
FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE –
STRONGER REGULATORS (2020 MEASURES)) BILL 2020:
ASIC REGULATION OF SUPERANNUATION

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AFSL	Australian financial services licence
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ATO	Australian Taxation Office
Bill	Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2020 Measures)) Bill 2020
Corporations Act	<i>Corporations Act 2001</i>
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
RSE	Registrable superannuation entity, defined in the SIS Act
SMSF	Self-managed superannuation fund
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>

Chapter 1

Implementing Recommendations 3.8, 6.3, 6.4 and 6.5 of the Financial Services Royal Commission

Outline of chapter

1.1 This Chapter explains the amendments in Schedule # to the Bill that implement recommendations 3.8, 6.3, 6.4 and 6.5 of the Financial Services Royal Commission.

Context of amendments

Recommendations 3.8, 6.3, 6.4 and 6.5 of the Financial Services Royal Commission

1.2 Schedule # to the Bill implements the following recommendations of the Financial Services Royal Commission:

- Recommendation 3.8 – The roles of APRA and ASIC with respect to superannuation should be adjusted, as referred to in Recommendation 6.3.
- Recommendation 6.3 – The roles of APRA and ASIC in relation to superannuation should be adjusted to accord with the general principles that:
 - APRA, as the prudential regulator for superannuation, is responsible for establishing and enforcing Prudential Standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by superannuation entities APRA supervises are met within a stable, efficient and competitive financial system; and
 - as the conduct and disclosure regulator, ASIC’s role in superannuation primarily concerns the relationship between RSE licensees and individual consumers.
- Recommendation 6.4 – Without limiting any powers APRA currently has under the SIS Act, ASIC should be given the power to enforce all provisions in the SIS Act that are, or will become, civil penalty provisions or otherwise give rise to a cause of action against an RSE licensee or director for

conduct that may harm a consumer. There should be co-regulation by APRA and ASIC of these provisions.

- Recommendation 6.5 – APRA should retain its current functions, including responsibility for the licensing and supervision of RSE licensees and the powers and functions that come with it, including any power to issue directions that APRA presently has or is to be given.

ASIC’s expanded role in superannuation regulation

1.3 The Financial Services Royal Commission recommended that the role of ASIC in superannuation be expanded to better promote consumer protection and market integrity in the superannuation industry.

1.4 To achieve this, recommendation 6.4 stated that ASIC be given the power to enforce the provisions in the SIS Act that concern consumer protection.

1.5 The SIS Act and the RSE licensing regime are primarily designed with prudential supervision in mind. That means the focus of obligations is on governance, capital and other prudential requirements that ensure trustees operate in a manner consistent with their best interest obligations and deliver quality outcomes for members.

1.6 Given the prudential focus of the SIS Act, the Government has expanded the AFSL regime to cover the provision of superannuation trustee services. This is a simple and effective way of ensuring that ASIC has access to appropriate powers and enforcement tools, and can successfully perform its expanded role as the superannuation regulator responsible for consumer protection and market integrity regulation.

1.7 The AFSL regime promotes confident and informed decision making by consumers of financial products and services, as well as fairness, honesty and professionalism by those who provide financial services. The regime imposes specific duties on licensees, including to provide financial services efficiently, honestly and fairly, and comply with Australian financial services laws. Currently, most superannuation trustees are required to hold an AFSL authorising them to deal in a superannuation interest. If a trustee provides other services, for example, financial product advice, its AFSL must also cover those services.

1.8 Expanding the coverage of the AFSL regime enables ASIC to enforce conduct and consumer protection obligations across a broader range of superannuation trustee activities. It also provides ASIC with access to its full suite of enforcement tools, which strengthens its ability to deter trustee misconduct through court-based enforcement activities and to ensure fair remediation of consumers.

1.9 Where possible, these changes to the SIS Act and Corporations Act are being implemented in a way that minimises the regulatory burden and avoids additional costs.

Summary of new law

1.10 Part 1 makes adjustments to the SIS Act relating to the roles and responsibilities of superannuation industry regulators. In line with Financial Services Royal Commission recommendations 3.8, 6.3, 6.4 and 6.5, Part 1 expands ASIC's role in the SIS Act to include promoting consumer protection and market integrity.

1.11 An outcome of this change is that APRA and ASIC now share general administration of, or co-regulate, the SIS Act provisions that have consumer protection and member outcomes as their touchstone. These co-regulated provisions are either civil penalty provisions or provisions that are otherwise enforceable.

1.12 Consistent with Financial Services Royal Commission recommendation 6.4, provisions with a consumer protection focus that become enforceable provisions in the future should also be co-regulated by APRA and ASIC.

1.13 The role of the Commissioner of Taxation has not changed.

1.14 Part 1 introduces general improvements to section 6 of the SIS Act and related provisions to modernise and simplify the allocation of the general administration of provisions. The general administration of a provision of the SIS Act is now determined under the general administration table. The new tabular structure of subsection 6(1) improves the readability and accessibility of the information in the provision.

1.15 Part 2 extends the AFSL regime to cover a broader range of activities undertaken by APRA-regulated superannuation trustees. It does this by creating a new financial service – providing a superannuation trustee service. A person provides a superannuation trustee service if they operate an RSE.

1.16 In general terms, this means that each RSE licensee must hold an AFSL authorising it to provide a superannuation trustee service, which captures all activities involved in operating a superannuation fund. Examples of the activities intended to be covered include fee charging practices, investment selection, product changes, oversight of service providers, insurance claims handling, and transfer, payment and rollover practices.

1.17 In turn, the AFSL obligations apply in full to these activities from 1 July 2020. A superannuation trustee service will generally be provided to the beneficiaries of a superannuation fund, which in turn constitutes the provision of a financial service to a retail client. This engages certain additional protections and obligations under Chapter 7 of the Corporations Act.

1.18 Part 2 also introduces requirements for ASIC to obtain APRA’s agreement before taking certain actions affecting RSE licensees, reflecting the changes this Bill makes to the framework for superannuation regulation. These requirements apply to the cancellation of an AFSL, the imposition of certain licence conditions and the making of certain banning orders.

1.19 In the context of the extension of the AFSL regime’s coverage over superannuation, Part 2 amends the SIS Act’s existing indemnification rules to prevent superannuation trustees and their directors from using trust assets to pay criminal, civil or administrative penalties incurred in relation to a contravention of any Commonwealth law.

1.20 Part 2 also applies the consumer protections for financial services under the ASIC Act to the expanded range of trustee activities captured by the extension of the AFSL regime.

1.21 The Bill contains a number of transitional provisions concerning the extension of the AFSL regime’s coverage of superannuation trustee services. Existing RSE licensees who already hold an AFSL authorising them to deal in a superannuation interest do not need to apply for the new authorisation, and the remainder of existing RSE licensees only need to meet the application requirements in respect of dealing in a superannuation interest.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<i>General administration of the SIS Act</i>	
ASIC’s role in superannuation is expanded to include protecting consumers from harm and market misconduct. ASIC is now generally responsible for consumer protection, market integrity, disclosure and the keeping of reports.	ASIC’s role is generally limited to matters of disclosure and the keeping of reports.

