

2015: Super Forever...



MySuper:

- *the duty to promote financial interests*
- *the scale determination*



Law Council
OF AUSTRALIA

Legal Practice Section

2015:Super Forever...



The provision: section 29VN(a)

A MySuper trustee **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)”*



Law Council
OF AUSTRALIA

Legal Practice Section

2015: Super Forever...



The journey:

- Statutory interpretation: principles
- Object of the SIS Act
- Ordinary meaning and context
- Extrinsic materials
- The general law
- The SIS Act
- The Prudential Standards
- A risk matrix
- Liability and indemnity



Law Council
OF AUSTRALIA

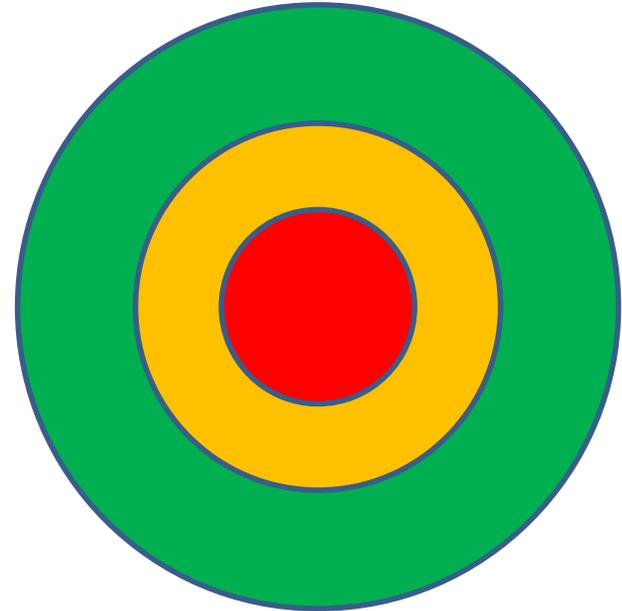
Legal Practice Section

2015: Super Forever...



A risk based approach:

- **LEVEL 1:** existing process
- **LEVEL 2:** more active oversight
- **LEVEL 3:** lower tolerance for poor performance



2015: Super Forever...



Statutory interpretation: principles under AIA and common law

1. Object of the Act	7. All words have meaning and effect
2. Start with the ordinary meaning	8. Words can be read down
3. The use of dictionaries	9. Consequences can be relevant
4. Ordinary meaning: <ul style="list-style-type: none">• confirm meaning; or• determine meaning if vague and ambiguous or absurd or unreasonable results	10. Definitions: function is not substantive law
5. Use of extrinsic material	11. Presumption: words used consistently
6. Purposive v literal construction	

2015: Super Forever...



The propositions

- The literal meaning of “promote”: to grow or advance
- The EM, case law and context do not support literal meaning
- Object of the SIS Act: prudential management of funds
- Literal approach: inconsistent with object of SIS Act
- Literal meaning: absurd or unreasonable results
- “Promote financial interests”: vague and ambiguous
- Extrinsic materials: Cooper, second reading speech and the EM
- Purposive over literal approach

2015: Super Forever...



The propositions continued:

- The meaning of “financial interests”
- Section 29VN(a): investment performance and cost control
- The EM: heightened obligation as at February 2012
- The general law, February 2012:
 - Duty of care and prudence
 - “Best financial interests” and ethical investing
 - Return outcomes: *Nestle* and *Re Mulligan*
- The SIS Act and Regulations: February 2012



2015: Super Forever...



The narrow gap

- Higher than duties that applied as at February 2012
- Lower than a guarantee of performance

2015: Super Forever...



Performance

- The narrow gap: a lower tolerance for poor performance
- Applies to both investment returns and cost control
- What is poor performance?
- What to do if underperforming?
- A conservative approach:
 - Fund based measures
 - Peer based measures
- Developing measures: duty of care and prudence/best interests/no conflict
- A rigorous and robust process; defensible set of measures eg SPS 530 and SPG 530



2015: Super Forever...



Risk matrix (investment performance):

Fund based measure	Peer based measure	Risk/action
Meet	Meet	Low risk
Not meet	Meet	Higher risk. Potentially remaining low risk if the reason for not meeting the fund based measures is because of across the board, sustained market behaviour.
Meet	Not meet	Higher risk. Should be infrequent if fund based measures are appropriate
Not meet	Not meet	High risk. The MySuper product is not hitting its primary investment performance measures. This calls for urgent action to understand the reasons for these outcomes and to address them.

2015: Super Forever...



Liability and indemnity

- Liability: based on conduct
- Right of indemnity:
 - commonly inequitable between generations
 - permitted scope of indemnity through ss 56 and 57 of the SIS Act
- Availability of judicial advice
- Judicial advice and right of indemnity



Law Council
OF AUSTRALIA

Legal Practice Section