

EXPOSURE DRAFT

TREASURY LEGISLATION AMENDMENT (IMPROVING ACCOUNTABILITY
AND MEMBER OUTCOMES IN SUPERANNUATION) BILL 2017

EXPLANATORY MEMORANDUM

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
AMM	Annual members' meeting
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
Bill	Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017
Committee	Parliamentary Joint Committee
Cooper Review	Review of the Governance, Efficiency, Structure and Operation of Australia's Superannuation System
Corporations Act	<i>Corporations Act 2001</i>
FSCODA	<i>Financial Services (Collection of Data) Act 2001</i>
FSI	Financial System Inquiry
FSSA	<i>Financial Sector Shareholding Act 1998</i>
RSE	Registrable superannuation entity
SMSF	Self managed superannuation funds
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>

Chapter 1

Overview of improving accountability and member outcomes in superannuation

Outline of chapter

1.1 The exposure draft Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017 (Bill) contains amendments to the *Superannuation Industry (Supervision) Act 1993* (SIS Act); the *Corporations Act 2001* (Corporations Act), and the *Financial Sector (Collection of Data) Act 2001* (FSCODA) that will modernise and increase confidence within the superannuation system.

1.2 This chapter provides an overview of those amendments.

Context of amendments

1.3 Superannuation is a major part of Australia's retirement income system. Together with the Age Pension and savings outside of superannuation, it supports Australians in their retirement years.

1.4 With savings of over \$2 trillion, superannuation is the second-largest savings vehicle for Australian households (accounting for 17 per cent of household assets).

1.5 Over the next decade as the system reaches maturity, Australians will have received compulsory superannuation contributions for most or all of their working lives. As such, the income generated from these contributions will be an essential contributor to people's wellbeing in retirement.

1.6 Given the importance of the superannuation sector to working Australians, and its importance in the financial system and the economy more broadly, we need to ensure that there is confidence in the system and that it meets contemporary standards, and is consistently delivering the best outcomes for members.

1.7 Having a modern, vibrant superannuation system, which is solely focused on delivering outcomes for members, culminating in the efficient delivery of income in retirement, is critical.

1.8 A modern superannuation system empowers members; provides for transparency and accountability around funds' activities and performance; enables regulators to hold trustees to high standards and take appropriate action where they fall short; and ensures members get their full entitlements.

1.9 It is now 25 years since the introduction of compulsory superannuation, balances are growing and more Australians are drawing down on their retirement savings. That is why it is appropriate for key aspects of the superannuation system to be modernised. At present the system is not consistently delivering. Several aspects of the regulatory framework do not meet contemporary best practice or the standards applied elsewhere in the financial system. This means that the current framework is not holding funds to the highest standards of accountability and transparency, to the detriment of members.

1.10 Superannuation funds must ensure members' interests are always paramount — after all, our system is premised upon a trust framework and trustees owe fiduciary obligations to their members.

1.11 The exposure draft Bill will modernise and increase confidence within the superannuation system by:

- lifting the bar for fund performance — facilitating improved decision-making;
- strengthening supervision and enforcement — giving APRA improved capability to take preventive and corrective action in response to breaches of the law or where funds may not be acting in the best interests of their members; and
- empowering members — strengthening fund accountability and boosting confidence in the superannuation system.

Summary of new law

Annual MySuper outcomes assessment

1.12 Schedule 1 to the exposure draft Bill strengthens the obligation on superannuation trustees to consider the appropriateness of their MySuper product offering. Trustees will be required to assess on an annual basis, whether the outcomes that are being delivered are promoting the financial interests of their MySuper members.

1.13 The amendments will expand the range of factors that trustees consider in assessing the quality and appropriateness of their MySuper product.

Authority to offer a MySuper product

1.14 Schedule 2 to the exposure draft Bill provides the Australian Prudential Regulation Authority (APRA) an enhanced capacity to refuse a registerable superannuation entity (RSE) a new authority to offer a MySuper product, or to cancel such authority.

1.15 This will improve the quality of MySuper products by allowing APRA to refuse, or cancel, an authority to offer a MySuper product if APRA has a reason to believe the RSE licensee may fail to comply with its obligations.

Director penalties

1.16 Schedule 3 to the exposure draft Bill will ensure that directors of RSE licensees are held accountable for their conduct in the same way directors of managed investments schemes are currently held accountable.

1.17 The amendments will ensure that an appropriate penalty regime is in place for directors who fail to execute their responsibilities to act in the best interests of members, or who use their position to further their own interests to the detriment of members.

1.18 The Government announced this on 20 October 2015 in its response to the Financial System Inquiry.

Approval to own or control an RSE Licensee

1.19 Schedule 4 to the exposure draft Bill seeks to protect members by strengthening APRA's supervision and enforcement powers when a change of ownership or control of a RSE licensee takes place. The amendments will reduce the potential for fraud against members of RSEs by requiring persons to obtain approval from APRA to own or hold a controlling stake in an RSE licensee.

1.20 The amendments will enable APRA to refuse authority for a change in ownership where it has concerns about the new owner, give a direction to a person to relinquish control of an RSE licensee and remove or suspend an RSE licensee where it is subject to the control of its owner.

APRA directions power

1.21 Schedule 5 to the exposure draft Bill harmonises the directions powers across the banking, insurance and superannuation industries, by enabling APRA to intervene at an early stage to address prudential concerns in a manner that ensures the required actions are in the best interests of members.

Annual members' meetings

1.22 Schedule 7 to the exposure draft Bill will ensure greater accountability and transparency of superannuation funds by requiring RSE licensees to hold annual members' meetings (AMMs), to discuss the key aspects of the fund and provide members with a forum to ask questions about all areas of the fund's performance and operations.

1.23 The amendments will require RSE licensees to hold an AMM within five months after the end of each financial year.

Reporting standards

1.24 Schedule 8 to the exposure draft Bill amends the FSCODA to provide APRA with the ability to obtain information on expenses incurred by RSE and RSE licensees in managing/operating the RSE.

