instances

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[12] As at 30 June 2020: See Australian Prudential Regulation Authority, 'APRA shines light on choice super sector' (Media Release, 28 October 2021) <https://www.apra.gov.au/news-and-publications/apra-shines-light-on-choice-super-sector#:~:text=The%20Australian%20Prudential%20Regulation%20Authority,Product%20Heatmap%20in%20late%202021>.

[13] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ) ('*SZTAL*').

[14] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

[15] [2022] HCA 21 at [31].

[16] *Acts Interpretation Act 1901* (Cth) s 15AA.

[17] See, eg, *Saraswati v The Queen* (1991) 172 CLR 1, 21 (McHugh J) ('*Saraswati'*).

[18] (2007) 232 CLR 138, 143 [5] (Gleeson CJ).

where that purpose is likely to more evident is in an amending act where the legislature has chosen to amend an act in specific way, to a specific end. As will be discussed below, this is arguably the case with the insertion of the duty to promote the interests of MySuper and choice product beneficiaries.

These principles do not render redundant consideration of the ordinary meaning of the text. In *SZTAL v Minister for Immigration and Border Protection,*[19] Kiefel CJ, Nettle and Gordon JJ observed:

> This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[20]

The practical application of these principles drawn together requires the ordinary meaning of the words to be determined and, at the same time, tested against the contextual background and statutory purpose. That testing might confirm the ordinary meaning or modify it, but an identifiable purpose of a provision is the lodestar in that process of determining the proper meaning to give to the words.

The Ordinary Meaning of "Promote"

The Oxford Dictionary of English Online provides three meanings of "promote" the most relevant being a verb to:

> support or actively encourage (a cause, venture, etc); further the progress of;

So understood, the concept of "promote" is not passive. It requires positive steps taken towards achieving desired outcomes. It is not of itself a requirement of attainment. It does not establish an endpoint or threshold to be satisfied. However, it requires action taken in support to further that aim.

The following part considers the context and purpose of the provision, and the manner in which it is consistent with this ordinary English meaning. Accordingly, it will be argued that the better construction of the statutory duty under s 52(12), in light of that context and purpose is that it bears the ordinary meaning of the word "promote"; so as to require some steps or action taken by trustees towards furthering the development or progress of those financial interests or outcomes.

PART B: LEGISLATIVE HISTORY OF S 52(12) FROM ITS INTRODUCTION AS S 29VN AND ASSOCIATED REPORTING OBLIGATIONS

Stronger Super Background

The Panel of the Super System Review proposed a new framework for the Australian superannuation system. The result was neither "a centrally-determined 'boilerplate' option for everybody",[21] nor a "completely laissez-faire system of unimpeded choices where

[19] *SZTAL* (n 13).
[20] Ibid 368 [14] (Kiefel CJ, Nettle and Gordon JJ).
[21] Commonwealth, *Super System Review* (Final Report, 30 June 2010) 9.

providers can be indifferent to the selection decisions made (or not made) by individuals."[22] In the view of the Panel, it was important that there was a default setting "that reflects a positive judgment about the most appropriate outcome for the consumer (member) in the eyes of the product provider (being the trustee in the case of a superannuation fund)."[23] This was *MySuper.*

Mysuper aimed to provide a simple, cost-effective product with a single, diversified portfolio of investments for the majority of Australian workers (roughly 80 per cent of members) who are in the default option in their current fund. The other key option was described as a '*Choice*' product. The difference was that Choice products were not the products into which an employee would be placed by default. The member would have to actively choose that product. However, as the Panel noted:

> … even within choice, there are graduated degrees of member responsibility and engagement. While the Panel believes that the trustee should be protected when a member chooses a particular investment option that causes that member to suffer loss, the trustee also has a responsibility to apply a greater level of scrutiny to the sorts of products that are offered to super fund members in the master trusts, platforms or wrap environment. It should not be possible for trustees merely to preside over a menu of investment options principally selected by 'dealer groups' or other external parties.[24]

Accordingly, for Choice products, as well as MySuper, the Panel recommended trustees should be under a refined duty with respect to due diligence and investment for those members.

The Introduction of s 29VN

In 2012, four tranches of legislation were introduced to reflect the Government's response to the Cooper Review, the first enacting the implementation of MySuper, and by the second tranche, the *Trustee Obligations and Prudential Standards Act 2012* (Cth), amongst other things, enacting the new obligation upon trustees to promote the financial interests of its members.

A new Division 6 was inserted into Part 2C of the *SIS Act*,[25] which contained a new section 29VN, described as "additional obligations" upon trustees of those products. It provided for several new obligations, subsection (a) being the duty that is now found in s 52(12). That was in the following form:

> Division 6—Trustee obligations relating to MySuper
>
> **29VN Additional obligations of a trustee in relation to a MySuper product**
>
> Each trustee of a regulated superannuation fund that includes a MySuper product must:

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[22] Ibid.
[23] Ibid.
[24] Ibid 11.
[25] *SIS Act* (n 8).

> (a) promote the financial interests of the beneficiaries of the fund who hold the MySuper product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes); …

It is also noteworthy that this "heightened" obligation to promote the financial interests with respect to MySuper beneficiaries was imposed at a time when the covenant to act in the best interests of beneficiaries under s 52(2)(c) had been part of the trustee's obligations for 20 years. This lends support to the appreciation of s 29VN(a) as a new and "additional" duty with a different scope to that of s 52(2)(c) already in existence. This is discussed further below.

In addition to this new duty, the section under subsection (b) required trustees to make a determination of whether members who hold the Mysuper or choice product were *disadvantaged* in comparison to beneficiaries of other funds holding Mysuper or choice products because their financial interests were affected by certain matters;[26] a requirement that such determination to be included in the investment strategy under subsection (c); and, pursuant to subsection (d), a requirement to include a 10-year return target and risk level in the investment strategy.

Second Reading Speech and Explanatory Memorandum in relation to s 29VN

In the Second Reading Speech, Senator James McGrath described the nature of MySuper as a 'simple standardised "no frills" superannuation product with regulated fees', and noted that 'typically MySuper members were younger and not proactively engaging with their superannuation.'[27] He stated that, '[f]or this reason trustees of MySuper products are subject to additional obligations, including the need to ensure that they promote the financial interests of members.'[28] The detailed explanation of the provisions in the Explanatory Memorandum was that these "new enhanced trustee obligations",[29] were duties that a trustee will owe to members of a MySuper product 'as these members rely on the trustee to make judgments about managing their superannuation.'[30]

The Explanatory Memorandum provided further:

> *Financial interests*
>
> 1.15 A trustee must promote the financial interests of members of a MySuper product. In particular, the most significant component of the financial interests of beneficiaries of the fund that hold the MySuper product will be returns to those beneficiaries (after the deduction of fees, costs and taxes). Returns to beneficiaries (after the deduction of fees, costs and taxes) are those amounts placed into member accounts through an increase in their unit price or credited to their account, which are a result of investing the member's balance.
>
> 1.16 This requirement heightens the obligations trustees owe to members of a MySuper product reflecting that members of a MySuper product have effectively delegated the responsibility for making decisions regarding their superannuation

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[26] concerning the numbers of beneficiaries in the fund or that product, or to do with the sufficiency of assets or pooling of assets.
[27] Commonwealth, Hansard, Senate, 14 September 2017, 7311 (James McGrath).
[28] Ibid.
[29] Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth) 13 [1.14].
[30] Ibid 12 [1.13].

> to the trustee. This requires a trustee to make informed judgments regarding the MySuper product, for example in relation to the composition of assets in the investment strategy, so that it secures the best financial outcome for these beneficiaries.
>
> 1.17 While this will lift the standard required of trustees, it is not a requirement that trustees generate certain level of returns. Sustained low returns may indicate a failure to promote the financial interests of beneficiaries, but low returns, on their own, will not necessarily involve a breach of this obligation. The obligation does not imply that members of a MySuper product should be given preference over other members of the fund, for example, by the trustee in allocating investment returns, or in any other way.

As discussed at the end of this Part, these extrinsic materials are relevant to consider in providing relevant context and inform the purpose of the obligation. They support a construction of the words of the obligation that accords with their ordinary English meaning, and as a positive obligation.

