

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2013 No. 155**

Issued by the authority of the Minister for Financial Services and Superannuation

*Corporations Act 2001*  
*Superannuation Guarantee (Administration) Act 1992*  
*Superannuation Industry (Supervision) Act 1993*  
*First Home Saver Accounts Act 2008*

*Superannuation Legislation Amendment (MySuper Measures) Regulation 2013*

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.

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.

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.

Section 131 of the *First Home Saver Accounts Act 2008* (FHSA Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the FHSA Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the FHSA Act.

On 16 December 2010, the Government announced the Stronger Super package of reforms in response to the recommendations of the review into the governance, efficiency, structure and operation of Australia's superannuation system final report. The reforms are designed to reduce costs for superannuation fund members, increase transaction efficiency and strengthen governance and integrity arrangements.

The purpose of the Regulation is to implement MySuper and governance measures announced by the Government as part of the Stronger Super reforms.

The Commonwealth consulted publicly on an exposure draft of the Regulation from 30 April 2013 to 15 May 2013. The Commonwealth undertook further targeted consultation on a revised draft of the Regulation from 12 to 18 June 2013 with the Financial Services Council, the Association of Superannuation Funds of Australia, the Industry Super Network and the Australian Institute of Superannuation Trustees. These bodies and other key stakeholders were consulted on various matters throughout the development of the Regulation. 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.

The major changes in the Regulation:

- make changes to improve transparency in the provision of superannuation products including by:
  - prescribing the way in which information in the product dashboard (a document for consumers allowing comparison of returns, risk and fees between MySuper superannuation products) is to be presented;
  - prescribing how fees for superannuation products are to be disclosed in product disclosure statements provided to consumers, with minor consequential amendments for product disclosure statements for managed investment schemes (MISs);
  - specifying the types of documents and information that trustees will need to publish on their websites (including information on trustee and executive officer remuneration);
  - requiring Registrable Superannuation Entity (RSE) licensees (that is, the trustees of superannuation funds) to provide, in a member's periodic statement, the latest product dashboard for that member's MySuper product; and
  - requiring trustees to inform members that they can request written reasons for decisions made (and in cases where no decision has been made) in relation to non-death benefit complaints.
- require RSE licensees that are also the responsible entities of registered managed investment schemes to inform the Australian Securities and Investments Commission (ASIC) of events that may lead to material adverse changes in their financial position;
- prescribe factors that RSE licensees may use to vary investment strategies for members in 'lifecycle' MySuper products, including the member's age, gender and projected time to retirement;
- permit the governing rules of a superannuation fund to limit certain contributions, including transfers from a foreign superannuation fund and in specie contributions;
- clarify the circumstances in which a person is a defined benefit member to ensure they are excluded from the MySuper regime;
- make various technical and consequential amendments such as: requiring RSE licensees to provide the Australian Prudential Regulation Authority (APRA) with early disclosure of successor fund transfers (such as a merger between superannuation funds) and other information; making minor technical amendments to clarify which regulatory obligations apply to persons who are involved in the management of both an RSE licensee and a First Home Saver Accounts (FHSA) provider; and to update references in the regulations; and

- repeal and/or amend existing regulations relating to subject matter that will be dealt with in APRA prudential standards.

Details of the Regulation are set out in the Attachment.

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

The commencement provision of the Regulation reflects its relationship to the Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2013 (Service Providers and Other Governance Measures Bill). Most of the provisions of the Regulation commence on 1 July 2013, regardless of the Service Providers and Other Governance Measures Bill receiving Royal Assent.

In the event that the Service Providers and Other Governance Measures Bill receives Royal Assent before 1 July 2013, the conditions in section 4 of the *Acts Interpretation Act 1901* are relevant and have been met.

The product dashboard measure is made under the Service Providers and Other Governance Measures Bill, should the Bill receive the Royal Assent by 1 July 2013. Otherwise, it will be made under section 1020G of the Corporations Act.

A number of other measures in the Regulation listed above also depend on the Service Providers and Other Governance Measures Bill and commence on the later of 1 July 2013 and the date on which the Bill receives the Royal Assent. These include:

- parts of the minor technical amendments to the FHSA changes;
- updating terminology relating to superannuation auditors and actuaries;
- requiring RSE licensees that are also the responsible entities of registered managed investment schemes to inform ASIC of events that may lead to material adverse changes in their financial position;
- requiring trustees to inform members that they can request written reasons for decisions made (and in cases where no decision has been made) in relation to non-death benefit complaints; and
- moving items relating to prudential matters from the SIS Regulations into APRA's superannuation prudential standards.

The measure relating to RSE licensees that are also the responsible entities of MISs will commence on 1 July 2015, should the Service Providers and Other Governance Measures Bill receive the Royal Assent, but will not commence otherwise.

## ATTACHMENT

### ***Details of the Superannuation Legislation Amendment (MySuper Measures) Regulation 2013***

#### Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013*.

#### Section 2 – Commencement

This section provides for sections 1 to 4 of the Regulation to commence the day after it is registered. It also provides for different provisions to commence, based on whether and when the Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2013 (Service Providers and Other Governance Measures Bill) receives Royal Assent.

The section provides that Schedule 1 is to commence on 1 July 2013, with the exception of item 89 (which will commence on 1 January 2014, on the commencement of its enabling provision).

Items 3 to 20 of Schedule 2 commence on the later of 1 July 2013 and the day on which the Service Providers and Other Governance Measures Bill receives the Royal Assent. Items 1 and 2 of Schedule 2 commence on 1 July 2015, but will not commence should the Service Providers and Other Governance Measures Bill not receive the Royal Assent.

Item 1 of Schedule 3 commences immediately after the commencement of items 1 to 88 of Schedule 1, on 1 July 2013. Item 2 of Schedule 3 commences on the later of the commencement of item 1 of Schedule 3 and the beginning of the day on which the Service Providers and Other Governance Measures Bill receives the Royal Assent. However, item 2 will not commence if item 1 of Schedule 3 does not commence, or if the Service Providers and Other Governance Measures Bill does not receive the Royal Assent.

The effect of these provisions is that the items in Schedule 1 commence regardless of whether the Service Providers and Other Governance Measures Bill receives the Royal Assent. Schedule 2 commences only if the Service Providers and Other Governance Measures Bill receives the Royal Assent. If it does not receive the Royal Assent by 1 July 2013, then item 1 of Schedule 3 will take effect – this implements the measures set out in item 3 of Schedule 2, through the mechanism available under section 1020G of the *Corporations Act 2001*. If the Service Providers and Other Governance Measures Bill subsequently receives the Royal Assent, then Schedule 2 will commence. Item 2 of Schedule 3 will then repeal item 1 of Schedule 3.