<p>APRA and ASIC share general administration of SIS Act provisions which have consumer protection and member outcomes as their touchstone. These co-regulated provisions are either civil penalty provisions or provisions that are otherwise enforceable.</p>	<p>ASIC has general administration of provisions concerning disclosure and the keeping of reports.</p>
<p>Section 6 of the SIS Act and related provisions are modernised and simplified. The general administration of a provision of the SIS Act is now determined under the general administration table.</p>	<p>Section 6 of the SIS Act is confusing and opaque; its structure makes it difficult to identify which regulator is responsible for a particular provision.</p>
<p><i>Extended AFSL coverage</i></p>	
<p>An RSE licensee must also hold an AFSL to provide a superannuation trustee service, which covers the operation of an RSE as trustee.</p>	<p>An RSE licensee must hold an AFSL to deal in a superannuation interest or provide financial product advice.</p>
<p>The ASIC Act consumer protections also apply to the provision of a superannuation trustee service.</p>	<p>The ASIC Act consumer protections apply to dealing in a superannuation interest and the provision of financial product advice.</p>
<p>ASIC must also obtain APRA’s agreement before cancelling an RSE licensee’s AFSL, imposing certain conditions on an RSE licensee’s AFSL or making certain banning orders against an RSE licensee.</p>	<p>APRA and ASIC must consult or inform each other about certain actions affecting entities they both regulate.</p>
<p>Superannuation trustees and trustee directors cannot use trust assets to pay a criminal, civil or administrative penalty incurred in relation to a breach of Commonwealth law in circumstances where the breach did not previously warrant disentitlement based on the principles in section 56.</p>	<p>Superannuation trustees and trustee directors cannot use trust assets to pay a liability for breach of trust if the trustee fails to act honestly in a matter concerning the entity, or intentionally or recklessly fails to exercise, in relation to a matter affecting the entity, the required degree of care and diligence.</p>

Detailed explanation of new law

Adjustment of APRA and ASIC’s role in the SIS Act

Adjustments relating to the roles and responsibilities of superannuation industry regulators

1.22 Schedule # repeals section 4 of the SIS Act and replaces it with a simplified outline. The simplified outline sets out high-level statements of APRA, ASIC and the Commissioner of Taxation’s supervision responsibilities in superannuation. *[Schedule #, item 1, section 4 of the SIS Act]*

1.23 Rather than demarcating the three regulators’ roles, the statements of their supervision responsibilities are intended to provide guidance to SIS Act users about the focus of their regulatory activities. Particularly for APRA and ASIC, the role statements highlight that their regulatory activities are complementary and overlapping, rather than mutually exclusive. The Commissioner of Taxation’s role is unchanged.

1.24 Other Financial Services Royal Commission recommendations support coordinated interactions between APRA and ASIC. For example, recommendation 6.9 provides that APRA and ASIC must work in cooperation and share information.

APRA’s role and responsibilities

1.25 APRA is generally responsible for prudential regulation and member outcomes. It is also generally responsible for licensing and supervision of RSE licensees. *[Schedule #, item 1, section 4 of the SIS Act]*

1.26 Consistent with Financial Services Royal Commission recommendations 6.4 and 6.5, APRA’s responsibilities in the SIS Act are largely unchanged. APRA, as the prudential regulator for superannuation, remains responsible for establishing and enforcing Prudential Standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by superannuation entities are met within a stable, efficient and competitive financial system.

1.27 The only substantive change to APRA’s general administration is reflected in item 26 of the general administration table, which reallocates APRA’s responsibility for section 68B of the SIS Act to ASIC. *[Schedule #, item 1, section 6(1) of the SIS Act]*

1.28 Section 68B concerns the promotion of illegal early release schemes. Such schemes may involve promoters encouraging individuals to transfer or rollover their superannuation from their existing superannuation fund to an SMSF so the individual can withdraw their superannuation before they are legally entitled to it. The general administration of section 68B is reallocated to ASIC because its focus on

preventing harm to individual consumers of superannuation products is consistent with ASIC's regulatory focus under the SIS Act, as set out in new section 4.

1.29 The Commissioner of Taxation's role in administering section 68B in relation to SMSFs is unchanged.

ASIC's role and responsibilities

1.30 Currently in the SIS Act, ASIC's role is generally limited to matters of disclosure and record keeping. For example, ASIC has general administration of the covenants imposed on RSE licensees under section 52 of the SIS Act, but only to the extent that they relate to record keeping and disclosure obligations of RSE licensees.

1.31 Consistent with Financial Service Royal Commission recommendations 6.3 and 6.4, Schedule # expands ASIC's role in superannuation to include promoting consumer protection and market integrity. As a result of these amendments, ASIC is now generally responsible for consumer protection, market integrity, disclosure and record keeping. *[Schedule #, item 1, section 4 of the SIS Act]*

1.32 'Consumer protection' regulation provides consumers and regulators with legal recourse concerning circumstances or actions that unreasonably disadvantage consumers. 'Market integrity' regulation promotes confidence in the efficiency and fairness of markets by ensuring that markets are fair, orderly and transparent. Market integrity and consumer protection regulation are inherently linked; both rely on disclosure and conduct rules to achieve regulatory outcomes.

1.33 ASIC's existing role in regulating certain disclosures and report keeping by superannuation trustees is unchanged by Schedule #.
[Schedule #, item 1, subsection 6(1) and (2) of the SIS Act]

1.34 ASIC's expanded role in superannuation regulation is consistent with ASIC's broader role in the Australian financial system, which is articulated in the ASIC Act. Indeed, subsection 12A(2) of the ASIC Act provides that ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.

1.35 Additionally, ASIC is allocated sole administration of section 99FA, a new fee charging provision introduced through Financial Services Royal Commission recommendation 3.3. *[Schedule #, item 1, subsection 6(1) of the SIS Act (table item 32)]*

The Commissioner of Taxation's role and responsibilities

1.36 Finally, the simplified outline provides that the Commissioner of Taxation is generally responsible for SMSFs, data and payment standards,

tax file numbers and the compassionate release of superannuation amounts. *[Schedule #, item 1, section 4 of the SIS Act]*

General administration table

1.37 Currently, section 6 of the SIS Act divides responsibility for the general administration of SIS Act provisions among APRA, ASIC and the Commissioner of Taxation. The existing section 6 is confusing and opaque insofar as the provision’s structure makes it difficult to identify which regulator is responsible for a particular provision.

1.38 Schedule # to the Bill repeals the existing section 6 of the SIS Act and inserts a new section 6. *[Schedule #, item 1, section 6 of the SIS Act]*

1.39 To modernise and simplify section 6, the general administration of a provision of the SIS Act is now determined under the general administration table in subsection 6(1). *[Schedule #, item 1, subsection 5(1) of the SIS Act]*

1.40 The new tabular structure of subsection 6(1) improves the readability and accessibility of the information in the provision. Under that subsection, the general administration of a provision referred to in column one of the table is conferred on the regulator listed in column three. *[Schedule #, item 1, subsection 5(1) and 6(1) of the SIS Act]*

1.41 Additionally, ***general administration table*** is now defined in subsection 10(1) to mean the table in section 6 of the SIS Act. *[Schedule #, item 2, subsection 10(1) of the SIS Act]*

Substantive changes to the general administration of provisions

1.42 The main changes to the general administration of provisions in the SIS Act relate to the co-regulation of provisions by APRA and ASIC. Other changes to section 6, including the general administration of provisions, improve the operation of the section and efficiency of general administration.

1.43 The following items in the general administration table reflect no substantive change from the allocation of general administration in the existing SIS Act: 1, 3-14, 17, 21-22, 24-25, 27-31, 33-35, 37-38, 40-49, 51-53, 55-61. *[Schedule #, item 1, section 6(1) of the SIS Act]*

Co-regulation of provisions by APRA and ASIC

1.44 Financial Services Royal Commission recommendations 3.8, 6.3, 6.4 and 6.5 underpin a number of changes to the allocation of general administration, which enable co-regulation of enforceable consumer/member focused SIS Act provisions by APRA and ASIC. Co-regulated provisions are civil penalty provisions or provisions that are otherwise enforceable, and which have consumer protection and member outcomes as their touchstone.

1.45 The introduction of the co-regulation by APRA and ASIC of enforceable consumer/member focused provisions is a shift from the existing division of responsibilities under the SIS Act where regulators have discrete responsibilities and roles.

1.46 Consistent with Financial Services Royal Commission recommendation 6.4, provisions with a consumer protection focus that become civil penalty provisions in the future should also be co-regulated by APRA and ASIC.