2019 Reforms – s 29VN Repealed and Re-enacted in New ss 52(9)-(13)

In 2019, the *SIS Act* underwent further substantive reforms affecting s 29VN. Under the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019* (Cth), the whole of Division 6 of Part 2C, in which s 29VN was located, was repealed. In its place, a new suite of covenants was added under s 52, forming subsections (9)-(13). These new covenants were formed through the separation of the component parts of the former s 29VN into discrete covenants.

The Core Obligation to Promote Financial Interests of Beneficiaries

The core obligation to promote the financial interests of beneficiaries was moved from s 29VN(a) into a new s 52(12), somewhat oddly positioned in the middle of the assessment and reporting requirements on the performance of this core obligation. Nevertheless, this repositioning in the *SIS Act* changed the obligation from being a "mere" statutory obligation into a covenant deemed to be included in the governing rules of relevant funds. This core obligation now reads:

> *Covenants relating to regulated superannuation funds—promoting financial interests of beneficiaries*
>
> (12) If the entity is a regulated superannuation fund (other than a regulated superannuation fund with fewer than 5 members), the covenants referred to in subsection (1) include a covenant by each trustee of the entity *to promote the financial interests of the beneficiaries* of the entity who hold a MySuper product or a choice product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes).

What is the effect of this repeal of s 29VN and re-enactment? Section 52(12) is in identical terms to s 29VN(1)(a) but for the fact that it now imposes the obligation upon trustees of entities offering *Choice* products, as well as MySuper products. This had been originally recommended in the Super System Review, but apparently not enacted into s 29VN. As a matter of statutory interpretation, legislation that repeals and re-enacts a provision with

enlarged scope has been held to amount to an amendment rather than repeal of the section.[31] In *Beaumont v Yeomans*,[32] Jordan CJ observed:

> …where a provision of an Act is repealed and re-enacted in a form which enlarges its scope, this has been construed as amounting in substance to an amendment, because the new provision has been regarded as intended to be retrospective so far as it is mere repetition, and prospective so far as it is new: *Ex parte Todd; In Re Ashcroft* (1887) 19 QBD 186.

The Explanatory Memoranda to both the 2012 introduction of s 29VN and the 2019 amendments support a construction of a common purpose to the duty to promote financial interests, consistent with the interpretation that s 52(12) was not a new duty. The 2019 Explanatory Memorandum notes:

> 2.5 The SIS Act requires superannuation trustees to promote the financial interests of their MySuper members as part of the enhanced trustee obligations in relation to a MySuper product.

This clearly implies that at the time of the amendments, the *SIS Act already* required superannuation trustees to promote the financial interests of their MySuper members. This supports the construction that s 52(12) is a re-enactment of the same obligation with the amendment to apply to choice products.[33] The important difference, discussed below, is not in its content but the consequences of repositioning the obligation as a covenant in the governing rules of a fund.

Disadvantage Under the "Scale" Test Changed to whether Financial Interests being Promoted through an "Outcomes Assessment".

The more significant reforms under the 2019 amendments were to the manner of assessment and reporting of performance of this core obligation.

Under former s 29VN(b), the trustee was obliged to make an assessment of whether any beneficiaries of the fund who hold the MySuper product were *disadvantaged* under a so-called "scale test"; to determine whether beneficiaries holding a MySuper product in their RSE are disadvantaged when compared to the experience of beneficiaries holding MySuper products in other RSEs because the trustee's MySuper product or RSE lacks sufficient scale taking into account the matters set out in s 29VN(b)(i)-(iv). Under the amendments introduced by the new ss 52(9)-(11), this obligation was replaced with an obligation to make an assessment of whether the financial interests of the beneficiaries were being *promoted* in accordance with the core obligation now located in s 52(12), to what is now known as the "outcomes" test that applies to both MySuper *and* to Choice products.

The Covenants in relation to the Outcomes Assessment

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[31] *Holcombe v Coulton* (1990) 20 NSWLR 138 ('*Holcombe*').

[32] (1934) 34 SR (NSW) 562, 569-70, cited in *Mathieson v Burton* (1971) 124 CLR 1, 20 (Gibbs J), both cited in *Commonwealth v South East Qld Aboriginal Corp for Legal Services* (2005) 219 ALR 180, 190-91 [55]-[56] (Muir J).

[33] *Holcombe* (n 31).

Pursuant to s 52(9)(a) these new reporting covenants now require each trustee of a relevant entity[34] to determine, in writing, on an annual basis, for each MySuper product and choice product offered by the entity, whether the financial interests of the beneficiaries of the entity who hold the product are being *promoted* by the trustee, having regard to certain criteria and to make that determination publicly available on its website within 28 days of being made and leave it there until the next determination.

The covenant under s 52(12) is not expressed to be in relation to promoting "outcomes" *per se*: it is a duty to "promote" financial interests, *in particular* returns to those beneficiaries after the deduction of fees, costs and taxes. However in this context, "returns" can mean little other than "outcomes" for beneficiaries. And with the introduction of the *annual outcomes assessment* required under s 52(9), performance of the duty to promote financial interests is now directly linked with outcomes. The Explanatory Memorandum states:

> 2.12 Accordingly, the amendments will replace the scale test with *a new outcomes test*, which will require trustees to assess whether their MySuper product is optimising outcomes to members by effectively promoting the financial interests of their beneficiaries. (emphasis added)[35]

This apparently squares "promoting financial interests" with the action taken towards "optimising outcomes." It should be noted that this is not inconsistent with the Explanatory Memorandum to the introduction of s 29VN(a): as discussed above, from its enactment, the duty to promote has required active judgment and decisions by trustees of these products to promote returns in particular. In this way, whilst the duty nor the reporting requires evidence of achieving a particular outcome, much less a "best" outcome, outcomes are directly linked to both the content of the duty (to work to achieving them) and evidence of the discharge of the obligation to promote the financial interests of beneficiaries.[36]

Subsection 52(9)(aa) requires *each trustee* to make a determination about *each trustee,* not simply about *itself*. In other words, if there is more than one trustee, it appears that each trustee must make a determination as to whether it and each other trustee of the entity is promoting the financial interests of the beneficiaries of the fund, as assessed against benchmarks specified in regulations made for the purposes of this paragraph.

The Requirement to have regard to Product Comparison and Benchmarks for MySuper and Choice Products under subparagraphs (i) and (ii) of s 52(9)(a)

MySuper and Choice Product Comparison and Benchmarking

For the purpose of making the determination under s 52(9)(a) as to whether the financial interests of the beneficiaries of the entity who hold a *MySuper* product are being promoted by the trustee, the trustee must have regard to certain matters. For both MySuper and choice

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[34] At the time of introduction, it applied to an entity that is a regulated superannuation fund (other than a regulated superannuation fund with fewer than 5 members). In its current form, as at the date of writing, s 52(9) now refers to a regulated superannuation fund with no more than 6 members.

[35] Explanatory Memorandum, Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2017 (Cth) 15 [2.12].

[36] The regulator, APRA, publishes guidance referring to it directly as an "outcomes assessment". See, eg, 'Outcomes assessment under s. 52(9) of the Superannuation Industry (Supervision) Act 1993 - frequently asked questions', *Australian Prudential Regulation Authority* (Web Page, 24 February 2022) <https://www.apra.gov.au/outcomes-assessment-under-s-529-of-superannuation-industry-supervision-act-1993-frequently-asked>.

products, the trustee must *compare* their product with other like products offered by other regulated superannuation funds and compare their product with any benchmarks specified in the regulations.

In making that comparison with other products, the trustee must take into account the matters in s 52(10) (in respect of MySuper products) which include (a) the fees and costs that affect the return to the beneficiaries holding the MySuper products; (b) the return for the MySuper products (after the deduction of fees, costs and taxes); (c) the level of investment risk for the MySuper products; and (d)any other matter set out in the prudential standards. The trustee must also make a comparison of the MySuper product with any other benchmarks specified in regulations.[37] These requirements are mirrored in respect of choice products where the trustee must take into account identical factors mentioned in subsection (10A) and also make a comparison of the choice product with any other benchmarks specified in regulations.[38]

Other matters to which regard must be had under subparagraph (iii) of s 52(9)(a) Outcomes Assessment – s 52(11)

In addition to the product comparisons and benchmarks for MySuper and choice products provided for in subsections 52(9)(a)(i)-(ii), each trustee must have regard to the factors mentioned in subsection 52(11). These are each factors which speak to matters about which a *decision* that a trustee might make could bear on the manner or extent to which the financial interests of beneficiaries are promoted. They include (a) whether the options, benefits and facilities offered under the product are appropriate to those beneficiaries; (b) whether the investment strategy for the product, including the level of investment risk and the return target, is appropriate to those beneficiaries; (c) whether the insurance strategy for the product is appropriate to those beneficiaries; (d) whether any insurance fees charged in relation to the product inappropriately erode the retirement income of those beneficiaries; and (e) any other relevant matters, including any matters set out in the prudential standards.

