TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING) BILL 2020: BEST FINANCIAL INTERESTS OBLIGATION

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of contents

Glossary

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

Abbreviation	*Definition*
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
SIS Act	*Superannuation Industry (Supervision) Act 1993*
SMSF	Self managed superannuation fund

Chapter 1
Discharging best financial interest duties obligation

Outline of chapter

1.1 Schedule # amends the SIS Act to require each trustee of a registrable superannuation entity and each trustee of a SMSF to perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries.

1.2 Schedule # also amends the SIS Act to require each director of the corporate trustee of a registrable superannuation entity to perform the director's duties and exercise the director's powers in the best financial interests of the beneficiaries.

1.3 Schedule # also amends the SIS Act to allow regulations to be made to specify that certain payments are prohibited, or prohibited unless certain conditions are met (regardless of whether the payment is considered to be in the best financial interests of beneficiaries).

1.4 Schedule # also amends the SIS Act to provide regulators with more options to respond to compliance issues relating to record-keeping requirements.

1.5 The intent of these amendments is to increase the accountability of superannuation trustees in relation to the execution of their fiduciary duties in relation to the many actions trustees take in operating a superannuation entity: from incurring day-to-day essential operational expenditure and investing members' money, to less frequent strategic decisions and discretionary expenditures.

1.6 The new best financial interests duty test is intended to clarify the existing best interest duty. By requiring trustees and directors of corporate trustees to only have regard to financial interests, it eliminates the possibility that trustees and directors of corporate trustees can act in a manner that they judge improves the non-financial interests of members but not their financial interests. The amendments clarify the standard trustees must meet when they make expenditure decisions and undertake actions in relation to the operation of the fund in the best financial interests of members. This is all the more important given the compulsory nature of superannuation so that Australians have confidence that the effort of trustees is solely focussed on improving their retirement incomes and not some subsidiary or ancillary purpose.

1.7 In addition, the amendments are the Government's response to recommendation 22 of the Productivity Commission review into superannuation by providing a clearer articulation of what it means for a trustee to act in members' best interests.

Context of amendments

Existing law

Section 52 covenants and the best interests duty

1.8 Trustees and directors of corporate trustees of superannuation entities are subject to a range of fiduciary and statutory obligations aimed at protecting beneficiaries. These obligations include a requirement to comply with covenants under the SIS Act.

1.9 Section 52 of the SIS Act sets out a number of covenants that are taken to be included in the governing rules of superannuation entities. This includes the covenant that each trustee of the entity must perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries (see paragraph 52(2)(c)).

1.10 Subsection 52(12) of the SIS Act also imposes another covenant on trustees to 'promote the financial interests of the beneficiaries'.

1.11 A trustee that contravenes an obligation to comply with a section 52 covenant is subject to a civil penalty (see subsection 54B(1) and section 193). Where the contravention involves dishonesty or an intention to deceive or defraud a criminal offence applies (see section 202). Trustees may be liable for fines up to 2,400 penalty units, and imprisonment up to five years (see sections 196 and 202)).

1.12 APRA has general administration of the section 52 covenants, to the extent that administration is not conferred on ASIC under section 6(1)(b). ASIC's current role is limited to matters of disclosure and record keeping. For example, ASIC has general administration of the section 52 covenants, but only to the extent that they relate to record keeping and disclosure obligations of RSE licensees.

1.13 On 4 February 2019, the Government released its response to the Financial Services Royal Commission Final Report entitled Restoring trust in Australia's financial system. The Government's response committed to taking action on all the recommendations of the Financial Services Royal Commission. Upon the passage of legislation to enact recommendations 3.8, 6.3, 6.4 and 6.5, both ASIC and APRA will have general administration of, or co-regulate, the SIS Act provisions that are enforceable by a civil or other penalty, including the sections 52 and 52A

covenants. This means that APRA and ASIC will both have roles in administering sections 52, 52A and 54B including enforcing compliance with these provisions.

1.14 APRA and ASIC's regulatory activities will be guided by statements of their regulatory responsibilities. APRA will administer the provisions where the relevant conduct relates to prudential matters (including the licensing and supervision of RSE licensees) and member outcomes. ASIC will administer the provisions where the relevant conduct relates to consumer protection and market integrity.