1.47 The amendments ensure that the following SIS Act provisions, which concern consumer protection and member outcomes are now co-regulated by APRA and ASIC:

- Section 29JCA, which concerns false representation about status as an RSE licensee (item 2 in the general administration table)
- Sections 52, 52A and 54B, which concern the governing rules covenants for registrable superannuation entities and the consequences for breaching these covenants (item 18 in the general administration table)
- Section 54A, which provides a power to prescribe other governing rules covenants in regulations (item 20 in the general administration table)
- Sections 62 and 68, which establish the sole purpose test and the prohibition against victimisation, including of trustees, respectively (item 23 in the general administration table)
- Section 108A, which concerns the duty on trustees to identify multiple superannuation accounts of members (item 36 in the general administration table)
- Section 126K, which provides that it is an offence for disqualified persons to be trustees, investment managers or custodians of superannuation entities (item 39 in the general administration table)
- Part 21 – Civil and criminal consequences of contravening civil penalty provisions – to the extent it relates to a provision administered by both APRA and ASIC (item 50 in the general administration table), and
- Sections 242K, 242L and 242M, which concern trustee obligations relating to eligible rollover funds and the consequences for breaching those obligations (item 54 in the general administration table).

[Schedule #, item 1, subsection 6(1) of the SIS Act]

1.48 While co-regulation introduces overlap between APRA’s member outcomes role and ASIC’s consumer protection and market integrity role, in practice, APRA and ASIC have a natural focus on different aspects of conduct. ASIC’s focus is generally on the relationship between superannuation trustees and individual consumers whereas APRA’s focus is generally on the outcomes that trustees deliver for their membership as a whole, or cohorts of members.

1.49 APRA and ASIC are working together to improve outcomes for superannuation members and beneficiaries, and to enhance their regulatory cooperation. For example, APRA and ASIC are jointly developing communications for RSE licensees about how the co-regulation of enforceable consumer/member focused provisions works in practice, to be released before 1 July 2020.

1.50 Co-regulation does not change any of the obligations on RSE licensees or how they are to comply with these obligations. For example, breaches of RSE licence conditions must still be reported to APRA in accordance with existing section 29JA of the SIS Act.

1.51 However, APRA and ASIC have a role in administering the obligations contained in the above listed enforceable consumer/member focused provisions. This could involve, for example, determining and enforcing compliance in relation to these provisions.

1.52 Co-regulation of enforceable consumer/member focused provisions is only between APRA and ASIC. The Commissioner of Taxation’s role is unchanged, including in relation to SMSFs.

1.53 These outcomes are consistent with Financial Services Royal Commission recommendations 3.8, 6.3, 6.4 and 6.5.

General improvements to section 6 and related provisions

Trustee elections and complying fund status

1.54 Schedule # to the Bill updates the SIS Act to clarify the existing position that the Commissioner of Taxation, rather than APRA, is responsible for receiving written notices from trustees of their election to have the Act apply to them as a regulated superannuation fund. *[Schedule #, item 6, subsection 19(4) of the SIS Act]*

1.55 Currently, subsection 19(4) of the SIS Act refers specifically to APRA receiving written notices from trustees. Despite this reference, subsection 19(4A) authorises regulations to prescribe that notices are to be given to different bodies or persons. Since 1999, regulation 1.04A of the SIS Regulations has prescribed that the Commissioner of Taxation is to receive all such notices in all circumstances. The amendments update the SIS Act to reflect this long-standing position, rather than relying on

regulation 1.04A (which is separately repealed through amendments to the SIS Regulations).

1.56 As a result of this change, the regulation making power in subsection 19(4A) is no longer required and is therefore repealed.

[Schedule #, item 7, subsection 19(4A) of the SIS Act]

1.57 The amendments also make a number of changes to provisions affected by the existing re-allocation of responsibility from APRA to the Commissioner of Taxation.

1.58 In particular, there are a number of references to ‘APRA’ in sections 42 and 42A about complying fund status that are currently deemed to be replaced with ‘the Commissioner of Taxation’. These provisions generally relate to decisions that are made by the entity that receives trustee elections under subsection 19(4) (for example, extensions that were granted to the times for providing written notices).

1.59 Under the current law, the Commissioner of Taxation is given general administration of these provisions instead of APRA through paragraph 6(4)(c) of the SIS Act, and the various references to APRA in the provisions are deemed to instead be to the Commissioner by subsections 42(3) and 42A(7).

1.60 Instead of relying on additional rules, the amendments update the various references to APRA in sections 42 and 42A so that they refer directly to the Commissioner of Taxation. *[Schedule #, items 9 to 11, 13 and 14, subparagraphs 42(1AA)(b)(ii) and (c)(ii), paragraphs 42(1AC)(b) and (c), subparagraph 42(1AC)(d)(ii), subparagraphs 42A(3)(c)(ii) and (d)(ii) and subsection 42A(4) of the SIS Act]*

1.61 These changes improve the readability of the provisions, but do not change their operation.

1.62 As a result of these amendments, the deeming rules to replace the references to APRA are no longer required and are therefore repealed.

[Schedule #, items 12 and 15, subsection 42(3) and 42A(7) of the SIS Act]

General administration of Part 5

1.63 General administration of the above provisions in sections 42 and 42A of the SIS Act that now refer to the Commissioner of Taxation is given directly to the Commissioner of Taxation through item 15 in the general administration table. Some administration responsibility remains with APRA. *[Schedule #, items 1, subsection 6(1) of the SIS Act (table item 15)]*

1.64 This is achieved by assigning general administration to the Commissioner of Taxation of provisions in Part 5 of the SIS Act that require or permit the Commissioner of Taxation to do something (which the various provisions do), in addition to other provisions that the

Commissioner of Taxation also has general administration of because they relate to SMSFs.

1.65 This replicates the outcome currently provided by paragraph 6(4)(c) of the SIS Act and means that this provision does not need to be separately re-enacted.

1.66 The amendments also maintain the existing responsibilities between APRA and the Commissioner of Taxation over sections 40 and 41 of the SIS Act (which relate to notices given by the Regulator about complying fund status) through item 15 in the general administration table. *[Schedule #, item 1, subsection 6(1) of the SIS Act (table item 15)]*

1.67 Item 16 in the general administration table maintains the outcome currently provided by paragraphs 6(4)(a) and (b) of the SIS Act, which allocate general administration of sections 40 and 41 on the basis of an entity's status on the final day of year of income.

1.68 The amendments also modify the note to section 40 to more accurately reflect who the Regulator is and how past notices may be dealt with as a result of a superannuation fund changing its status (for example by ceasing to be an SMSF). *[Schedule #, item 8, subsection 40(4) of the SIS Act]*

Redundant Parts repealed

1.69 Schedule # to the Bill repeals Parts 33 and 34, which relate to the MySuper transition and the Eligible Rollover Fund transitions respectively. *[Schedule #, item 26, Parts 33 and 34 of the SIS Act]*

1.70 The MySuper start date was the later of 1 July 2017 and the end of the period set out in paragraph 387(2)(b) (essentially 90 days after a authority or refusal to offer a MySuper product was given). The Eligible Rollover Fund transition was to occur 90 days after 1 January 2014. Given the transfer of all relevant amounts has occurred, and Parts 33 and 34 impose no current requirements on trustees, the Parts are redundant.

1.71 Schedule # to the Bill also repeals Sections 388 and 394 within Parts 33 and 34, which are civil penalty provisions. *[Schedule #, item 16, paragraphs 193(l)-(n) of the SIS Act]*

1.72 In line with section 7 of the *Acts Interpretation Act 1901*, the repeal of these civil penalty provisions does not affect a penalty or punishment incurred in respect of an offence committed in breach of them.