Section 52(9)(a) was further amended in June 2021 to insert an additional subparagraph (iv)[39] which now requires a trustee to also take into account the latest performance assessment made by the regulator under s 60C(2).[40]

S 52(13): Covenant to include assessment and other matters in investment strategy

The obligations that had formed subsections 29VN(c) and (d), to include in the trustee's investment strategy the details of the determination under s 29VN(b), and to include investment return targets for a ten-year period and level of risk, were replaced with a new s 52(13) in substantially identical form.[41] This obligation applies only in relation to MySuper products.

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[37] Pursuant to Regulation 4.01A(2) of the *Superannuation Industry (Supervisions) Regulations* 1994 (Cth), that benchmark is the requirement in subsection 60D(1) of the Act having been met for the product in relation to the most recently ended financial year.

[38] Pursuant to Regulation 4.01A(4) of the *Superannuation Industry (Supervisions) Regulations* 1994 (Cth), that benchmark is the requirement in subsection 60D(1) of the Act having been met for the product in relation to the most recently ended financial year.

[39] It provides: "(iv) the latest determination (if any) made by APRA under subsection 60C(2) for the product."

[40] This was included in the insertion of a new Part 6A Annual performance assessments into the Act pursuant to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Cth) (No. 46, 2021) - Schedule 2, s 9. Section 60C(2) provides for the regulator to make annual performance assessments.

[41] See *SIS Act* (n 8) s 52(13): *Covenants relating to regulated superannuation funds—MySuper products*

S 52(14): new covenant in 2021 in relation to failed annual performance assessments

In 2021, a new subparagraph to 52(14) was added that provides further new covenants by each trustee to comply with the obligations under 60E and 60F, notifying beneficiaries about failed annual performance assessments conducted by the regulator, APRA.[42]

Inconsistent governing rules invalid

Finally, and importantly, under the 2019 amendments, a new s 55D was inserted that provides that a trust's governing rules are void to the extent that they are inconsistent with the covenants under ss 52(9)-(13).

Analysis of legislative history and the interpretation of s 52(12)

There are at least three aspects of this legislative history that are arguably important to the proper construction of this covenant to promote financial interests.

(i) An "additional" duty implies it adds to the scope of existing duties

First, both at the time s 29VN(a) was introduced in 2012, and at the time it was relocated into s 52(12) in 2019, it was described in the extrinsic materials as an "additional",[43] "enhanced",[44] "heightened"[45] obligation. It is important to see the introduction of this duty against the backdrop of the then existing duty under s 52(2)(c) that had been enacted nearly twenty years prior in 1993, and the express reference to this obligation operating in an additional (therefore *cumulative*) way to add to the other duties, including s 52(2)(c). It is clear that it was introduced and then retained to perform a different role, and that it was an obligation that was requiring *more* of trustees by way of an "enhanced" or "heightened" duty with respect to these products only. This is particularly relevant to the suggestion discussed in the next part that s 52(2)(c) already covers the field rendering s 52(12) largely or even wholly, redundant.

(ii) A positive duty

Secondly, the obligation appears clearly to be a *positive duty to act* to support or actively encourage the financial interests of beneficiaries, in particular their returns, without being prescriptive as to the precise steps required of trustees. Its purpose was as described in the Super System Review: in the view of the Panel, it was important that there was a default setting 'that reflects a positive judgment about the most appropriate outcome for the consumer (member) in the eyes of the product provider (being the trustee in the case of a superannuation fund).'[46] There is specific discussion of the requirement for the trustee "to make informed judgments",[47] 'for example in relation to the composition of assets in the

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[42] See *YFYS Act* sch 2 s 8.
[43] See *Trustee Obligations and Prudential Standards Act 2012* which introduced a new Division 6 into Part 2C of the *SIS Act* (n 8) that contained a new section 29VN headed, 'Additional obligations of a trustee in relation to a MySuper product'.
[44] Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth) 13 [1.14].
[45] Ibid 13 [1.16].
[46] Commonwealth, *Super System Review* (Final Report, 30 June 2010) 9.
[47] Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth) 13 [1.16].

investment strategy so that it secures the best financial outcome.'[48] As discussed above, in the Second Reading Speech, Senator James McGrath stated that, '… trustees of MySuper products are subject to *additional obligations*, including the need to ensure that they promote the financial interests of members.'[49] These articulations of the purpose of the provision as found in extrinsic materials serve to confirm rather than alter the ordinary English meaning of the words of s 52(12). In other words, it is a duty to support or actively encourage or further the progress of the financial interests of beneficiaries.

(iii) "Returns" a subset of "financial interests"

Thirdly, it is also noteworthy that the form of the duty is cast in terms that indicate that returns may not be the only form of financial interest of a member. Returns are afforded focus by the words "*in particular*", which indicates that returns are an aspect of a larger picture of financial interests served by the trustee, although required to be given attention. In other words, "financial interests" cannot by synonymous with "returns," if "returns after deduction of costs, fees and taxes" are a "particular" aspect of the beneficiaries' financial interests.

"Financial interests" referable to and limited by terms of trust

That said, it is argued here that the scope of financial interests capable of being served by the trustee must be limited to those with respect to which the trustee has powers and duties under the trust. Pursuant to s 52(1), the covenants under s 52 of the *SIS Act* work so that if the governing rules of a registrable superannuation entity do not contain covenants to the effect of the covenants set out in this section, those governing rules are taken to contain covenants to that effect. "Governing rules" in relation to a fund, scheme or trust, are defined in the Act to mean: (a) any rules contained in a trust instrument, other document or legislation, or combination of them; or (b) any unwritten rules; *governing the establishment or operation of the fund, scheme or trust*. Therefore, any covenant forming part of the governing rules of the trust can only be referable to the exercise of the duties and powers of a trustee under the trust. It would be an arguably absurd construction of s 52(12) to interpret it as requiring the trustee to go beyond its powers under that trust to further their financial interests in ways beyond its power. Section 52(12) imposes obligations; it does not give trustee concomitant powers.

There are numerous judicial references to the fact that given the nature of a superannuation trust, the interests of the beneficiaries are generally their financial interests, and that the purpose of the trust by which the trustee has its powers and duties defines what the best interests of the beneficiaries is: as observed by Aspin J in *Re Merchant Navy Ratings Pension Fund v Stena Line Ltd*,[50] "… the purpose of the trust defines what the best interests are and … they are opposite sides of the same coin."[51] Accordingly, a construction of s 52(12) that requires a trustee to promote the financial interests of beneficiaries, in particular returns after costs, fees and taxes, is likely to be construed as requiring a trustee, acting within its powers, to seek to further or progress or support the range of financial interests of beneficiaries under the terms of the trust, but with particular focus to their returns.

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[48] Ibid.
[49] Commonwealth, Hansard, Senate, 14 September 2017, 7311 (James McGrath).
[50] [2015] EWHC 448 (Ch).
[51] Ibid [229] (Aspin J).

It is noteworthy that in the Explanatory Memorandum to the enactment of s 29VN(a), it was expressly stated that low returns would not of themselves constitute a breach. The corollary would seem to be that high returns alone cannot be required to prove compliance. The Explanatory Memorandum provided:

> 1.17 While this will lift the standard required of trustees, *it is not a requirement that trustees generate certain level of returns. Sustained low returns may indicate a failure to promote the financial interests of beneficiaries, but low returns, on their own, will not necessarily involve a breach of this obligation.* The obligation does not imply that members of a MySuper product should be given preference over other members of the fund, for example, by the trustee in allocating investment returns, or in any other way.[52]

However, it appears evident that the shift from a *scale test* at the time that the duty to promote financial interests of MySuper beneficiaries was introduced in 2012, to an *outcomes assessment* required following the 2019 amendments, coupled with the focus of the new performance assessments pursuant to s 60C-D since 2021, indicates that low returns are of increasing significance in the determination of whether the obligation has been met. Whether it can be said that there is now some tension between that original articulation of the scope of the duty and its present scope with respect to whether and when low returns will provide evidence of breach, is unclear.

