



ASIC
Australian Securities &
Investments Commission

Review of trustee communications about the MySuper performance test

Report 729 | June 2022

About this report

This report gives an update on ASIC's work on superannuation trustee communications relating to the annual performance test introduced in 2021 as part of the Your Future, Your Super reforms. It sets out our findings and our expectations of trustees for future communications about performance.



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About this report

In 2021, ASIC reviewed communications by 30 trustees in relation to the annual performance test for MySuper products conducted by the Australian Prudential Regulation Authority (APRA) under Pt 6A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

Part 6A was introduced by the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* with the purpose of holding trustees to account for underperformance through greater transparency and increased consequences so as to protect members and increase retirement savings.

This report sets out the key findings from our review, which focused primarily on communications made by 12 trustees in relation to the 13 products that failed the test.

We found that trustees whose products failed the test generally complied with their mandatory disclosure obligations. However, we found more significant issues (and sought corrective changes) in relation to the quality of website and marketing communications.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents: consultation papers, regulatory guides, information sheets and reports.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the *Corporations Act 2001* (Corporations Act) and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

The performance test and its consequences

The performance test and its impact

Underperformance of superannuation products leads to lower retirement savings for members.

To hold trustees to account for underperformance by improving transparency, APRA must conduct a performance test of all products covered by Pt 6A of the SIS Act that are offered by a regulated superannuation fund. In 2021, these were MySuper products.

Products that failed the performance test

Of the 80 products APRA tested, **13 MySuper products** failed the performance test: see Table 1. Communications to members about these products were the focus of ASIC's review.

Note: See APRA, [MySuper performance test outcomes](#), August 2021.

Table 1: Products that failed the performance test (as at date of test)

MySuper product	Trustee/fund (short form name)
Accumulate Plus Balanced	Commonwealth Bank Officers Superannuation Corporation Pty Limited/ Commonwealth Bank Group Super (CBA BO)
AMG MySuper	Equity Trustees Superannuation Limited/ AMG Super (ETSL-AMG)
ASGARD Employee MySuper	BT Funds Management Limited/ ASGARD Independence Plan Division Two (BT Asgard)

Table 1 (cont.): Products that failed the performance test (as at date of test)

MySuper product	Trustee/fund (short form name)
AvSuper Growth (MySuper)	AvSuper Pty Ltd/ AvSuper Fund (AvSuper)
Balanced (MySuper)	Energy Industries Superannuation Scheme Pty Ltd/ Energy Industries Superannuation Scheme – Pool A (EISS)
BOC MySuper	BOC Superannuation Pty Ltd/ BOC Gases Superannuation Fund (BOC)
BT Super MySuper	BT Funds Management Limited/ Retirement Wrap (BT Super)
FirstChoice Employer Super	Colonial First State Investments Limited/Colonial First State FirstChoice Superannuation Trust (CFSIL)
LifetimeOne	SCS Super Pty Limited/Australian Catholic Superannuation and Retirement Fund (SCS)
My Ethical Super	Christian Super Pty Limited/ Christian Super (Christian Super)
MySuper Balanced	L.U.C.R.F. Pty Ltd/ Labour Union Co-Operative Retirement Fund (LUCRF)
MySuper Investment Option	Maritime Super Pty Limited/ Maritime Super (Maritime)
VISSF Balanced Option (MySuper Product)	V.I.S Nominees Pty. Limited/ The Victorian Independent Schools Superannuation Fund (VISSF)

After the test: Merger activity

As at 15 June 2022, all but three funds with MySuper products that failed the test have merged or plan to do so: see Figure 1.

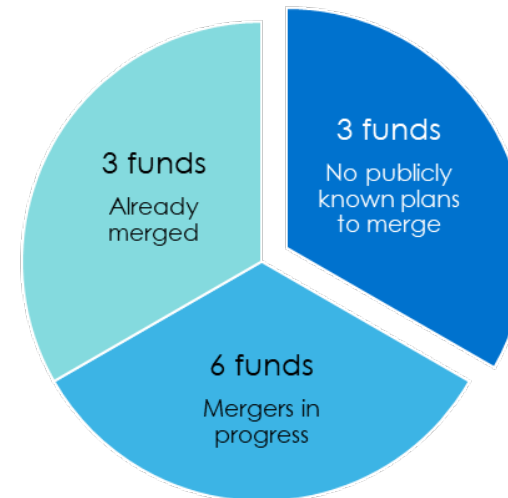
Of the funds whose products failed the performance test:

- › **three funds** have already merged;
- › **six funds** have mergers in progress; and
- › **three funds** have no publicly known plans to merge.