Directors of the corporate trustee of a registrable superannuation entity and best interests duty

1.15 Section 52A of the SIS Act sets out a number of covenants relating to each director of a corporate trustee of a registrable superannuation entity that are taken to be included in the governing rules of the registrable superannuation entity. This includes the covenant that each director must perform the director's duties and exercise the director's powers in the best interests of the beneficiaries.

1.16 A director that contravenes an obligation to comply with a section 52A covenant is subject to liability under a civil penalty order and where dishonesty or an intention to deceive or defraud is involved may be liable for a criminal offence (see sections 193 and 202). Directors may be liable for fines up to 2,400 penalty units and imprisonment up to five years (see sections 196 and 202)).

SMSFs and the best interests duty

1.17 Section 52B of the SIS Act sets out a number of covenants that are taken to be included in the governing rules of SMSFs. This includes the covenant that each trustee of the fund must perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries.

1.18 Contraventions of covenants for SMSF trustees are not civil penalty provisions, but SMSF trustees found to have breached the duty may face a number of other consequences including issuance of a notice of non-compliance, rectification or education directions, or disqualification.

The superannuation system and the Productivity Commission review

1.19 Superannuation trustees currently manage around $3 trillion of Australians' retirement savings. Trustees of superannuation funds must be accountable for how they operate the fund and expend members' money. This obligation is all the more important given the compulsory nature of the system.

1.20 Numerous reports and hearings in recent years have highlighted the extent of spending by superannuation funds on discretionary items like advertising, sponsorships and corporate entertainment. Inappropriate expenditure on these items risks compromising member outcomes and eroding retirement incomes.

1.21 In addition, the Productivity Commission review into superannuation found that superannuation entities clearly do not always act in the best interests of their members. The Productivity Commission noted at page 43 of its Report that "this reflects not only trustee misconduct but a lack of clarity around what is expected of trustees under the best interests duty in legislation — as has become apparent in the evidence emerging through the Royal Commission". Recommendation 22 stated that the Government should pursue a clearer articulation of what it means for a trustee to act in members' best interests under the SIS Act. It said the Government should decide whether to pursue legislative change, greater regulatory guidance, and/or proactive testing of the law by regulators.

Summary of new law

1.22 Schedule # amends the SIS Act to require each trustee of a registrable superannuation entity and trustee of a SMSF to perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries.

1.23 Schedule # also amends the SIS Act to require each director of the corporate trustee of a registrable superannuation entity to perform the director's duties and exercise the director's powers in the best financial interests of the beneficiaries.

1.24 Schedule # also amends the SIS Act to allow regulations to be made to specify that certain payments, are prohibited, or prohibited unless certain conditions are met. These payments are prohibited regardless of whether the payment is considered to be in the best financial interests of beneficiaries.

1.25 The Schedule also amends the SIS Act to allow contraventions of record-keeping obligations specified in regulations to be subject to a strict liability offence and ensure that directors of corporate trustees are held to account for the corporate trustee's failure to keep required records in appropriate circumstances.

Comparison of key features of new law and current law

New law	*Current law*
Trustees of registrable superannuation entities must perform the trustee's duties and exercise the trustee's powers in the best *financial* interests of the beneficiaries. The evidential burden of proof is reversed.	Trustees of registrable superannuation entities must perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries.
Directors of the corporate trustee of a registrable superannuation entity must perform the director's duties and exercise the director's powers in the best *financial* interests of the beneficiaries. The evidential burden of proof is reversed.	Directors of the corporate trustee of a registrable superannuation entity must perform the director's duties and exercise the director's powers in the best interests of the beneficiaries.
Trustees of SMSFs must perform the trustee's duties and exercise the trustee's powers in the best *financial* interests of the beneficiaries.	Trustees of SMSFs must perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries.
Regulations may prohibit certain payments, or prohibit certain payments unless certain conditions are met (regardless of whether the payment is considered to be in the best financial interests of beneficiaries).	No equivalent.
As well as the existing arrangements, a contravention by a regulated superannuation fund of a record-keeping obligation specified in regulations may result in liability for a strict liability offence. A director of a corporate trustee of a registrable superannuation entity may be liable for an offence, where a corporate trustee has intentionally or recklessly contravened a record-keeping requirement specified in the regulations in certain circumstances.	The SIS Act allows regulations to prescribe operating standards relating to keeping and retaining records in relation to regulated superannuation funds, approved deposit funds and pooled superannuation trusts. These record keeping obligations apply to the trustees of a registrable superannuation entity. An intentional or reckless contravention of an operating standard may result in liability for a criminal offence.