Consequences of Breach

Pursuant to s 54B, there are civil and criminal consequences for contravening the covenants in ss 52 and 52A. This is one of the significant consequences of the relocation of the duty from a stand-alone duty under s 29VN, which did not attract civil or criminal consequences, to its present location as a covenant, where it does. Pursuant to s 54B(3) contraventions of the s 52 and 52A covenants are civil penalty provisions as defined by s 193, and pt 21 therefore provides for civil and criminal consequences of contravening, or being involved in a contravention of, those subsections. Furthermore, a contravention of those covenants may result in an action to recover loss or damage under s 55.

The main distinguishing feature between a breach of a covenant under s 52(12) as opposed to s 52(2)(c), is that a breach of the latter attracts the operation of the presumption under s 220A, which creates a presumption of breach of the statutory duty under s 52(2)(c) to act in the best financial interests of members unless a trustee "adduces evidence to the contrary."

Hayne Royal Commission – Case Study of AMP and Breach of s 29VN

There has been no judicial consideration of the operation of the duty to promote financial interests. However, in the Hayne Report, one of the case studies in relation to the conduct of AMP directly addressed the duty and prospect of breach of the duty under s 29VN. The Hayne Report described circumstances in a case study involving funds of which AMP Superannuation Limited was trustee.[53]

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[52] Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth) 13 [1.17].

[53] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 4 February 2019) 103-130.

Poor performance in the AMP trustees' MySuper products in September 2016 was raised then with the AMP trustee boards. There was a 'gap' in reporting of investment performance (in connection with the negative net returns on cash investments), which was identified by AMP Investment Regulatory Governance in April 2017 in respect of reporting of investment performance of the AMP trustees' MySuper products. However, no-one reported the results of the April 2017 memorandum to the AMP trustee boards. There was no evidence that any changes were made to investment performance reporting to the AMP trustee boards thereafter. MySuper scale assessments performed in November 2016 and November 2017 respectively identified that the AMP trustees' generic MySuper products were 'below median' or in the 'bottom quartile' when fees were considered.

Counsel Assisting submitted that it was open to the Commissioner to find that the relevant trustees may each have breached the duty (then under s 29VN(a)) to 'promote' the financial interests of their MySuper members. The Commissioner found no evidence that the boards of the trustees had ever advocated for the financial interests of MySuper members, and no evidence that any steps were taken to address the effect of fees on net performance at the time that its MySuper products were 'below median' or in the bottom quartile, or following the identification of the negative net returns on cash investments, or after notification of the gap in reporting. The only action came after APRA's contact. The Commissioner found that AMP's submission that it had advocated for members' interests "reduces to meaningless the obligation imposed upon the AMP trustees by section 29VN(a) to promote the financial interests of the MySuper members."[54] Commissioner Hayne concluded that since at least the third MySuper scale determination performed in 2016, ASL and NM may not have complied with section 29VN(a).[55]

At the time of the Royal Commission and the discussion of the case study referred to in Part D, the Commissioner noted that pursuant to s 29VP, a contravention of s 29VN was not an offence, although any person suffering loss or damage as a result of the contravention could recover that loss from the contravener and any person involved in it pursuant to s 29VP(3).

Although it is not a judicial finding, the Commissioner's conclusion and interpretation of the scope of the duty lends support to a construction of the duty to promote as a positive one, that in this case may have been breached through failure to undertake positive action by way of (i) failure to "advocated for the financial interests of MySuper members"; (ii) failure by the AMP trustees to take "any step … at or around those times to inquire into, or to address, the effect of fees on net performance"; and (iii) the extent of the delay in taking steps to reduce fees. Each of these was a positive act that could have been taken and was not, such that the omissions were regarded by the Commission as supporting breach of the duty. The case study is a salutary reminder of the scope for action to be taken in relation to the conduct of trustees of underperforming MySuper and Choice products for failure to promote their financial interests. Whilst breach of the duty is not squared with poor returns, persistent low performance may be an indication of breach and open up the scope for the same degree of examination of the manner in which the trustee has, or has not, promoted the returns of members.

[54] Ibid 129.
[55] Ibid.

PART D: COMPARISON WITH THE BEST INTERESTS DUTY UNDER S 52(2)(c)

One of the questions that has been raised about s 52(12) is whether, even if its scope is clear, it is effectively redundant, on the basis that, if the best interests duty under s 52(2)(c) is already broad enough to cover the same obligations, s 52(2)(c) leaves s 52(12) little or no work to do. Due to the ongoing uncertainty as to the proper scope of the best interests duty under s 52(2)(c), this Part considers its introduction and subsequent consideration, and statutory interpretation principles that might apply to resolve an apparent redundancy of s 52(12). The proper scope of s 52(2)(c) has been the subject of extensive scholarly consideration,[56] a testament to the complexity of the questions. It is beyond the scope of this article to resolve it entirely. However, the spectrum of views is discussed for context to the question of its overlap with s 52(12).

The introduction of s 52(2)(c) and amendments to it

The best interests duty was one of the initial covenants to be taken to be included in the governing rules of a trust under s 52 of *Superannuation Industry (Supervision) Act* 1993 (Cth) when it came into force in 1993. It was initially enacted in the following form:

> (c) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries.

Section 52 was entirely replaced by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) – the same legislation which introduced s 29VN. The best interests duty remained, with what has been held to be minimal change to syntax, and none to meaning:

> (c) to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries.

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[56] Including but not limited to the following: John RF Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7(1) *Bond Law Review* 36; SEK Hulme, 'The Basic Duty of Trustees of Superannuation Trusts – Fair to One, Fair to All?' (2000) 14 *Trust Law International* 130; Margaret Stone, 'The Superannuation Trustee: Are Fiduciary Obligations and Standards Appropriate?' (2007) 1 *Journal of Equity* 167; D Pollard, 'Trustees' Duties to Employers: the Scope of the Duty of Pension Trustees' (2005) 20 *Trust Law International* 21; M Scott Donald, ''Best' interests?' (2008) 2 *Journal of Equity* 245; Geraint W Thomas, 'The duty of trustees to act in the 'best interests' of their beneficiaries' (2008) 2 *Journal of Equity* 177; Michael Vrisakis, 'Inputs versus outputs – an increased focus on trustee decision making?' (2009) 20(9) *Australian Superannuation Law Bulletin* 126; Daniel Mendoza-Jones, 'Superannuation trustees: Governance, best interests, conflicts of interest and the proposed reforms' (2012) 30 *Companies & Securities Law Journal* 297; Pamela Hanrahan, 'The relationship between equitable and statutory 'best interests' obligations in financial services law' (2013) 7 *Journal of Equity* 46; Ronald Sackville, 'Duties of Superannuation Trustees: From Equity to Statute' (2013) 37 *Australian Bar Review* 1; Paul Collins, 'The best interests duty and the standard of care for superannuation trustees' (2014) 88 *Australian Law Journal* 632; Joseph Campbell, 'Some Aspects of the Civil Liability Arising from Breach of Duty by a Superannuation Trustee' (2017) 44(1) *Australian Bar Review* 24; Nuncio D'Angelo, 'Trustees' Rights: When Can a Trustee Act in its own Interests?' (Conference Paper, Superannuation Committee of the Law Council of Australia Conference, 8 March 2018); David Pollard, 'The Short-form 'Best Interests Duty' – Mad, Bad and Dangerous to Know' (2018) 32 Trust Law International 106; Pamela F Hanrahan, 'A Singular Loyalty: Superannuation After the Hayne Royal Commission' (2019) *Journal of Banking and Finance Law and Practice* 109; 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; J Campbell, 'Obligations and Powers of Superannuation Trustees Concerning Situations of Actual or Possible Conflict' (2020) 49(1) *Australian Bar Review* 1.

Last year, the Federal Government's Your Future, Your Super (YFYS) reform package was announced and the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* ('*YFYS Act*') came into effect on 1 July 2021. One of the reforms was the insertion of the word "financial" into the "best interests" duty contained in s 52(2)(c). The Explanatory Memorandum to the Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (Cth) discusses the *purpose* of the amendment to s 52(2)(c):

> 3.32 The purpose of this amendment is to *clarify* that the financial interests (and not non-financial interests) of beneficiaries must be the determinative factor for trustees to comply with their obligations.