#### Section 3 – Authority

This section provides that the Regulation is made under the *Corporations Act 2001* (the Corporations Act), the *First Home Saver Accounts Act 2008* (the FHSA Act), the *Superannuation Guarantee (Administration) Act 1992* (the SGA Act), and the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

## Section 4 – Schedules

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, items 1, 2 and 3 MySuper definitions**

The Regulation inserts a new definition of a generic MySuper product into the Corporation Regulations and also inserts references to the definitions of a MySuper product and a choice product.

Item 1 inserts a reference to the definition of a choice product in the SIS Act. A class of beneficial interest in a regulated superannuation fund is a choice product if it is not a MySuper product.

Item 2 inserts a new definition of a generic MySuper product. A class of beneficial interest in a superannuation entity is a generic MySuper product if:

- the superannuation entity is a regulated superannuation fund; and
- the RSE licensee of the fund is authorised to offer that class of beneficial interest in the fund as a MySuper product under section 29T of the SIS Act; and
- the RSE licensee of the fund is not authorised to offer that class of beneficial interest in the fund as a MySuper product because section 29TA or 29TB of the SIS Act is satisfied in relation to the class.

Item 3 inserts a reference to the definition of a MySuper product in the SIS Act. A class of beneficial interest in a regulated superannuation fund is a MySuper product if an RSE licensee is authorised under section 29T to offer that class of beneficial interest in the fund as a MySuper product.

### **Schedule 1, item 5 and Schedule 2, item 3 and Schedule 3, item 1 Product dashboard requirements**

#### Way information is to be set out in a product dashboard

The *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* (Further MySuper and Transparency Measures Act) will insert new subsections 1017BA(1) and (2) into the Corporations Act. These subsections require trustees of an RSE to make a product dashboard publicly available, and to present certain information in that product dashboard. A product dashboard is to be presented in a table format setting out key information on a superannuation product. The product dashboard is designed to increase transparency and allow comparisons between superannuation products.

The Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2013 (Service Providers and Other Governance Measures Bill) will amend subsections 1017BA(1) and (2) of the Corporations Act to change the requirements for information that must be set out in a product dashboard.

As amended, subsection 1017BA(1) will provide for the Regulation to set out the way the product dashboard is to be presented, and subsection 1017BA(2) will require the product dashboard for a MySuper product to display:

- a return target or targets for the product;
- a return or returns for the product;
- a comparison or comparisons between these;
- a level of investment risk that applies to the product; and
- a statement of fees and other costs in relation to the product.

Subsection 1017BA (2) states that all of these measures are to be worked out in accordance with the Regulation and in accordance with the period or periods prescribed in the Regulation. The legislation also requires the product dashboard to set out any other prescribed information.

The Regulation requires the trustee of RSEs to publish a product dashboard for each of their MySuper products, including MySuper lifecycle products, from 31 December 2013. These requirements will only apply to an RSE that offers a MySuper product.

A Regulation prescribing a product dashboard for an investment option within a choice product will not take effect until 1 July 2014 and will be further developed in consultation with industry before being released.

Regulation 7.9.07Q of the *Corporations Regulations 2001* (Corporations Regulations) requires the specified information to be set out in a table which presents the target return, a graphical presentation of the return and a comparison of the return target and the return, the level of investment risk that applies to the product and a statement of fees and other costs. The completed table will form the product dashboard.

The Regulation sets out the general parameters relating to the specified information to be included in the product dashboard. Further detail will be set out in the Australian Prudential Regulation Authority's (APRA's) MySuper product dashboard reporting standards made under section 13 of the *Financial Sector (Collection of Data) Act 2001*. The Further MySuper and Transparency Measures Act inserts section 29QC into the SIS Act, which will require RSE licensees to provide information that is calculated in a way prescribed by APRA's reporting standards.

Currently under APRA's draft MySuper product dashboard reporting standards it is proposed that:

- The return target for the product will be presented as a net return target which will be a per annum estimate of the expected return for the product over ten years after investment and administration fees and other costs, and advice fees and other costs, excluding activity and insurance fees and costs, in excess of the Australian Bureau of Statistics published Consumer Price Index (CPI).
- The return for the product will be presented as a graphical chart of the annual net return for a representative member for each year of the last 10 years. This chart will also show two lines to compare the return and the return target. As

the return target is measured as the expected average return above CPI growth over 10 years, the comparison return is the 10 year moving average rather than the annual net return. Thus there will be a line plotting the 10 year moving average return that was achieved, and a line plotting the realised value of the 10 year moving average return target using realised CPI for the relevant years.

- A representative member is a member with an account balance of \$50,000 at the end of the financial year who is fully invested in the given investment option and who does not incur any activity fees during the reporting period.
- If the product has not been in existence for 10 years then the graph showing the historical performance (that is annual net returns, the moving average return, and the realised value of the moving average return target) will cover the period that the product, together with any predecessor product, has been in existence, up to a cumulative period of ten years.
  - A predecessor product, in relation to a MySuper product, means a default investment option in existence on 30 June 2013 in relation to which, if a member's accrued default amount were attributed to the MySuper product, the RSE licensee would be exempted from disclosure requirements under subregulation 9.46(2) of the *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations).
- The level of investment risk will represent the estimated number of years in each 20 years that the RSE licensee estimates that negative net investment returns will be incurred. The RSE licensee must include both the level of investment risk, as well as the corresponding risk label that is associated with that level of investment risk, in their product dashboard. The level of investment risk must be calculated for the current financial year therefore the current financial year is the starting year for the 20 year estimate. The calculation must be over a 20 year horizon.
  - The level of investment risk will be calculated, and the relevant risk label identified, in a manner that is consistent with the product dashboard reporting standards which in turn will apply the method provided in the *Standard Risk Measure Guidance Paper for Trustees* published by the Association of Superannuation Funds of Australia and the Financial Services Council on 1 July 2011.
- The statement of fees and costs will include the annual investment, administration and advice fees and costs for a representative member, excluding activity fees and insurance fees and costs, in respect of the current financial year. The statement of fees and costs is to be calculated in a manner that is consistent with the product dashboard reporting standard.
  - Paragraph 1017BA(1)(c) of the Corporations Act requires that the statement of fees and costs are to be updated 14 days after the end of the period prescribed by the regulations. Subregulation 7.0.07W(4) prescribes a period of 14 days after the change in fees and costs. Therefore, the period for updating the information on fees and costs is 28 days from the change.

A MySuper product offered by a fund in accordance with a lifecycle exemption under subsection 29TC(2) of the SIS Act (a lifecycle product) will be required to apply these requirements to each lifecycle stage within the lifecycle product. Thus if the entitlements of each lifecycle stage in the product are referable to a particular class of assets then the Regulation will provide for the product dashboard requirements to apply as if each lifecycle stage were a MySuper product in its own right. This is because returns, the returns target, asset-related risks and (to the extent permitted by the SIS Act) fees and costs, have the potential to vary between each lifecycle stage.