1.25 This additional information will enable APRA to understand the full picture of how RSEs are using member contributions and will enable APRA to consider whether expenses of individual RSEs are in line with covenants under the SIS Act.

Application and transitional provisions

1.26 The amendments in this exposure draft will take effect from the day after the exposure draft Bill receives Royal Assent.

1.27 The application and transitional provisions for each schedule are explained in detail in their respective chapters.

Chapter 2

Annual MySuper outcomes assessment

Outline of chapter

2.1 Schedule 1 to the exposure draft Bill amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to strengthen the obligation on superannuation trustees to consider the appropriateness of their MySuper product offering on an ongoing annual basis and how that product continues to deliver appropriate outcomes to MySuper members.

2.2 The purpose of these amendments is to ensure that trustees are promoting the financial interests of their MySuper members, which is expected to lead to an increase in the overall quality of MySuper products.

2.3 Trustees will be required to undertake an annual determination considering a number of features that the outcomes being delivered are in promoting the financial interests of their MySuper members.

2.4 All legislative references in this chapter are to the SIS Act unless otherwise indicated.

Context of amendments

2.5 The SIS Act requires superannuation trustees to promote the financial interests of their MySuper members as part of the enhanced trustee obligations in relation to a MySuper product. In particular, trustees must have regard to returns to those beneficiaries (after the deduction of fees, costs and taxes).

2.6 Currently, trustees are required to undertake an annual assessment of whether beneficiaries holding a MySuper product in their registrable superannuation entity (RSE) are disadvantaged when compared to the experience of beneficiaries holding MySuper products in other RSEs because the trustee's MySuper product or RSE lacks sufficient scale (the scale test).

2.7 Whilst the scale test was designed to ensure that members were not disadvantaged by being in a small fund with high costs per member, there are limitations to the value of the current test. For example, trustees with a large number of members and assets in the MySuper product can

easily pass the scale test, even if they are underperforming relative to other MySuper products.

2.8 The Government recognises that member outcomes are influenced by more than just the scale of the superannuation fund. When making their annual assessment, trustees should have regard to not only scale but also to the outcomes that are being delivered to members in that MySuper product. These include consideration of the returns, costs, fees, investment strategy and the insurance offering of the MySuper product to determine whether they are promoting the financial interests of members.

2.9 Accordingly, the amendments will replace the scale test with a new outcomes test, which will require trustees to assess whether their MySuper product is optimising outcomes to members by effectively promoting the financial interests of their beneficiaries.

2.10 Promoting financial interests requires trustees to assess their MySuper product in respect to a range of product features including their insurance and investment strategies, and comparing how their product is performing against other MySuper products using certain performance metrics. That is, promoting the financial interests of beneficiaries does not just mean achieving the highest return at the expense of improved member outcome.

2.11 A more comprehensive assessment of MySuper products will make trustees more accountable for their MySuper products and enhance APRA's ability to take specific action to ensure the trustee rectifies the performance of their MySuper product where the financial interests of members are not being effectively promoted.

2.12 Trustees' determinations will be made annually in writing and publicly available.

Summary of new law

2.13 The amendments require each trustee of a regulated superannuation fund to make an annual determination, in writing, as to whether the financial interests of the members in the MySuper product are being promoted by the trustee, having regard to a range of factors.

2.14 The determination follows a two-step process.

2.15 The first step is for the trustee to make an assessment of its MySuper product taking into consideration a range of matters, including any matter prescribed in the regulations.

2.16 The second step is for the trustee to compare their MySuper product against other MySuper products using specified comparable metrics.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Each trustee of a regulated superannuation fund that includes a MySuper product must make an annual determination on whether the financial interest of the beneficiaries of the fund who hold the MySuper product are being promoted by the trustee.	Each trustee of a regulated superannuation fund that includes a MySuper product must make an annual determination on whether the beneficiaries of the fund who hold the MySuper product are disadvantaged, because the financial interests of the beneficiaries of the fund who hold the MySuper product are affected because of: <ul style="list-style-type: none"> • the insufficient number of beneficiaries of the fund holding the MySuper product; • the insufficient number of beneficiaries of the fund; • the insufficient pool of assets, where the fund's assets that are attributed to the MySuper product are, or are to be, pooled with other assets of the fund or assets of another entity or other entities; or • the insufficient assets of the fund that are attributed to the MySuper product, where the assets are not pooled;
The annual determination is made having regard to assessments of certain matters, and a comparison of the MySuper product with other MySuper products based on certain factors.	The annual determination is made by comparing the beneficiaries of the fund who hold the MySuper product to the beneficiaries of other funds who hold a MySuper product within those other funds.
The assessments are made on the following matters: <ul style="list-style-type: none"> • whether the options, benefits and facilities offered under the MySuper product are appropriate to those beneficiaries; • whether the investment strategy for the MySuper product, 	No equivalent.

<i>New law</i>	<i>Current law</i>
<p>including the level of investment risk and the return target, is appropriate to those beneficiaries;</p> <ul style="list-style-type: none"> • whether the insurance strategy for the MySuper product is appropriate to those beneficiaries; • whether any insurance fees charged in relation to the MySuper product inappropriately erode the retirement income of those beneficiaries; • whether there are problems of scale in relation to the MySuper product because of: <ul style="list-style-type: none"> – the insufficient number of beneficiaries of the fund holding the MySuper product; – the insufficient number of beneficiaries of the fund; – the insufficient pool of assets, where the fund’s assets that are attributed to the MySuper product are, or are to be, pooled with other assets of the fund or assets of another entity or other entities; or – the insufficient assets of the fund that are attributed to the MySuper product, where the assets are not pooled; and • any other relevant matters, including those prescribed in regulations. 	
<p>The comparison of the MySuper product against other MySuper products uses the following metrics:</p> <ul style="list-style-type: none"> • the fees, costs and taxes that affect the return of the beneficiaries holding the MySuper products; • the return target for the MySuper products; • the return for the MySuper products; • the level of investment risk for the MySuper products; and 	<p>The comparison of the MySuper product against other MySuper products uses the following metrics:</p> <ul style="list-style-type: none"> • the number of beneficiaries holding the MySuper product; • the number of beneficiaries of the fund; • the pool of assets, where the fund’s assets that are attributed to the MySuper product are, or are to be, pooled with other assets of the fund or assets of another entity or