Extrinsic materials in relation to the best interests duty as originally enacted

The 1992 joint report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee, *Collective Investments: Superannuation* ('ALRC Report'),[57] confirms that s 52(2)(c) was enacted as a statutory form of the general law fiduciary duty. Chapter 9 of the ALRC Report specifically 'identifies the principal fiduciary duties owed by responsible entities to members of superannuation schemes', observing that these duties of trustees 'have been developed, along with the concept of the trust, over many years and *their fiduciary nature is highly appropriate to the needs of superannuation schemes*.'[58] A significant concern was to prevent avoidance of these duties in the terms of the trust deed. The ALRC Report noted that, '[t]he Review considers it to be of great importance that the deed not permit derogation from the proper duties of trustees and that those duties ought to be clearly identified.'[59] In light of compulsory superannuation, and for trustees unfamiliar with their duties, it was said that members *"require the full protection of the fiduciary duties imposed by equity upon superannuation scheme trustees*."[60]

In explaining the nature of this fiduciary duty, the ALRC Report referred to both Paul Finn's influential work, *Fiduciary Obligations*,[61] and to Ford and Lee, *Principle of the Law of Trusts* ('Ford and Lee'),[62] for the content of the fiduciary duty. These two sources informed the understanding of the fiduciary duty which formed the basis of the recommendations made by the ALRC and adopted by the legislature. Under the heading 'Duty to act always in the best interests of the members of the scheme', the ALRC Report noted that the authors of Ford and Lee described this duty as 'the duty which 'marshals' the trustee's duty of loyalty to the service of the economic wellbeing of the trust fund and of the personal welfare of the beneficiaries.'[63] It is worth considering the passage referred to by the ALRC in full. Ford and Lee described the duty in the following way:

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[57] Australian Law Reform Commission and the Companies and Securities Advisory Committee, *Collective Investments: Superannuation*, (Report No 59, 28 April 1992) ('*ALRC Report 59*').

[58] Ibid 97, citing Cardozo J in *Meinhard v Salmon* (1928) 164 NE 545, as cited in HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book Co Ltd, 2nd ed, 1983) 391:

> …Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rules of undivided loyalty by the disintegrating erosion of particular exceptions. Only this has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd.

[59] *ALRC Report 59* (n 58) 99 [9.10].

[60] Ibid.

[61] Ibid 98, citing Paul Finn, *Fiduciary Obligations* (The Law Book Co Ltd, 1977) 45-6.

[62] HAJ Ford and WA Lee, *Principles of the Law of Trusts* (2nd ed, Law Book Co Ltd, 1990) 393.

[63] *ALRC Report 59* (n 58) 105 [9.22], citing ibid 400.

> [909] Duty to act exclusively for the benefit of all the beneficiaries of the trust
>
> The duty to act exclusively for the benefit of all the beneficiaries of the trust *marshals the trustee's duty of loyalty* to the service of the economic well-being of the trust fund and of the personal welfare of all the beneficiaries. With respect to the economic well-being of the trust the trustee's duty of loyalty complements the duty to preserve the trust assets by disabling the trustee from taking any unauthorised profit, from allowing any conflict to arise between the duty the trustee has undertaken and any interest he or she has, from undertaking any duty which may conflict with the duty he or she has undertaken, and from setting up the rights of others against those of the beneficiaries. With respect to the personal welfare of all the beneficiaries the trustee's duty of loyalty requires the beneficiaries to be treated impartially, that is, equally where they have similar rights and fairly where they have dissimilar rights.[64] (emphasis added)

The Report concluded 'this is a general duty that complements the more specific obligations to act honestly and to exercise care, diligence and skill.'[65] The ALRC made three relevant recommendations:

- Recommendation 9.1: 'The law should set out the basic fiduciary obligations owed by responsible entities of superannuation funds, Approved Deposit Funds (ADFs) and Pooled Superannuation Trusts (PST) to members.'[66]

- Recommendation 9.2: 'The law should specify basic fiduciary duties of a responsible entity that cannot be excluded or modified,' including that 'to exercise its powers, and perform its duties, as responsible entity in the best interests of the members.'[67]

- Recommendation 9.3: 'The law should provide that each member of a board of management of the responsible entity for a superannuation fund, an ADF or a PST owes to the members of the fund, ADF or PST the same obligations set out in Recommendation 9.2.'[68]

Further support for the construction of the best interests duty as a statutory form of the general law duty is also found in the remarks of the Parliamentary Secretary to the Treasurer in the course of the second reading debate of the SIS Bill, who informed the House of Representatives: "In the SICS Bill, *what we have done is simply to transcribe trust law already existing trust law that will govern the behaviour of these people - codify it and write it down*."[69] These materials support the identification of the mischief to be remedied by the legislation is the risk that superannuation trusts could exclude their general law fiduciary duties.[70]

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[64] Ford and Lee (n 59) 400.
[65] *ALRC Report 59* (n 58) 105 [9.22].
[66] Ibid xxxiii, 104.
[67] Ibid xxxiii, 111-12.
[68] Ibid xxxiii, 113.
[69] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1993 House Hansard, 1103 (Mr Johns).
[70] See also Donald Duval, 'The Objectives of the Superannuation Supervisory Legislation', in M Scott Donald and Lisa Butler Beatty (eds), *The Evolving role of Trust in Superannuation* (Federation Press, 2017) 10, 15. That paper was delivered the year after the reforms were passed. Mr Duval, who was the Government Actuary at the time, observed that the reason for putting these covenants into the *SIS Act* (n 8) was:

> partly declaratory – people take more notice of the SIS Act than they do of the common law. However the main reason for these provisions … is to ensure that trustees are in fact in control of their funds and so can be held

The scope of the general law fiduciary duty to act in the interests of beneficiaries under Australian law

A statutory duty to reflect the general law fiduciary duty requires consideration of the scope of the general law duty. As noted by the ALRC, Ford and Lee described this duty at the time as 'the duty which 'marshals' the trustee's duty of loyalty to the service of the economic wellbeing of the trust fund and of the personal welfare of the beneficiaries.'[71] The duty of a fiduciary to act "in the interests of" the person to whom the duty is owed is a longstanding feature of fiduciary jurisprudence, particularly in the context of directors' duties – there are High Court references to it going back over a century.[72] But it is no less applicable for trustees who are, of course, the "archetypical" fiduciary.[73]

At the time the statutory best interests duty was enacted, fiduciary loyalty was not articulated in terms of a prescriptive or proscriptive classification. The first exposition of the fiduciary duty under Australian law as *proscriptive* appeared three years later, in the 1996 decision of *Breen v Williams*.[74] Gaudron and McHugh JJ observed:

> In this country, *fiduciary obligations arise because a person has come under an obligation to act in another's interests*. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. *But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed* (132).[75] (emphasis added)

Gummow J concluded:

> It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.[76]

In other words, the *duty to act in the best interests* of the party to whom the duty is owed is unquestionably fiduciary, but under Australian law, loyalty is not exacted by a *positive duty to act* in any particular way but, rather, by proscribing certain conduct. These proscriptive duties mark the ring around acceptable conduct and define what will *not* be in the best interests of beneficiaries.[77] As Finn said later, but to the same effect:

> accountable. At the ISC we had observed that a number of trust deeds gave effective power to a party other than the trustee.