Clarifying general administration of certain covenants

1.73 As discussed above, both APRA and ASIC now have general administration of the provisions concerning covenants and the

consequences of breaching covenants. *[Schedule #, item 1, section 6(1) of the SIS Act (table item 19)]*

1.74 Schedule # to the Bill also gives the Commissioner of Taxation sole administration of the covenants concerning SMSFs under sections 52B and 52C of the SIS Act. *[Schedule #, item 1, section 6(1) of the SIS Act (table item 19)]*

1.75 An additional change has been made to the general administration of section 54A, which enables regulations to prescribe other covenants. Currently, APRA has general administration of section 54A. Schedule # to the Bill allocates general administration of section 54A to the Commissioner of Taxation, to the extent it relates to SMSFs, and APRA and ASIC to the remaining extent. *[Schedule #, item 1, section 6(1) of the SIS Act (table item 20)]*

1.76 This change ensures that each regulator has general administration of regulations made under section 54A, to the extent those regulations concern the provisions they have general administration of.

Use of the term ‘Regulator’

1.77 Schedule # to the Bill amends the definition of ***Regulator*** in subsection 10(1) of the SIS Act so that it operates when it is being applied for the purposes of a provision that is administered by both APRA and ASIC. *[Schedule #, item 3, subsection 10(1) of the SIS Act]*

1.78 For co-regulated provisions, the context may require ‘Regulator’ to mean the same body as referred to elsewhere. For example, in subsection 344(1), the Regulator who may be requested to reconsider a decision is required by the context to be a reference to the body who made the reviewable decision.

1.79 Existing subsection 298A(1) provides that the Regulator may authorise a member of staff of ‘the other Regulator’ for a specified purpose. Schedule # removes the reference to ‘the other Regulator’ and replaces it with a cross-reference to the definition of ‘Regulator’ in subsection 10(1). *[Schedule #, item 22, subsection 298(1) of the SIS Act]*

1.80 A similar change has been made to subsection 265(1). *[Schedule #, item 21, subsection 265(1) of the SIS Act]*

1.81 The intent and substance of subsections 265(1) and 298A(1) have not changed. Any of APRA, ASIC or the Commissioner of Taxation could appoint or authorise an APRA, ASIC or taxation officer, as appropriate, to conduct investigations or commence relevant proceedings, as required.

1.82 A saving rule ensures that any existing appointments or authorisations under subsections 265(1) and 298A(1) of the SIS Act continue to apply despite the fact that the rules under which existing

appointments and authorisations were made have been amended. *[Schedule #, item 27]*

1.83 Schedule # to the Bill also amends the following provisions to ensure the definitions of **Regulator** and a **member of staff** (of the Regulator) work as intended:

- Subsection 265(1) *[Schedule #, item 20, section 265(1) of the SIS Act]*
- Paragraphs 315(1)(a)-(f) *[Schedule #, item 23, paragraphs 315(1)(a)-(f) of the SIS Act]*
- Subsection 315(3) *[Schedule #, item 24, subsection 315(3) of the SIS Act]*

Powers and duties of the regulators

1.84 Schedule # to the Bill moves existing provisions related to the powers and duties conferred on the regulators into new section 5. It also restructures the provisions to improve their flow and readability. *[Schedule #, item 1, subsections 5(2) to (6) and (9) of the SIS Act]*

1.85 Schedule # adds that the provisions listed in new subsection 5(3) also confer powers and duties on APRA and ASIC for the purpose of administering the provisions that they co-regulate. *[Schedule #, item 1, subsections 5(2)(a) and (b) of the SIS Act]*

1.86 There are two changes to the provisions that confer powers and duties on the regulators. Firstly, Schedule # adds Part 29A, which provides protections for individuals against self-incrimination, to the list of provisions that confer powers and duties on the three regulators. *[Schedule #, item 1, subsection 5(3) of the SIS Act]*

1.87 Relatedly, Schedule # amends section 336F in Part 29A of the SIS Act so that it now refers to ‘the Regulator’ rather than just ‘APRA’, as the provision should also apply in cases where ASIC and the Commissioner of Taxation are the Regulator. *[Schedule #, item 25, subsection 336F(1) of the SIS Act]*

1.88 Secondly, Schedule # amends the existing conferral of exemptions and modifications powers and duties by sections 328 and 332. These provisions now confer exemptions and modifications powers and duties on ASIC in relation to all of the modifiable provisions that it solely administers. *[Schedule #, item 1, paragraph 5(8)(b) of the SIS Act]*

1.89 ASIC solely administers the following modifiable SIS Act provisions:

- Sections 29P to 29QC (item 4 in the general administration table), and
- Part 19 (item 48 in the general administration table).

[Schedule #, item 1, section 6(1) of the SIS Act]

1.90 The conferral by sections 328 and 332 of powers and duties on ASIC means that ASIC can now exempt RSE licensees from obligations under the abovementioned provisions, or modify the obligations imposed on RSE licensees under those provisions.

1.91 Additionally, sections 328 and 332 now also confer powers and duties on APRA for the purpose of administering the provisions it co-regulates with ASIC. *[Schedule #, item 1, subsection 5(8(a)) of the SIS Act]*

1.92 This means that only APRA may exercise the exemption and modification powers conferred on APRA by sections 328 and 332 for co-regulated provisions.

1.93 Finally, a new provision makes clear that, for the purposes of the definition of **taxation law** in subsection 995-1(1) of the *Income Tax Assessment Act 1997*, the Commissioner of Taxation is taken to have the general administration of a provision of the SIS Act or regulations that confers power and duties on the Commissioner of Taxation. *[Schedule #, item 1, subsection 5(7) of the SIS Act]*

1.94 The effect of a provision being administered by the Commissioner of Taxation is that people who acquire information under the provision (such as a taxation officer) are subject to the confidentiality obligations and exceptions in Division 355 in Schedule 1 to the *Taxation Administration Act 1953*.

Other minor changes

1.95 Schedule # to the Bill also makes a number of consequential amendments to other provisions of the SIS Act:

- Subsection 10(1) – note to the definition of **self managed superannuation fund** *[Schedule #, item 4, subsection 10(1) of the SIS Act]*
- Subsection 10(4) *[Schedule #, item 5, subsection 10(4) of the SIS Act]*
- Section 253 – note 2 *[Schedule #, item 17, section 253 of the SIS Act]*
- Section 253 – note 3 *[Schedule #, item 18, section 253 of the SIS Act]*
- Section 253 – note 3 *[Schedule #, item 19, section 253 of the SIS Act]*

1.96 Currently, in subsection 6(3) of the SIS Act, the Minister may give APRA or ASIC directions about the performance or exercise of its functions or powers under the SIS Act. Schedule # to the Bill amends this direction rule so that the Minister must use a legislative instrument to direct APRA or ASIC. *[Schedule #, item 1, subsection 5(9) of the SIS Act]*

1.97 This change updates the existing requirement that the Minister publish such directions in the Gazette, and is consistent with other

amendments in respect of directions to APRA under the *Australian Prudential Regulation Authority Act 1998* introduced through miscellaneous amendments in items 155 and 156 of Schedule 3 to the Treasury Laws Amendment (2019 Measures No. 3) Bill 2019 (which is currently before the Parliament). Legislative instruments that are directions to agencies (as well as instruments relating to superannuation) are exempt from disallowance and do not sunset because of the *Legislation (Exemption and Other Matters) Regulation 2015*.

Extending the coverage of the AFSL regime for superannuation trustee services

New financial service – providing a superannuation trustee service

1.98 The Bill creates a new type of financial service: providing a superannuation trustee service. The purpose of creating the new financial service is to ensure that the conduct of RSE licensees in operating an RSE is subject to the AFSL regime’s obligations and protections.

1.99 The amendments require each RSE licensee to hold an AFSL with an authorisation to provide a superannuation trustee service. This encompasses all trustees of an RSE, with the exception of trustees of pooled superannuation trusts in certain circumstances (this is explained in further detail below).

1.100 The amendments introduce this requirement by specifying that a person provides a financial service, within the meaning of section 766A of the Corporations Act, if they provide a superannuation trustee service. A person provides a superannuation trustee service if they operate an RSE as trustee of the entity. *[Schedule #, items 41 and 43, paragraph 766A(1)(ec) and subsection 766H(1) of the Corporations Act]*

1.101 A notional person who is a group of individual trustees holding an RSE must also obtain an AFSL authorising them to provide a superannuation trustee service. The notional person would hold one AFSL as if they constituted a single legal entity. *[Schedule #, item 43, note 1 to subsection 766H(1) of the Corporations Act]*

1.102 In turn, section 911A of the Corporations Act requires a person who carries on a financial services business to hold an AFSL covering the provision of the financial services they provide.

1.103 Each RSE licensee must also continue to hold an AFSL authorisation to deal in a financial product if they are to issue, vary or dispose of an interest in a superannuation fund. The Bill does not alter that requirement. In practice, this is expected to result in every RSE licensee holding an AFSL authorising them both to deal in a superannuation interest and to provide a superannuation trustee service (again with the

exception of trustees of pooled superannuation trusts in certain circumstances).

1.104 Similarly, the introduction of the new financial service does not displace the existing requirement that RSE licensees be separately authorised to provide financial product advice if they are to provide that service.

1.105 Financial services can overlap. The Bill clarifies that conduct is capable of constituting the provision of more than one financial service. For example, conduct may constitute providing a superannuation trustee service and dealing in a superannuation interest at the same time, as indicated below in the explanation of activities covered by the new service. *[Schedule #, item 42, subsection 766A(5) of the Corporations Act]*

Which activities constitute the provision of a superannuation trustee service?

1.106 The new financial service is intended to cover all of the activities involved in operating an RSE, at all stages of the trustee’s interactions and transactions with members and others.

1.107 Broadly, this is intended to ensure the AFSL and SIS Act regulatory regimes have comparable coverage of RSE licensee activities, and that all relevant activities of licensees need to be conducted in accordance with the conduct obligations in the AFSL regime.

1.108 For example, licensees must do all things necessary to ensure they provide a superannuation trustee service efficiently, honestly and fairly.

1.109 Table 1.1 sets out examples of those activities. Neither the activities nor the descriptions in Table 1.1 are intended to be exhaustive.

Table 1.1 – examples of operating an RSE

Activity	Description
Product design and development	Decisions about the design and distribution of trustees’ superannuation products. Decisions when creating a new product. Decisions made by trustees when making changes to an existing superannuation product.
Marketing to employers / consultants	Marketing activities used to encourage employers or consultants hired by employers to recommend the employer select the fund as its default fund.

Activity	Description
Investment selection	<p>Disclosure and provision of marketing materials to members when an investment decision is made.</p> <p>Implementation of investment directions from members.</p>
Death benefit nominations	Disclosure and information provided to members relating to nominations.
Fee charging	<p>Fee charging practices including:</p> <ul style="list-style-type: none"> • fee disclosure; • record keeping relating to member authorisation of fees deducted; and • oversight of services provided in exchange for fees charged.
Compliance systems	Design and review of compliance systems and monitoring of compliance with regulatory and other obligations.
Oversight of service providers	Trustee oversight of duties and responsibilities delegated to third party service providers.
Dispute resolution	<p>Design, review and monitoring of internal dispute resolution processes and procedures in relation to member complaints about all trustee activities.</p> <p>Communications and interactions with members and other beneficiaries who make complaints about trustee activities.</p>
Employer de-linking	Communications with members who are affected by changes to their superannuation as a result of no longer being eligible to participate in an employer subplan.
Insurance claims handling	<p>Pursuing insurance claims on behalf of members.</p> <p>Handling and settling of insurance claims as explained below.</p>
Transfer, payment and rollover	Trustee practices relating to transfer, payment and rollover of superannuation monies.

1.110 Some of these activities are likely to already fall, at least in part, into the category of ‘dealing’ in a superannuation interest.

1.111 As noted above, a trustee deals in a superannuation interest when it issues, varies or disposes of an interest in a superannuation fund. This means a trustee is dealing whenever it accepts a new member into the fund and issues that member an interest in the fund, changes a member's interest in a fund, or disposes of a member's interest in the fund.

1.112 The extension to the AFSL regime made by this Bill is intended to ensure that the regime's conduct obligations clearly apply to those superannuation trustee activities that may fall outside the parameters of dealing in a superannuation interest. In turn, this is intended to ensure ASIC is an effective conduct regulator in superannuation and can take action against misconduct by superannuation trustees, whatever the type of activity in question.

Insurance claims handling

1.113 Separately to this Bill, the handling and settling of insurance claims will be introduced as a new financial service from 1 July 2020, implementing recommendation 4.8 of the Financial Services Royal Commission.

1.114 As a result, insurers and certain parties acting on behalf of insurers will each be required to hold an AFSL authorising them to provide claims handling and settling services.

1.115 The insurance claims handling activities of RSE licensees will be captured by the AFSL regime because they constitute the provision of a superannuation trustee service.

1.116 This means that, while RSE licensees do not need to obtain a specific AFSL authorisation to handle insurance claims, all of the AFSL obligations still apply to their claims handling conduct as part of their provision of a superannuation trustee service.

1.117 For example, if an RSE licensee engages in any of the following activities, it is intended to constitute the provision of a superannuation trustee service and attract all of the AFSL obligations:

- making a recommendation or stating an opinion that could influence a decision whether to make an insurance claim;
- assisting another person to make an insurance claim;
- assessing whether an insurer is liable under an insurance product, or providing assistance in relation to such an assessment;
- making a decision to accept or reject all or part of an insurance claim;
- quantifying an insurer's liability under an insurance product;

- offering to settle all or part of an insurance claim; or
- satisfying a liability of an insurer under an insurance claim.

What kind of obligations are triggered?

1.118 From 1 July 2020, licensees must comply with the general AFSL obligations in relation to the provision of a superannuation trustee service. This means that licensees must, for example:

- do all things necessary to ensure that they provide the superannuation trustee service efficiently, honestly and fairly;
- have in place adequate arrangements for the management of conflicts of interest arising in relation to their provision of the superannuation trustee service; and
- comply with the financial services laws and take reasonable steps to ensure their representatives comply with the financial services laws.

1.119 The requirement to comply with the financial services laws centres on the definition of that term in section 761A of the Corporations Act. A number of provisions in the SIS Act can be expected to fall within the meaning of ‘financial services laws’ because they cover conduct relating to, in this case, the provision of a superannuation trustee service. For example, a contravention of the general fee rules in Part 11A of the SIS Act may constitute a failure to comply with financial services laws, in turn allowing ASIC to treat it as a failure to comply with an AFSL obligation.

1.120 The scope of ‘financial services laws’ is affected by exemptions or modifications made by a regulator or through regulations. For example, if a licensee is exempt from complying with a particular legal obligation because of an instrument made by ASIC, the general AFSL obligation to comply with the financial services laws is not intended to override that exemption.

1.121 Apart from the general AFSL obligations at section 912A of the Corporations Act, Chapter 7 of the Act imposes other obligations. The following are examples of where the AFSL regime extension made by this Bill affects the breadth of RSE licensees’ obligations:

- The obligation in section 912D to report breaches of AFSL obligations and other financial services laws to ASIC applies directly to a broader range of trustee activities.
- Division 6 of Part 7.8, relating to financial records, statements and audit – the scope of what constitutes a licensee’s financial services business for the purposes of

these reporting requirements is expanded by the new superannuation trustee service.

- The prohibition on unconscionable conduct in relation to the provision of a financial service under section 991A extends to the new superannuation trustee service.
- Part 7.10, relating to further conduct prohibitions – the prohibitions on dishonest conduct (which attracts a criminal sanction) and misleading or deceptive conduct now extend to the new superannuation trustee service.

To whom is a superannuation trustee service provided?

Retail clients

1.122 A superannuation trustee service will generally be provided to the beneficiaries of a superannuation fund, which in turn constitutes the provision of a financial service to a retail client. *[Schedule #, items 38 and 43, paragraph 761G(6)(b), and note 2 to subsection 766H(1) of the Corporations Act]*

1.123 This engages certain additional protections and obligations under Chapter 7 of the Corporations Act that attach specifically to circumstances where services are provided to a retail client. For example, licensees must have arrangements for compensating retail clients for loss or damage suffered because the licensee breached its licensing obligations.

