EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Superannuation Industry (Supervision) Act 1993

Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2023

The *Superannuation Industry (Supervision) Act 1993* (the SIS Act) governs the prudent management of superannuation funds and the supervision by the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Commissioner of Taxation.

Section 353 of the SIS Act allows the Governor-General to 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. Sections 60D, 60G and 60J of the SIS Act allows the Governor-General to make regulations prescribing matters for the purposes of a superannuation performance test and a comparison tool which ranks superannuation products.

The *Electronic Transactions Act 1999* (the Electronic Transactions Act) provides a regulatory framework for that facilitates the use of electronic transactions.

Section 16 of the Electronic Transactions Act provides that the Governor-General may make regulations prescribing all matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Electronic Transactions Act. Section 7A of the Electronic Transactions Act allows the Governor-General to make regulations prescribing that all or specified provisions of the Electronic Transactions Act do not apply to specified laws of the Commonwealth. The *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (the YFYS Act) introduced an annual performance test for 'Part 6A products', which include MySuper products and other products as specified in regulations. The YFYS Act came into effect on 1 July 2021, with supporting regulations made on 5 August 2021. The performance test applied in relation to MySuper products on and after 1 July 2021 and will apply in relation to trustee-directed products on and after 1 July 2023.

The purpose of *Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2023* (the Regulations) is to amend the S*uperannuation Industry (Supervision) Regulations 1994* (the Principal Regulations) to support the improved implementation of the annual performance test. The amendments address issues raised in Treasury's review of Your Future, Your Super laws. The Regulations:

- amend the testing period, benchmarks and notification letter that form part of the annual performance test requirements.

- amend the operation of the test for trustee-direct products, so that platform products are tested separately to non-platform products, and on a gross-of-taxation basis.

- make minor technical updates to improve accuracy and clarity for the annual performance test, reduce the administrative burden for APRA and ensure the test is fit for purpose when it is extended to trustee directed products.

- make minor and technical amendments to the Your Super comparison tool to ensure that the tool reflects updated reporting standards.

The Regulations also amend the *Electronic Transactions Regulations 2020* to allow APRA to give notifications in relation to the performance test to trustees by means of electronic communication.

The amendments apply on and after 1 July 2023.

The SIS Act and Electronic Transactions Act do not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Principal Regulations are exempt from sunsetting due to the operation of item 59A of the table in regulation 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOM Regulation). Given that the Regulations make consequential amendments to the Principal Regulations, the justifications that support their exemptions from sunsetting apply equally to the Regulations. As these Regulations solely consist of consequential amendments, the Regulations are further subject to the automatic repeal process under section 48A of the *Legislation Act 2003*. Once repealed, the sunsetting regime no longer applies.

The Regulations commenced on the day after they were registered on the Federal Register of Legislation.

Details of the Regulations are set out in Attachment A.

A statement of Compatibility with Human Rights is at Attachment B.

The Office of Impact Analysis has been (OIA) has been consulted (OBPR22-03464) and agreed that the proposal is unlikely to have a more than minor regulatory impact, as changes are minor, provide further options or are consequential. As such, the preparation of an Impact Analysis (IA) is not required.

A statement of Compatibility with Human Rights is at Attachment B.

ATTACHMENT A

Details of the *Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2023*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2023* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commenced on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The section states that the Regulations are made under the *Electronic Transactions Act 1999* and the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

Section 4 – Schedule

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 the Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments to *Superannuation Industry (Supervision) Regulations 1994* (the Principal Regulations)

Items 24, 25, 60 and 67 – 10 year lookback period

Items 24 and 25 amend the Principal Regulations to extend the lookback period of the performance test from 8 to 10 years. This means the performance test will now measure a Part 6A product's performance based on the past 10 years of the product's performance history. Item 67 inserts a transitional rule to ensure the 10-year lookback period will be applied on a transitional basis as new data becomes available, meaning the lookback period in 2023 is 9 years, before increasing to 10 years from 2024. Extending the lookback period is expected to sharpen the incentive of trustees to focus on long-term decision making and aligns with broader industry disclosures.

Item 60 is a consequential amendment to ensure the test period for the comparison ranking aligns with the extended lookback period.

Items 26 and 67 – Products with 7 year minimum performance history are subject to the test

Item 26 amends the Principal Regulations to extend the minimum period of performance history that a Part 6A product must have to be subject to the performance

test from 5 to 7 years. Item 67 inserts a transitional rule to ensure the 7-year minimum period is applied on a transitional basis. For the 2023 test, Part 6A products with a minimum of 6 years will be tested, and for the 2024 and future years, products with a minimum of seven years will be tested. Extending the minimum performance history period gives funds more time to implement longer-term investment strategies on new products before being subject to the test. The minimum period is intended to strike a balance between maximising coverage of the performance test and giving new products a chance to get established.

The amendments do not change ARPA's discretion under subregulation 9AB.10(4) of the Principal Regulations to determine that a Part 6A product with a performance history that is less than the minimum performance history is to be subject to the test.

Items 5, 14, 15, 17 and 56 – Meaning of initial quarter

Item 5 inserts a definition of 'initial quarter' for the purposes of the performance test. The purpose of the amendment is to clarify the concept which is key to the operation of the test and is already in the Principal Regulations but not clearly defined. The initial quarter means the first quarter in which a Part 6A product reports returns to APRA because the product has member assets. This provides clarity as there can be superannuation products that meet the definition of a Part 6A product because they exist and are open to receive members but do not actually have any members yet.

Items 14, 15, 17 and 56 make consequential amendments relating to the consolidation of the definition. The initial quarter is key to the meaning of a lifecycle Part 6A product, the calculation of SAA, and the identification of benchmark return.

Items 3 and 59 – Table of covered asset classes

Item 59 updates the table of covered asset classes with corresponding fee, tax and index assumptions under subregulation 9AB.17(7) of the Principal Regulations.

The purpose of the amendment is to improve the accuracy of the test, reduce the incentive for trustees to avoid certain investments, and reflect the latest index names, while maintaining the integrity of the test.

The table provides additional rows to disaggregate some covered asset classes which are now available to be used for the performance test as, under the new asset allocation standard, funds now have the choice to report more granular data. Disaggregated covered asset classes are provided for:

- International Equity (hedged; emerging markets)
- International Equity (hedged; developed markets)
- International Equity (unhedged; emerging markets)
- International Equity (unhedged; developed markets)
- Australian Fixed Income Excluding Credit
- Australian Credit

- International Fixed Income Excluding Credit
- International Credit
- Defensive Alternatives
- Growth Alternatives

The assumed index is also updated for the following covered asset classes:

- International Unlisted Property is updated to an index with a greater geographical allocation to international unlisted property assets.
- Australian and International Unlisted Infrastructure are updated to a median version of the existing index to ensure that the benchmark remains representative of investments in these asset classes.
- Australian and International Listed Infrastructure are updated to a version of the index that has a regional and sectoral allocation more representative of infrastructure investments.

Item 3 clarifies that assumed index has the meaning currently given in subregulation 9AB.17(7).

Items 9, 10, 11, 12 and 13 – Meaning of trustee-directed products

The annual performance test applies for 'Part 6A products', which are defined in section 60B of the SIS Act to be a MySuper product, or a class of beneficial interest in a regulated superannuation fund, if that class is identified by regulations.

Regulation 9AB.2 of the Principal Regulations includes a class known as 'trustee—directed products'. APRA is required to conduct the first annual performance test for trustee-directed products by 31 August 2023.

Broadly, trustee-directed products are accumulation choice products with strategic asset allocations to more than one asset class where the trustee or a connected entity has involvement in the design or implementation of the investment strategy of the product.

Item 9 inserts a definition of 'trustee-directed product' into regulation 9AB.1 of the Principal Regulations (the definitions provision) and defines the term as having the meaning given by regulation 9AB.2. This definition is necessary as the amendments made by the Regulations means that the term 'trustee-directed product' will appear throughout Division 9AB of the Principal Regulations whereas in the Principal Regulations the term only appeared in regulation 9AB.2.

Item 10 repeals subregulation 9AB.2(1) of the Principal Regulations and substitutes a revised subregulation to improve readability. The operation of the subregulation is unchanged.

Item 11 repeals paragraph 9AB.2(2)(a) of the Principal Regulations and substitutes a revised paragraph to clarify the class of beneficial interests that fall within the scope of a 'trustee directed product'. The intended operation of the subregulation is unchanged. It provides for the test to apply to products where at least one member is in the accumulation phase. As provided for under the Principal Regulations, superannuation interests that are supporting an income stream in the retirement phase are not captured by the definition of trustee-directed product. For example, a product will be deemed to be a trustee-directed product if it has member assets supporting at least one member in the accumulation phase at the time the test is run.

Item 13 provides rules to allow certain covered asset classes to be treated as one asset class for the purposes of working out whether a product is a trustee-directed product. This ensures that if a certain covered asset class is disaggregated, the same underlying product is consistently tested regardless of how it is reported to APRA. Item 12 makes a minor amendment to correct a reference of "Part 6A product" to the more specific "standard Part 6A product".

Items 5, 7, 9, 27 and 55 –Trustee directed products with multiple investment pathways

Trustee-directed products are offered to members through investment menus. A single trustee-directed product may be offered through one or more investment menus. There are three types of investment menus: generic, lifecycle option, and platform.

Item 7 inserts a definition of a 'platform TDP', which is a trustee-directed product that is offered through one or more investment menus of the platform type, as reported to APRA in accordance with the applicable RSE structure standard.

Items 5 and 9 insert definitions which represent the variety of ways in which members can access 'platform TDPs'. Specifically, these sub-categories of platform TDPs are:

- a 'hybrid platform TDP' which means a platform TDP that is offered through one or more investment menus of the generic type or the lifecycle option type (in addition to investment menus of the platform type), as reported to APRA in accordance with the applicable RSE structure standard; and

- a 'standard platform TDP' which means a platform TDP that is not a hybrid platform TDP.

In extending the performance test to trustee-directed products, the amendments ensure products will be tested against other comparable products. This means, generally, trustee-directed products of the platform type are tested against other trustee-directed products of the platform type, and trustee-directed products of the non-platform type (that is, those offered through generic and lifecycle option investment menus) are tested against other trustee-directed products of the non-platform type. The purpose of the amendments is to ensure the test operates fairly in its application to trustee-directed products which vary in their structures and consequently in administration fees and costs.

Item 27 amends regulation 9AB.10 of the Principal Regulations to clarify how the performance test applies to hybrid TDPs. Where a trustee-directed product is offered through both platform and non-platform investment menus (that is, it is a hybrid platform TDP), that product is separated into two notional products. One notional product will be based on its platform investment menu characteristics and the other based on its non-platform menu characteristics. The two notional products are tested independently: the notional platform TDP tested against comparable trustee-directed products of the platform type, and the other tested against trustee-directed products of the non-platform type. For the overall product to pass the performance test, both notional products must pass their respective tests. This means if one of the two notional products has failed the performance test, then the Part 6A product has failed. Item 55 repeals paragraph 9AB.16(2)(b) of the Principal Regulations and substitutes paragraphs 9AB.16(2)(b) and (c) to ensure that a 'benchmark RAFE' may be accurately computed for all Part 6A products. As amended, subregulation 9AB.16(2) ensures the 'benchmark RAFE' which is the median administration fees and expenses (as charged on a $50,000 balance) can be computed across a certain category of products where the category is: MySuper products, not MySuper products that are platform TDPs, and not MySuper products that are not platform TDPs. This means that when a hybrid platform TDP is separated into the two notional products, regulation 9AB.16 allows two benchmark RAFEs to be computed and used in the separate tests.

Item 68 – Trustee notification to beneficiaries

Under section 60E of the SIS Act, trustees are required to notify beneficiaries if a Part 6A product fails the performance test. Subsection 60E(6) of the SIS Act states that the notice from the trustee that a product has failed the performance test must be in the form, and contain information of a kind, specified in regulations. Schedule 2A of the Principal Regulations sets out this form and information as template letters. It includes standard words explaining why the member has received the notice, and how poor performance of a superannuation investment option can negatively affect their retirement income.

Item 68 repeals Schedule 2A to the Principal Regulations and substitutes a new Schedule 2A with new letter templates and instructions on when each should be used, as well as revised standard words. There are five template letters that trustees may use depending on the type of Part 6A product and whether it has failed the performance test once or consecutive times:

- MySuper product
- Platform trustee-directed product with a single failure
- Platform trustee-directed product with consecutive failures
- Non-platform trustee-directed product with a single failure
- Non-platform trustee-directed product with consecutive failures.

If a beneficiary has more than one failed MySuper product offered by the trustee, the trustee is expected to send a separate letter for each failed MySuper product to the

beneficiary. If a beneficiary has more than one failed Part 6A product offered by the trustee, the trustee has the option to send one consolidated letter within each of the non--MySuper categories above. For example, if a beneficiary has three platform trustee-directed products with a single failure (one consolidated letter) and four platform trustee-directed products with consecutive failures (one consolidated letter), the trustee can send two consolidated letters. In another example, if a beneficiary has one MySuper product with a single failure (one letter) and three non-platform trustee-directed products with a single failure (one consolidated letter), the trustee can send two letters.

The revised standard words intend to improve accessibility and effectiveness by using simpler language, and clearly explain what the result means for beneficiaries in different situations.

Items 5, 23, 29, 30, 31, 34, 35 and 36 – Definition of 'return' for the calculation of 'actual return'

Under the Principal Regulations, the variable 'NIR' is used to calculate the actual return part of the performance measure of a Part 6A product (see the formulas in regulations 9AB.11 and 9AB.12). Amendments are made to clarify how the performance test is calculated in circumstances where trustees report 'net investment return' or 'gross investment return net of fees'. This is to reflect the different methods trustees may report investment return under the investment performance standard. 'Net investment return' is adjusted for tax whereas 'gross investment return net of fees' is not. Item 29 and 34 makes a consequential change to update the variable NIR to 'Return' in the relevant formulas to reflect that the variable now takes into account the two different ways trustees may report their data about investment return.

Items 30 and 35 repeals the definition of 'NIR' as the Regulations update this variable to 'return' so a definition of 'NIR' is no longer required.

Item 5 inserts a definition of 'gross investment return net of fees'. This has the same meaning as in the investment performance standard.

Item 31 amends subregulation 9AB.12(2) of the Principal Regulations to clarify that 'return' for a Part 6A product in relation to a quarter means:

- the Part 6A product's net investment return in relation to the quarter, or
- if it is not possible to identify the Part 6A product's net investment return in relation to the quarter from information available to APRA, but it is possible to identify the Part 6A product's gross investment return net of fees in relation to the quarter from information available to APRA, then 'return' means gross investment return net of fees in relation to the quarter.

This ensures that for the purposes of calculating a 'return', APRA are able to use the data point that is reported to APRA in accordance with the applicable investment performance standard.

Item 36 makes a similar amendment to subregulation 9AB.12(2) of the Principal Regulations to clarify 'return' for lifecycle Part 6A products.

Item 23 makes a consequential amendment to update 'net return' which appears in subregulation 9AB.6(1) of the Principal Regulations to reflect that funds now report 'net investment return or gross investment return net of fees'.

Items 45 and 49 – Calculation of 'benchmark return' where gross investment return net of fees is reported

Item 45 inserts subregulations 9AB.13(3) and (4) to provide that where a standard Part 6A product reports gross investment return net of fees for the purposes of calculating benchmark return 'ART' (assumed rate of tax) is treated as zero and in working out 'index' in relation to the Alternatives asset classes which requires using the variable 'ART', ART is treated as zero. This ensures that benchmark return is not adjusted for taxes, as this is not necessary when the gross investment return net of fees is reported. Item 49 inserts subregulations 9AB.14(3) and (4) to provide the same rules for benchmark return for a lifecycle Part 6A product.

Items 32 and 45 – Calculation of 'actual return' and 'benchmark return' where a trustee-directed product has no member assets for a quarter

Item 32 inserts a rule for working out 'actual return' where a trusteedirected product has no member assets in any investment pathways in relation to a quarter. Subregulations 9AB.11(3) and (4) provide that where a trusteedirected product has no member assets in any investment pathways at the end of the quarter, the quarterly return will be treated as zero. Return will be taken to be zero for that quarter, whether the product reports a return of zero or not. Reporting a non-zero return where there are no member assets is likely due to a partial quarter of investment performance and therefore it is not appropriate to test it against a benchmark return over the full quarter.

Item 45 inserts rules for working out 'benchmark return' where a trusteedirected product reports no member assets in relation to a quarter. Subregulations 9AB.13(5) and (6) resolves this by taking benchmark return to be zero for quarters where there are no investment pathways for the Part 6A product that hold member assets for that quarter. Benchmark return is calculated as the sum of all quarters in 9AB.13(2). Therefore, benchmark return will be taken to equal zero for a quarter by applying 9AB.13(5), which takes fee and index to be treated as zero in in the formula in 9AB.13(2).

Items 9 and 32 – Calculation of 'actual return' where a trustee-directed product has 2 or more net investment returns or gross investment returns net of fees

Item 32 inserts subregulations 9AB.11(5), (6) and (7) to provide rules for working out 'actual return' where a standard Part 6A product is a trustee-directed product that has two or more net investment returns or gross investment return net of fees in relation to at least one quarter in the lookback period. This can occur when the trustee-directed product has different net investment returns within an investment pathway or has multiple investment pathways.

The ‘actual return’ is found by first identifying the quarterly return for each investment pathway based on the standard fees and costs arrangement for each investment pathway. Item 9 inserts a definition for standard fees and costs arrangements. The definition clarifies that standard fees and costs arrangements for a Part 6A product are those arrangements as reported to APRA under the investment performance and RSE structure standards. Next, the *smallest* of the quarterly returns across investment pathways is taken to be included in the calculation of ‘actual return’ for the Part 6A product. The investment pathway with the lowest net investment returns or gross investment returns net of fees represents the pathway that incurs the highest investment fees. This incentivises funds to reduce investment fees on their highest fee pathways. An asset-weighted approach as undertaken for RAFE is not possible due to data limitations.

Items 5, 8, 16 and 57 – Meaning of representative administration fees and expenses or RAFE

The Regulations do not substantively change the performance measure and its use of ‘representative administration fees and expenses’ or ‘RAFE’ as set out in the Principal Regulations. A product’s ‘actual RAFE’ are the actual administration fees and expenses charged in the most recent financial year (as charged on a $50,000 balance). ‘Benchmark RAFE’ is the median administration fees and expenses (as charged on a $50,000 balance) across a certain category of products for the most recent financial year.

Item 8 repeals the definition of ‘representative administration fees and expenses’ or ‘RAFE’ in regulation 9AB.1 of the Principal Regulations and substitutes a new definition that provides that the term has the meaning given by regulation 9AB.4A. Instead of appearing under 9AB.1 (the definitions provision), ‘representative administration fees and expenses’ or ‘RAFE’ is set out separately in a new regulation 9AB.4A.

Item 16 inserts regulation 9AB.4A which provides an updated definition of ‘RAFE’. The definition clarifies how RAFE is worked out for a Part 6A product, a Part 6A product that is a lifecycle Part 6A product, and a Part 6A product that is a trustee-directed product.

Subregulation 9AB.4A(1) clarifies that the relevant fees and costs, and related tax expenses and benefits, are those reported to APRA in relation to the Part 6A product’s standard fees and costs arrangement.

Subregulation 9AB.4A(2) provides that in working out an amount for RAFE, assume that the amount related to a beneficiary of the entity with an account balance in respect of the Part 6A product of $50,000 throughout the period. The purpose of this amendment is to ensure RAFE is calculated on the basis of a representative member. This does not change the way that RAFE is worked out, but makes it explicit in the Principal Regulations, which is necessary due to changes in APRA’s reporting standards. The $50,000 balance is not affected by investment gains and losses.

However, products may require members to have a minimum account balance of more than $50,000. Therefore, these products will not have any members with a balance of $50,000, and no administration fees will be reported. Subregulation 9AB.4A(2) provides that where there is a minimum balance requirement of more than $50,000, the RAFE is calculated based on that minimum balance.

Subregulations 9AB.4A(3) to (6) clarify that the RAFE for a lifecycle Part 6A product is the lifestage that incurs the *largest* RAFE from the set of lifestage RAFEs. The purpose of the amendment is to ensure the Principal Regulations remain fit for purpose and provide certainty to trustees by explicitly stating in the law that it is the largest RAFE that is relevant to 'actual RAFE' and 'benchmark RAFE'. Item 57 repeals subregulations 9AB.16(7) and (8) of the Principal Regulations which set out how to provide RAFE for lifecycle Part 6A products. These subregulations are no longer required as the rules are now provided for in the updated definition of RAFE.

Subregulations 9AB.4A(7) to (9) clarify that the RAFE for trustee-directed products is the standard fees and costs arrangement within each investment pathway and asset-weighted across investment pathways. Subregulation 9AB.4A(8) provides the rule for asset-weighting across an investment pathway in relation to a period. Asset-weighting by pathway provides an incentive for funds to reduce fees on the most popular pathways.

Item 5 inserts a definition for 'investment pathway' to clarify that if there is a choice of different ways of investing in a Part 6A product, as reported to APRA in accordance with the applicable RSE structure standard, each of those ways is an investment pathway of the Part 6A product. A single Part 6A product can be accessed through multiple investment pathways. Investment pathways can be identified through APRA data collection and are the combinations of ways that a member may access the Part 6A product. In a complex superannuation structure the investment option can be accessed through different superannuation products and investment menus. Item 5 also inserts a definition of 'investment pathway weight', which has the meaning given by subregulation 9AB.4A.

Subregulation 9AB.4A(8) clarifies that RAFE is first worked out for each investment pathway for a quarter and then asset-weighted to get the RAFE for the quarter. The RAFE for the four quarters in a year is then summed to produce the RAFE for a financial year. This ensures that RAFE remains fit for purpose when new investment pathways begin during a financial year.

Item 56 – Meaning of benchmark RAFE

Item 56 amends regulation 9AB.16 of the Principal Regulations which sets out the identification of 'benchmark RAFE'. The amendment clarifies that Part 6A products which have their initial quarter start after 1 July during the test year are not included in the identification of 'benchmark RAFE'. That is, such products are excluded from the group of products from which the median administration fees and expenses (as charged on a $50,000 balance) is identified. As these products may have less than a full year of performance history and less than a full year's worth of administration

fees and expenses, this exclusion ensures the benchmark RAFE is not artificially skewed.

Items 17, 18, 19, 20, 21, 44, 45, 48 and 49 – Meaning of strategic asset allocation or SAA

Under the Principal Regulations the calculation for 'strategic asset allocation' or 'SAA' was set out separately for standard Part 6A products and lifecycle Part 6A products. The amendments place these rules together under regulation 9AB.5 of the Principal Regulations.

Items 17, 18, 19, 20 and 21 consolidate and clarify how SAA is calculated for lifecycle Part 6A products, where the test will consider data reported at the lifestage level. This ensures that the test more accurately reflects the characteristics of lifecycle products, but does not substantively change the operation of the current law.

Item 21 inserts a rule for where the SAA may not add up to 100 per cent where the trustee reports SAA at the disaggregate level. Subregulations 9AB.5(11) and (12) allows APRA to apply a reasonable allocation to a covered asset class if the sum of all the SAAs do not equal 100 per cent.

Items 44, 45, 48 and 49 make related consequential amendments relating to the consolidation of the definition of SAA. Definitions of SAA now refer to 9AB.5A and subregulations that set our rules for SAA in the Principal Regulations are repealed.

Items 3 and 17 – Rules for determining 'currency hedging ratio'

Regulation 9AB.5 of the Principal Regulations provides rules to work out strategic asset allocation where certain information about 'asset domicile type', 'currency hedging ratio' and/or 'the 'asset listing type' is identified or not identified. Item 17 updates these rules to allow 'strategic asset allocation' to be worked out where information about 'currency hedging ratio' is not identified but option-level currency exposure is identified. Where currency exposure is identified, it can be used to impute a currency hedging ratio for the international asset classes.

The purpose of the amendment is to improve the accuracy of the test. The currency exposure can now be used for the performance test as, under the new asset allocation standard, funds now have the choice to report currency exposure at the investment option level instead of currency hedging ratios for each asset class.

Item 3 inserts a definition of 'currency exposure' into regulation 9AB.1 of the Principal Regulations. 'Currency exposure' of a standard Part 6A product in relation to a quarter, means the Part 6A product's currency exposure in relation to the quarter, as reported to APRA in accordance with the applicable asset allocation standard. 'Currency exposure' of a lifecycle Part 6A product in relation to a quarter, means the Part 6A product's currency exposure in relation to the lifestage and the quarter, as reported to APRA in accordance with the applicable asset allocation standard. This difference is because lifecycle Part 6A products report currency hedging exposure at the lifestage level.

Items 5, 22, 43, 45, 47 and 49 – Meaning of index

Under the Principal Regulations the calculation for 'index' was set out separately throughout Division 9AB. Items 5 and 22 makes amendments to consolidate the rules for calculating 'index' under a new regulation 9AB.5A so that there is a single definition of the term for Division 9AB.

Items 43, 45, 47 and 49 would make related consequential amendments relating to the consolidation of the definition of index.

Items 1, 5, 22, 58 and 59 – Alternatives asset class

Item 58 amends the description of the covered asset class 'Other/Commodities' to 'Alternatives' to reflect the description of the covered asset class as it appears in the updated APRA reporting standard for asset allocation. Consequential amendments are made to correct references to this covered asset class description throughout Division 9AB.

Items 22 and 59 clarify the treatment of index assumptions for the Alternatives asset classes which can now be reported to APRA in an aggregated or disaggregated form (see table items 17, 18 and 19 of the table in 9AB.17). The amendments allow the consideration of data whether it is reported to APRA in an aggregated or disaggregated form. The disaggregated form will be reported as Growth Alternatives and Defensive Alternatives.

Item 22 also sets out that for the Alternatives asset classes, the index returns for the underlying asset class are first adjusted for fees and taxes using their corresponding fee and tax assumption and subsequently have a weighting applied. This provides for a more consistent calculation of the benchmark return for the Alternatives covered asset classes by ensuring each assumed component is adjusted based on their relevant fee and tax assumption before aggregating.

Item 59 includes a consequential change to table item 24 in the table of covered asset classes under 9AB.17(7) of the Principal Regulations to reflect that after the adjustments in subregulations 9AB.13(7) and 9AB.14(7), the relevant assumed annual fee for the Alternatives asset class is 0% and the relevant assumed rate of tax for the Alternatives asset class is 0%. Table items 25 and 26 now reflect the disaggregated asset classes, Growth Alternatives and Defensive Alternatives.

Items 1 and 5 insert definitions of 'adjusted index', 'IEH percentage', 'IEU percentage' and 'IFI percentage' as these are all new terms required for the updated rules about the calculation of index for the Alternatives asset classes:

- 'Adjusted index' is worked out using a formula in subregulation 9AB.5A(7);
- 'IEH percentage' relates to the proportion of the allocation benchmarked against international equities hedged;
- 'IEU percentage' relates to the proportion of the allocation benchmarked against international equities unhedged;

- ‘IFI percentage’ relates to the proportion of the allocation benchmarked against international fixed interest.

Items 2, 4, 6 and 9 – Definitions of asset allocation standard, fees standard, investment performance standard, and RSE structure standard

Items 2, 4, and 6 repeal the definitions of ‘asset allocation standard’, ‘fees standard’, and ‘investment performance standard’ in regulation 9AB.1 of the Principal Regulations and substitute new definitions that incorporate new legislative instruments that were made in 2023.

Item 9 inserts a definition of ‘RSE structure standard’ to incorporate another two reporting standards made in 2023 under which trustees report information relevant for the performance test.

The amendments provide clarity for trustees that APRA is allowed to use information collected under the new APRA reporting standards which have been determined by:

- *Financial Sector (Collection of Data) (reporting standard) determination No. 42 of 2023;*
- *Financial Sector (Collection of Data) (reporting standard) determination No. 43 of 2023;*
- *Financial Sector (Collection of Data) (reporting standard) determination No. 44 of 2023;*
- *Financial Sector (Collection of Data) (reporting standard) determination No. 45 of 2023; and*
- *Financial Sector (Collection of Data) (reporting standard) determination No. 46 of 2023; and*
- *Financial Sector (Collection of Data) (reporting standard) determination No. 47 of 2023.*

APRA may use information collected under these legislative instruments and analogous past and future instruments. The Regulations incorporate the above legislative instruments as in force at the commencement of the instrument, and analogous legislative instruments (whether or not the legislative instrument is in force). The incorporated instruments, past, present and future, are freely and publicly available or will be available on the Federal Register of Legislation.

Items 37, 38, 39, 40, 41, 50, 51, 52, 53 and 54 – Actual and benchmark return formulae modifications determination

Items 37, 38, 39, 40 and 41 amend section 9AB.12 of the Principal Regulations to allow APRA to make a general determination to combine part quarter data for the calculation of ‘actual return’ for a lifecycle Part 6A product. Items 50, 51, 52, 53 and 54 makes a similar amendment to section 9AB.14 of the Principal Regulations for the calculation of ‘benchmark return’ for a lifecyle Part 6A product. This ensures the test

can more accurately reflect products which change character during a quarter. The data for a quarter before and after a change are "stitched" together for the purposes of the test.

It is expected that APRA will make a general determination that will be made publicly available on the APRA website and the Federal Register of Legislation. Despite this amendment, APRA retains the power provided for under the Principal Regulations to make a specific determination for intra-quarter data stitching. The amendments clarify that the formulas may be modified through either the specific or general determination.

Items 22, 28, 33, 42, and 46– Rounding rules

Items 22, 28, 33, 42 and 46 update the rounding rules in Part 9AB of the Principal Regulations to ensure greater certainty and consistency. Certain calculation outputs must now be rounded to 10 decimal places instead of 4 decimal places. For certain calculation outputs that are eleven or more decimal places, the output should be rounded to 10 decimal places. This should be done by rounding up if the eleventh decimal place is a 5 or higher, or down if the eleventh decimal place is a 4 or lower. Where calculation output is 10 decimal places or lower, generally the rounding rules do not apply and the value should be inputted into the formula in full.

Items 9, 61, 62, 63 and 64 – Fee ranking formula to support implementation of YourSuper comparison tool

Division 9AB.23 of the Principal Regulations specify formulas and method by which Part 6A products can be comparatively ranked. Part 6A products are ranked according to two methods: by net returns and by total annual fees. These rankings are published on the YourSuper comparison tool – the interactive website maintained by the Commissioner of Taxation.

Items 61, 62 and 64 amend regulation 9AB.24 of the Principal Regulations to ensure that products can continue to be ranked by total annual fees after changes to APRA's data collection to reflect ASIC Regulatory Guides. The updated fee ranking formula takes into account 'applicable cost amount' which means either the Part 6A products applicable transaction costs, or applicable indirect cost ratio. Transactions costs and indirect costs ratio are both relevant to the calculation of total annual fees and either can be reported to APRA. Where 'applicable transaction costs' are reported, this should replace 'indirect cost ratio' in the fee ranking formula. This will ensure the formula is appropriate for products whether they report fees based on the 2017 version of ASIC Regulatory Guide RG 97, or the newer 2020 version of ASIC Regulatory Guide RG 97.

Subregulation 9.AB.24(4) provides the method for calculating the 'applicable transaction costs' for the purposes of the fee ranking formula in subregulation 9.AB.24(1).

Item 9 inserts definitions for 'transaction costs cap', 'transactions costs flat amount' and 'transaction costs percentage' that are necessary for calculating the 'applicable

transaction costs'. The definition clarifies that this information corresponds to information reported to APRA in accordance with the fees standard.

Item 63 corrects a typographical error.

Items 65, 66 and 67 – Application and transitional provisions

Item 65 is a minor amendment to clarify that the transitional arrangements in Division 14.27 are the arrangements specifically arising out of to Schedule 1 to the *Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2021*. This fixes a technical drafting issue where the original provision did not correctly specify the amending regulations.

Item 66 repeals a transitional provision that is no longer required as it was only applicable to the 2021 performance test, which has occurred.

Item 67 inserts a new Division 14.32 to the Principal Regulations to provide transitional arrangements arising out of the amendments made by these Regulations. The first transitional rule provides that the amendments apply on and after 1 July 2023. The second transitional rule provides that for performance assessment conducted for the 2022-23 financial year, the minimum period of performance history that a product must have to be subject to the performance test is 6 years. The third transitional rule provides that for performance assessment conducted for the 2022-23 financial year, the lookback period is 9 years.

Schedule 2 –Amendments to the *Electronic Transactions Regulations 2020*

Subsections 60C(3) and (4) of the *Superannuation Industry (Supervision) Act 1993* require APRA to give notification in writing, which includes a copy of the determination, about the annual performance assessment to trustees of the superannuation fund. Part 9AB of the Principal Regulations requires APRA to give written notification about various discretionary decisions related to the annual performance assessment to trustees of the superannuation fund.

The *Electronic Transactions Act 1999* applies to all Commonwealth laws unless, pursuant to section 7A of that Act, they are specifically exempted by regulations, or another exemption applies. Schedule 1 to the *Electronic Transactions Regulations 2020* contains a list of Commonwealth laws that are exempt from the application of the *Electronic Transactions Act 1999*. Exemptions are necessary to account for circumstances where it is not appropriate to provide information, documents or signatures electronically.

Item 89 of the table in Section 1 of Schedule 1 to the *Electronic Transactions Regulations 2020* exempts the whole of the *Superannuation Industry (Supervision) Act 1993* from certain provisions of the *Electronic Transactions Act 1999*, except for certain provisions that are listed in that item. Item 90 of the table in Section 1 of Schedule 1 to the *Electronic Transactions Regulations 2020* exempts the whole of the *Superannuation Industry (Supervision) Regulations 1994* from certain provisions of

the *Electronic Transactions Act 1999*, except for certain provisions that are listed in that item.

The amendments in Schedule 2 to the proposed Regulations would apply the *Electronic Transactions Act 1999* to subsections 60C(3) and 60C(4) of the SIS Act. The amendments in Schedule 2 to the proposed Regulations also would apply the *Electronic Transactions Act 1999* to certain provisions in Part 9AB of the Principal Regulations. The amendments would enable that where APRA is required to give notification in writing of an APRA determination in relation to the annual performance assessment of superannuation products, it may do so by means of electronic communication.

Allowing electronic communication will reduce the administration burden for APRA while ensuring that notifications are received by trustees in a timely manner. This is in light of the extension of the annual performance test to trustee-directed products which has significantly increased the number of products subject to the test, and subsequently the number of notifications in writing APRA must give.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2023

This Legislative Instrument 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 of the Legislative Instrument

The purpose of *Superannuation Industry (Supervision) Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2023* (the proposed Regulations) is to amend the *Superannuation Industry (Supervision) Regulations 1994* (the Principal Regulations) to support the improved implementation of the annual performance test. The amendments address issues raised in Treasury's review of Your Future, Your Super laws. The Regulations:

- amend the testing period, benchmarks and notification letter that form part of the annual performance test requirements.
- amend the operation of the test for trustee-direct products, so that platform products are tested separately to non-platform products, and on a gross-of-taxation basis.
- make minor technical updates to improve accuracy and clarity for the annual performance test, reduce the administrative burden for APRA and ensure the test is fit for purpose when it is extended to trustee directed products.
- Make minor and technical amendments to the Your Super comparison tool to ensure that the tool reflects updated reporting standards.

The Regulations also amend the *Electronic Transactions Regulations 2020* to allow APRA to give notifications in relation to the performance test to trustees by means of electronic communication.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.