[71] *ALRC Report 59* (n 58) 105 [9.22], citing Ford and Lee (n 63) 400.
[72] See *Manning River Co-Operative Dairy Company Limited v Shoesmith* (1915) 19 CLR 714.
[73] *Maguire v Makaronis* (1997) 188 CLR 449, 473 (Brennan CJ, Gaudron, McHugh, Gummow JJ).
[74] (1996) 186 CLR 71 ('*Breen*').
[75] Ibid 113 (Gaudron and McHugh JJ).
[76] Ibid 137 (Gummow J).
[77] Anthony Mason has observed that the judgments in *Breen v Williams* (n 75) as to the proscriptive nature of fiduciary obligations are a testament to the influential scholarship of Paul Finn in the Foreword to: Paul Finn, *Fiduciary Obligations 40th anniversary publication with Additional essays*, (The Federation Press, 2016) ch 3 vii, noting:

> His work was cited in the judgments of Dawson and Toohey JJ, Gaudron and McHugh JJ and Gummow J, all expressly rejecting American and Canadian approaches to fiduciary law. Dawson and Toohey JJ relied on Finn for

> It is accepted as axiomatic that a consequence of concluding that a relationship is fiduciary in whole or in part is that, to that extent, the fiduciary is obliged to act in the interests of the beneficiary… to the exclusion of his or her own interest. This consequence though, does not express any positive obligation. It merely encapsulates in positive language the burden of the "misuse of position" and "no conflict" themes of fiduciary principle itself.[78]

On five occasions, from 1996 to 2018, the High Court has expressly affirmed that, in equity, loyalty is exacted by means of these proscriptive duties, rather than positive prescriptive duties.[79] This development has been discussed critically by eminent scholars in the United Kingdom,[80] and Canada.[81] In Australia, particularly in relation to the obligations of directors in company law, but more broadly Australian courts,[82] and judges, also continue to express doubts as to the limited proscriptive analysis of fiduciary duties developed by the High Court.[83] One of the difficulties is reconciling this analysis with older Anglo-Australian cases on the duty of loyalty,[84] that were not expressed in proscriptive terms.[85] These questions are particularly well developed in the context of directors duties and the interpretation of s 181(1)(a) of the *Corporations Act 2001* (Cth).[86] However, the point is that, for better or

> the proposition that 'what the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that'.

[78] See Finn (n 78) 368-9. NB: this chapter, ch 26, is a reproduction of Paul Finn 'Fiduciary Reflections' (2014) 88 *Australian Law Journal* 127.
[79] *Breen* (n **) 113 (Gaudron and McHugh JJ), 137-8 (Gummow J); *Pilmer v Duke Group Ltd* (2001) 207 CLR 165, 197-8 (McHugh, Gummow, Hayne and Callinan JJ), 220 (Kirby J); *Friend v Brooker* (2009) 239 CLR 129, 160 [84] (French CJ, Gummow Hayne and Bell JJ); *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 98-100 [31]-[33] (French CJ and Keane J), 106-8 [54]-[64] (Hayne and Crennan JJ); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 29-30 [67]-[68] (Gageler J).
[80] See, eg, Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2nd ed, 2012) 27 [1.51]:

> It also seems to have been accepted that fiduciary duties are necessarily and exclusively negative or proscriptive. However, this, too, is not a view accepted in this book. Rather, it is argued that fiduciary duties are not simply and exclusively proscriptive but can also be prescriptive (indeed, that this is self-evident in the case of active trustees.) An active trustee's overriding fiduciary duty is positive in nature: it is to promote the best interests of the trust and of his beneficiaries.

[81] See also Lionel Smith, 'Prescriptive Fiduciary Duties' (2018) 37(2) *University of Queensland Law Journal* 261.
[82] See, eg, *BCI Finances Pty Ltd (in liq) v Binetter* (2018) 362 ALR 597, 693-4 [596]-[598] (Allsop CJ, Moshinsky and Colvin JJ) ('*BCI Finances'*).
[83] See JD Heydon, 'Modern fiduciary liability: the sick man of equity' (2014) 20(1) *Trusts and Trustees* 1006. See also Justice Fabian Gleeson, 'Proscriptive and prescriptive duties: is the distinction helpful and sustainable and if so, what are the practical consequences?' (Conference Paper, Supreme Court Corporate and Commercial Law Conference, 15 November 2017).
[84] See for example, *Metropolitan Gas Co v Federal Commissioner of Taxation* (1932) 47 CLR 621, 633 (Gavan Duffy CJ and Starke J) said the trustees of a pension scheme 'are, of course, in a fiduciary position under the trust instrument, and must exercise their powers honestly and reasonably in the interest of contributors. Otherwise, we apprehend, they would be controlled by a Court of competent jurisdiction'. These remarks were directed to the power of Trustees to consent to the exercise by the company of its power to alter the rules. These statements could be read as permitting the duty some basic positive function; at a high level of generality admittedly, but as expressions of giving genuine consideration to their interests, and in so doing, being loyal to the interests of the members in making decisions.
[85] For a discussion of some of these authorities see for example *BCI Finances* (n **) 693-4 [596]-[598] (Allsop CJ, Moshinsky and Colvin JJ).
[86] See especially *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1, 166-7 [900]-[902] (Lee AJA), 346-50 [1957]-[1978] (Drummond AJA), 590 [3036] (Carr AJA). There is significant scholarly consideration of this case and the question in the company law context in relation to the interpretation of s 181(1) of the *Corporations Act 2001* (Cth), which is not discussed here. See, by way of example only,

worse, the general law of Australia on the content of the fiduciary obligation is now clear, even if the merits of the prescriptive/proscriptive distinction remain the subject of heated debate.[87] These issues are important to bear in mind in the construction of s 52(2)(c) of the *SIS Act* – in light of the cases that have found that the statutory best interests duty goes no further than the general law – and thus its relationship with s 52(12).

Does "best" add anything to "interests of"?

Before considering the cases and interpretation of s 52(2)(c) there is another threshold question, which is whether the superlative "best" in the statutory provision adds anything to either the general law or statutory duty to act "in the interests of" the beneficiaries. This is also interesting because it does not appear in the s 52(12) formulation. It is sometimes noted that *Cowan v Scargill* was the first reference to the "best interests" duty in relation to trustees, where Megarry V-C observed that "*the best interests of the beneficiaries are normally their best financial interests.*"[88] However, the cases are replete with examples of the general fiduciary duty expressed in alternate ways – "in the interests of", "for the benefit of (or for)", "in the best interests of" – all seemingly used interchangeably. In *Breen v Williams*,[89] Gummow J used the expressions "in the best interests of their principals" and "in the interests of the plaintiff" on the same page with no apparent difference in meaning.[90] The authors of Ford, Austin and Ramsay's *Principles of Corporations Law*,[91] conclude that interchangeable use of "interests of the company" and "best interests of the company" lends support to the argument that there is no significant difference between the two expressions as used in the context of directors' best interests duties owed under s 181(1)(a) of the *Corporations Act 2001* (Cth).[92] There are examples in the trusts context as well.[93] There is a strong argument to be made that it is a distinction without a difference and reflective only of the different manner in which judges express themselves from time to time.[94]

Rosemary Teele Langford 'Solving the Fiduciary Puzzle – The Bona Fide and Proper Purposes Duties of Company Directors' (2013) 41 *Australian Business Law Review* 127. See also Justice Gleeson (n **); TF Bathurst, 'It Tolls for Thee: Accessorial Liability after Bell v Westpac' (Conference Paper, Banking and Financial Services Law Association Annual Conference, 29-31 August 2013). Paul Finn has observed that 'the common law on directors' duties has been distorted so much by corporations legislation' that it should be 'treated with considerable reticence to the extent that it is said to represent fiduciary law generally': Paul Finn, 'Fiduciary Reflections' (2014) 88 *Australian Law Journal* 127, 136.

[87] See also further discussion in JD Heydon, MJ Leeming and PG Turner, *Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 210-24 [5-380]-[5-440].

[88] *Cowan v Scargill* [1985] Ch 270, 287 (Megarry V-C) ('*Cowan*').

[89] *Breen* (n 75).

[90] Ibid 137 (Gummow J).

[91] Ford, Austin and Ramsay, *Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018).

[92] Ibid 475 [8.070.6]. The authors note, for example, that in *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 293 (Mason, Deane and Dawson JJ), their Honours refer to directors acting 'in the interests of the company', whilst at 304 Wilson J refers to directors acting in the 'best interests of the company'.

[93] *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* [1999] 1 VR 144, 159-61 (Beach J), where his Honour considered the general law duty to act 'in the interests of' members and then in the following paragraph, set out and adopted with approval Megarry V-C's dicta in *Cowan* (n 89) addressing the duty to act 'in the best interests' of members, without drawing any distinction at all between the two formulations.

[94] As Lord Hoffmann has observed:

> [m]ost of the general statements of equitable principles which we use today are simply a way of putting the matter which occurred to some Victorian judge in the course of an ex tempore judgment which his successors sought sufficiently felicitous to be worth repeating. There is nothing sacred about such formulations …. What matters is not the source of the principle but whether the judges are willing to regard it as a principle rather than try to interpret it as a black–letter rule.