Detailed explanation of new law

Obligation on trustees and directors to act in the best financial interests of the beneficiaries

Obligation applies to trustees of registrable superannuation entities

1.26 Schedule # amends the SIS Act to require trustees of registrable superannuation entities to perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries. The existing covenant, which requires trustees to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries is amended to refer to best *financial* interests. ***[Schedule #, item 5, paragraph 52(2)(c) of the SIS Act]***

1.27 The purpose of this amendment is to clarify the range of interests covered by the obligation solely to financial interests (not non-financial interests). Subject to the trustees complying with the sole purpose test, this does not preclude trustees undertaking actions that also yield non-financial benefits to the beneficiaries, but the action cannot compromise the best financial interests of members. How any action will yield financial benefits to the beneficiaries of the superannuation entity must be the determinative consideration for any trustee.

1.28 The identification of a quantifiable financial benefit to members is a threshold consideration for trustees in assessing whether the proposed exercise of their power will fulfil the requirements of the duty. Trustees will need to have robust quantitative and qualitative evidence to support their expenditures.

1.29 As a part of their decision making process, trustees will need to consider the appropriateness of making various kinds of expenditure, including a kind that can be considered core or essential to the operation of a superannuation entity. For example, such expenditure may be made towards investments in systems, risk management, governance and the engagement of sufficient resources to operate the trustee's business operations.

1.30 So long as the expenditure is essential to the prudent operation of a superannuation entity, and reporting and monitoring frameworks for such expenditure are put in place by trustees to ensure that the expenditure is necessary and competitively priced (and any ongoing expenditure continues to achieve its intended outcomes), then the expenditure decision would likely be regarded to be in the best financial interests of the beneficiaries. Whether the expenditure ultimately is or is not in the best financial interests of beneficiaries will of course depend on all of the circumstances of the relevant case.

1.31 There are other kinds of expenditure that might be considered discretionary or non-essential to the ongoing operation of the superannuation entity. Some of these expenditures could be strategic in nature (for example offering member services, including financial advice, or additional investment products for members). A business case, supported by technical analysis (including cost benefit analysis, articulation of risks associated with achieving the outcome and any mitigation strategy) and quantifiable metrics to reflect expected financial outcomes would be expected to support trustee decision making on strategic expenditure.

1.32 Other strategic discretionary expenditure, such as expenditure relating to building a brand, promoting awareness of the fund or supporting external activities, which are not supported by an identifiable and quantifiable financial benefit to members, articulated in a clear business case, are unlikely to satisfy the requirements of the best financial interests obligation.

1.33 For investment decisions, the determinative motivation for trustees must be maximising the financial returns to beneficiaries having regard to an appropriate level of risk. As indicated above, this does not preclude investments that also yield non-financial benefits, but such an investment must not compromise the best financial benefits.

Example 1.1- Expenditure not in the best financial interests of beneficiaries

Yellow Super has decided to spend an amount of beneficiaries' funds in wellbeing and counselling services due to its preference for providing beneficiaries with a holistic retirement experience. While beneficiaries derive some benefits from these services, they are not financial benefits and offering the services comes at financial cost to the fund. This expenditure is unlikely to be in the best financial interests of beneficiaries.

Example 1.2- Investment with financial and non-financial benefits in the best financial interests of beneficiaries

The Red Super Fund has decided to invest in Blue Health, a private health insurance company. Blue Health offer its members access to an online health and wellbeing information tool. As part of the investment opportunity, Blue Health agreed to offer members of the Red Super Fund access to the information tool as well.

When conducting due diligence on the investment, the Red Super Fund found that the investment in Blue Health yielded an appropriate rate of return given the level of risk. Thus, Blue Health met the risk-return hurdles set out in the investment strategy agreed by The Red Super Fund's board. Red Super Fund also notes the other non-financial benefits that beneficiaries of the Fund may obtain from the investment in the form of access to the online health and wellbeing information

tool, but the determinative factor in Red Super Fund's investment decision are the returns that the investment will generate for the Fund. This investment is likely to be in the best financial interests of beneficiaries.

Example 1.3- Expenditure in the best financial interests of beneficiaries

Orange Superannuation Fund decided to fund a television marketing campaign to promote their fund, spending $5 million of members' money. Orange Superannuation Fund argues that spending the money will lead to an increase in the number of members by 5,000. As a result of the increase in members, the trustee believes that this will allow them to reduce their fees by 0.01 percentage points by spreading the fixed costs of the fund across more members. However, following the campaign no decline in fees results.

APRA undertakes an audit of Orange Superannuation Fund. It asks for information to justify why the marketing campaign was in the best financial interests of beneficiaries. The trustee produces detailed analysis that shows previous campaigns delivered the increase in members. The trustee is also able to produce evidence of unforeseeable events that undermined the effectiveness of the campaign. APRA is satisfied that at the time of making the decision to proceed with the marketing campaign the fund had acted reasonably in forming the view that the expenditure was in the best financial interests of beneficiaries.

1.34 The best financial interests obligation is not subject to any materiality threshold.

1.35 The penalty for trustees of registrable superannuation entities not performing the trustee's duties or not exercising the trustee's powers in the best financial interests of the beneficiaries is a civil penalty, and where dishonesty or an intention to deceive or defraud is involved a criminal offence. As the obligations are part of the section 52 covenants, the penalty for not performing the trustee's duties and exercising the trustee's powers in the best financial interests of the beneficiaries is the same penalty that applies if a trustee contravenes an existing section 52 covenant (see sections 54B and 193 of the SIS Act).

Obligation applies to each director of the corporate trustee of a registrable superannuation entity

1.36 Schedule # amends the SIS Act to require each director of a corporate trustee of a registrable superannuation entity to perform the director's duties and exercise the director's powers in the best financial interests of the beneficiaries. The existing covenant, which requires each director of the corporate trustee of a registrable superannuation entity to perform their duties and exercise their powers in the best interests of the

beneficiaries is amended to refer to best financial interests. ***[Schedule #, item 7, paragraph 52A(2)(c) of the SIS Act]***

1.37 The purpose of this amendment is the same as the purpose for clarifying the duty for trustees.

1.38 The penalty for directors not performing their duties and not exercising their powers in the best financial interests of the beneficiaries is a civil penalty, and where dishonesty or an intention to deceive or defraud is involved, a criminal offence. As the obligations are part of the section 52A covenants, the penalty for not performing the director's duties and exercising the director's powers in the best financial interests of the beneficiaries is the same penalty that applies if a director contravenes an existing section 52A covenant (sections 54B and 193 of the SIS Act).

Obligation applies to trustees of SMSFs

1.39 Schedule # amends the SIS Act to require trustees of SMSFs to perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries. The existing covenant to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries is amended to refer to best financial interest. ***[Schedule #, item 9, paragraph 52B(2)(c) of the SIS Act]***

1.40 The amendments apply to SMSF trustees to clarify the existing best interest duty. Similar to the trustees of other APRA-regulated superannuation entities, SMSF trustees will be required to ensure that they are acting in the best financial interests of their beneficiaries.

1.41 As the obligations are part of the section 52B covenants, there is no penalty if a trustee of a SMSF contravenes the best financial interests duty. However, SMSF trustees found not acting in the best financial interests of the beneficiaries could be penalised under other regulatory provisions in the SIS Act such as section 62 for breaching the sole purpose test or section 65 for providing financial assistance to relatives or members. SMSF trustees in breach of the covenants may also be considered not to be fit and proper to manage their SMSF and could be disqualified under section 126A of the SIS Act.

Clarification of the best financial interest duty – third party payments

1.42 As with the existing best interests duty, the new best financial interests duty will continue to apply to an exercise of a trustee's powers in making payments to third parties by, or on behalf of the entity or fund. The amendments specifically clarify this as third party payments tend to be particularly subject to abuse. These actions by a trustee must be in the best financial interests of beneficiaries. The trustee should be able to produce evidence supporting its decision, and have oversight that monies paid are being used by third parties for the intended purpose. ***[Schedule #, items 6 and 10, subsections 52(3A) and 52B(2A) of the SIS Act]***

1.43 In order to meet this duty, trustees should conduct reasonable due diligence when assessing payments to a third party. If, after having conducted this reasonable due diligence, the trustee knows or ought reasonably to know that the payment to the third party is not in the best financial interests of beneficiaries, or there is a concern that they might not be, the trustee should not make the payment. The use of an interposed corporate entity that a superannuation fund owns equity in to acquire services on behalf of the superannuation fund will not insulate the trustee from ensuring that the services that are ultimately provided to the fund are in the best financial interest of their beneficiaries.