This means that all but three of the trustees who operated the funds at the time the fund's product failed the performance test will cease to have this role.

While some of these mergers were planned before the performance test, there is no doubt that measures like the performance test are driving merger activity. This has benefits for members who move to higher performing products.

Figure 1: Status of mergers as at 15 June 2022



Note: While 13 products failed the performance test, BT Asgard moved to BT Super in October 2021 and is not captured separately in Figure 1 (BT Asgard and BT Super are now part of the same fund). See Table 4 for the data underlying this figure (accessible version).

How the performance test works

The performance test assesses the performance of products against an objective, consistently applied benchmark to ensure greater transparency for members.

How the test works

The test is in two-parts, involving an assessment of:



investment performance relative to a benchmark portfolio created using the product's strategic asset allocation (SAA); and



administration fees charged in the last financial year relative to the median fee charged for the category of product.

The test applies an objective benchmark for each product that reflects the SAA the trustee has set for the product. This indicates whether the investment decisions of the trustee have produced performance outcomes that are higher or lower than would have been achieved by investing passively in each asset class the product is invested in.

- › If a product underperforms the combined test by more than 0.50 percentage points, the product is deemed to have failed the performance test.
- › In the 2020–21 financial year, investment performance was assessed over a seven-year timeframe. Going forward it will be assessed over an eight-year timeframe.
- › APRA must determine if a product has failed the test. It does this between the end of the financial year and 31 August.

Figure 2: What the test does (and doesn't) do

What the test does

- › It measures how well the trustee is implementing its own SAA.
- › It compares the product's investment return to a passively invested benchmark (hypothetical product) with the same SAA.

What the test doesn't do

- › It is not a measure of the overall level of investment returns.
- › It does not assess whether the trustee has set the 'right' SAA.
- › It does not directly measure the performance of a product against the products of other trustees.

Consequences for trustees of a test failure

If a product fails the performance test, APRA will notify the trustee of its determination under s60C(2) of the SIS Act that the product has failed the test.

The trustee is then required to:

- › give notice about the test failure to the beneficiaries of the product (the notice must include the suggestion that the member considers moving their money to a different product); and
- › make information about the test failure publicly available on the fund's website.

If a product fails the test in two consecutive years, the trustee will be prohibited from accepting new members into that product.

Note: In this report, we refer to beneficiaries as 'members'.

ASIC's review of trustees' communications

What we did

We set our expectations early

Before the assessment date for the performance test, ASIC sent a letter to selected trustees setting out our expectations and reminding trustees of their legal obligations should a product fail. These expectations included warnings about not engaging in misleading or deceptive conduct. At the same time, APRA published a series of frequently asked questions (FAQs): see [Your Future, Your Super FAQs](#).

ASIC and APRA worked together in setting expectations.

We reviewed general communications and mandatory disclosures

ASIC reviewed trustees' general communications with members for potentially misleading or deceptive representations about investment performance and the performance test. As well as relying on publicly available information, we used our information gathering powers to review a broad sample of these communications.

We did this for all **30 trustees** in our sample, including trustees whose products passed the test, so we had an overall picture of communications to members about the performance test.

However, we focused on the **13 products** that failed the test (**12 trustees**). For these, we also reviewed compliance with trustee mandatory obligations to notify members and publicly disclose the test failure on the fund's website.

Note: For a summary of the general communications and mandatory disclosures we reviewed, see Table 2 on page 7. For details on our process for selecting trustees see the appendix to this report.

We considered applications for relief

Relief can be provided to defer the time period in which the notice about the test failure must be sent. While both ASIC and APRA can give relief, and work together in relation to deferral requests, ASIC is the lead regulator: see [Your Future, Your Super FAQs](#).

The notice obligation ensures that members are provided with important information about the underperformance of their superannuation product so that they can consider moving their money. For the 2021 performance test, ASIC received four requests for relief, all in relation to funds in the process of merging with another fund.

Even if a merger is planned, members should be given the information they need to make their own decision. In the one instance we gave relief, the merger was to occur (and did occur) a few weeks after the performance test results were released.

As there was a very restricted time from the notification date for a member to move before the merger occurred, we considered that there was a net regulatory benefit in deferring the notification, as the information in the notice would shortly be irrelevant to the member. This is consistent with the intent set out in the Revised Explanatory Memorandum to the *Treasury Laws Amendment (Your Future, Your Super) Bill 2021*.

Note: See s60E(4) of the SIS Act.

Table 2: What ASIC reviewed

General communications



Trustees' general communications, including internal key messages, call centre transcripts, member newsletters, advertising and website disclosures.

To understand the use and decision-making concerning these, we also reviewed governance and board papers.

Mandatory disclosures



Notice to members

Trustees must give notice of a test failure to members:

- › no later than 28 days after being notified by APRA;
- › in the prescribed form; and
- › by pre-paid post or courier and by email to the nominated electronic address (if known).

Note: See s60E of the SIS Act and Sch 2A and reg 9AB.19 of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations).



Website disclosure

Trustees must make information about a test failure publicly available on the fund's website and keep it up to date at all times.

Note: See s29QB of the SIS Act.

What we found

Significant concerns with quality of communications

While trustees generally complied with their mandatory disclosure obligations, we had significant concerns in some cases with the quality of communications. We found that communications risked confusing or misleading members about the test failure. **We contacted trustees directly for corrective changes to their websites or other materials.**

Our review suggested that often the primary aim of trustees whose product failed the test was to retain members, even if this involved using communication strategies that potentially undermined good decision making by individual members. Examples of these kinds of strategies included not prominently disclosing a test failure or presenting information to discount the importance of the test.

Any failure by trustees to communicate in a balanced, clear and factual manner is not acceptable. The prescribed form of the notice trustees must send to members if a product fails the test includes that the member should consider moving their money to another superannuation product, and other trustee communications should not undermine this.

We will continue to review trustee communications in future and take action where we find issues, as appropriate.

Figure 3: Snapshot of quality issues resulting in corrective changes



General communications

Trustees whose products passed the test generally focused on providing factual information about the test in their communications.

However, we identified concerns and obtained corrective changes in relation to communications by **seven trustees**, most of whose products failed the test. These communications generally adopted strategies to challenge the relevance or importance of the test and to divert attention to other, more favourable performance measures.

We saw examples of communications from trustees that:

- › highlighted one-year performance results, positive rankings or ratings and their own percentage return above inflation targets in preference to the performance test; and
- › criticised aspects of the test rather than concentrating on explaining why the trustee was not able to meet the test parameters and how this affected their test result overall.

Compliance with mandatory disclosure obligations

Trustees whose products failed the test generally met their technical notice and website disclosure obligations, indicating that they understood the new requirements under Pt 6A of the SIS Act.

However, we obtained corrective changes from **six trustees** in relation to website communications that:

- › failed to prominently disclose the test failure on the homepage; and
- › used unclear language to identify the test.

Managing communications

We found that trustees did not always have effective arrangements in place to manage their communications in relation to a test failure.

Our review found three key areas for trustee attention:

- › *Communication plans*—Some trustees whose products failed the test had strategies aimed at obscuring the impact of the test embedded in their communication plans.
- › *Call centres*—Some trustees did not adequately resource, train and supervise call centre staff.
- › *Consistency of messaging*—Some trustees did not consistently include messages about the test failure across their communications.

General communications

Misleading or deceptive representations

The performance test assesses products against a benchmark to give members greater transparency about a product's performance to protect them from underperforming products.

In our expectations letter, we cautioned trustees that any communications made about the performance test or about a product's performance should provide information in a balanced and factual way that is not misleading or deceptive.

We approached our review of trustee communications by considering whether the communications were potentially misleading or deceptive. We contacted trustees directly about our concerns, resulting in corrective changes.

Note: For examples of ASIC's concerns, see 'Content of communications' on page 10.

To avoid the risk of communications being misleading, trustees should have regard to [RG 234](#) and [Regulatory Guide 53](#) *The use of past performance in promotional material* (RG 53). In particular:

- › advertising messages need to be clear, accurate and balanced;
- › undue prominence should not be given to benefits over risks or advantages over disadvantages;
- › information about past performance should relate to a relevant and sufficient period to give a balanced indication of performance; and
- › forecasts about future performance should be based on reasonable assumptions.

Relevance of timing and type of communications

While some trustees whose products failed the performance test sent members a cover letter with the notice of the test failure, other trustees released information about these products in letters before meeting the notice requirement, or in newsletters published after they had met the notice requirement, or on websites.

While the timing and type of the communication affected the messaging, it was the content of the communication that had the most impact on the message conveyed.

Upcoming mergers

If a product fails the test and the trustee is progressing a merger in relation to the fund, the trustee must not use the merger to downplay the importance of the test failure to members. It should not be assumed that at the point that a merger is planned a member's right to choose another superannuation fund becomes unimportant. We note that part of the process of a merger itself involves notification of members ahead of the merger occurring to enable them to decide whether to choose another superannuation fund: see [Information Sheet 90](#) *Notifying members about superannuation transfers without consent* (INFO 90).

A merger is not an excuse to avoid current legal obligations and information about the test failure will be relevant to a member's investment decision in relation to its superannuation product.

Content of communications

The communications about the performance test that most concerned us were largely made by trustees whose products failed the test. These communications reflected strategies to minimise the test's impact.

Strategies we observed included:

- › highlighting positive performance results using other performance measures; and
- › outlining the limitations of the performance test.

The communication plans of some trustees whose products narrowly passed the test raised similar concerns: see 'Communication plans and messages' on page 17. We were also concerned that some of these trustees were exaggerating the positive performance of the product, and in one case the trustee made corrective changes.

The sample of communications we reviewed by trustees whose products clearly passed the test raised no concerns relevant to the focus of this review.

Highlighting positive performance results using other measures

A common approach in communications by trustees whose products failed the performance test was to acknowledge the test failure, then refer prominently to a different performance measure: see Examples 1–3.

Example 1: Highlighting one-year performance

The issue: A trustee whose product failed the performance test highlighted strong one-year returns for the product on its website and did not refer to or link to information on the test failure in this content.

The resolution: After ASIC contact, the trustee incorporated information on the test failure into the website communications.

This was a commonly adopted strategy. Performance across the superannuation industry was very strong in the 2020–21 financial year, so trustees could generally highlight a very impressive performance figure.

In RG 53, our good disclosure principle 7.3 states:

'it may be misleading to use past performance selectively so as to exaggerate the entity's success or disguise its lack of success.'

Our review suggested that one-year performance data was used selectively and for the purpose of exaggerating success in some cases and disguising lack of success in others. This is particularly concerning where the one-year strong performance may not continue or may not be enough to prevent a product failing the test a second time.

As with the trustee in Example 1, we obtained changes from trustees that had disclosed one-year performance data in the following ways:

- › without acknowledging that industry-wide performance was relatively strong, potentially creating an overstated impression of the success of trustee performance;
- › attributing strong performance to a change in investment strategy without establishing a causal link between investment strategy change and performance, in circumstances where industry-wide performance was strong; and
- › without providing performance data over longer time periods, as the one-year period is both inappropriately short (given superannuation is a long-term product) and selectively shows better performance: see good disclosure principle 9 in [RG 53](#).

Example 2: The use of other ratings

The issue: A trustee whose product failed the performance test described it as 'top rated'. The trustee displayed an image of a 'five-star' award received for the product with the words 'you can have peace of mind knowing that your super is in great hands', without disclosing that the product had failed the test. The Product Disclosure Statement (PDS) also had an image of a tick of approval.

The resolution: After ASIC contact, the trustee removed the award images and the wording from its website.

We had concerns with the positive performance ratings and rankings to promote performance used by a number of trustees.

Often these ratings were used without attributing the source or sufficiently explaining what the product or fund was being measured against. We contacted some trustees and corrective changes were made in the context of performance test communications.

When using ratings, we expect trustees to:

- › ensure rating agency reports are identifiable and described with the source of ratings and basis for those ratings adequately explained;
- › use positive performance ratings carefully so members have balanced information and complete context (see Example 2);
- › be clear about which part of the fund or product a positive performance rating relates to; and
- › follow the guidance in [RG 234](#).

Example 3: Trustee's own performance objectives met

The issue: A trustee whose product failed the performance test answered an FAQ about why its product was 'underperforming' by referring to its performance against its own percentage return above inflation target, and without reference to the test.

The resolution: We were concerned that this FAQ suggested that members should prefer the trustee's percentage return above inflation target instead of the test result. After ASIC contact, these statements were removed from the fund's FAQ.

While it is common for trustees to assess a product's performance using a percentage return above inflation target, including in their MySuper product dashboard, this is not comparable to the measure used in the performance test, which measures how well the product has performed against a tailored benchmark based on the product's SAA.

These tests measure different aspects of fund performance and one is not a substitute for the other. Trustees should not juxtapose a discussion about meeting or exceeding a percentage return above inflation target with the test result in a manner that could suggest that test failure is of less significance, or should be ignored as an appropriate performance measure by the member.

Outlining the limitations of the performance test

A strategy we observed used by trustees whose products failed the performance test was to explain the test failure by criticising an aspect of the test's application to their product, with the implication that the outcome of the test was therefore unreliable: see Examples 4–6.

Example 4: Taking a more defensive/conservative approach

The issue: A trustee stated on its website that a reason its product failed the test was because it deployed a more conservative profile for its MySuper product than it had set for the product's SAA.

The resolution: We were concerned that members would not understand this explanation and that further context was needed about the SAA, why the conservative profile was adopted, and how it deviated from the SAA. After ASIC contact, the trustee made corrective changes and provided more information.

It is possible for a product to fail the performance test in part because the assets were invested much more conservatively than the trustee's SAA for the product over the period covered by the test.

Where this is the case, trustees should give members clear and accurate information about how the assets are being invested and why this differs from the SAA.

Example 5: The test is new so the product can't pass

The issue: A trustee whose product failed the performance test attributed its product's test failure to the fact that the test did not exist at the time investment decisions were made in the past.

The resolution: The test assesses the product's actual performance as submitted to APRA as measured against benchmarks related to the trustee's own SAA for the product over time. The trustee deleted its explanation from the website.

Explanations about why a product fails the test should focus on the product's performance against the test, rather than suggesting the product failed the test because of the test itself. Trustees should concentrate on providing sufficient information for members to understand why the product failed the test.

Example 6: Changes in investment strategy

A number of trustees criticised the retrospectivity of the performance test, particularly where they changed their investment strategy and a product's performance had improved.

An explanation around a change in investment strategy that undermines the message to members that the product failed the test may be misleading. Trustees should provide clear and accurate information as well as a reasonable basis for any representations about future performance.

Examples 4–6 highlight that trustees should focus not on criticising the performance test, but on explaining the product's performance against the test.

If a trustee considers that the product failed due to the impact of a particular feature of the test, the trustee should communicate why the product could not meet the test parameters and how this affected the test result overall, so a member can assess the reasonableness of the explanation. Explanations should be clear and informative.

Compliance with mandatory disclosure obligations



Notice to members

Trustees whose products fail the performance test must give notice of the test failure to members.

One trustee was granted relief from sending the notice (see 'ASIC's review of trustees' communications' on page 6), meaning notices were sent by 11 trustees in relation to 12 MySuper products.

No later than 28 days

11	notices received by 27 September 2021	1	notice sent by 27 September 2021
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The notice must be given no later than 28 days after APRA gives its determination on the test failure to the trustee. In the 2020–21 financial year, APRA gave this determination to all the trustees on 30 August 2021.

Of the 12 notices sent, 11 were received by 27 September 2021 and one was sent by 27 September 2021.

The obligation is for members to *receive* the notice **within** 28 days.

ASIC did not take any action in relation to this issue in the 2020–21 financial year because we found a general intention to comply based on trustees' apparent interpretation of the law, and we recognised that with the newness of the test the approaches adopted were not unreasonable.

In the prescribed form

10	notices contained no changes to prescribed form	2	notices contained immaterial changes to prescribed form
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The law requires that the notice is given in the prescribed form. Of the 12 notices sent, 10 contained no changes to the prescribed form and two contained immaterial changes to the prescribed form.

The form of the notice is prescribed by regulations – **trustees should not change it.**

Discretionary information is identified with square brackets. When providing the discretionary information, trustees should:

- › use the account-level balance calculated as at the date of the letter and account-level fees for the previous financial year; and
- › exclude insurance fees.

Material accompanying the notice

3

notices sent without accompanying material

9

notices were sent with accompanying material

Of the 12 notices sent, nine were sent with accompanying material and three without.

Our expectations letter warned that any communication, including its manner of delivery, could be at risk of being misleading if it, for example, contradicted the notice.

The accompanying material we saw was usually a cover letter or additional information about the recent performance of the fund, or about the performance test and what action the trustee is taking to improve performance.

While some trustees sent accompanying material and others just the notice, the statements made in the accompanying materials were similar to statements other trustees made in general communications such as their website updates or direct member newsletters. We took the same approach to all communications (i.e. determined whether there was a risk that the communication was misleading or deceptive).

Note: See 'General communications' on page 9 for further discussion.

Contact details of members



Update member details!

The law requires that the notice is sent to the address of the place of residence or business of the member last known to the trustee. If a trustee has a nominated email address for a member, it must send the notice to that address as well as by post. (The subject header must say 'Important notice about your super product's performance'.)

Our expectations letter stated that trustees could use the latest address the member notified to the trustee, even if that is a postal address. This position recognises that some members may not receive mail at a residential address. It is most important that members receive the notice.

There were trustees that did not have any correct contact details for small proportions of their affected members.

Trustees should seek to improve member data and update contact details regularly.

Website disclosure

Trustees of the **13 products** that failed the performance test were required to make a description of these circumstances publicly available, on their website. The purpose of this disclosure is to warn prospective members about the test failure.

Note: See Explanatory Statement to the *Treasury Laws Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2021*, p. 16.

We actively monitored both the timing and quality of trustees' website disclosure in the period immediately after they were notified that a product had failed the test, and we sought corrective changes where necessary.

We contacted **six trustees** in relation to their website material and achieved corrective disclosure to make sure it was clear to members and others that the product had failed.

Timing of disclosure

In our expectations letter, we gave guidance that following notification of a test failure, websites must be **up to date at all times** in accordance with the law. There is no safe harbour of 20 days for complying with this obligation which means that updates must be made immediately.

Note: See s29QB of the SIS Act and reg 2.38(2)(ea) of the SIS Regulations. We have not amended [ASIC Superannuation \(RSE Websites\) Instrument 2017/570](#) to extend to reg 2.38(2)(ea). See also [Regulatory Guide 252](#) *Keeping superannuation websites up to date* (RG 252).

As APRA had already contacted trustees about products with a high risk of failing the test, we consider trustees should have been well-prepared to update their website after the formal notification of a determination from APRA was received. Overall, this was the case.

While some trustees did not update their websites immediately, we only ultimately contacted **one trustee**. That trustee took longer than others to update its website, though once contacted, did so quickly.

Ongoing disclosure

Our expectation is that this disclosure will appear clearly on the fund's homepage and remain prominently available until the next performance test.

As part of our review, we intermittently checked the websites of the trustees whose products failed the performance test. We found one example of a trustee who did not continue to keep disclosure of the test failure displayed on its fund's homepage: see Example 7.

Example 7: Ongoing s29QB obligation

The issue: A trustee used a banner on its homepage to disclose that its MySuper product had failed the performance test. The banner is used to highlight items of interest and is changed regularly, meaning that the disclosure was replaced in due course.

The resolution: In response to ASIC contact, the trustee reinstated the disclosure permanently on its homepage. Banner advertising is designed to change regularly, and so is not an appropriate place to publish the disclosure.

Quality of disclosure

Our expectations letter stated that the website material should be prominently and clearly disclosed so that any prospective member accessing the website is made aware that the product failed the performance test.

Five trustees made changes to their websites in response to concerns raised by ASIC about the prominence and clarity of their disclosure: see Examples 8 and 9.

Example 8: Prominence of notice

The issue: A trustee did not disclose on its website homepage that its product had failed the performance test. Instead, it published this information on a webpage titled 'Governance', which is not a page users would necessarily navigate to for the purpose of finding information about the MySuper product.

The resolution: After ASIC contact, the trustee put information about the notice on the homepage.

We saw examples of similar conduct such as the notice being placed on the announcements and statutory documents pages of the website.

Placing the notice on webpages that members are unlikely to visit is unacceptable. Each time we saw this conduct, we obtained corrective changes.

Example 9: Unclear labelling of notice

The issue: A trustee used the title 'Your Future Your Super' on its fund website homepage to provide a link to information about the notice. We considered that this language was unclear and a member or prospective member may not understand that this link would be to information about the test failure.

The resolution: After ASIC contact, the trustee clearly identified that the linked information related to the failed performance test so that members would be on notice of the importance of this information.

The wording used to notify users of the notice should make it clear in the title that the information relates to failure of the performance test by the particular product.

Members who hold that product, or consumers who are interested in acquiring the product, should be on notice that the information (which may be behind a link) is important to their consideration of the product.

Managing communications

Communication plans and messages

Ten of the trustees whose MySuper product failed the performance test had a performance test communications plan in place. Some trustees whose products were at a high risk of failing (though ultimately passed) had also prepared a plan.

These plans tended to be coordinated strategies, often discussed at board level, for how the trustee would communicate about the test failure. Plans often included communicating through multiple channels such as meetings with key stakeholders (including employers), briefings for internal staff and member emails, website FAQs, newsletters and advertising.

Trustee boards considering a communication strategy should have members' best financial interests foremost in their decision making.

If a product fails the performance test, this should be communicated to members in a balanced and factual way, with full transparency about the underperformance.

This may need to include information about whether the product might fail the performance test the next year (and so be closed to new members), and whether the trustee is likely to merge the fund with another fund as a result.

Minimising the impact of a test failure

For trustees whose products failed (or were at a high risk of failing but narrowly passed) the performance test, communication plans often included strategies to minimise the impact of the test by highlighting positive performance results using other performance measures and outlining the limitations of the test.

These strategies have the potential to be misleading or deceptive. For example, if a product is close to failing the test, focusing too much on recent positive performance may create a more positive impression than is the case and suggest that the trustee has not been responsible for performance difficulties, which could be misleading: see 'General communications' on page 9.

For trustees whose products passed (rather than narrowly passed) the performance test, communication plans in place were generally limited to factual messaging about the test and/or increasing advertising of the MySuper product in an environment where members in underperforming products may be looking to switch their superannuation investment.

We expect that, for trustees whose products fail the test, communication plans relating to the performance test should focus on clearly delivering the message to members that the product failed the test so that members are put on notice that they **should** consider moving their money to a different superannuation product.

Specific retention strategies

In some cases, we saw communication strategies that appeared to be aimed at keeping members in the fund where a product had failed the performance test. Trustees who deploy a strategy that promotes switching to another of their products using direct communication to members may risk breaching the financial advice and anti-hawking laws.

Penalties may apply where trustees give financial advice without an appropriate licence, or where the quality of advice is poor. Similarly, there are consequences for breach of the hawking prohibition which prevent trustees from offering financial products in the course of, or because of, real-time unsolicited contact.



Consistency across communications

Our review showed that trustees did not always consistently incorporate information about the test failure in all member-facing communications.

If a product fails the performance test, we expect this information would be included in all relevant performance-related communications, including fund websites. This will help to minimise confusion and help members understand the overall performance of the product.

Relevant forms of communication could include the following:

- › *MySuper product dashboards*—These should reflect product performance history accurately, including, where relevant, that it failed the performance test.
- › *Annual outcome assessments*—Trustees must take into account the results of the performance test when completing their annual outcomes assessment: see s52(9)(a)(iv) of the SIS Act.

- › *Other disclosures*—These could include PDSs, periodic statements, annual reports and annual member meetings.

We expect that where performance of the product is mentioned, the test failure should also be mentioned to give the complete performance picture.



Communications by third parties

Trustees should ensure where possible that they monitor and manage the messages distributed by connected third parties about trustee products.

Example 10: Union communication

The issue: Unions connected with two separate superannuation funds contacted union members about products that failed the performance test.

The resolution: We wrote to the two unions concerned reminding them that financial services laws apply to them in relation to their communications to union members. We warned that they must be careful not to provide unlicensed financial advice or make misleading or deceptive statements about financial products.

We also raised this issue with a peak union representative body so our concerns were communicated more generally throughout the industry.



Call centres

Direct contact with call centre staff is a key and influential way trustees communicate with their members. Members are often seeking clarity, and information from call centre staff could be highly influential.

Our review highlighted a number of concerns with call centres, all of which may contribute to poor outcomes for members.

Call centre transcripts and key messages not up to date

A trustee had a number of out-of-date disclosures in its call centre scripts. This trustee has now either updated these documents or has committed to update them within an agreed timeframe.

Where information is not up to date, members will be given the wrong information which could result in poor decisions. If the information is misleading or deceptive, use of this information could also result in a breach of the law.

To ensure that call centre staff are well equipped to answer queries about the test, trustees should prepare internal key message documents covering a range of circumstances, particularly where the member has invested across multiple products.

Call centre materials must be clear, concise and balanced, and not contain misleading statements. They must reflect the performance test and the intentions of the reforms and be kept up to date.

Call centres not adequately resourced to deal with volume of calls

A trustee asked staff who were not usually in the call centre to assist with the volume of calls which had implications for the quality of call centre interactions.

Trustees should anticipate that call volumes will increase if a product fails the performance test and make appropriate arrangements.

Call centre staff not adequately trained and supervised

In some cases, information about the performance test was not clearly articulated to members or important details were left out during phone conversations.

Particularly where the requirements are new, call centre staff must be adequately trained so that they are able to answer a variety of questions clearly and without misrepresenting the facts.

Supervision should enable trustees to detect and rectify any errors early.

Appendix: Methodology and data

Selection of trustees for review

We reviewed the general communications of 30 trustees. Our sample included all trustees with a MySuper product that failed the performance test and a selection of other trustees: see Table 3.

Table 3: Trustees in sample

Reason for inclusion	Number
Failed the test	12
Narrowly passed the test	10
Had mid-quartile performance	2
Had top-quartile performance	6
Total	30

Note: While 13 MySuper products failed the performance test, BT Asgard and BT Super were both BT products and were included in our sample as belonging to the one trustee. Since October 2021, they have been part of the same fund.

Data on merger activity

Table 4 summarises the merger activity for funds with MySuper products that failed the performance test, including mergers in progress through a heads of agreement (HOA) or memorandum of understanding (MOU).

Table 4: Status of mergers as at 15 June 2022

Trustee/fund	Merging partner	Status of merger	Timing
AvSuper	Commonwealth Superannuation Corporation	In progress (MOU)	Mid-2023
BOC	Equisuper	Merged	Nov 2021
BT Super	Mercer	In progress (HOA)	Q2, 2023
CBA BO	—	No known plans	—
CFSIL	—	No known plans	—
Christian Super	Australian Ethical	In progress (MOU)	2022–23
EISS	Cbus	In progress (MOU)	2022–23
ETSL–AMG	—	No known plans	—
LUCRF	AustralianSuper	Merged	Jun 2022
Maritime	Hostplus	In progress (MOU)	2023
SCS	UniSuper	In progress (HOA)	Q4, 2022
VISSF	Aware Super	Merged	Nov 2021

Note: This is an accessible version of Figure 1. BT Asgard moved to BT Super in October 2021 and is not captured in this table.

Key terms and related information

Key terms

APRA	Australian Prudential Regulation Authority
APRA determination	The requirement in s60C of the SIS Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
expectations letter	ASIC's letter to selected trustees dated 25 August 2021
MySuper product	A default superannuation product provided under Pt 2C of the SIS Act
notice	The obligation in s60E of the SIS Act
performance test (or test)	Annual performance test as described in Pt 6A of the SIS Act
Product Disclosure Statement (PDS)	A document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A of the Corporations Act for the exact definition
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>

SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>
strategic asset allocation (SAA)	Guidance given by a trustee as to what proportion of the investment option it intends to invest in each asset class
superannuation fund	Has the meaning given in s10(1) of the SIS Act
trustee (superannuation)	A person or group of persons licensed by APRA under s29D of the SIS Act to operate a registrable superannuation entity (e.g. superannuation fund) (also known as an 'RSE licensee')
Your Future Your Super reforms	The reforms introduced by <i>Treasury Laws Amendment (Your Future, Your Super) Act 2021</i> and <i>Treasury Laws Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2021</i> which were based on recommendations of the Productivity Commission's 2018 final report Superannuation: Assessing efficiency and competitiveness

Related information

Headnotes

Annual performance assessment, member communications, consumer harm, disclosure, misleading or deceptive, MySuper product, performance test, superannuation trustees

Legislation and legislative instruments

[ASIC Superannuation \(RSE Websites\) Instrument 2017/570](#)

Corporations Act

Explanatory Statement to the *Treasury Laws Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2021*

Revised Explanatory Memorandum to the *Treasury Laws Amendment (Your Future, Your Super) Bill 2021*

SIS Act

SIS Regulations

Treasury Laws Amendment (Your Future, Your Super) Act 2021

Treasury Laws Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2021

Regulatory guides

[RG 53](#) *The use of past performance in promotional material*

[RG 234](#) *Advertising financial products and services (including credit): Good practice guidance*

[RG 252](#) *Keeping superannuation websites up to date*

Information sheet

[INFO 90](#) *Notifying members about superannuation transfers without consent*