Cowan v Scargill

No discussion of the best interests duty at general law - or its statutory form under s 52(2)(c) - can overlook the decision of Megarry V-C in the English case *Cowan v Scargill.*[95] That case was decided in 1985 in the context of a pension scheme (which is how superannuation trusts are described in the United Kingdom), where union representatives on the board of the trustee were insisting that trustees not pursue foreign investments and preference investing in the local coal mining industry, in which its members largely worked. In the course of the reasons for judgment dismissing the claim, Megarry V-C referred in several passages to the duty upon trustees to act in the best interests of beneficiaries, as discussed below. Some take the view that his Lordship's reasons support construing the general law duty to act in the best interests of the beneficiaries as a positive equitable duty upon trustees to act for the financial benefit of beneficiaries (at least under English law), which supports construing s 52(2)(c) also as a positive duty to act in the interests of beneficiaries. It has also been suggested that the statutory duty under s 52(2)(c) owes its provenance to the decision.

Any influence of *Cowan v Scargill* upon the proposal by the ALRC for a statutory duty is unknown. The decision would undoubtedly have been known to ALRC researchers at the time. However, there is no reference at all to that decision in the ALRC Report or its recommendations in relation to the proposal for the duty that are summarised above. As discussed, there is no suggestion in the ALRC Report that the duty recommended by it had any other intended scope than to provide a statutory cognate of the general law fiduciary duty to act in the best interests of beneficiaries under Australian law, having expressly cited Australian scholars for the scope of the duty of loyalty. However, the case is considered below as it is regularly cited in Australian cases addressing the scope of the best interests duty under s 52(2)(c), as it is in English pensions law.

It was considered by Byrne J in *Invensys Australia Superannuation Fund Pty ltd v Austrac Investments Ltd* ('*Invensys*') in the context of construing s 52(2)(c),[96] and this analysis has been frequently cited, so it needs to be analysed. There, Byrne J referred to two passages from Megarry V-C's reasons, citing 'the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust',[97] and that '*trustees must do the best they can for the benefit of their beneficiaries and not merely avoid harming them.*'[98] This latter quotation, read in isolation, suggests an equitable duty to take positive action.[99] However, the two passages are drawn from different parts of the judgment and on one view, putting the two together as support for a positive scope for the duty at general law – and under s 52(2)(c) – may be misconceived.

The first passage appears where his Lordship describes the "starting point" of his analysis of the relevant law as the 'duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different

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Lord Justice Hoffmann, 'Equity and its Role for Superannuation Pension Schemes in the 1990s', in M Scott Donald and Lisa Butler Beatty (eds), *The Evolving role of Trust in Superannuation* (Federation Press, 2017) 72, 79.

[95] *Cowan* (n 89).

[96] *Invensys Australia Superannuation Fund Pty ltd v Austrac Investments Ltd* (2006) 15 VR 87 ('*Invensys*').

[97] *Cowan* (n 89) 286 (Megarry V-C).

[98] Ibid 294-5 (Megarry V-C).

[99] It was relied upon in argument by APRA in *Australian Prudential Regulation Authority v Kelaher* [2019] FCA 1521 ('*Kelaher*'), as supporting a positive scope to s 52(2)(c).

classes of beneficiaries.'[100] His Lordship describes "this duty" as "paramount",[101] noting that '[t]hey must of course obey the law; but subject to that, they must *put the interests of their beneficiaries first*.'[102] This would seem to speak to the concept of fiduciary loyalty.

The second citation comes later in the reasons, there dealing with evidence that had been filed by Mr Scargill in support of the prohibition against foreign investment, so as to preference local investments that supported the domestic coal industry. It was said that that evidence tended to show that the prohibitions would not be harmful to the beneficiaries, and that apparently some pension funds 'got along well enough without any overseas investments.'[103] Megarry V-C said that '[s]uch evidence misses the point.'[104] His Lordship explained that:

> Trustees must do the best they can for the benefit of their beneficiaries, and not merely avoid harming them. I find it impossible to see how it will assist trustees to do the best they can for their beneficiaries by prohibiting a wide range of investments that are authorised by the terms of the trust.[105]

These reasons were apparently directly to the trustee's exercise of a *power of investment*, not the scope of the duty to act in the interests of the beneficiaries.

In *Knudsen v Kara Kar Holdings Pty Ltd*,[106] (decided prior to *Invensys*,[107] but not cited by Byrne J), Austin J observed that *Cowan* may be understood in a number of ways; as an example of the second ground of judicial intervention in relation to the exercise of discretion under the principles in *Karger v Paul*,[108] where the trustees have failed to act on a real and genuine consideration;[109] or for the fact that the trustee's investment power must be exercised for a proper purpose, which is the best interests of the beneficiaries and not an extraneous purpose.[110] On this analysis, *Cowan* is not treated as a freestanding, positive equitable duty upon a trustee to promote the financial returns of beneficiaries.

It is not the purpose of this article to reconcile the different judicial and scholarly analyses of *Cowan v Scargill* or resolve its influence on the development of the content of s 52(2)(c). However, it is important to note how frequently this English case is cited in both English and Australian judgments, and scholarly discourse, for a general duty of a trustee to act in the best interests of the beneficiaries; and cited in the proper construction of s 52(2)(c) in contemporary Australian case law, notwithstanding the lack of any reference to it in the ALRC Report or Explanatory Memorandum at the time s 52(2)(c) was enacted. The longstanding debate as to the identification of the *ratio* in that case appears to have influenced

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[100] *Cowan* (n 89) 286-7 (Megarry V-C).
[101] Ibid 287 (Megarry V-C).
[102] Ibid.
[103] Ibid 294-5 (Megarry V-C).
[104] Ibid.
[105] Ibid 295 (Megarry V-C).
[106] [2000] NSWSC 715 ('*Knudsen*').
[107] *Invensys* (n 97).
[108] *Karger v Paul* (1984) VR 161.
[109] See *Knudsen* (n 107) [57] (Austin J) observing that 'by taking into account their personal views and moral reservations, the union trustees had misunderstood their duty and had failed to give proper consideration to the exercise of the investment power'.
[110] Ibid [60] (Austin J).

the uncertainty of the proper scope of s 52(2)(c), and that different views exist as to the ratio of that case.

Inconsistent judicial interpretation of the scope of s 52(2)(c)

The scope of s 52(2)(c) has been considered in different ways by the courts. On the one hand, there has been regular acceptance of the fact that the best interests duty under statute was enacted to provide a statutory form of the general law duty, and goes no further than it. For example, in *Manglicmot v Commonwealth Bank Officers Superannuation Corporation*,[111] Rein J concluded that, '[i]n short then, I do not accept that s 52 imposes a higher standard on a trustee than the general law.'[112] In doing so, his Honour also cited the discussion in *Jacobs' Law of Trusts in Australia*: 'This covenant [under s 52(2)(c)] corresponds to the general law.'[113] This is suggestive of a general law duty of loyalty.

However, in other cases considering s 52(2)(c) courts appear to have accepted that s 52(2)(c) has a broader scope, and that even if corresponding to the general law, it is not limited by reference to fiduciary loyalty. For example, on appeal in *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd Corporation* ('*Manglicmot*'),[114] Giles JA (with whom Young JA and Whealy JA agreed) observed in obiter at [121]:

> Nor in my opinion does s 52(2)(c) materially add to breach by the respondent of its general law duty to act in the best interests of members of the Fund. … *There is liability if the discretionary power is exercised improperly, but otherwise there is not.*[115]

This suggests that any act taken in exercise of discretion that is not in the best interests of beneficiaries will breach s 52(2)(c). Stated in a positive way, a trustee must exercise its powers in the best interests of beneficiaries in order to comply with its obligation.