- If the lifecycle stage of the MySuper product has been offered for less than 10 financial years, and there is no equivalent lifecycle stage of a predecessor product then the representation of returns is to cover the number of whole financial years for which the lifecycle stage has been offered.
- If the lifecycle stage of the MySuper product and an equivalent lifecycle stage of a predecessor product have been offered for a total of less than 10 financial years then the representation of returns is to cover the number of whole financial years for which the lifecycle stage of the MySuper product and the predecessor product have been offered.
- If the lifecycle stage of the MySuper product (or the lifecycle stage together with any equivalent stage in a predecessor product) has been offered for 10 financial years or more then the representation of returns must cover the 10 financial years.

Should the Service Providers and Other Governance Measures Bill not receive Royal Assent, the product dashboard provisions will be made under paragraph 1020G(1)(c) of the Corporations Act, as if section 1017BA of the Act were modified as set out in amended Part 6A of Schedule 10A of the Corporations Regulations.

#### Product dashboard to be included in a periodic statement

Currently, trustees of superannuation entities are required to provide periodic statements under subsections 1017DA(1) and (2) of the Corporations Act and subdivisions 5.5 and 5.6 of the Corporations Regulations. The Corporations Act in conjunction with the Corporations Regulations list information that must be included in a periodic statement.

The Further MySuper and Transparency Measures Act will insert new section 1017BA into the Corporations Act with effect from 31 December 2013, and 1 July 2014 for investment options within a choice product. This section introduces a requirement for trustees to publish product dashboards on their fund's websites.

The Regulation will amend regulation 7.9.20 of the Corporations Regulations to require the latest product dashboard for the MySuper product or investment option within a choice product in which a member is invested in to be published in the periodic statement. If a member is fully invested in a MySuper product, their periodic statement will include the product dashboard that was most recently published on the fund's website. If a member has a part of their interest in each of several investment options, the periodic statement will include the product dashboard for each investment option that has assets that are attributable to the member.



### **Schedule 1, item 6 and Schedule 2, item 4 Reasons for decision**

The Regulation will ensure that, in general, if an eligible person makes a complaint and the decision-maker makes a decision in relation to the complaint, then the decision-maker must, within 30 days of making the decision, inform the eligible person of the date of the decision, about the external dispute resolution system that covers complaints by eligible persons and about how that system may be accessed.

The Regulation will also ensure that when a decision is made in relation to a non-death benefit complaint, the trustee must (within 30 days of making the decision) inform the eligible person that they can request written reasons for the decision made by the trustee. The trustee should also comply with the Regulation where reasons have already been given with the decision and the trustee advises that in doing so it has fulfilled the person's right to request reasons.

The Regulation will also ensure that when a decision is made in relation to a non-death benefit complaint and the decision maker has not made a decision, the decision maker must inform the eligible person of a number of matters. The trustee must, within 45 days of the complaint, inform the eligible person that if a decision is not made within 90 days of the complaint, then they can request written reasons for the non-decision.

In both cases where a decision is made and where one is not made, the decision maker must respond to an eligible person's request for written reasons within 28 days or within the extended period if one is granted by the regulator.

The intent of the Regulation is to address the concern that people might not know that they can request reasons from a trustee, nor about the process for doing so.

### **Schedule 1, items 7 to 86 Enhanced fee and other disclosure in product disclosure statements**

The Regulation would update the product disclosure statement (PDS) requirements set out in the Corporations Regulations to take into account the MySuper regime.

The Corporations Regulations prescribe that PDSs (see Schedule 10) and shorter PDSs (see Schedule 10D) must set out fees charged in a table format. Items 34 and 83 introduce new tables and templates into Schedule 10 and Schedule 10D of the Corporations Regulations. For superannuation products, these tables and templates set out the format in which fees and costs must be disclosed in the PDS.

In most cases, a trustee of a fund that is authorised to offer a MySuper product will be required to prepare a PDS under the shorter PDS provisions and so the fees and costs information would need to be presented in accordance with the proposed template set out in Schedule 10D. In limited circumstances where a trustee is permitted to use the long form PDS format, the fees and costs information will need to be presented in accordance with the proposed template set out in Schedule 10.

The types of fees that can be charged in a MySuper product are defined in Division 5 of Part 2C of the SIS Act. These form the basis of the definitions which items 8 to 33 incorporate into Schedule 10 of the Corporations Regulations. These definitions are the basis of the fees that are disclosed in the tables at items 34 and 83. Items 39 to 45 will prescribe information that must be inserted into the 'Additional Explanation of

Fees and Costs' section of the PDS, which is cross-referenced in the tables. Item 46 will set out the fee definitions that must be included in a PDS for superannuation products.

Item 15 would create a new concept of the 'indirect cost' of a superannuation product, which is used as the basis of the amended definition of 'indirect cost ratio' for superannuation products in items 33, 34, 46, 47, 60 and 67. The indirect cost is any amount that a trustee of an entity knows or reasonably should know will reduce the return for a member that is not charged to that member as a fee.

The Regulation will also update the examples of annual fees and costs that must be included in a PDS. Items 47 to 64 will set out an updated example template, showing how fees and costs apply to a representative member, and will revise the instructions on how to complete the template.

The Regulation will also make minor revisions to the consumer advisory warning that must be included in a PDS (items 65 to 68) and update the disclosure regarding indirect costs that must be included in a PDS (item 67).

The Regulation will also make similar changes to the shorter PDS regime in Schedule 10D of the Corporations Regulations. These include requirements to state where MySuper product dashboards and other transparency documents can be found (item 70) and update the language of the Schedule to reflect the new MySuper terminology. The Regulation will also provide that PDSs must base fee disclosure and examples around MySuper products where these are available (item 77).

Any other fees that are charged that do not fall into the categories set out in the template would have to be disclosed under the heading, 'Additional Explanation of Fees and Costs'. For example, this material could include activity fees for contributions splitting. A cross-reference would need to be inserted under the fee template at item 83.

For shorter PDSs, if the fees charged do not fall within these categories, they would have to be cross-referenced as is required by Schedule 10D.

The changes to the PDS regime for superannuation products have created minor flow-on amendments to the regime for managed investment products. These include the fee templates and tables (items 34 and 83), the consumer advisory warning (items 65 to 66) and the indirect cost disclosure in periodic statements (item 67).

### **Schedule 1, items 87 and 88 and Schedule 2, item 5 Amendments to the *First Home Saver Accounts Regulations 2008***

Regulation 4 of the *First Home Saver Accounts Regulations 2008* (the FHSA Regulations) will be amended to apply relevant provisions of the SIS Regulations to persons involved in the management of an RSE licensee that is also a First Home Saver Accounts (FHSA) provider in the same way that the relevant provisions of the SIS Regulations apply to a responsible officer of an RSE licensee that is a trustee of a public offer superannuation fund.

The amendment mirrors an amendment to the FHSA Act contained in the Service Providers and Other Governance Measures Bill that deals with the application of provisions of the SIS Act.

Subregulation 6(1) of the FHSA Regulations will also be amended to replace the reference to paragraph 52(2)(h) of the SIS Act with a reference to paragraph 52(2)(j) of the SIS Act. From 1 July 2013, as a result of changes made by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Trustee Obligations and Prudential Standards Act), the provision currently contained in paragraph 52(2)(h) will move to paragraph 52(2)(j) of the SIS Act. The provision requires trustees to provide fund beneficiaries with access to prescribed information and documents.

Finally, Schedule 1 of the FHSA Regulations will be amended to delete the references to regulations 8.02A, 8.03 and 8.04 of the SIS Regulations. Schedule 1 lists those provisions of the SIS Regulations that apply to FHSA providers. Item 88 of Schedule 1 to this Regulation will repeal regulations 8.02A, 8.03, and 8.04 of the SIS Regulations. While regulations 8.02A and 8.03 will be reworded to deal with self managed superannuation funds (SMSFs), these provisions will no longer be relevant to FHSA providers.

**Schedule 1, items 89 and 90 and Schedule 2, items 6 to 8 Definition of defined benefit member and circumstances in which a member is taken to be a defined benefit member**

From 1 January 2014, employers will only be permitted to make contributions for employees who do not have a chosen fund, to a fund that offers a MySuper product. The Further MySuper and Transparency Measures Act will insert new subsection 19(2CA) into the SGA Act, with effect from 1 January 2014, which will provide an exemption from the rules relating to MySuper for defined benefit members as MySuper is designed to apply to accumulation arrangements only.

Item 89 of Schedule 1 will insert regulation 6A into the SGA Regulations, which will set out circumstances in which a member who is not a defined benefit member under the general definition is taken to be a defined benefit member. These circumstances are where the member:

- is a member of the scheme established under the *Military Superannuation and Benefits Act 1991* (the military superannuation scheme);
- holds an interest, as a non-member spouse within the meaning of the section 90MD of the *Family Law Act 1975*, in the military superannuation scheme or in a superannuation scheme established under the *Superannuation Act 1976* or the *Superannuation Act 1990*;
- has made an election under section 137 of the *Superannuation Act 1976*;
- is a preserved benefit member within the meaning of the *Public Sector Superannuation Scheme Trust Deed*, as in force from time to time;
- has a preserved benefit in the military superannuation scheme;
- has an ancillary account in the military superannuation scheme; or
- is a member of the scheme established under the *Defence Force Retirement and Death Benefits Act 1973*; and has an ancillary account in the military superannuation scheme.

Similarly, item 90 of Schedule 1 will insert subregulation 1.04(2) into the SIS Regulations, which would set out the circumstances in which a member who is not a defined benefit member under the general definition is taken to be a defined benefit member for section 20B or Part 2C of the SIS Act. These circumstances are where the member:

- is a member of the scheme established under the *Military Superannuation and Benefits Act 1991* (the military superannuation scheme);
- holds an interest, as a non-member spouse within the meaning of the section 90MD of the *Family Law Act 1975*, in the military superannuation scheme or in a superannuation scheme established under the *Superannuation Act 1976* or the *Superannuation Act 1990*;
- has made an election under section 137 of the *Superannuation Act 1976*;
- is a preserved benefit member within the meaning of the *Public Sector Superannuation Scheme Trust Deed*, as in force from time to time;
- has a preserved benefit in the military superannuation scheme;
- has an ancillary account in the military superannuation scheme;
- is a member of the scheme established under the *Defence Force Retirement and Death Benefits Act 1973*; and has an ancillary account in the military superannuation scheme;
- has either a capital guaranteed interest in a voluntary preservation plan, or a deferred retirement benefit amount, in the scheme established under the *Superannuation (State Public Sector) Act 1990* (Qld); or
- both is covered by the *Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2012* (the 2012 award) or by an award that replaces the 2012 award (a successor award); and would be entitled, on the occurrence of an event mentioned in any of the following clauses, to a pension or lump sum mentioned in that clause:
  - (A) clause 7 of the 2012 award, or an equivalent clause of a successor award;
  - (B) clause 8 of the 2012 award, or an equivalent clause of a successor award;
  - (C) clause 10 of the 2012 award, or an equivalent clause of a successor award;
  - (D) clause 11 of the 2012 award, or an equivalent clause of a successor award.

Items 6 and 7 of Schedule 2 will amend the current definitions of ‘defined benefit fund’, ‘defined benefit member’, and ‘defined benefit pension’ in subregulation 1.03(1) of the SIS Regulations, as well as inserting a new definition for ‘defined benefit sub-fund’.

Item 8 of Schedule 2 inserts regulation 1.03AAA into the SIS Regulations, which will clarify that for certain specified provisions, a fund will be taken to be a defined benefit fund if it has at least one member who receives a defined benefit pension.

These amendments are consequential to the amendments to Division 9.5 of the SIS Regulations (see items 13 to 19 of Schedule 2 below) and incorporate definitions that have been in place under Modification Declaration 23 (see the discussion below relating to items 13 to 19).

### **Schedule 1, item 91 Disclosure of remuneration and systemic transparency**

For the purposes of paragraph 29QB(1)(a) of the SIS Act, item 91 inserts regulation 2.37 into the SIS Regulations, which sets out the details of information relating to remuneration that must be published, and kept up to date, at all times on the RSE licensee's website.

From 1 July 2013, RSE licensees have a new obligation to disclose the remuneration of each director or other executive officer if the RSE licensee is a body corporate, or each trustee if the RSE licensee is a group of individual trustees. RSE licensees need to disclose all payments, benefits and compensation paid for or provided by the RSE licensee or by related body corporates of the RSE licensee.

The regulation is modelled on the existing requirements for listed companies under regulation 2M3.03 of the Corporations Regulations. This includes general information, in addition to the items relating to payments and benefits and compensation. An additional item that is to be disclosed is where monies are attributable to the service as a director and are not paid to the director. For example, in funds where the director has been appointed by an employer or employee sponsor and the fee for their service is paid to the organisation rather than directly to the person, the name of the organisation and amount paid will also need to be disclosed.

Information on payments and benefits received by relevant executive officers and individual trustees must, in most cases, be disclosed for the two most recently completed financial years.

In addition, where an executive officer or individual trustee also receives payments or benefits from a related entity to the RSE, subregulation 2.37(2) requires the disclosure of the amount of those payments or benefits that accurately represent the proportion of the person's time committed to their obligations to the RSE.

For other information that does not fall into these categories, such as remuneration policies, ASIC will consider providing guidance to the industry on the minimum information that should be included in these documents. In addition, APRA has requirements for Remuneration Policy in its Governance Prudential Standard SPS 510.

New paragraph 29QB(1)(b) of the SIS Act (to be inserted by the Further MySuper and Transparency Measures Act, with effect from 1 July 2013) will require RSE licensees to publish any other document or information prescribed by the regulations. The Regulation specifies documents and information that RSE licensees need to publish on the public section of the RSE's website to promote systemic transparency. The Corporations Act prescribes some of the documents to be in a certain form.

For the purposes of this new paragraph, item 91 also inserts regulation 2.38 into the SIS Regulations. This regulation sets out further documents and information that must be published, and be kept up to date at all times, on the RSE licensee's website from 1 July 2013.

The information and documents include the trust deed, the governing rules, rules relating to the nomination, appointment and removal of trustees and trustee directors, actuarial reports, product disclosure statements, annual reports, financial services guides, summaries of significant event notices and material change notices, the details of the providers of outsourced material business activities, details of executive officers or trustees, board attendance records, registers of relevant interests and duties, a summary of the conflicts management policy, the proxy voting policies and a summary of how the entity has exercised its voting rights in relation to shares in listed companies.

ASIC will consider providing guidance on the information to be included in these documents.

#### **Schedule 1, item 94 Technical amendments relating to the governing rules of a superannuation entity**

With effect from 1 July 2013, the Trustee Obligations and Prudential Standards Act will replace the current section 52 of the SIS Act dealing with covenants taken to be included in the governing rules of a superannuation entity. The new section 52 will apply to APRA regulated funds and a new section 52B to SMSFs.

Consequently, the amendments to regulation 4.01 of the SIS Regulations update the reference to paragraph 52(2)(h) of the Act to refer to paragraphs 52(2)(j) and 52B(2)(h). Similarly, regulation 4.02 refers to paragraph 52B(4)(b) of the SIS Act.

Regulation 4.02A is made under new subparagraph 58(2)(d)(ii) of the SIS Act (to be inserted by the Trustee Obligations and Prudential Standards Act with effect from 1 July 2013). The regulation, which does not apply to superannuation funds with fewer than five members, sets out the circumstances in which a fund's governing rules can permit a direction to be given by a beneficiary to the trustee in respect of changes to an amount invested in an investment option.

Regulation 4.02AA is an operating standard and makes provision in similar terms to regulation 4.02A but in relation to APRA-regulated funds with fewer than 5 members. These funds are not covered by section 58 of the Act and regulation 4.02A, and therefore need to be covered separately.

#### **Schedule 1, item 99 and Schedule 2, items 9 and 20 Auditor/actuary changes**

These amendments update references to 'auditor' and 'actuary' as used throughout the SIS Regulations.

The definition of approved auditor will be repealed by Schedule 1, item 30 of the Service Providers and Other Governance Measures Bill. It will be replaced by the term 'superannuation auditor' which includes the definitions of the terms 'RSE auditor' and 'approved SMSF auditor'.

Similarly the definition of ‘actuary’ will be repealed by the Service Providers and Other Governance Measures Bill and replaced by definitions of the terms ‘superannuation actuary’, ‘RSE actuary’ and ‘SMSF actuary’ (inserted by the *Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiencies Measures) Act 2012*).

**Schedule 1, items 92, 93, 95, 96, 97, 98 and Schedule 2, item 12 Repeal existing regulations**

APRA has the power to make prudential standards in relation to superannuation under section 34C of the SIS Act. This section was inserted by the Trustee Obligations and Prudential Standards Act and took effect from 9 September 2012.

A ‘prudential matter’ is broadly defined in subsection 34C(4) of the SIS Act. The Further MySuper and Transparency Measures Act introduced new section 29X to the SIS Act to allow the prudential standards to cover the transfer of accrued default amounts; new section 389 to allow transitional issues to be addressed; and new section 242Q to allow eligible rollover funds to be covered.

Subsection 34D(2) of the SIS Act provides that prudential standards are of no effect to the extent they conflict with the SIS Act or SIS Regulations. Thus, in order to allow APRA to issue prudential standards on a full suite of issues, and to enable those standards to have full effect, a number of regulations which relate to subject matter to be dealt with in the prudential standards need to be repealed.

The note to subregulation 3A.03(2) is repealed as well as Division 3A.2 of the SIS Regulations (items 92 and 93). These relate to the current capital requirements for the trustees of public offer superannuation funds contained in the SIS Act which will be repealed by the Trustee Obligations and Prudential Standards Act on 1 July 2013 and replaced by an operational risk financial requirement. Details of the operational risk financial requirement will be contained in APRA’s Superannuation Prudential Standard (SPS) 114 - Operational Risk Financial Requirement.

Division 4.1A of the SIS Regulations (item 95) will be repealed. This Division supports the current requirements for risk management strategies and plans in the SIS Act which will be repealed by the Trustee Obligations and Prudential Standards Act on 1 July 2013 and replaced by a new requirement for a risk management strategy. Details of the new risk management requirements will be contained in APRA’s Superannuation Prudential Standard (SPS) 220 - Risk Management.

Regulation 4.09 of the SIS Regulations (items 96 and 97) will be amended to set out an operating standard requiring the trustee of a superannuation entity to formulate, review, and give effect to an investment strategy that has regard to the whole of the circumstances of the entity. The amendments to subregulation 4.09(1) and paragraph 4.09(2)(e) provide that the operating standard will only apply to trustees of SMSFs. For APRA-regulated superannuation entities, this requirement will be given effect through a prudential standard. Details of the new requirement will be contained in APRA’s Superannuation Prudential Standard (SPS) 530 - Investment Governance.

Regulations 4.14 to 4.17 of the SIS Regulations (item 98) will be repealed. These regulations set out standards on the fitness and propriety of RSE licensees, the adequacy of resources of, or available to, RSE licensees and outsourcing arrangements for RSE licensees. They also set out transitional arrangements for

certain outsourcing arrangements. These regulations support provisions which will be repealed by the Trustee Obligations and Prudential Standards Act on 1 July 2013 and replaced by prudential standards. Details of the new requirements would be contained in APRA's Superannuation Prudential Standards (SPS) 220 - Risk Management, SPS 231 - Outsourcing and SPS 520 – Fit and Proper.

Regulation 8.04 will be repealed as the period to give an audit report to APRA would be replaced by prudential standards (item 12).

**Schedule 1, item 100 Obligation to inform members with accrued default amounts**

Under section 29SAA of the SIS Act, an RSE licensee applying for authority to offer a MySuper product must provide an election that they will attribute to a MySuper product each accrued default amount in each fund for which they are a trustee. Subsection 29SAA(3) provides that an RSE licensee making an election must comply with any prescribed requirements relating to the provision of notices to members with accrued default amounts.

Regulation 9.46A ensures that fund members with identified accrued default amounts are adequately informed by the RSE licensee about their transition to a MySuper product.

Once an accrued default balance has been identified in the member's account, an RSE licensee must provide members with this information in the first member statement to be sent after, and each subsequent member statement issued until the accrued default balance has been placed in a suitable MySuper product.

Under this regulation, RSE licensees are required to inform members of both the licensees' obligation to promote the financial interests of the beneficiaries of their fund who hold an interest in a MySuper product, and of the licensees' obligation to attribute or transfer a member's accrued default amount into a suitable MySuper product by no later than 30 June 2017.

An RSE licensee is also be required to advise each affected member of the value of their accrued default amount and, if the licensee has identified a suitable MySuper product to which they propose to attribute the member's accrued default amount, the name of that MySuper product and the expected timing of that attribution. If the RSE licensee has not identified a suitable MySuper product to which they propose to move the member's accrued default amount, the licensee will be required to advise the member of the steps that are being undertaken by the licensee to identify such a product, and the reason why no such product has yet been identified.

**Schedule 1, item 100 Other factors that may be used for a lifecycle investment strategy in a MySuper product**

Paragraph 29TC(1)(c) of the SIS Act prohibits the streaming of gains or losses to specific members of a fund who hold a MySuper product, except to the extent permitted under a lifecycle exception. A lifecycle exception is defined by subsection 29TC(2) of the SIS Act as a governing rule of the fund that allows gains and losses to be streamed to different subclasses of members on the basis of: age alone; age and other prescribed factors; or age and other prescribed factors in prescribed circumstances.



Regulation 9.47 prescribes these factors to be a member's: account balance; contribution rate; current salary; gender; and the trustee's opinion of the member's likely time to retirement. Trustees may take into account a combination of these factors in designing a lifecycle investment strategy.

### **Schedule 1, item 100 Limitation imposed by governing rules**

Paragraphs 29TC(1)(f) and 29TC(3)(a) of the SIS Act, taken together, permit the governing rules of a superannuation fund to place limitations on the source or kind of contributions to a MySuper product, if those limitations are of a prescribed kind.

Regulation 9.48 allows funds to limit contributions where the contribution is a transfer from a foreign superannuation fund, as defined under the *Income Tax Assessment Act 1997*, or a similar foreign fund. This is designed to ensure consistency with other legislative arrangements under which funds can choose not to accept transfers from certain foreign superannuation funds.

Regulation 9.48 also allows funds to limit in-specie contributions and contributions by non-associated employers to corporate MySuper products (as defined by the *Fair Work Act 2009*) or to MySuper products to which s 29TB of the SIS Act, relating to large employers, applies.

### **Schedule 1, item 101 Eligible rollover funds**

The replacement of Part 10 of the SIS Regulations removes the existing definition of an eligible rollover fund (ERF) which became redundant upon the introduction (through Division 2 of Part 24 of the SIS Act) of the authorisation of RSE licensees to operate a superannuation fund as an ERF.

Regulation 10.01 requires that only RSE licensees that hold a public offer or extended public offer class of licence may apply to be authorised to operate a superannuation fund as an ERF. This makes no practical change from current arrangements, as all RSE licensees which operate a current ERF hold the relevant class of licence.

Regulation 10.02 simply renumbers existing regulation 10.03.

Regulations 10.06 and 10.07 retain the operating standards for ERFs currently set out in regulations 10.06 and 10.07, modified only to reflect the fact that approved deposit funds will not be able to be operated as an authorised ERF, the effect of subsection 29E(6D) of the SIS Act and the repeal of the member protection provisions.

### **Schedule 1, item 102 Operating standard—disclosure of certain information for funds other than self managed superannuation funds**

Item 102 repeals regulations 11.07 and 11.07AA of the SIS Regulations, and substitutes them with the provisions set out below. Provisions under Regulation 11.07A still apply in relation to SMSFs.

Regulation 11.07 applies to superannuation entities other than SMSFs. The operating standard requires the trustee of the entity to give APRA notice of a change in the: name of the entity; the postal/registered/service address of the entity; contact details of a person for the entity and; the RSE licensee of the entity.

The notice must be given for a superannuation entity that is an ERF immediately after the change, but in any case, within 28 days of the change.

The operating standard would also require that an RSE licensee who is an incoming trustee of the entity to give written notice of that fact to the regulator. This notice must be given as soon as practicable but no later than 5 days after the date on which the RSE licensee becomes trustee of the entity.

The standard requires the trustee of the entity to give written notice to the regulator of a decision to wind up the entity or to retire as a trustee of the entity. This must be given as soon as practicable after the making of the decision and before the winding up has commenced or the trustee has retired.

The proposed operating standard requires the entity to give written notice to the regulator of a change in the class of the RSE before, or as soon as practicable after, the change in the class. This will facilitate the timely provision of information, which is required in order to ensure APRA's Register of RSEs under Part 11A of the SIS Regulations is kept up-to-date.

RSE licensees currently do not need to formally notify APRA where there is a change in a fund's class, for example, from a non-public offer fund to a public offer fund, provided the RSE licence is already of a class that permits the RSE licensee to be a trustee of the new class of fund.

Paragraph 11A.02(3)(a) specifies that the Register must contain the class of RSE licence that each RSE licensee holds. Currently APRA only becomes aware (after the event) of a change in an RSE's class if the fund's risk management plan is modified (per section 29PC of the SIS Act) or if the RSE licensee applies to vary its class of RSE licence. However, a change in a class of fund does not always necessitate a need for a change in licence class; hence APRA may not always be informed of such change.

Regulation 11.07 does not apply to SMSFs.

#### Operating standard—disclosure of certain information for self managed superannuation funds

For SMSFs the operating standard 11.07AA has been amended for clarity and continues to require the trustee of the SMSF to give written notice to the Regulator of a change in the: name of the fund; the postal/registered/service address of the fund; contact details of a person for the fund; the fund's membership; trustees; and the directors of the fund's corporate trustee (if the trustee is a corporate trustee).

The notice must be given using the approved form and within 28 days after the change.

The standard requires the trustee of the fund to give written notice to the Regulator of a decision to wind up the fund; or to retire as a trustee of the fund. This notice must be given before, or as soon as practicable after, the winding up has commenced or the trustee of the entity has retired.

**Schedule 1, item 103 Operating standard – disclosure of successor fund transfer (formerly: Notice requirements for successor fund transfers)**

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 RSE licensees of those funds.

Regulation 11.08 prescribes an operating standard under which funds must give to APRA early notice, in writing, of an intention to undertake a successor fund transfer or merger.

The transfer, under regulation 6.29 of the SIS Regulations of a member's benefits to another fund, for example in a fund merger situation, may be undertaken without member consent if the transfer is to a successor fund (as defined in regulation 1.03). The transfer may or may not culminate in the winding up of the fund, depending on whether all or only some members and their benefits are transferred.

For the purposes of subsections 31(1) and 32(1) of the SIS Act, it will be prescribed that a trustee is required to give notice in writing to APRA of a decision to transfer any member's benefits from the fund without the member's consent.

Notice to APRA must be given as soon as practicable after making the decision, and in the case of the winding-up of the fund, before the winding-up is commenced. For successor fund transfers, notice should be given to APRA when the decision to seek a successor fund is made, rather than when a final decision is made about the identity of the successor fund. APRA is then able to maintain up-to-date information and monitor the transfer or merger, thereby ensuring that the rights of beneficiaries are protected.

This change does not apply to pooled superannuation trusts and SMSFs.

**Schedule 1, item 104 Register to be kept by APRA**

The Regulation amends Part 11A of the SIS Regulations to include further information on the Register that is to be kept by APRA.

- If the entity has a MySuper product, the Register needs to keep information on: each product name; each MySuper product unique identifier; and the type of MySuper authorisation.
- For RSE licensees that have authorisation from APRA to offer a 'tailored' MySuper product, the name and ABN of the large employer or each associated large employer must also be kept on the Register.
- RSE licensees also require authorisation from APRA to operate an eligible rollover fund. Information on whether the RSE operates an eligible rollover fund also needs to be kept on the Register.

**Schedule 2, items 10 and 11 Period within which an auditor must be appointed and an audit report must be given**

Subsection 35C(1) of the SIS Act requires SMSF trustees, for each income year, to appoint an approved auditor to give trustees a report in the approved form of the

operations of the fund for that year. The appointment must be made within the period set out in the Regulations.

Paragraph 8.02A(b) of the SIS Regulations currently prescribes the period as being as soon as practicable, but in any event, no later than 30 days before the date that the auditor must give the audit report to the trustee.

Subsection 35C(6) currently provides that the auditor must give the report to each trustee of the fund within the prescribed period after the end of the year of income.

Paragraph 8.03(a) of the SIS Regulations prescribes the period as being the period ending on the day before the SMSF trustees are required to lodge the fund's annual return.

The purpose of the Regulation is to amend the SIS Regulations to require:

- SMSF trustees to appoint an approved auditor no later than 45 days before the trustee is required to lodge the fund's annual return; and
- auditors to give the audit report to each trustee 28 days after the trustees have provided all documents relevant to the preparation of the report to the auditor.

The Regulation provides that the prescribed period within which SMSF trustees must appoint an auditor is the period ending 45 days before the due date for lodgement of the SMSF annual return. The amendment would ensure that the prescribed period for the appointment of an auditor does not vary when the prescribed period within which the auditor must give their report is extended.

The Regulation also provides that the prescribed period for which an audit report in respect of an SMSF must be given is 28 days after the trustee of the fund has provided all documents relevant to the preparation of the report to the auditor. This amendment is intended to ensure that SMSF auditors do not contravene the SIS Regulations if they cannot provide the audit report within the prescribed period due to certain circumstances beyond their control.

### **Schedule 2, items 13 to 19 Incorporating MD 23 – actuarial requirements for defined benefit funds that are SMSFs**

In 1999, the SIS Regulations were modified by Modification Declaration No 23 (MD 23), made under Part 29 of the SIS Act. MD 23 ensures that superannuation funds offering defined benefit pensions were subject to an appropriate level of prudential supervision by treating them as defined benefit funds for certain purposes. Such funds became subject to an annual actuarial certification that there is a reasonable probability that those pensions will continue to be paid under the governing rules of the funds.

APRA will determine Prudential Standard *SPS 160 – Defined benefit matters* which incorporates the actuarial investigation and reporting requirements set under MD 23 and applies them to APRA-regulated defined benefit funds and sub-funds.

Items 13 to 19 amend Division 9.5 of the SIS Regulations to ensure similar requirements continue to apply to those legacy SMSFs that were defined benefit funds

at 12 May 2004, or commenced paying defined benefit pensions prior to 12 May 2004. The amendments will also apply to a defined benefit sub-fund of a SMSF.

MD 23 will be revoked upon registration of these regulations.

**Schedule 2, items 1 and 2 Dual regulated entities – reporting of events leading to material adverse changes in financial position**

Currently, paragraph 7.6.04(1)(a) of the Corporations Regulations requires financial services licensees (which include the responsible entities of registered managed investment schemes) to notify ASIC of any event that may result in a material adverse change in their financial position, unless they are a body regulated by APRA.

The effect of this exemption is that responsible entities which are also RSE licensees do not have to comply with the reporting requirement contained in paragraph 7.6.04(1)(a).

The Service Providers and Other Governance Measures Bill will amend the Corporations Act to require such entities to meet the requirement in paragraph 912A(1)(d) of the Corporations Act to have available adequate resources, including adequate financial resources.

To assist ASIC in enforcing this new obligation, regulation 7.6.04 of the Corporations Regulations is being amended to require RSE licensees which are also the responsible entities of registered managed investment schemes to inform ASIC of events that may lead to material adverse changes in their financial position.

The removal of the exemption from the ASIC reporting requirement for these entities will occur on 1 July 2015, in line with the associated amendment to the Corporations Act.

## Statement of Compatibility with Human Rights

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

### ***Superannuation Legislation Amendment (MySuper Measures) Regulation 2013***

**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**

The *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013* amends the *Superannuation Industry (Supervision) Regulations 1994*, the *First Home Saver Accounts Regulations 2008*, 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 Review into the governance, efficiency, structure and operation of Australia's superannuation system (Super System Review) final report. The reforms are designed to reduce costs for superannuation fund members, increase transaction efficiency and strengthen governance and integrity arrangements.

The purpose of the *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013* (the Regulation) is to implement MySuper and governance measures announced by the Government as part of the Stronger Super reforms.

The major changes in the Regulation:

- make changes to improve transparency in the provision of superannuation products including by:
  - prescribing the way in which information in the product dashboard (a document for consumers allowing comparison of returns, risk and fees between MySuper superannuation products) is to be presented;
  - prescribing how fees for superannuation products are to be disclosed in product disclosure statements provided to consumers, with minor consequential amendments for product disclosure statements for managed investment schemes (MISs);
  - specifying the types of documents and information that trustees will need to publish on their websites (including information on trustee and executive officer remuneration);
  - requiring Registrable Superannuation Entity (RSE) licensees (that is, the trustees of superannuation funds) to provide, in a member's periodic statement, the latest product dashboard for that member's MySuper product; and
  - requiring trustees to inform members that they can request written reasons for decisions made (and in cases where no decision has been made) in relation to non-death benefit complaints.

- require RSE licensees that are also the responsible entities of registered managed investment schemes to inform the Australian Securities and Investments Commission (ASIC) of events that may lead to material adverse changes in their financial position;
- prescribe factors that RSE licensees may use to vary investment strategies for members in ‘lifecycle’ MySuper products, including the member’s age, gender and projected time to retirement;
- permit the governing rules of a superannuation fund to limit certain contributions, including transfers from a foreign superannuation fund and in specie contributions;
- clarify the circumstances in which a person is a defined benefit member to ensure they are excluded from the MySuper regime;
- make various technical and consequential amendments such as: requiring RSE licensees to provide the Australian Prudential Regulation Authority (APRA) with early disclosure of successor fund transfers (such as a merger between superannuation funds) and other information; making minor technical amendments to clarify which regulatory obligations apply to persons who are involved in the management of both an RSE licensee and a First Home Saver Accounts (FHSA) provider; and to update references in the regulations; and
- repeal and/or amend existing regulations relating to subject matter that will be dealt with in APRA prudential standards.