1.44 Trustees cannot hide behind unjustifiable claims that they are ignorant of what they are purchasing. Trustees should reasonably know what they are purchasing, and such purchases should be in the best financial interests of beneficiaries.

Example 1.4- Payment to industry representative body

Blue Trustee manages the Aqua Superannuation Fund. Blue Trustee authorises the payment of subscription fees to an industry representative body. Prior to making the decision to pay the subscription fees, Blue Trustee does not closely examine what services the industry representative body will provide in return for those fees and how the payment is in the best financial interests of members. The industry representative body then uses the fees paid by Blue Trustee, in addition to fees from other superannuation entities, to undertake activities that are not in the best financial interests of Aqua Superannuation Fund's member. In this case, the payment of the subscription fee is unlikely to be in the best financial interests of beneficiaries.

1.45 The clarification applies equally to directors of corporate trustees in relation to their best financial interests obligation. ***[Schedule #, item 8, subsection 52A(2A) of the SIS Act]***

Reversal of the evidential burden

1.46 The evidential burden of proof for the best financial interests duty is reversed so that the onus is on the trustee and each director of a corporate trustee of a registrable superannuation entity to adduce evidence to support the contention that the trustee or director performed their duties and exercised their powers in the best financial interests of the beneficiaries. ***[Schedule #, item 13, section 220A of the SIS Act]***

1.47 A definition of 'evidential burden' is inserted into the SIS Act. ***[Schedule #, item 1, subsection 10(1) of the SIS Act]***

1.48 The reversal of the evidential burden should emphasise to trustees and directors of corporate trustees that they need to have strong systems and processes in place to ensure that all actions they take can be

demonstrated to be in the best financial interests of beneficiaries. It should also highlight the need for trustees to keep clear records of the decision-making process.

1.49 Trustees should assess the costs and benefits of actions, including quantifiable metrics to demonstrate what the anticipated financial outcome is and the reasonable basis for that expectation. Actions taken by trustees differ in quantum, complexity and duration, and the detail in supporting analysis would be expected to reflect these aspects of a particular action.

1.50 The evidential burden of proof is not reversed for trustees of SMSFs as there is no penalty for a contravention of the best financial interests duty. However, SMSF trustees found not acting in the best financial interests of the beneficiaries could be penalised under other regulatory provisions in the SIS Act.

1.51 The reverse onus would not apply where a criminal penalty is pursued because the effect would not be proportionate due to the serious consequences of being held liable for a criminal offence.

1.52 The reverse onus would not apply to actions to recover loss or damage under section 55 of the SIS Act. This means that it will only apply to actions brought by a regulator and not private actions against trustees brought by beneficiaries (such as class actions).

1.53 This reversal of the evidential burden of proof is proportional, necessary, reasonable and in pursuit of a legitimate objective. Given that the facts of whether a trustee has acted in the best financial interests of beneficiaries is peculiarly within the knowledge of the trustee; proof of this could be readily provided by the trustee; and the reverse onus is confined to situations where the consequences of a breach are civil penalties sought by the regulator, and will not be applied to situations where a criminal penalty is pursued.

1.54 The reversal of evidential burden is reasonable as a trustee should be readily able to point to evidence that they considered the likely financial impact on beneficiaries of a decision to make a payment to a third party and how such payment was in the best financial interests of beneficiaries. For example, the trustee could adduce records showing the due diligence undertaken in respect of the payment and the relevant third party and other factors demonstrating that the payment was in the best financial interests of beneficiaries. Whereas it is difficult for the regulator to prove that the trustee failed to take certain matters into account in determining whether a decision or payment was in the best financial interests of beneficiaries.

1.55 Reversal of the evidential burden is also justified given the potentially serious and widespread impact of a trustee's failure to act in the best financial interests of beneficiaries.

1.56 Reversing the evidential burden will mean that if the trustee or director of a corporate trustee is able to adduce evidence or point to circumstances consistent with the proper discharge of its duties, the evidential burden is discharged and the regulator will then be required to prove on the balance of probabilities that the that the trustee or director of a corporate trustee did not perform their duties and exercise their powers in the best financial interests of the beneficiaries. ***[Schedule #, item 15, subsection 220A(3) of the SIS Act]***

Prohibition on certain payments and investments

1.57 Schedule # amends the SIS Act to allow regulations to be made to specify that certain payments or investments made by trustees of registrable superannuation entities, and trustees of SMSFs, are prohibited, or prohibited unless certain conditions are met. For the avoidance of doubt, this prohibition would apply to payments where the trustees have used a third party intermediary to procure the prohibited expenditure or investment on their behalf. ***[Schedule #, item 12, subsections 117A(1) and 117C(1) of the SIS Act]***