Australian Prudential Regulation Authority v Kelaher,[116] is the most significant recent consideration of the duty. The claim failed in that case, so the discussion is obiter, but it is informative of the manner in which the best interests duty was argued and discussed. In that case, APRA argued:

> [T]he trustee's best interests obligation when applied to the duty to get in the trust property and to protect and vindicate the rights attaching to it …. requires, in the superannuation context, *that the trustee seek to achieve the best outcome for the capital of the fund*, judged in relation to the risks of particular action and the prospects that it might provide a partial or complete recovery of funds for the trust.[117] (emphasis added)

Jagot J did not discuss or analyse this statement. However, this is clearly different from a conception of the best interests duty as a fiduciary duty of loyalty. This is to apply the best

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[111] [2010] NSWSC 363 [53] (Rein J).
[112] Ibid.
[113] Ibid [50] (Rein J), quoting JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2922].
[114] (2011) 282 ALR 167 ('*Manglicmot*').
[115] Ibid 191 [121] (Giles JA).
[116] *Kelaher* (n 100).
[117] Ibid [49], quoted by Jagot J.

interests duty as a separate, positive duty to act to achieve returns. Jagot J also cited at [54] APRA's submission that:

> There will be a breach of the obligation if the exercise of the power in issue or performance of a duty, or the failure to exercise a power or perform the duty, could not reasonably be regarded as in the best interests of beneficiaries. This is not to suggest that there is, in every case, only one possible course of action that is in members' "best interests".[118]

Her Honour noted that "[t]his much may be accepted."[119] Jagot J also accepted the following statement of the scope of s 52(2)(c), proffered by the 4th-7th respondents:

> I also accept the further submissions of the fourth to seventh respondents, citing G Thomas, "[t]he duty to trustees to act in the 'best interests of their beneficiaries'" (2008) 2 Journal of Equity 177, that (1) a standard of perfection is not imposed on trustees; (2) in cases where the purpose of the trust is to provide financial benefits for the beneficiaries, "the best interests of the beneficiaries are normally their best financial interests": Cowan v Scargill [1985] 1 Ch 270 at 287, 289: (3) *acting in the best interest of the beneficiaries is in effect synonymous with a trustee's obligation to promote and act consistently with the purpose for which the trust was established*; (4) in relation to discretionary powers, there will be "liability" pursuant to s 52(2)(c) "if the discretionary power is exercised improperly, but otherwise there is not": Manglicmot at [121]; (5) the duty applies when the power is exercised; (6) there may be cases where an issue is so finely balanced that "a decision either way can be regarded as objectively right": Nestle v National Westminster Bank [1993] 1 WLR 1260 at 1270; and (7) the relevant question is whether the course of action that was taken was one of the courses of action that may be described as being in the best interests of the beneficiaries.[120] (emphasis added)

It is not clear if this summary is suggesting that "acting in the best interest of the beneficiaries" is synonymous with a positive equitable and statutory obligation "to *promote* … the purpose for which the trust was established", in the sense of a freestanding, positive equitable duty to promote (in the ordinary English sense of the word) the financial interests of beneficiaries. This would arguably leave s 52(12) with no work to do. However, s 52(12) was not considered in the case, and the discussion was obiter.

The view that the duty to act in the best interests of beneficiaries in s 52(2)(c) is such a broad-based positive duty has been applied recently in the District Court of South Australia. In *Steer v AMP Life Limited & AMP Superannuation Ltd*,[121] Burnett J found that in circumstances where the trustee had failed to send an email to the correct address of the deceased and had cancelled a life insurance policy as a result of not hearing from the member, the trustee had breached its duty to act in the best interests of the deceased. Judge Burnett cited *Manglicmot,*[122] and *Cowan v Scargill*,[123] noting specifically that "*[t]rustees must do the best they can for the benefit of their beneficiaries and not merely avoid harming them*."[124] His Honour found that failing to comply with the provisions to give notice under s 68AAA

[118] Ibid [54] (Jagot J).
[119] Ibid [55] (Jagot J).
[120] Ibid [65] (Jagot J).
[121] [2021] SADC 109 ('*Steer*').
[122] Ibid [95] (Burnett J), citing *Manglicmot* (n 115).
[123] Ibid [95] (Burnett J), citing *Cowan* (n 89).
[124] Ibid [96] (Burnett J), quoting *Cowan* (n 89) 295.

constituted a breach of its best interests duty.[125] That a process failure which is in no respect a fiduciary transgression, was characterised as a breach of s 52(2)(c), raises directly the scope of this duty to apply to any conduct that results in financial disadvantage to a beneficiary. This is a question that requires urgent clarification by the courts.

Other construction of s 52(2)(c) as a "loyalty" duty

In contrast to this broad view of s 52(2)(c), it has been considered as a fiduciary duty of loyalty in the context of construing the parallel duty placed upon the trustees of management investment schemes under s 601FC(1)(c) of the *Corporations Act 2001* (Cth). In *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers Appointed) (in liquidation) (Controllers appointed) (no 3*) ('*ASIC v APCH*'),[126] Murphy J constructed that section with reference to s 52(2)(c) of the *SIS Act*. His Honour held that: 'the imposition of a duty to act in the best interests of the members in ss 601FC(1)(c) and 601FD(1)(c) does not extend its content beyond previously understood general law boundaries;' and accepted that the test for breach of s 601FC(1)(c), which his Honour construed directly by reference to s 52(2)(c), was to ask: "was [the trustee] of the Trust acting with undivided loyalty solely in the interests of the members?"[127] The impugned conduct there was clearly inconsistent with loyalty to the pursuit of the interests of the trust; it concerned the resolution to amend the scheme's constitution, without member approval, to introduce substantial new fees without corresponding benefit to the members of the scheme, of which a substantial portion was to be payable to the interests of one of the directors. Fiduciary *dis*loyalty to the purposes of the trust was manifestly evident. No error in this approach or summary of the scope of s 52(2)(c) was identified on appeal to the High Court in *Australian Securities and Investments Commission v Lewski.*[128]

These different conceptions of the scope of s 52(2)(c) suggest confusion in the case law.

Cardinal principle of statutory interpretation that every provision has its own work to do

The reason for considering this background to s 52(2)(c) is that there is an argument that if s 52(2)(c) is construed as a positive duty to "promote" the financial interests of the beneficiaries (including returns), there may be such an overlap between the two sections that s 52(12) may, in effect, be rendered redundant.

The proper scope of s 52(2)(c) needs to be tested directly and resolved in a superior court to determine the extent of any overlap with s 52(12). However, the presence of s 52(12), and the relative clarity of its scope, provide a powerful argument *against* giving s 52(2)(c) such a broad construction. It is a cardinal principle of statutory interpretation that Parliament is taken to have intended every provision in a statute to have its own work to do.[129] An interpretation of s 52(2)(c) that leaves s 52(12) no work to do, on the basis that the best interests duty already requires trustees to promote the best financial interests of beneficiaries,

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[125] Ibid [115] (Burnett J).
[126] *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (recs & mgrs apptd) (in liq) (No 3)* [2013] FCA 1342 [484] (Murphy J).
[127] Ibid [489] (Murphy J).
[128] (2018) 266 CLR 173.
[129] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

including returns, offends this principle, and would be a strong ground for a court to decline to give it such a broad construction.[130]

It is also a principle of statutory interpretation that a statute is to be construed as a whole, so as to make its provisions work harmoniously. As was said in *Project Blue Sky Inc v Australian Broadcasting Authority*:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. ...
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.[131] (emphasis added, footnotes omitted)

As discussed above, s 29VN/52(12) was enacted twenty years after the introduction of s 52(2)(c). The rationale for enacting "*additional*" obligations for trustees with respect to these products makes sense only against a construction of the Act under which trustees do not already owe the same duties. An interpretation of s 52(2)(c) that renders s 52(12) effectively redundant is inconsistent with basic principle.

Conclusion

This article has argued that the s 52(12) covenant needs to be recognised as an independent obligation with a different scope and purpose to s 52(2)(c). This obligation casts a positive duty upon trustees and since its re-enactment as a covenant under s 52, gives rise to the scope for civil and criminal action. On a more practical level, s 52(12) offers an apparently clearer scope as compared with s 52(2)(c). This may afford a more available and certain route by which the regulator might pursue action against an underperforming trustee of a MySuper or Choice product. For that reason alone, this is a source of obligation that should be taken seriously and factored into relevant superannuation trustee's policies, procedures, and strategies.

[130] This principle was cited and applied in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 333-4 [315] (Maxwell P, Neave and Redlich JJA), to reject a construction of s 77 of the *Equal Opportunity Act 1995* (Vic) that gave s 75(2) no work to do.

[131] *Project Blue Sky* (n 121) 381-2 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ).