

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2013 No. 26**

Subject - *Corporations Act 2001*  
*Superannuation Guarantee (Administration) Act 1992*  
*Superannuation Industry (Supervision) Act 1993*

#### *Superannuation Legislation Amendment Regulation 2013 (No. 1)*

Subsection 1364(1) of the *Corporations Act 2001* (the Corporations Act) provides, in part, that the Governor-General may make regulations prescribing all matters required or permitted by the Corporations Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Corporations Act. The *Corporations Regulations 2001* (the Corporations Regulations) are made under section 1364 of the Corporations Act.

Section 80 of the *Superannuation Guarantee (Administration) Act 1992* (the SGA Act) provides, in part, that the Governor-General may make regulations prescribing all matters required or permitted by the SGA Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the SGA Act. The *Superannuation Guarantee (Administration) Regulations 1993* (the SGA Regulations) are made under section 80 of the SGA Act.

Subsection 353(1) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the SIS Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the SIS Act. The *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations) are made under section 353 of the SIS Act.

On 16 December 2010, the Government announced the Stronger Super package of reforms in response to the recommendations of the Super System Review final report. Following extensive consultation, on 21 September 2011 the Government announced its decisions on key design aspects of the Stronger Super reforms.

The Regulation gives effect to changes arising from legislation implementing the MySuper and governance reforms.

The Regulation:

- ensures that a trustee provides a member of a MySuper product with a notice of a material change or significant event, where the member's balance in the MySuper product is moved to any other product or investment option, upon the recommendation of the trustee;
- requires superannuation funds to provide, rather than only offer, a minimum amount of death insurance to members of MySuper products in order to be able to receive superannuation contributions from employers on behalf of employees who have not chosen a fund;

- ensures that the existing definition of ‘permanent incapacity’ in the SIS Regulations applies for the purposes of the SIS Act, supporting the new requirement in the SIS Act that superannuation funds provide members of MySuper products with permanent incapacity benefits;
- prohibits trustees from providing insured benefits other than those that are consistent with the conditions of release in the SIS Regulations for death, terminal medical condition, permanent incapacity and temporary incapacity, to beneficiaries who join a fund from 1 July 2014;
- prohibits trustees from providing insured benefits for members unless they are supported by an insurance policy from an insurer, that is, a fund will not be able to self-insure;
- provides that the successor fund transfer rules relating to the transfer of a member’s benefit between funds, do not apply to the transfer of accrued default amounts to a MySuper product in another fund, to facilitate the movement of existing default amounts to the new MySuper regime;
- requires trustees to provide a notice of a material change or significant event to a member when they are attributing the member’s accrued default amount to a MySuper product within the fund, or are moving the accrued default amount to another fund; and
- provides that life and total and permanent disability (TPD) insurance is compulsory for MySuper members if the trustee is reasonably satisfied the insurance cannot be provided on an opt-out basis at reasonable cost, or at all.

The Commonwealth consulted publicly on an exposure draft of the Regulation in November 2012, and also consulted with superannuation industry associations and individual stakeholders. The purpose of the consultation was to ensure the changes were technically correct and created no unintended or undesirable consequences for the industry or members.

Details of the Regulation are set out in Attachment A.

A statement of the Regulation’s compatibility with human rights is set out in Attachment B.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on 1 July 2013, except for Schedule 2, which commences on 1 January 2014. Regulation 4.07D under item 2 of Schedule 3, which prohibits trustees from providing insured benefits other than those that are consistent with certain conditions of release, takes effect on 1 July 2014.

Authority: Subsection 1364(1) of the *Corporations Act 2001*

Section 80 of the  
*Superannuation  
Guarantee  
(Administration) Act  
1992*

Subsection 353(1) of the  
*Superannuation Industry  
(Supervision) Act 1993*

**Details of the *Superannuation Legislation Amendment Regulation 2013 (No. 1)***

**Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Superannuation Legislation Amendment Regulation 2013 (No. 1)*.

**Section 2 – Commencement**

This section provides for Schedules 1 and 3 of the Regulation to commence on 1 July 2013, and for Schedule 2 of the Regulation to commence on 1 January 2014.