1.58 The amendments allow regulations to be made to specify that directors of the corporate trustee are prohibited from causing the corporate trustee to make a payment or investment. This reflects the fact that directors do not make payments and investments themselves. ***[Schedule #, item 12, subsection 117B(1) and paragraph 117C(1)(b) of the SIS Act]***

1.59 For the avoidance of doubt, where a payment or investment is not prohibited under the regulations, this does not necessarily mean that the payment or investment meets the best financial interests duty.

1.60 The power has been drafted to broadly cover any payments and investments from a superannuation entity, including payments relating to expenses associated with running the entity or investments made by the entity.

1.61 This ensures that regulations can be made to prohibit certain payments and investments where they are considered to be unsuitable expenditure by trustees in any circumstance.

1.62 The prohibition is a civil penalty provision under section 193 of the SIS Act for trustees and directors of registrable superannuation entities and trustees of a SMSF. A contravention of a civil penalty provision under the SIS Act involving dishonesty or intention to deceive or defraud is punishable on conviction by imprisonment for a maximum of 5 years (section 202 of the SIS Act). ***[Schedule #, items 11 and 12, subsections 117A(2), 117B(2) and 117C(2), paragraphs 193(ka), 193(kb) and 193(kc) of the SIS Act]***

Amendments relating to the enforcement of record-keeping requirements

1.63 The Schedule includes a range of amendments to the SIS Act to provide regulators with more options to respond to compliance issues relating to record-keeping requirements. This includes making specified record-keeping obligations a strict liability offence and ensuring that directors of corporate trustees may be held to account for the corporate trustee's failure to keep required records in appropriate circumstances.

1.64 The amendments relating to the best financial interests duty may encourage trustees and directors to keep better records to demonstrate compliance with their duties. The amendments relating to record-keeping support this by ensuring that where regulations are made to require the keeping of records, regulators are able to take a proportionate enforcement response.

1.65 Currently, section 34 of the SIS Act provides that a breach of an operating standard is an offence, where the contravention is intentional or reckless and the maximum fine is 100 penalty units. This will include where there is a contravention of record-keeping obligations that are specified as operating standards.

New strict liability offence

1.66 The amendments supplement the offence in section 34 of the SIS Act with a strict liability offence. Specifically, the amendments introduce a strict liability offence for the contravention of an operating standard relating to a record-keeping obligation. The offence will attract a maximum penalty of 50 penalty units. ***[Schedule #, item 2, subsections 34(2A) and 34(2B) of the SIS Act]***

1.67 Imposing a strict liability offence (with maximum penalty of 50 penalty units) for a failure to comply with a record-keeping obligation is consistent with other similar provisions in the SIS Act. For example, see section 104 of the SIS Act about the duty to keep records of changes of trustees.

1.68 The penalty amount of 50 penalty units is also consistent with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, which provides that a fine of up to 60 penalty units should be imposed for a strict liability offence. Consistent with the principles in this guide, the strict liability offence will also not be punishable by imprisonment.

1.69 A contravention of the strict liability offence does not affect the validity of a transaction. ***[Schedule #, item 3, subsection 34(3) of the SIS Act]***

New offence applying to directors

1.70 The amendments also ensure that directors of corporate trustees may be held accountable for the corporate trustee's intentional or reckless failure to keep required records. Specifically, directors may be liable for an offence, with a maximum penalty of 100 penalty units. The offence only applies if the director was in a position to influence the conduct of the trustee in relation to the commission of the offence and the director failed to take all reasonable steps to prevent the commission of the offence. ***[Schedule #, item 4, section 34AA of the SIS Act]***

Application and transitional provisions

1.71 The amendments relating to the duty to act in the best financial interest of beneficiaries apply in relation to duties that are performed, or powers that are exercised on or after 1 July 2021. ***[Schedule #, item 15]***

1.72 The amendments relating to the reversal of the evidential burden apply in relation to contraventions that occur on or after 1 July 2021. ***[Schedule #, item 16]***

1.73 The amendments relating to record-keeping apply in relation to contraventions that occur on or after 1 July 2021. ***[Schedule #, item 14]***

1.74 The amendments allowing regulations to prohibit certain payments and investments apply from the day after Royal Assent.