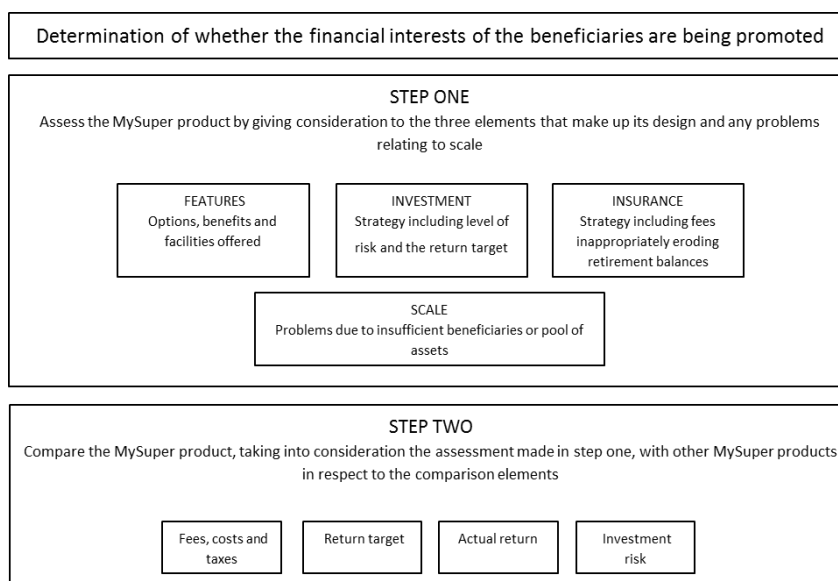
<i>New law</i>	<i>Current law</i>
<ul style="list-style-type: none"> any other matter prescribed in regulations. 	<ul style="list-style-type: none"> other entities; and the assets of the fund that are attributed to the MySuper product, where the assets are not pooled.

Detailed explanation of new law

2.17 The amendments require each trustee of a regulated superannuation fund to make an annual determination, in writing, as to whether the financial interests of the members in the MySuper product are being promoted by the trustee having regard to a range of factors. *[Schedule 1, item 2, paragraph 29VN(1)(b)]*

2.18 The determination follows a two-step process. *[Schedule 1, item 2, subparagraphs 29VN(1)(b)(i) and (ii)]*

Diagram 2.1



2.19 The first step is for the trustee to make assessments on each of the following matters:

- whether the options, benefits and facilities offered under the MySuper product are appropriate to those beneficiaries;

- whether the investment strategy for the MySuper product, including the level of investment risk and the return target, is appropriate to those beneficiaries;
- whether the insurance strategy for the MySuper product is appropriate to those beneficiaries;
- whether any insurance fees charged in relation to the MySuper product inappropriately erode the retirement income of those beneficiaries;
- whether there are problems of scale in relation to the MySuper product; and
- any other relevant matters, including those prescribed in the regulations.

[Schedule 1, item 3, subsection 29VN(2)]

2.20 The assessment of whether the options, benefits and facilities offered under the MySuper product are appropriate to those beneficiaries, involves considering whether the trustee's decision to include those features effectively promotes the beneficiaries financial interests by improving overall outcomes for members.

2.21 The assessment of whether the insurance strategy for the MySuper product is appropriate to those beneficiaries involves considering whether the cost of the insurance inappropriately erodes the retirement income of the beneficiaries.

2.22 The current scale test is incorporated into the assessment of whether there are problems of scale in relation to the MySuper product. That is, the assessment may indicate that there are problems of scale due to:

- the insufficient number of beneficiaries of the fund holding the MySuper product;
- the insufficient number of beneficiaries of the fund;
- the insufficient pool of assets, where the fund's assets that are attributed to the MySuper product are, or are to be, pooled with other assets of the fund or assets of another entity or other entities; or
- the insufficient assets of the fund that are attributed to the MySuper product, where the assets are not pooled.

[Schedule 1, item 3, paragraph 29VN(2)(e)]

2.23 The second step is for the trustee to make a comparison of the MySuper product against other MySuper products using the following metrics:

- the fees, costs and taxes that affect the return of the beneficiaries holding the MySuper products;
- the return target for the MySuper products;
- the return for the MySuper products;
- the level of investment risk for the MySuper products; and
- any other matter prescribed in regulations.

[Schedule 1, item 3, subsection 29VN(3)]

2.24 In addition, regulations can prescribe standards and methodology to be applied or used by the trustees for either or both steps in the determination process. *[Schedule 1, item 3, subsection 29VN(4)]*

Consequential amendments

2.25 To facilitate the replacement of the scale test with the outcomes test, consequential amendments are included to restructure section 29VN. *[Schedule 1, item 1, subsection 29VN(1)]*

Application and transitional provisions

2.26 The amendments will apply to annual determinations required to be made by a trustee of a regulated superannuation fund from the day after the exposure draft Bill receives Royal Assent, in regards to whether the financial interests of the beneficiaries of the fund holding a MySuper product are promoted by the trustee.

Chapter 3

Authority to offer a MySuper product

Outline of chapter

3.1 Schedule 2 to the exposure draft Bill amends the *Superannuation Industry (Supervision) Act 1993* to give the Australian Prudential Regulation Authority (APRA) an enhanced capacity to refuse an RSE licensee a new authority to offer a MySuper product or to cancel an existing authority.

3.2 This will improve the quality of MySuper products by allowing APRA to refuse, or cancel, an authority to offer a MySuper product if APRA has a reason to believe the RSE licensee may fail to comply with its obligations.

3.3 All legislative references in this chapter are to the SIS Act unless otherwise indicated.

Context of amendments

3.4 Currently, APRA must authorise an RSE licensee to offer a MySuper product if it is satisfied (among other requirements) that:

- the RSE licensee ‘is likely to’ comply with the enhanced trustee obligations for MySuper products, ‘is likely to’ comply with the general fee rules and the fees rules in relation to MySuper products; and
- the RSE licensee ‘is not likely to’ contravene sections 29W, 29WA or 29WB.