Further detail on the Regulation can be found in the accompanying explanatory materials.

## **Human rights implications**

### *The Right to Privacy*

The publication of personal information under the executive remuneration and systemic transparency requirements in the Regulation engages the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Full realisation of the right to privacy includes a right to secrecy from the public of personal information.

Regulations that allow for the disclosure of personal information should be reasonable, necessary and proportionate to meeting the legitimate objective of increasing transparency in the superannuation industry.

The Regulation imposes a new requirement for RSE licensees to publicly disclose documents or information which may contain personal information. Documents or information which may contain personal information and which must be publicly disclosed include:

- the name and Australian Business Number (ABN) of each outsourced service provider who provides a service which may affect a material business activity of the entity;
- the name, qualification and a summary of relevant experience as a trustee or board member of each executive officer of an RSE licensee or each individual trustee of an RSE;
- the record of attendance at board meetings for each director; and
- a register of relevant interests and a register of relevant duties.

The remuneration of each executive officer where the RSE licensee is a body corporate and of each individual trustee of an RSE will also be required to be publicly disclosed. Relevant payments, benefits and compensation paid for or provided to executive officers or individual trustees by related entities will also need to be disclosed.

The Super System Review found that the Australian superannuation system is characterised by a lack of transparency, comparability, and consequently, accountability. These disclosure measures are designed to increase transparency in superannuation funds, both to members and within the industry. They form part of broader reforms within the industry to increase transparency and provide greater disclosure to superannuation fund members. The requirements ensure members and other stakeholders have access to relevant and reliable information about how superannuation funds are governed and managed.

The data published by RSE licensees will enable members and other individuals to make comparisons between superannuation funds and make informed decisions about their own superannuation. As such, the availability of this information promotes the freedom of expression which includes the right to seek and receive information. Moreover, the new disclosure requirements will enhance the accountability of trustees in meeting their heightened duties to act in the best financial interests of MySuper members.

To ensure that the objective of increasing transparency is balanced against privacy considerations, the disclosure requirements in the Regulation are subject to a number of limitations.

First, RSE licensees are only required to publish information about outsourced service providers who perform a function which may affect a material business activity of the entity. This means that only details about outsourced service providers whose functions may have an effect on members' financial outcomes, such as insurers or investment managers, must be publicly disclosed. This ensures that the privacy of immaterial service providers, such as cleaners or caterers is protected, while also ensuring that members have access to information which may have an impact on their financial outcomes.

Second, the limitation on privacy in relation to executive remuneration and the requirement to disclose the names, qualifications and summaries of relevant experience imposed by the Regulation is not targeted at all employees of an RSE licensee; it is only directed at executive officers and individual trustees. Such individuals occupy decision making positions and are responsible for the governance and management of superannuation funds. It is reasonable to limit their right to



privacy as that limitation is in the interests of the members whose superannuation funds they manage.

Furthermore, only documents or information which will assist members to assess an executive officer or trustee's capacity to fulfil their duties to a high standard is required to be disclosed. It is reasonable and necessary to disclose this information in order to increase transparency and accountability to members.

Finally, if an RSE licensee considers that the publication of any documents or information would compromise the privacy of members of the fund, or if the disclosure of a document or piece of information would have unforeseen adverse consequences, then the RSE licensee may apply to ASIC not to disclose the documents or information. Depending on the circumstances, ASIC may grant the entity relief from disclosing the information.

For example, if an RSE licensee for a defined benefit fund with a small number of members was required to publish an actuarial report there is a risk that the entitlements of the members of that fund could be identified. In circumstances such as this, the RSE licensee could apply to ASIC for relief.

The provisions of the Regulation are, therefore, reasonable, proportional and necessary in the circumstances. Consequently, the limitation to the right to privacy is reasonable according to Article 17 of the ICCPR.

#### *The Right to Equality and Non-Discrimination*

The list of factors that RSE licensees may use to vary investment strategies for members in lifecycle MySuper products in the Regulation engages the right to equality and non-discrimination under Article 26 of ICCPR.

Article 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Regulations that draw distinctions, either directly or indirectly, between people or groups based on any of the grounds listed in Article 26 of the ICCPR should be reasonable, necessary and proportionate to meeting a legitimate objective.

The Regulation prescribes factors which may be used to vary investment strategies for members in a lifecycle MySuper product. A lifecycle investment strategy uses member characteristics to guide investment decisions. The Regulation provides that the factors which may be considered to vary a lifecycle investment strategy are a member's:

- account balance;
- contribution rate;
- current salary;
- gender; and
- the time remaining, in the opinion of the trustee, before the member could be expected to retire.

Lifecycle MySuper products are designed to promote the legitimate objective of improving the financial outcomes of individual MySuper members. The Regulation allows trustees to differentiate between members on the basis of gender and age as a means of recognising that different groups of people may require different investment strategies to achieve appropriate financial outcomes.

Prescribing gender as a factor that may be considered to vary a lifecycle investment strategy recognises that women, on average, have longer life expectancies and lower account balances than men. Prescribing age, or time remaining to retirement, as a factor that may be considered recognises that older members have less time to make contributions to their superannuation, and less time to benefit from compound returns.

For example, a woman nearing retirement with a low account balance who has spent time out of the workforce to fulfil caring duties may have a lower balance than a man of the same age. In this circumstance it may be appropriate for the trustees to adopt a more aggressive investment strategy than they otherwise would in order to boost the woman's superannuation balance before she retires. As such, lifecycle factors allow trustees to provide investment strategies that are tailored to the individual characteristics of members, and which are therefore more likely to lead to positive financial outcomes.

To ensure that the objective of improving financial outcomes is balanced against equality and anti-discrimination considerations, the lifecycle requirements in the Regulation are subject to a number of limitations.

First, the list of factors which may be considered to vary a lifecycle investment strategy is limited to those factors that have an effect on members' retirement outcomes. Factors which bear no relationship with members' retirement outcomes, such as race or language, may not be considered.

Second, funds that offer a MySuper product are not required to adopt a lifecycle investment strategy. Should they choose, they may offer a common investment strategy that applies to all members, without regard to factors such as their age, gender or account balance.

Third, members have the choice to move their account balance to a fund that does not use a lifecycle investment strategy if they wish.

Finally, if a member wishes to make a complaint regarding the investment strategy of their fund, they may pursue the matter through a fund's internal dispute resolution system.

The provisions of the Regulation are, therefore, reasonable, proportional and necessary in the circumstances. Consequently, the limitation to the right to equality and non-discrimination is reasonable according to Article 26 of the ICCPR.

## **Conclusion**

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