**Section 3 – Authority**

This section provides that the Regulation is made under the *Corporations Act 2001* (the Corporations Act), the *Superannuation Guarantee (Administration) Act 1992* (the SGA Act) and the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

**Section 4 – Schedule(s)**

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1, item 2**

**Significant event notice – where replacement of MySuper is recommended by the trustee or an associate of the trustee**

The Regulation prescribes that where a member of a MySuper product has their balance in the MySuper product moved to any other product, including to another MySuper product, upon the recommendation of a trustee, the trustee must provide a significant event notice to that member. The significant event notice must specify the consequences to the member that might result from moving to another product regardless of whether the information was contained in the product disclosure statement (PDS).

Section 1017B of the Corporations Act provides that a notice must be given 30 days prior to a potential increase in fees or charges. This is consistent with requirement in the *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012* which requires consent in writing to a transfer from a MySuper product no more than 30 days before a move occurs. This ensures the member, prior to deciding to provide consent, is informed of the consequences to them that might result from moving to another product.

**Schedule 2, items 1 and 2**

**Requirements for benefits in respect of death**

The SGA Act contains ‘choice of fund’ provisions, under which employees are able to nominate the superannuation fund into which their compulsory employer superannuation contributions must be made. Section 32C of the SGA Act sets out the

circumstances in which employer superannuation contributions satisfy the ‘choice of fund’ requirements.

Paragraph 32C(2)(c) of the SGA Act states that, in order for superannuation contributions to satisfy the choice of fund requirements, the relevant fund must comply with requirements in the *Superannuation Guarantee (Administration) Regulations 1993* (the SGA Regulations) in relation to insurance in respect of death. These requirements are set out in regulation 9A of the SGA Regulations, which sets out the minimum levels of life insurance (otherwise known as death insurance) funds are required to offer their members in order to comply with the choice of fund requirements.

From 1 July 2013, section 68AA of the SIS Act will require superannuation fund trustees to ensure their funds provide benefits for death in respect of MySuper members (other than a member who is also a defined benefit member) by taking out insurance. From 1 January 2014, paragraph 32C(2)(c) of the SGA Act will be replaced by new paragraphs 32C(2)(d) and (e). The two new paragraphs will distinguish between the requirement to provide death benefits to MySuper members of a fund, which will be reflected in paragraph 32C(2)(d), and to offer death benefits to other members of a fund, which will be reflected in paragraph 32C(2)(e).

Accordingly, regulation 9A of the SGA Regulations, which details the requirements for insurance in respect of death, is amended. This involves a reference to actually providing death benefits in respect of MySuper members (other than members who are also defined benefit members), rather than merely offering death benefits (which would apply in respect of other members).

Regulation 9A is also amended to reflect the requirement, which will be contained in section 68AA of the SIS Act, to allow MySuper members to elect that death benefits not be provided in respect of the member by the fund. While the regulation now requires funds to provide a minimum level of death benefits in respect of MySuper members, in order to comply with the choice of fund requirements, there is an exception for cases where a member has elected that the benefits will not be provided or, if it is permitted by the fund, the member has elected to hold an amount of life insurance that is lower than that set out in regulation 9A.

Finally, regulation 9A is amended to reflect the provision, which will be contained in section 68AA of the SIS Act, that the provision of death benefits to MySuper members of a fund is subject to such reasonable conditions as the trustees of the fund determine.

These amendments take effect on 1 January 2014.

### **Schedule 3, items 1 and 3** **Meaning of permanent incapacity**

The existing definition of ‘permanent incapacity’ in the *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations) applies for the purposes of the SIS Act.