3.5 The amendments will enhance APRA’s supervision of the offering of MySuper products by RSE licensees by giving APRA greater capacity to refuse a new authority to offer a MySuper product or to cancel such an authority. This provides more scope for APRA to ensure that RSE licensees who are authorised to offer a MySuper product are in a position to provide products of sufficient quality to promote the financial interests of members.

3.6 The change from an assessment on the balance of probabilities to a test based on APRA’s reasonable belief aligns the MySuper

authorisation and cancellation process with the assessment made by APRA when making decisions in relation to the granting and cancellation of RSE licensees.

3.7 These amendments work together with the amendments in respect of the obligation on a trustee of a regulated superannuation fund to make an annual determination on whether the financial interests of their beneficiaries who hold the MySuper product are being promoted by the trustee (see Chapter 1).

3.8 If APRA is not satisfied that the trustee complied with their obligations when undertaking the annual determination, APRA will have a reason to believe that the trustee may fail to comply with its enhanced trustee obligations and may therefore cancel the trustee’s authorisation to offer a MySuper product.

Summary of new law

3.1 The amendments will enhance APRA’s capacity to refuse authority to offer a MySuper product or to cancel an existing authority to offer a MySuper product, depending on whether it has reason to believe (or no reason to believe in the case of cancellation) that:

- the RSE licensee (or its directors) may fail to comply with its enhanced trustee obligations;
- the RSE licensee may fail to comply with the general fees rules and the fees rules in relation to MySuper products; and
- the RSE licensee may contravene section 29W, 29WA or 29WB.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Before agreeing to authorise an RSE licensee to offer a MySuper product, APRA must have no reason to believe that:</p> <ul style="list-style-type: none"> • the RSE licensee (or its directors) may fail to comply with the enhanced trustee obligations for MySuper products; • the RSE licensee may fail to 	<p>Before agreeing to authorise an RSE licensee to offer a MySuper product, APRA must be satisfied:</p> <ul style="list-style-type: none"> • the RSE licensee (or its directors) is likely to comply with the enhanced trustee obligations for MySuper products; • the RSE licensee is likely to comply with the general fees rules

<i>New law</i>	<i>Current law</i>
<p>comply with the general fees rules and the fees rules in relation to MySuper products; or</p> <ul style="list-style-type: none"> the RSE licensee may contravene section 29W, 29WA or 29WB. 	<p>and the fees rules in relation to MySuper products; or</p> <ul style="list-style-type: none"> the RSE licensee is not likely to contravene section 29W, 29WA or 29WB.
<p>Before cancelling authorisation of a MySuper product, APRA must have a reason to believe that:</p> <ul style="list-style-type: none"> the RSE licensee (or its directors) may fail to comply with the enhanced trustee obligations for MySuper products; the RSE licensee may fail to comply with the general fees rules and the fees rules in relation to MySuper products; or the RSE licensee may contravene section 29W, 29WA or 29WB. 	<p>Before cancelling authorisation of a MySuper product, APRA must no longer be satisfied:</p> <ul style="list-style-type: none"> the RSE licensee (or its directors) is likely to comply with the enhanced trustee obligations for MySuper products; the RSE licensee is likely to comply with the general fees rules and the fees rules in relation to MySuper products; or the RSE licensee is not likely to contravene section 29W, 29WA or 29WB.

Detailed explanation of new law

3.2 The exposure draft Bill amends the conditions to be satisfied in order for APRA to authorise an RSE licensee to offer a MySuper product.

3.3 Under the amendments, APRA can only authorise the RSE licensee to offer a MySuper product if it has no reason to believe that:

- the RSE licensee (or its directors) or, where the RSE licensee is made up of individual trustees, any of those trustees may fail to comply with its enhanced trustee obligations;
- the RSE licensee or, where the RSE licensee is made up of individual trustees, any of those trustees may fail to comply with the general fees rules and the fees rules in relation to MySuper products; and
- the RSE licensee or, where the RSE licensee is made up of individual trustees, any of those trustees may contravene section 29W, 29WA or 29WB.

[Schedule 2, item 1, paragraphs 29T(1)(h), (i), (j) and (k)]

3.4 Section 29W makes it an offence for a person that makes a representation to offer a MySuper product when the RSE licensee for the fund is not authorised to offer MySuper products.

3.5 Sections 29WA and 29WB makes it an offence for a trustee (or trustees) to not treat a contribution by a member as paid into a MySuper product of the fund, if the member has not given the trustee (or trustees) a direction that the contribution is to be invested under a specified investment option for all or part of the contribution.

3.6 That is, APRA may refuse an authority to offer a MySuper product if APRA considers there are one or more reasons why an RSE licensee may fail to comply with its obligations, rather than having to assess, on a balance of probabilities, whether the RSE licensee is likely to comply with its obligations.

Example 3.1

Inka Superannuation Trustee Pty Limited (Inka) is the RSE licensee of Lighthouse Super Fund and has authority to offer a MySuper product to the members of that fund.

APRA considers that the way the fees have been charged to different members in Lighthouse Super Fund does not comply with the fees rules in relation to MySuper products, because the exit fee has not been charged on a cost recovery basis. Inka has indicated to APRA that it will correct the problem with the fees rules but it is not taking steps to do that as quickly as agreed with APRA.

Inka has lodged an application for authorisation to offer a MySuper product for a large employer in relation to another fund for which it is the trustee, Callista Super Fund.

APRA's belief, based on its experiences dealing with Inka in relation to Inka's response in relation to Lighthouse Super Fund, is that the MySuper product in Callista Super Fund will not comply with the fees rules.

On the basis of this belief, APRA may refuse to grant authority to Inka to offer the large employer a MySuper product.

3.7 The amendments to the situations in which APRA may cancel an RSE licensee's authority offer a MySuper product will allow APRA to cancel existing authorisation if it has a reason to believe that:

- the RSE licensee (or its directors) or, where the RSE licensee is made up of individual trustees, any of those trustees may fail to comply with its enhanced trustee obligations;

- the RSE licensee or, where the RSE licensee is made up of individual trustees, any of those trustees may fail to comply with the general fees rules and the fees rules in relation to MySuper products; and
- the RSE licensee or, where the RSE licensee is made up of individual trustees, any of those trustees may contravene section 29W, 29WA or 29WB.

[Schedule 2, item 2, paragraphs 29U(2)(c), (ca), (d) and (e)]

3.8 That is, APRA may cancel the authority to offer a MySuper product if APRA considers there are one or more reasons why an RSE licensee may fail to comply with its obligations, rather than having to assess, on a balance of probabilities, whether the RSE licensee is no longer likely to comply with its obligations.

3.9 These align with APRA's assessment in making decisions in relation to authorisation and cancellation of RSE licenses under sections 29D and 29G.

Example 3.2

Aztek Superannuation Trustee Pty Ltd (Aztek) is the RSE licensee of Nightfall Super Fund and has authority to offer a MySuper product to the members of that fund.

APRA becomes aware that Aztek is charging their MySuper members switching fees beyond what is required for the fund to recover the associated costs.

Thus, APRA has reason to believe that the RSE licensee is failing to comply with its obligations, under section 29V, to only charge switching fees on a cost-recovery basis.

On the basis of this belief, APRA may cancel Aztek's MySuper authority.

Application and transitional provisions

3.10 The amendments apply to all applications received by APRA on or after the day after this exposure draft Bill receives Royal Assent.

[Schedule 2, item 3]

Chapter 4

Director penalties

Outline of chapter

4.1 Schedule 3 to the exposure draft Bill amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to impose civil and criminal penalties on directors of RSE licensees who fail to execute their responsibilities to act in the best interests of members, or who use their position to further their own interests to the detriment of members.

4.2 All legislative reference in this Chapter are to the SIS Act unless otherwise stated.

Context of amendments

4.3 Recommendation 13 of the Final Report of the Financial System Inquiry (FSI) dated 7 December 2014 was to align the penalty regime for directors of trustees set out in the SIS Act with the penalty regime applying to directors of responsible entities of managed investment schemes. The Recommendation was adopted in the Government's response to the Inquiry.

4.4 The *Corporations Act 2001* (Corporations Act) sets out the duties that an officer of a responsible entity has in relation to a registered scheme. A contravention of these duties is a civil penalty provision subject to civil and criminal consequences. In broad terms these duties are:

- to act honestly and exercise a reasonable degree of care and diligence;
- to act in the best interests of the scheme's members;
- to prioritise the interests of the scheme's members over the interests of the responsible entity;
- not to make use of information acquired though being an officer to gain an improper advantage, or to cause detriment to the members of the scheme; and

- to take reasonable steps to comply with the Corporations Act, the conditions imposed by the responsible entity's financial services licence, as well as the scheme's constitution and compliance plan.

General obligation on directors

4.5 The SIS Act contains similar provisions related to the governing rules of superannuation entities, with section 52A setting out covenants that apply to each director of a corporate trustee of a superannuation entity. These obligations are incorporated into the governing rules of a superannuation entity by subsection 52A(2) to the extent they are not already included in those governing rules.

4.6 In broad terms these obligations require each director to act in the best interests of members, and to prioritise those members' interests over those of any other person in the event of a conflict.

4.7 Under existing law, a contravention of the governing rules of a superannuation entity is not an offence, and does not affect the validity of a transaction. This means a contravention does not result in a civil or criminal penalty. However, a contravention can give rise to a claim for loss or damages by the affected member.

Additional directors obligations relating to MySuper products

4.8 The SIS Act imposes additional obligations on the trustees of a regulated superannuation fund that includes a MySuper product. In contrast to the general obligations which are incorporated as covenants in the governing rules of the superannuation entity, these additional obligations apply directly to the trustee and its directors.

4.9 These obligations were introduced to supplement the general obligations that apply to the directors of corporate trustees of regulated superannuation funds in recognition of the fact that the beneficiaries of a fund that hold a MySuper product are default members and generally do not make active decisions about their superannuation. In particular, the requirement that the trustee 'promote the financial interests' of beneficiaries was introduced to impose a higher degree of care than the general requirement to act in the 'best interests' of beneficiaries.

4.10 In addition to the obligations placed on the trustee of the superannuation fund, each director of the corporate trustee of a regulated superannuation fund that includes a MySuper product is required to exercise a reasonable degree of care and diligence in ensuring that the trustee carries out its additional MySuper obligations.

4.11 A contravention of the obligations in relation to MySuper products is not an offence, and does not result in the invalidity of a transaction. A contravention of these obligations can give rise to a claim for compensation or damages by an affected member but cannot result in a civil or criminal penalty.

Summary of new law

4.12 These amendments ensure that a director of a RSE licensee can be subject to civil penalties and if they breach the general director covenants, or the enhanced MySuper director duties.

4.13 The amendments achieve this by specifying that a contravention of those duties or covenants is a contravention of a civil penalty provision for the purposes of Part 21.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>A person must not contravene a covenant which is, or is taken to be, contained in the governing rules of a superannuation entity.</p> <p>A contravention is a civil penalty provision which may give rise to civil and criminal consequences (as set out in Part 21).</p> <p>A contravention does not result in the invalidity of a transaction.</p>	<p>A person must not contravene a covenant which is, or is taken to be, contained in the governing rules of a superannuation entity.</p> <p>A contravention is not an offence and does not result in the invalidity of a transaction.</p>
<p>A person must not contravene the obligations that are to be contained in the governing rules of an RSE licensee that relate to MySuper products.</p> <p>A contravention is a civil penalty provision which may give rise to civil and criminal consequences (as set out in Part 21).</p> <p>A contravention does not result in the invalidity of a transaction.</p>	<p>A person must not contravene the obligations that are to be contained in the governing rules of an RSE licensee that relate to MySuper products.</p> <p>A contravention of these obligations is not an offence and does not result in the invalidity of a transaction.</p>

Detailed explanation of new law

4.14 The amendments in Schedule 3 allow civil and criminal penalties to be imposed on directors of corporate trustees of superannuation funds who fail to execute their responsibilities to act in the interests of members, or who use their position to further their own interests to the detriment of members.

4.15 To achieve this outcome, the amendments introduce a specific obligation not to contravene the general covenants that apply to each director of a corporate trustee of a superannuation entity. The amendments also specify that the obligation not to contravene these covenants is a civil penalty provision. *[Schedule 3, items 2 and 3, subsections 55AA(1) and (2) and paragraph 193(a)]*

4.16 These relevant obligations are those contained in subsection 52A(2) which require each director to act in the best interests of members, and to prioritise those members' interests over those of any other person in the event of a conflict.

4.17 The amendments also introduce a similar obligation not to contravene the additional director obligations in relation to MySuper products. The contravention of this obligation is also a civil penalty provision. *[Schedule 3, items 1 and 3, subsection 29VPA(2) and paragraph 193(a)]*

4.18 Listing these additional obligations as civil penalty provisions means that a failure to comply with them can result in civil or criminal penalties under Part 21. In this respect, it is not the initial breach of the covenant or obligation that gives rise to penalties —it is the breach of the separate obligations introduced by these amendments not to contravene the related covenants and obligations.

4.19 When a contravention of a civil penalty provision occurs APRA can apply to the Court for a civil penalty order.

4.20 If the Court finds that a person has contravened one of these civil penalty provisions, the Court must declare that they have contravened the provision, and for serious contraventions may fine the person up to 2,000 penalty units.

Example 4.1

Semi, a long serving and dominant director on the trustee board of 'Yellow Growth Super', deliberately limited conversations about the future sustainability of the fund. It was found that Semi did this to maintain his role on the board instead of taking into consideration the long-term best interests of fund beneficiaries. Semi could be liable to pay a civil penalty of up to 2,000 penalty units for the contravention if

APRA successfully applies to the court for a civil penalty order in respect of Semi's actions.

4.21 In addition, serious breaches of the director's duties (such as those involving intentional or fraudulent contraventions) may constitute a criminal offence punishable by up to 5 years imprisonment.

4.22 The consequences for failing to comply with the new obligation not to contravene the general directors duties apply in addition to any consequences that may already apply for contravening the actual duties under section 55 (which is about giving rise to a claim for loss or damages). *[Schedule 3, item 2, subsection 55AA(4)]*

4.23 Consistent with other obligations under the SIS Act, a contravention of these additional obligations do not result in the invalidity of a transaction. *[Schedule 3, items 1 and 2, subsections 29VPA(2) and 55AA(3)]*

Application and transitional provisions

The amendment applies in relation to contraventions occurring on or after commencement of this Schedule. *[Schedule 3, item 4]*

Chapter 5

Approval to own or control an RSE licensee

Outline of chapter

5.1 Schedule 4 to the exposure draft Bill amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to strengthen APRA's supervision and enforcement powers when a change of ownership or control of a RSE licensee takes place. The amendments will reduce the potential for fraud against members of registrable superannuation entities (RSEs) by requiring persons to obtain approval from APRA to own or hold a controlling stake in an RSE licensee.

5.2 The amendments provide APRA with the power to:

- refuse authority for a change in ownership where it has concerns about the new owner;
- give a direction to a person to relinquish control of a RSE licensee, whether control is held via the amount of shares held, or exists in practice; and
- remove or suspend an RSE licensee where it is subject to the control of its owner.

5.3 All legislative references in this chapter are to the SIS Act unless otherwise indicated.

Context of amendments

5.4 In 2009, approximately \$176 million of member's superannuation benefits was lost following the collapse of Trio Capital. In response the Australian Parliament launched a Parliamentary Joint Committee (Committee) Inquiry into the collapse of Trio Capital. In the Committee's report (released in May 2012), it recommended that APRA conduct an internal assessment of the adequacy and timeliness of its checks to monitor the ownership and control of a RSE licensee.

5.5 APRA, following its internal assessment, concluded that more powers to monitor the ownership and control of a RSE licensee were

needed to ensure that RSE licensees are best placed to carry out their duties free of any influence that may not be in the best interests of the members of their fund.

5.6 Trustees of superannuation funds are required to obtain a licence before they can operate as a trustee of a registered superannuation fund.

5.7 Currently, when a person applies for an RSE licence, APRA is able to consider whether that person is suitable and would comply with RSE licensee law through the application process.

5.8 That is, in order to obtain an RSE licence, the trustee or director must comply with certain conditions, including meeting minimum standards of fitness and propriety and maintaining risk management strategies and plans governing each fund under their control.

5.9 APRA has the power to impose additional conditions upon those licences, vary or revoke the conditions or cancel the licences. RSE licences may be granted to constitutional corporations, other bodies corporate and groups of individual trustees.

5.10 While APRA assesses the suitability of persons to hold an RSE licence when an application is made, it is currently unable to consider the suitability of trustees or directors who may subsequently obtain ownership or control (including practical control) of the RSE licensee. This hinders APRA's ability to monitor whether RSE licensees continue to carry out their duties free of any influence that may not be in the best interests of beneficiaries.

5.11 This means, after an RSE licence has been granted, APRA has no ability to prevent the sale of an RSE licensee to a party which may affect the licensee's ability to comply with its obligations.

5.12 The change would make the superannuation industry broadly consistent with the change of ownership requirements for other industries regulated by APRA.

Summary of new law

APRA Approval

5.13 A person will be required to apply to APRA for approval to hold a controlling stake in a RSE licensee prior to them obtaining ownership of an RSE licensee. The approval process (see Diagram 5.1, below) is similar to the process required to be undertaken when a person seeks a new RSE licence.

5.14 Consistent with the *Financial Sector Shareholding Act 1998* (FSSA) a controlling stake is a stake of more than 15 per cent of the RSE licensee.

5.15 A person’s stake in an RSE licensee is a person’s shareholding (including the shareholdings of their associates) and votes associated with that the shareholding.

Diagram 5.1– Application Process



5.16 A decision by APRA to refuse an application for a change in ownership or control (including practical control) is merits reviewable in the Administrative Appeals Tribunal (AAT).

5.17 The holding of a controlling stake in an RSE licensee without approval is a strict liability offence, which incurs a penalty of 400 penalty units per day.

Direction to relinquish control

5.18 In the event that there has been, is, or is likely to be, interference with the ability of the RSE licensee to satisfy its obligations in respect of the fund, due to a change in ownership or control, APRA has the power to issue a direction to a person who is in control of the RSE licensee to relinquish that control.

5.19 The direction to relinquish control can occur when the person has a controlling stake, or where the person has practical control. Practical control occurs where the directors of the RSE licensee are accustomed or under an obligation, whether formal or informal, to act in accordance with the person's directions, instructions or wishes, or the person is in a position to exercise control over the RSE licensee.

5.20 Practical control can only occur where the person does not hold a stake of more than 15 per cent of the RSE licensee. As such, APRA may give a direction to relinquish control to a person that was not required to obtain approval to hold their stake in the RSE licensee.

5.21 APRA's decision to issue a direction is merits reviewable in the AAT.

5.22 A reckless or intentional failure to comply with the direction is an offence subject to 400 penalty units per day.

Suspension or removal of trustee of superannuation entity

5.23 APRA's current power to suspend or remove an RSE licensee is expanded to allow it to exercise that power if it has reason to believe that a person that owns or controls an RSE licensee is exercising, has been exercising, or is likely to exercise, that control in a way that means the RSE licensee is unable to satisfy one or more of the trustee's obligations contained in the covenants inserted by the SIS Act, or the additional obligations for RSE licensees that relate to MySuper products.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A person must seek APRA's approval if they seek to own or hold a controlling stake in a RSE licensee.	No equivalent.
An RSE licensee must notify APRA of any change in the composition or control of the RSE licensee within 14 days after the change takes place.	An RSE licensee must notify APRA of any change in the composition of the RSE licensee within 14 days after the change takes place.
APRA can direct a person holding a controlling stake (or has practical control) of an RSE licensee to relinquish that control, if there has been, is, or is likely to be, interference with the ability of the RSE licensee to satisfy its obligations, due to a change control or practical control.	No equivalent.
<p>APRA can suspend or remove an RSE licensee if it is has reason to believe that:</p> <ul style="list-style-type: none"> • the person holding a controlling stake (or has practical control) of the RSE licensee is or is likely to hinder the ability for the RSE licensee to comply with one or more of the covenants; • the person holding a controlling stake in the RSE licensee does not have approval to hold the controlling stake. 	No equivalent.

Detailed explanation of new law

5.24 The amendments strengthen APRA's supervision and enforcement powers when a change of ownership or control of a RSE licensee takes place.

Obligation to apply for APRA approval

5.25 The amendments insert Division 8 into Part 2A to require approval to hold a controlling stake in an RSE licensee. The provisions will apply to RSE licensees that are body corporates. [*Schedule 4, item 8, section 29H*]

5.26 If a person is seeking to hold a stake of more than 15 per cent in the RSE licensee, the person must apply to APRA for approval to hold a controlling stake in an RSE licensee. *[Schedule 4, items 1 and 8, definition of ‘controlling stake’ in subsection 10(1) and subsection 29HA]*

5.27 This is consistent with the concept of *controlling stake* in the FSSA.

5.28 A stake in an RSE licensee is a person’s shareholding (including the shareholdings of their associates) and votes associated with that the shareholding.

5.29 The application must be in approved form and contain the information required by the form. *[Schedule 4, item 8, subsection 29HA(2)]*

5.30 APRA will issue an approved form for this purpose.

5.31 If after the application is made, but before APRA decides the application, the information on the form ceases to be correct, the person must give APRA the correct information, in writing, as soon as practicable after the information ceases to be correct. Otherwise, the application is taken to not be in compliance with its requirements. *[Schedule 4, item 8, subsections 29HA(3) and (4)]*

5.32 APRA may request specific information relating to the application by giving a notice to the applicant. *[Schedule 4, item 8, section 29HB]*

Time to decide the application

5.33 APRA must make a decision on the application within 90 days of receiving the application or of receiving all the information requested by APRA where APRA requested further information from the applicant. *[Schedule 4, item 8, subsection 29HC(1)]*

5.34 However, APRA may extend the period by a further 30 days, as long as APRA informs the applicant in writing within 90 days of receiving the application, in this case APRA must decide the application within the extended period *[Schedule 4, item 8, subsections 29HC(2) and (3)]*

Approval of an application

5.35 APRA must approve the application if and only if:

- the application is in the form required and with the correct information;

- the applicant has provided all the information requested or the request has been disposed; and
- APRA has no reason to believe that the RSE licensee may be unable to satisfy one or more the trustee's obligations contained in a covenant set out in section 52 to 53, or prescribed under section 54A, or referred to in section 29VN or 29VO, because of:
 - the applicant's controlling stake in the RSE licensee; or
 - the way in which that controlling stake is likely to be used.

[Schedule 4, item 8, section 29HD]

Example 5.1

Ms Hetty is seeking to make an offer to SA Adventure Pty Ltd to acquire 100 per cent of the shares in Harpoon Pty Ltd (an RSE licensee). Prior to making the offer Ms Hetty seeks approval from APRA. During the approval process APRA forms the view that due to previous and ongoing connections with individuals who have previously come to APRA's attention for questionable tax practices, Ms Hetty raises significant prudential concerns.

After seeking further information from Ms Hetty, APRA's original concerns remained. APRA subsequently rejected that application for approval.

Example 5.2

SA Adventure Pty Ltd seeks APRA's approval for its planned purchase of 100 per cent of Harpoon RSE licensee Pty Ltd (Harpoon) from HLMW RSE licensee for \$3 million. Harpoon holds an RSE licence and has approximately \$1.5 billion under trusteeship across a number of funds.

In considering approval APRA forms the view that SA Adventure Pty Ltd raises significant prudential concerns, particularly around its financial capacity. SA Adventure Pty Ltd was listed on the ASX with a share price but had only recently become active as a financial services company. APRA also recognises potential issues around the past dealings of SA Adventure Pty Ltd's managing director.