1.124 However, the obligation to provide a Financial Services Guide to a retail client will not be engaged merely because a licensee provides a superannuation trustee service (see below).

Wholesale clients

1.125 The only instances where a superannuation trustee service is provided to a wholesale client are when it is provided to:

- a trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme that has net assets of at least \$10 million; or
- a retirement savings account provider.

[Schedule #, item 38, paragraph 761G(6)(c) of the Corporations Act]

Who must obtain an authorisation to provide a superannuation trustee service?

RSE licensees and third party service providers

1.126 An RSE licensee is the only entity who requires an authorisation to provide a superannuation trustee service. Administrators, custodians

and others who may be involved in activities that constitute operating an RSE do not themselves operate the RSE. However, such other entities may be regulated as authorised representatives of an AFSL holder or as holders of their own AFSLs for financial services they provide – for example, providing a custodial or depository service.

Trustees of non-public offer funds

1.127 One category of RSE licensees – non-public offer funds (that is, trustees of superannuation funds not open to the general public) – have been exempt from the requirement to hold an AFSL to deal in a superannuation interest. This exemption is removed through related amendments to be introduced through the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators) (Regulation of Superannuation) Regulations 2020*. From 1 July 2020, every trustee of a non-public offer fund must hold an AFSL with authorisations to deal in superannuation interests and to provide a superannuation trustee service.

Existing exemptions – pooled superannuation trusts

1.128 The Corporations Act sets out a number of exemptions from the requirement to hold an AFSL to provide particular financial services. None of these exemptions applies to an RSE licensee in respect of a superannuation trustee service, unless the exemption expressly covers that service. [*Schedule #, item 45, subsection 911A(4A) of the Corporations Act*]

1.129 This makes it clear that an exemption that applies to a particular financial service does not also apply to the new superannuation trustee service, even if both services share the same underlying conduct.

1.130 However, the Bill preserves a set of exemptions relating to pooled superannuation trusts by amending them to expressly cover a superannuation trustee service. As a result of these amendments, an AFSL is not required for a superannuation trustee service provided only to wholesale clients – namely, to:

- a trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme that has net assets of at least \$10 million; or
- a retirement savings account provider.

[*Schedule #, items 38 and 44, paragraphs 761G(6)(c) and 911A(2)(ga) of the Corporations Act*]

1.131 Amendments to be introduced through the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators) (Regulation of Superannuation) Regulations 2020* will also extend existing exemptions for pooled superannuation trusts in the *Corporations*

Regulations 2001 that currently apply in relation to dealing in a superannuation interest.

1.132 The combined effect of these expanded exemptions is that a trustee of a pooled superannuation trust is exempt from the requirement to hold an AFSL to provide a superannuation trustee service. This is the only instance where an RSE licensee could continue to operate an RSE beyond 1 July 2020 without holding an AFSL.

Exempt public sector superannuation schemes

1.133 The Bill clarifies that the operation of an exempt public sector superannuation scheme does not constitute the provision of a superannuation trustee service. This is consistent with the fact that such schemes are outside the scope of the RSE licensing regime. *[Schedule #, item 43, paragraph 766H(2)(a) of the Corporations Act]*

Regulation making power for exemptions

1.134 A regulation making power allows the Government to prescribe certain conduct so that it is exempt from constituting the provision of a superannuation trustee service. Regulations made under this power would be subject to disallowance. *[Schedule #, item 43, paragraph 766H(2)(b) of the Corporations Act]*

Licence cancellation, variation of licence conditions and banning orders

1.135 The Corporations Act and SIS Act contain requirements for APRA and ASIC to consult or inform each other about certain actions affecting entities they both regulate.

1.136 For example:

- For entities regulated by APRA, other than authorised deposit-taking institutions, ASIC must consult APRA before imposing a condition on the entity's AFSL that would prevent it carrying on its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities). This includes RSE licensees who are AFSL holders.
- For an RSE licensee who is an AFSL holder, APRA must consult ASIC before varying a condition where that action might reasonably be expected to affect the licensee's ability to provide one or more of the financial services that it provides.

1.137 Additional statutory requirements are introduced to reflect the changes this Bill makes to the framework for superannuation regulation.

1.138 RSE licensees are prudentially regulated entities that provide a compulsory product to members. These additional requirements recognise the importance of ASIC’s coordination with APRA when taking regulatory actions that would prevent the trustee from operating a superannuation fund.

Licence suspension or cancellation

1.139 ASIC must obtain APRA’s written agreement before suspending or cancelling an AFSL that authorises a licensee to provide a superannuation trustee service. *[Schedule #, item 50, subparagraph 915I(1)(aa)(i) of the Corporations Act]*

Variation etc. of licence conditions

1.140 ASIC must also obtain APRA’s written agreement before imposing, varying or revoking a condition on an RSE licensee’s AFSL if that action would, in ASIC’s opinion, prevent the licensee from providing a superannuation trustee service. *[Schedule #, item 46, subparagraph 914A(4)(aa)(i) of the Corporations Act]*

1.141 For example, this means ASIC must obtain APRA’s agreement before varying a condition on an RSE licensee’s AFSL to remove its authorisation to provide a superannuation trustee service.

1.142 In any other case where ASIC imposes, varies or revokes a condition on an RSE licensee’s AFSL, it must comply with the existing requirements to:

- consult APRA if the condition would prevent the licensee carrying on its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities); or
- otherwise, within one week, inform APRA of the action that has been taken.

[Schedule #, items 47 and 48, paragraphs 914A(4)(a) and 914A(4)(b) of the Corporations Act]

Banning orders

1.143 ASIC must obtain APRA’s written agreement before making a banning order against an RSE licensee if that action would, in ASIC’s opinion, prevent the licensee from providing a superannuation trustee service. *[Schedule #, item 54, subparagraph 920A(3A)(a)(i) of the Corporations Act]*

1.144 In any other case where ASIC makes a banning order against an RSE licensee authorised to provide a superannuation trustee service, ASIC must, within one week, inform APRA of the action that has been taken. This could be the case where, for example, the order would ban the licensee from providing financial product advice, but would not otherwise

affect its operation of the RSE. *[Schedule #, item 54, paragraph 920A(3A)(b) of the Corporations Act]*

1.145 These requirements do not apply where the banning order is against a director or other officer of an RSE licensee, rather than the licensee itself. Where a banning order is made against a director or officer of an RSE licensee, the RSE licensee is still able to provide the superannuation trustee service.

Compliance with the requirements to obtain APRA's agreement

1.146 A failure to comply with any of these requirements does not invalidate the action taken by ASIC. *[Schedule #, items 49, 53 and 54, subsections 914A(5A), 915I(3) and 920A(3B) of the Corporations Act]*

1.147 This is consistent with the existing approach for the requirement for ASIC to consult with APRA on licensing actions that affect the ability of an APRA regulated entity to carry on its usual activities. However, ASIC's compliance with these requirements is subject to scrutiny by the Financial Regulator Assessment Authority as part of that authority's mandate to assess and report on APRA and ASIC's effectiveness.

1.148 This approach reflects that the benefits of avoiding any potential cost or uncertainty if the affairs of third parties were subsequently affected by any non-compliance with these administrative requirements outweigh the potential benefits of assuring compliance through the prospect of invalidity.

Exceptions to the requirements to obtain APRA's agreement

1.149 None of the requirements introduced by the Bill to obtain APRA's agreement apply where the RSE licence, of the subject of ASIC's proposed regulatory action, is not in effect. *[Schedule #, items 46, 50 and 54, subparagraphs 914A(4)(aa)(iii), 915I(1)(aa)(iii) and 920A(3A)(a)(ii) of the Corporations Act]*

1.150 This may occur where APRA has already removed the entity from acting as the trustee of a superannuation fund and cancelled its RSE licence. In those circumstances, APRA would not have any reason to object to ASIC's proposed action.