The *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* amended subsection 10(1) of the SIS Act to insert a definition of

‘permanent incapacity’. This definition will be used in defining the types of insured benefits trustees must provide MySuper members of regulated superannuation funds.

The subsection 10(1) definition of permanent incapacity will state that “a member of a regulated superannuation fund is suffering permanent incapacity if the member is taken, under the regulations, to be suffering permanent incapacity for the purposes of this Act”.

Currently, subregulation 6.01(2) of the SIS Regulations contains a definition of ‘permanent incapacity’, which applies to Part 6 and Schedule 1 of the SIS Regulations, dealing with payment standards and conditions of release of benefits, respectively. This definition is moved to a new regulation 1.03C to allow it to be employed for the purpose of the definition of ‘permanent incapacity’ set out in subsection 10(1) of the SIS Act, in addition to its existing applications.

It is not intended that the meaning of the definition change, rather, simply that the existing definition is not applicable for the purpose of the Act.

This amendment to the SIS Regulations takes effect on 1 July 2013.

### **Schedule 3, item 2, regulations 4.07C and 4.07D** **Operating standard – permitted types of insurance**

Subsection 31(1) of the SIS Act allows operating standards to be prescribed in relation to the operation of regulated superannuation funds and to trustees and registrable superannuation licensees of those funds.

An operating standard is prescribed under which the trustee of a regulated superannuation fund is prohibited from providing members with insured benefits other than those that satisfy the conditions of release at Schedule 1 of the SIS Regulations for death, terminal medical condition, permanent incapacity and temporary incapacity.

In order to comply, a trustee does not need to adopt the SIS Regulations definitions of these terms. However, the definitions that are used must be consistent with the conditions of release and the insured benefits must be able, in all circumstances, to be released to members.

The prohibition applies in respect of regulated superannuation funds.

The prohibition does not apply to the continued provision of insured benefits to members who joined a fund before 1 July 2014 and were covered in respect of that insured benefit before 1 July 2014. This exemption only extends to circumstances where a member was actually covered in respect of an insured benefit prior to 1 July 2014. From 1 July 2014 the exemption cannot be used to provide a member with a type of cover they did not have prior to 1 July 2014. However, a member can vary their level of cover from 1 July 2014. For example, the cover could be increased or decreased, and associated premiums adjusted, after 1 July 2014.

This exemption still applies if the member is transferred to another fund under the successor fund transfer rules at regulation 6.29. The insurance arrangements they had in place prior to 1 July 2014 can continue in the new fund.

In addition, where an approval has been granted, prior to 1 July 2014, under subparagraph 62(1)(b)(v) of the SIS Act for the provision of and release to beneficiaries of particular insured benefits, those benefits are exempted from the restrictions on providing types of insured benefits. This exemption includes the provision of such benefits to beneficiaries who joined the fund from 1 July 2014. The exemption only applies while the approval under subparagraph 62(1)(b)(v) remains in force.

Where a trustee is unable to amend the governing rules of a fund to comply with the restrictions on providing insured benefits, those terms of the governing rules are deemed to be omitted from the governing rules and replaced by terms that allow the provision of benefits that are permitted.

Currently, superannuation funds offer a range of benefits to members as permitted by the core and ancillary purposes of the sole purpose test at section 62 of the SIS Act.

The wording of section 62 allows funds to offer insured benefits that are not consistent with the conditions of release in Schedule 1 of the SIS Regulations. As a result, they cannot be released to members at the time of their disability, but must remain within a member's superannuation account until a condition of release, such as the member reaching their superannuation preservation age, is met.

The operating standard takes effect from 1 July 2014.

**Schedule 3, item 2, regulation 4.07E**  
**Operating standard – self-insurance**

Paragraph 31(2)(eb) of the SIS Act will allow operating standards to be prescribed in relation to the kinds of benefits that must not be provided other than by taking out insurance, or insurance of a particular kind.

An operating standard is prescribed under which trustees of regulated funds are not permitted to provide insured benefits unless they are backed by an insurance policy provided by an insurer. This includes insurance from a Lloyd's underwriter.

For funds that do not self-insure, this standard takes effect on 1 July 2013.

For funds that do self-insure at 1 July 2013, this standard takes effect on 1 July 2016. This provides a three year transitional period for funds to move from self-insurance to external insurance arrangements. During this period, those funds can continue to self-insure in respect of new members. In addition, if a fund is self-insuring in respect of members that become MySuper members on or after 1 July 2013, then under this regulation the insured benefits of these members may continue to be provided by way of self-insurance until 1 July 2016. The requirement to provide benefits under section 68AA of the SIS Act, by taking out insurance, encompasses self-insurance.

Where a member is transferred from a fund that is self-insured to one that, prior to the transfer of the member, did not self-insure, the trustee of the receiving fund is able to continue to self-insure in respect of that member until 1 July 2016. This applies only to successor fund transfers and to transfers under Part 33 of the SIS Act, which deals with moving accrued default amounts to MySuper products.

Furthermore, the prohibition on self-insurance does not apply to the provision of insured benefits to defined benefit members of funds (or sub-funds) that, as at 1 July 2013, are self-insuring in respect of their defined benefit members and are not prohibited from doing so by means of a condition on their trustee's licence.

The proposed prohibition does also not apply to the trustees of any fund where the insured benefits are provided by or their provision is guaranteed by the Commonwealth Government or the government of a State or Territory.

In addition, where a beneficiary is receiving benefit payments, has made a claim for benefit payments, or has experienced an insured event, during the period when self-insurance is permitted in respect of their fund, that beneficiary's ability to continue to receive benefit payments, to lodge a claim, to have a claim determined or to have further benefits paid is not affected.

The operating standard reflects concerns raised in the Super System Review, which concluded there are significant risks associated with self-insurance.

Where the governing rules of a fund do not permit a trustee to obtain an external insurance policy in respect of benefits previously self-insured the standard, if necessary, deems the governing rules to be amended to allow the trustee to obtain such a policy.

The operating standard commences on 1 July 2013.

### **Schedule 3, item 4**

#### **Successor fund transfer rules not to apply to the transfer of accrued default amounts**

The amendment provides that transfers required under prudential standards are permitted by regulation 6.29 of the SIS Regulations, which relate to the transfer of member benefits to another fund (for example, in a fund merger situation).

This is necessary as prudential standards are of no effect to the extent that they conflict with the regulations. Therefore, transfers under prudential standards would have to otherwise satisfy one of the existing requirements of regulation 6.29.

The successor fund transfer rules will not apply to the transfer of accrued default amounts to a MySuper product in another fund. A prudential standard, made under section 34C for the purpose of section 29SAA, 29SAB, 387, 388 or 394 of the SIS Act, will require the transfer of the accrued default amounts to another fund in the following circumstances:

- Paragraphs 29SAA(1)(b) and 387(1)(b) require the trustee to take the action required under the prudential standards in relation to accrued default amounts where the trustee has sought MySuper authorisation but the member is not eligible to be in the fund's MySuper product.
- Section 29SAB requires action to be taken under the prudential standards if the authorisation to offer a MySuper product is cancelled under subsection 29U(1).



- Section 388 requires the trustee to take the action required by the prudential standards if the trustee holds accrued default amounts and has not applied for MySuper authorisation before 1 July 2017.
- Section 394 requires trustees that are not authorised to operate an eligible rollover fund at 1 January 2014, to transfer the amounts held in existing eligible rollover funds to an authorised eligible rollover fund or a fund that offers a MySuper product in accordance with the prudential standards.

**Schedule 1, item 1, regulations 7.9.11A and 7.9.11LB, and Schedule 3, item 5, regulation 9.46**

**Notification – accrued default amount attributed to MySuper product**

The amendment requires trustees to provide members with a notice when attributing an accrued default amount to a MySuper product in the fund, or transferring that accrued default amount to another fund because the member is not eligible to hold a MySuper product offered by that fund.

The notice must mention the following:

- the amount that will be attributed;
- the name of the MySuper product to which the amount will be attributed;
- how the member may obtain a Product Disclosure Statement (PDS) for the MySuper product; and
- any other information the member needs to understand the attribution.

This notice is a modified significant event notice, and under the requirements of the significant event regime may be given 12 months after the change, which would be the attribution of the accrued default amount to a MySuper product.

However, where the attribution of the accrued default amount would result in one or more of the following:

- an increase in a fee or charge that applies to the amount;
- a reduction in an insured benefit;
- an increase in an insurance premium attributable to the member; or
- a change in the investment strategy that relates to the amount,

then a notice must be provided 90 days prior to the accrued default amount being attributed to the MySuper product.

This requirement is made under the regulations that a trustee elects to comply with under section 29SAA of the SIS Act. In this case, the notice must instead mention the following:

- the amount that is attributable to the member at the time the notice is sent;

- the name of the MySuper product to which the amount will be attributed;
- how the member can elect, in writing, to opt out of the attribution;
- how the member may obtain a Product Disclosure Statement (PDS) for the MySuper product;
- any change to fees or charges that apply to the amount;
- any change to the member's insured benefits as a result of the attribution;
- any change to the investment strategy applicable to the amount as a result of the attribution; and
- any other information the member needs to understand the attribution.

A member that opts-out of the attribution of their accrued default amount to a MySuper product may opt to remain in their existing investment option where it continues to exist. However, in cases where the existing investment option is no longer available, the trustee may require a member to nominate an investment option for their accrued default amount to be transferred to, in order for the member to validly opt-out.

Fees and charges must be expressed in dollars except where the Australian Securities and Investments Commission determines that, due to the nature of the fee and the charge, there is a compelling reason to allow them to be expressed in another way.

These notices must be provided in writing. This does include electronic forms of communication such as email.

Schedule 1, item 1 also amends the *Corporations Regulations 2001* to ensure that where a registrable superannuation entity (RSE) licensee is required to provide this notice they would not also have an obligation to provide a significant event notice that would usually be required by section 1017B of the Corporations Act.

### **Schedule 3, item 5, regulation 9.49**

#### **Opt-out insurance covering MySuper members cannot be obtained at reasonable cost**

The regulation provides that life and TPD insurance must be offered on a compulsory basis for MySuper members if the trustee is reasonably satisfied that the insurance cannot be provided on an opt-out basis at reasonable cost or cannot be obtained from an insurer on opt-out basis at all. Subsection 68AA(7) of the SIS Act will provide that regulations may specify conditions where funds are not required to provide members holding a MySuper product with the ability to opt-out.

**ATTACHMENT B****Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Superannuation Legislation Amendment Regulation 2013 (No. 1)***

**This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.**

**Overview**

*Superannuation Legislation Amendment Regulation 2013 (No. 1)* amends the *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations), the *Corporations Regulations 2001* and the *Superannuation Guarantee (Administration) Regulations 1993*.

On 16 December 2010, the Government announced the Stronger Super package of reforms in response to the recommendations of the Super System Review final report. Following extensive consultation, on 21 September 2011 the Government announced its decisions on key design aspects of the Stronger Super reforms.

The purpose of the Regulation is to give effect to changes arising from legislation implementing the MySuper and governance reforms.