1.151 However, the requirements do still apply where APRA has cancelled the RSE licence but allowed it to be treated as if it were in effect, under APRA's power in section 29GB of the SIS Act. *[Schedule #, items 46, 50 and 54, subparagraphs 914A(4)(aa)(iii), 915I(1)(aa)(iii) and 920A(3A)(a)(ii) of the Corporations Act]*

1.152 Similarly, ASIC does not need to obtain APRA's agreement before suspending or cancelling an RSE licensee's AFSL, or imposing, varying or revoking a condition, if the licensee itself applied for ASIC to take the proposed action. *[Schedule #, items 46 and 50, subparagraphs 914A(4)(aa)(ii) and 915I(1)(aa)(ii) of the Corporations Act]*

1.153 Existing requirements to consult or inform APRA may still apply in the above circumstances. *[Schedule #, items 47, 48, 51 and 52, paragraphs 914A(4)(a), 914A(4)(b), 915I(1)(a) and 915I(1)(b) of the Corporations Act]*

Extending the SIS Act indemnification prohibitions

1.154 Sections 56 and 57 of the SIS Act currently operate to prevent a superannuation trustee or a director of a superannuation trustee from using trust assets to pay a penalty that they incurred for liabilities arising from breach of trust in certain circumstances or the contravention of certain provisions and types of provisions under the SIS Act.

1.155 In view of the extension of the AFSL regime to cover the provision of a superannuation trustee service, Schedule # to the Bill extends the existing indemnification prohibitions. Specifically, sections 56 and 57 of the SIS Act now prevent trustees and directors from using trust assets to pay a criminal, civil or administrative penalty incurred in relation to a contravention of a Commonwealth law. *[Schedule #, items 63 and 64, subsections 56(2) and 57(2) of the SIS Act]*

1.156 This means that a superannuation trustee or a director of a superannuation trustee cannot use trust assets to pay a penalty that they incurred for the contravention of a provision of the Corporations Act or ASIC Act.

1.157 An application provision clarifies that these amendments apply in relation to liabilities that arise, and amounts that become payable, before, on or after the commencement of those items. *[Schedule #, item 66, sections 56 and 57 of the SIS Act]*

Court to consider impact of penalties on beneficiaries

1.158 When considering the imposition of a fine for a Corporations Act offence committed by a trustee of an RSE, or a pecuniary penalty for a contravention of a civil penalty provision of that Act, the court must take into account the impact the fine or penalty would have on the beneficiaries of the RSE. *[Schedule #, items 57, 58 and 59, section 1311A and paragraph 1317G(6)(e) of the Corporations Act]*

1.159 This is in addition to the existing factors identified in subsection 1317G(6) of the Corporations Act that the court must consider in determining a pecuniary penalty, including the nature and extent of the contravention and the nature and extent of any loss or damage suffered.

1.160 The nature and structure of superannuation funds means that there is a risk that penalties incurred by a superannuation trustee could impact members. The requirement to consider the impact on beneficiaries mitigates this risk.

1.161 While it is expected that this consideration would already be taken into account by the courts in determining the appropriateness of a particular penalty, the specific inclusion of this factor ensures that the courts explicitly turn their minds to it.

1.162 The impact of a fine or penalty on trustee directors is not required to be taken into account.

Alignment of breach reporting timeframes

1.163 Schedule # in the Bill extends the timeframe within which an RSE licensee must report breaches of its RSE licence conditions from 10 business days to 30 calendar days. *[Schedule #, item 62, subsection 29JA(1) of the SIS Act]*

1.164 This change aligns the breach reporting timeframe with the new 30 day breach reporting deadline for AFSL holders (Financial Services Royal Commission recommendation 2.8). This alignment helps to reduce the reporting burden on dual regulated superannuation trustees.

1.165 An application provision clarifies that this change applies in relation to breaches of which the RSE licensee becomes aware on or after 1 April 2021. *[Schedule #, item 65, section 29JA of the SIS Act]*

1.166 This application date aligns with the application date of the changes to the Corporations Act breach reporting timeframes made through Financial Services Royal Commission recommendation 2.8.

ASIC Act consumer protections

1.167 As explained above, the amendments in this Bill create a new type of financial service: providing a superannuation trustee service. The amendments require every RSE licensee to hold an AFSL with an authorisation to provide a superannuation trustee service, by listing that service at section 766A of the Corporations Act.

1.168 The Bill also specifies that a person provides a financial service for the purpose of the ASIC Act consumer protection provisions if they provide a superannuation trustee service. *[Schedule #, item 29, paragraph 12BAB(1)(ea) of the ASIC Act]*

1.169 Superannuation trustee service has the same meaning here as in Chapter 7 of the Corporations Act – a person provides a superannuation trustee service if they operate an RSE as trustee of the entity. *[Schedule #, item 28, the definition of ‘superannuation trustee service’ in subsection 12BA(1) of the ASIC Act]*

1.170 This ensures the ASIC Act consumer protection provisions in Division 2 of Part 2 of that Act apply to RSE licensees’ conduct in operating a superannuation fund. These protections include:

- the prohibition on conduct in relation to financial services that is or is likely to be misleading or deceptive;
- the prohibition on false or misleading representations in connection with the supply or possible supply of financial services;
- rules about offering rebates, gifts, prizes or other free items in trade or commerce, in the supply or possible supply or promotion of financial services;
- the prohibition on conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services; and
- the prohibition on accepting payment without intending or being able to supply the financial services paid for.

1.171 It is important that ASIC has clear powers to take action to protect consumers from these practices, whatever the type of activity in question.

1.172 In a superannuation context, these provisions are intended to apply to protect past and present members and consumers who may become new members. For example, the accuracy of representations made in advertisements is relevant to the interests of consumers who may become members.

1.173 Certain provisions in the ASIC Act apply in respect of the ‘supply’ of a financial service to a person, rather than to the provision of that service. These provisions apply in respect of the new superannuation trustee service to the extent that the service is supplied to a person (which will in turn depend on conduct that constitutes the provision of the service in a particular case and the context in which it is provided).

Court to consider impact of penalties on beneficiaries

1.174 The Bill also introduces requirements equivalent to those explained above for contraventions of the ASIC Act consumer protections. When considering the imposition of a fine for an offence committed by a trustee of an RSE, or a pecuniary penalty for a contravention of a civil penalty provision, the court must take into account the impact the fine or penalty would have on the beneficiaries of the RSE. *[Schedule #, items 30, 31 and 32, section 93C and paragraph 12GBB(5)(e) of the ASIC Act]*

Consequential amendments

Retail and wholesale clients

1.175 A consequential amendment is made to exclude the new financial service – providing a superannuation trustee service – from the rules governing who is a retail client that apply to financial products and services other than those in the superannuation, general insurance and traditional trustee company service categories. *[Schedule #, item 39, subsection 761G(7) of the Corporations Act]*

1.176 Similarly, a consequential amendment is made to exclude the provision of a superannuation trustee service from a mechanism permitting sophisticated investors to be treated as wholesale clients if they satisfy a licensee of certain matters. This is consistent with the existing exclusion of superannuation products from that mechanism. *[Schedule #, item 40, section 761GA of the Corporations Act]*

1.177 The Bill amends the heading for subsection 761G(6) of the Corporations Act to better reflect its coverage of financial services, as well as financial products. *[Schedule #, item 37, subsection 761G(6) of the Corporations Act]*

Financial Services Guides

1.178 The Bill does not require an RSE licensee to provide a Financial Services Guide merely because it provides a superannuation trustee service. This effectively preserves the current requirements about Financial Services Guides, as they apply to superannuation trustees. *[Schedule #, item 55, subsection 941C(3B) of the Corporations Act]*

1.179 However, an obligation to give a Financial Services Guide may arise because of another financial service provided by the trustee as part of the operation of the entity, such as the provision of financial product advice. The superannuation trustee service would then form part of the authorised services referred to in paragraph 942B(2)(c) of the Corporations Act.

1.180 That is, the relief provided by this consequential amendment does not extend to other financial services that may require a trustee to provide a Financial Services Guide. Trustees may separately be relieved of the requirement to provide a Financial Services Guide in relation to such other services by existing exemptions (for example, if they provide the relevant information through a Product Disclosure Statement).

RSE licence conditions and APRA prudential standards

1.181 APRA has an existing power to impose additional conditions on individual RSE licences, and such conditions may be expressed to have effect despite anything in APRA's prudential standards.

1.182 The Bill amends the SIS Act to clarify that in the event of inconsistency between an RSE licence condition imposed by APRA and a provision of the prudential standards, the licence condition prevails in determining, for the purposes of any law of the Commonwealth, whether the RSE licensee has complied with its obligations under the prudential standards. *[Schedule #, item 61, subsection 29EA(2B) of the SIS Act]*

1.183 This is intended to resolve any uncertainty that may arise in the context of RSE licensees' obligations to comply with the **RSE licensee law**, within the meaning of the SIS Act, and with the **financial services law**, within the meaning of the Corporations Act.

Definitions

1.184 The term **superannuation trustee service** is inserted into the definition section of Chapter 7 of the Corporations Act and the definition section of Division 2 of Part 2 of the ASIC Act. The term **registrable superannuation entity** is also inserted into the definition section of Division 2 of Part 2 of the ASIC Act. *[Schedule #, items 28 and 35, subsection 12BA(1) of the ASIC Act and section 761A of the Corporations Act]*

1.185 The definition of **registrable superannuation entity** in section 761A of the Corporations Act is relocated to section 9 so that it applies across that Act. An identical definition in section 960 is repealed. *[Schedule #, items 33, 34 and 56, sections 9, 761A and 960 of the Corporations Act]*

1.186 The definition of **RSE licensee** in section 960 of the Corporations Act is relocated to section 9 so that it applies across that Act. The term **RSE licence** is inserted into the definition section of Chapter 7 and its definition of **trustee** is amended. *[Schedule #, items 33, 35, 36 and 56, sections 9 and 761A of the Corporations Act]*

Application and transitional provisions

SIS Act application and transitional provisions

Breach reporting timeframes

1.187 The amendments to align the SIS Act timeframe for breach reporting with the Corporations Act timeframe for breach reporting apply in relation to breaches of which an RSE licensee becomes aware on or after 1 April 2020. *[Schedule #, item 65, section 29JA of the SIS Act]*

1.188 This application date aligns with the application date of the changes to the Corporations Act breach reporting timeframes made through Financial Services Royal Commission recommendation 2.8.

Indemnification prohibitions

1.189 The amendments of the SIS Act indemnification prohibition provisions apply in relation to liabilities that arise, and amounts that become payable, before, on or after the commencement of the amendments on 1 July 2020. *[Schedule #, item 66, sections 56 and 57 of the SIS Act]*

1.190 This application provision clarifies the extent to which a provision in the governing rules of a superannuation entity becomes void on 1 July 2020. That is, it becomes void to the extent that it purports to provide indemnification for liabilities that arise before, on or after the commencement of the amendments on 1 July 2020.

AFSL extension application and transitional provisions

1.191 The legislation commences on 1 July 2020. However, the Bill contains a number of transitional provisions concerning the extension of the AFSL regime's coverage for superannuation trustee services.

Relief from ordinary AFSL application requirements

1.192 An important objective of these legislative amendments is to ensure that ASIC has full regulatory coverage over the activities of RSE licensees and can take action against misconduct. The findings of the Financial Services Royal Commission demonstrate the importance of achieving this outcome expeditiously.

1.193 Consistent with this objective, each existing RSE licensee who already holds an AFSL authorising it to deal in a superannuation interest does not need to apply for the new authorisation, and the remainder of existing RSE licensees only need to meet the application requirements in respect of dealing in a superannuation interest. This is explained further below.

1.194 However, from 1 July 2020, licensees must comply in full with all AFSL obligations in respect of all of their activities in providing a superannuation trustee service.

1.195 After 1 July 2020, new applicants for AFSLs authorising them to provide a superannuation trustee service must comply with all of the ordinary AFSL application requirements in respect of each financial service they propose to provide.

Grant of authorisation to provide a superannuation trustee service

1.196 The ordinary mechanism to grant an AFSL authorisation is for ASIC to make the person's AFSL subject to a condition authorising the person to provide the particular financial service or services. In the event

of an existing AFSL holder successfully applying for an additional authorisation, ASIC varies that condition on the AFSL and inserts a reference to the additional authorisation.

1.197 An RSE licensee who is covered by the transitional provisions is taken from 1 July 2020 to be subject to a condition authorising the holder to provide a superannuation trustee service (this is explained further below). This occurs automatically because they are deemed by the transitional provisions in this Bill to be authorised, rather than being authorised by a decision of ASIC.

1.198 However, after 1 July 2020, ASIC or the Minister retain the powers they would ordinarily have to vary or revoke the authorisation condition, or vary, suspend or cancel the licence, as though ASIC had granted the authorisation in the first instance. *[Schedule #, item 60, sections 1675 and 1675D of the Corporations Act]*

Transitional provisions for existing AFSL holders authorised to deal in superannuation interests

1.199 Each RSE licensee who holds an AFSL authorising it to deal in a superannuation interest just before 1 July 2020 are deemed from that date to be authorised to provide a superannuation trustee service. *[Schedule #, item 60, sections 1675 and 1675A of the Corporations Act]*

1.200 RSE licensees in this category do not need to apply for the new authorisation or take any specific action to obtain it. However, licensees must comply with all AFSL obligations from 1 July 2020 in respect of all activities involved in operating an RSE.

Transitional provisions for applicants for an AFSL before 1 July 2020

1.201 In certain circumstances, if an RSE licensee successfully applies for an AFSL to deal in a superannuation interest, they will also be deemed to be authorised to provide a superannuation trustee service from the time that application is approved. This occurs if all of the following requirements are met:

- the applicant lodges an application for an AFSL to deal in a superannuation interest on or before 30 June 2020;
- ASIC approves that application on or after 1 July 2020; and
- the applicant is an RSE licensee at the time ASIC approves that application.

[Schedule #, item 60, sections 1675 and 1675B of the Corporations Act]

1.202 A number of existing trustees of non-public offer superannuation funds are in this category because they have been exempt from the requirement to hold an AFSL authorising them to deal in a

superannuation interest, and they do not provide other financial services. The *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators) (Regulation of Superannuation) Regulations 2020* repeal that exemption from 1 July 2020.

1.203 From that date, non-public offer trustees must hold AFSL authorisations both to deal in a superannuation interest and to provide a superannuation trustee service. However, while these trustees must each obtain an AFSL to continue operating, they only need to meet the application requirements in respect of dealing in a financial product.

Transitional provisions for existing AFSL holders without an authorisation to deal in superannuation interests

1.204 Similarly, in certain circumstances, existing AFSL holders who successfully apply for an additional authorisation to deal in a superannuation interest will also be deemed to be authorised to provide a superannuation trustee service from the time that application is approved. This occurs if all of the following requirements are met:

- the applicant lodges an application, on or before 30 June 2020, for an additional authorisation on its AFSL to deal in a superannuation interest;
- ASIC approves that application on or after 1 July 2020; and
- the applicant is an RSE licensee at the time ASIC approves that application.

[Schedule #, item 60, sections 1675 and 1675C of the Corporations Act]

1.205 Again, a number of existing trustees of non-public offer superannuation funds are in this category because they have been exempt from the requirement to hold an AFSL to deal in a superannuation interest, but hold an AFSL with another authorisation, such as the provision of financial product advice.

1.206 From 1 July 2020, these trustees must hold AFSL authorisations both to deal in a superannuation interest and to provide a superannuation trustee service, but they only need to meet the application requirements in respect of the former.