The Regulation:

- ensures that a trustee provides a member of a MySuper product with a notice of a material change or significant event, where the member's balance in the MySuper product is moved to any other product or investment option, upon the recommendation of the trustee;
- requires superannuation funds to provide, rather than only offer, a minimum amount of death insurance to members of MySuper products in order to be able to receive superannuation contributions from employers on behalf of employees who have not chosen a fund;
- ensures that the existing definition of 'permanent incapacity' in the SIS Regulations applies for the purposes of the SIS Act, supporting the new requirement in the SIS Act that superannuation funds provide members of MySuper products with permanent incapacity benefits;
- prohibits trustees from providing insured benefits other than those that are consistent with the conditions of release in the SIS Regulations for death, terminal medical condition, permanent incapacity and temporary incapacity, to beneficiaries who join a fund from 1 July 2014;

- prohibits trustees from providing insured benefits for members unless they are supported by an insurance policy from an insurer, that is, a fund will not be able to self-insure;
- provides that the successor fund transfer rules relating to the transfer of a member's benefit between funds, do not apply to the transfer of accrued default amounts to a MySuper product in another fund, to facilitate the movement of existing default amounts to the new MySuper regime;
- requires trustees to provide a notice of a material change or significant event to a member when they are attributing the member's accrued default amount to a MySuper product within the fund, or are moving the accrued default amount to another fund; and
- provides that life and total and permanent disability (TPD) insurance is compulsory for MySuper members if the trustee is reasonably satisfied the insurance cannot be provided on an opt-out basis at reasonable cost, or at all.

Further information on these amendments is contained in the explanatory materials accompanying the Regulation.

### **Human rights implications**

The Regulation engages the right to health under the Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 12 recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. According to the United Nations Committee on Economic, Social and Cultural Rights, this includes a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health. Such facilities, goods and services must be accessible to everyone.

Under Article 4 of the ICESCR, the right to health may be subject to only such limitations as are determined by law which are compatible with the nature of the right and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must pursue a legitimate objective and be reasonable, necessary and proportionate to that objective.

Two of the provisions described above limit the circumstances in which superannuation fund trustees can provide fund members with insurance coverage. These are the prohibitions on self-insurance by funds and on providing insured benefits that are inconsistent with the SIS Regulations conditions of release. The prohibition on self-insurance does not limit the type or level of insurance cover that trustees can provide members. Rather, it deals with how trustees are able to fund the provision of this cover.

The restriction on the types of insured benefits that trustees are able to provide will have an impact on fund members. From 1 July 2014, new superannuation fund members will only receive insurance coverage where the insurance benefits satisfy the conditions of release at Schedule 1 of the SIS Regulations for death, terminal medical

condition, permanent incapacity and temporary incapacity. The conditions of release set out the circumstances in which a trustee may make payments to a fund member.

Currently, funds are able to provide their members with types of disability insurance cover that are broader in scope or have less restrictive eligibility criteria than the definitions of permanent and temporary incapacity employed in the SIS Regulations. As a result, there are circumstances where a member may suffer a disability that satisfies the terms of their insurance coverage but does not satisfy either the permanent or temporary incapacity condition of release.

Where a fund member receives an insurance benefit that does not satisfy a disability-related condition of release, that benefit remains within the member's superannuation account until another condition of release, such as reaching preservation age, is met. It cannot be immediately accessed by the member at the time of their disability, even though they may have been paying premiums for that insurance cover for many years.

The objective of restricting the types of insurance cover for new members to those that are consistent with the SIS Regulations conditions of release is to ensure that, where a member receives insurance cover through their superannuation fund, the insurance benefits are available to the member at the time of their disability. The Regulation does not affect the cover of existing members and does not reduce the insurance payments that a member can receive at the time of their disability. The provision is a necessary, reasonable and proportionate response to the problem of members paying for insurance cover that they are unable to access at the time of their disability.

Where a member wishes to obtain insurance that will cover them in circumstances that fall outside the conditions of release, they will still be able to seek this cover outside of superannuation. Members will be able to receive any benefits under such cover at the time of their disability.

## **Conclusion**

This Regulation is compatible with human rights because to the extent that it limits human rights, those limitations are reasonable, necessary and proportionate.