APRA subsequently notifies SA Adventure Pty Ltd that they do not approve its purchase Harpoon RSE licensee Pty Ltd.

5.36 Sections 52 to 52C provide the covenants to be included in the governing rules of a registrable superannuation entity or self-managed superannuation fund, if such covenants are not included in the governing rules of the entity. Some of these covenants relate to the directors of the registrable superannuation entity or self-managed superannuation fund.

5.37 The covenants include obliging trustees to act honestly, in the best interests of their beneficiaries and keep the money and assets of the entity separate from any other money and assets.

5.38 Similarly, section 53 implies a covenant into the governing rules of an approved deposit fund to require a trustee to repay an amount to a beneficiary, if a beneficiary requests the repayment and compliance with the request would not be inconsistent with the operating standards for the approved deposit fund.

5.39 Section 54A allows regulations to prescribe other covenants.

5.40 Section 29VN contains additional obligations imposed on trustees of a regulated superannuation fund in relation to MySuper product. These include obligation to promote the financial interests of beneficiaries in the fund and having up to date investment strategies for each product.

5.41 Section 29VO contains additional obligations imposed on directors of corporate trustees to exercise reasonable care and diligence for the purposes of ensuring the corporate trustee carrying out its obligations under section 29VN.

5.42 If APRA approves the applicant to hold a controlling stake in an RSE licensee, APRA must notify the applicant in writing. *[Schedule 4, item 10, section 29HE]*

Refusal of an application

5.43 If APRA refuses the application, APRA must take all reasonable steps to ensure that the applicant is given a notice informing it of the decision and setting the reasons for the refusal. *[Schedule 4, item 8, section 29HF]*

5.44 The decision to refuse to give approval is reviewable by the Administrative Appeals Tribunal (AAT). *[Schedule 4, item 2, paragraph (dla) of definition of 'reviewable decision' in subsection 10(1)]*

5.45 Where APRA does not decide on the application within 90 days (or 120 days for extensions) of receiving the application, the application is taken to be refused. *[Schedule 4, item 8, subsection 29HC(4)]*

Offence to hold a controlling stake without approval

5.46 Where a person holds a controlling stake in an RSE licensee without approval, the person is committing a strict liability offence with a penalty of 400 penalty units for each day in which the controlling stake is held without approval. *[Schedule 4, item 9, section 29JCB]*

5.47 The offence is subject to an infringement notice. *[Schedule 4, item 12, paragraph 223A(1)(aa)]*

5.48 This is to address the situation where the person holding a controlling stake in an RSE licensee has not been aware of the requirement to obtain approval but is otherwise considered to be satisfying their fiduciary obligations.

Direction to relinquish control

5.49 APRA may direct a person to relinquish control of an RSE licensee if APRA has reason to believe that:

- the person has a controlling stake in or have practical control of the RSE licensee; and
- APRA has reason to believe that the RSE licensee has been, is or is likely to be unable to satisfy one or more the trustee's obligations contained in a covenant set out in section 52 to 53, or prescribed under section 54A, or referred to in section 29VN or 29VO, because of:
 - the person's controlling stake in or practical control of the RSE licensee; or
 - the way in which that control is likely to be exercised.

[Schedule 4, item 10, subsection 131EB(1)]

5.50 These requirements are similar to the conditions for APRA to approve an application for controlling stake in the RSE licensee. The likelihood of interference with the RSE licensee's ability to fulfil its obligations, due to the person controlling the RSE licensee, is the key consideration in APRA's assessment of either approval of an application or the issue of a direction to relinquish control.

5.51 The main difference between the conditions for an approval of an application and the giving of a direction is that a direction can be given to a person's practical control over an RSE licensee who does not have a controlling stake in the RSE licensee.

5.52 A person has **practical control** over an RSE licensee if the person does not hold a controlling stake in the RSE licensee and:

- the directors of the RSE licensee are accustomed or under an obligation (formal or informal) to act in accordance with the directions, instructions or wishes of the person; or
- the person, alone or together with their associates, is in a position to exercise control over the RSE licensee.

[Schedule 4, items 1 and 10, definition of ‘practical control’ in subsection 10(1) and section 131EC]

5.53 Practical control occurs irrespective of whether the person’s directions, instructions or wishes or their position to exercise the control originate from the person alone, or together with their associates.

[Schedule 4, items 1 and 10, definition of ‘practical control’ in subsection 10(1) and section 131EC]

5.54 APRA may also give a person a direction to relinquish control of an RSE licensee if it has reason to believe that the person has a controlling stake in the RSE licensee and:

- the person does not have approval from APRA to hold a controlling stake; or
- the person has approval from APRA to hold a controlling stake, but the information given in the application was false or misleading in a material particular.

[Schedule 4, item 10, subsections 131EB(2) and (3)]

5.55 To avoid doubt, a direction to relinquish control can be given to a person who holds a controlling stake in an RSE licensee even if APRA has given approval to the person to hold a controlling stake. *[Schedule 4, item 10, subsection 131EB(4)]*

Giving and revoking a direction

5.56 The direction must be in writing, and APRA must give the person subject to the direction a copy of the direction and a statement of APRA’s reasons. *[Schedule 4, item 10, subsections 131EB(5) and (6)]*

5.57 APRA may revoke a direction to relinquish control of an RSE licensee in writing and a copy of the revocation must be given to the person subject to the direction. *[Schedule 4, item 10, subsections 131EB(7) and (8)]*

Consequences of a direction to relinquish control

5.58 Upon receiving a direction to relinquish control, the person must take necessary steps to ensure that:

- the directors of the RSE licensee are not accustomed or under an obligation (formal or informal) to act in accordance with the directions, instructions or wishes of the person (either alone or together with associates);
- the person (either alone or together with associates) is not in a position to exercise control over the RSE licensee; and
- the person does not hold a controlling stake in the RSE licensee.

[Schedule 4, item 10, subsection 131ED(1)]

5.59 That is, a person receiving the direction must take necessary steps so that the person does not hold a controlling stake or have practical control of the RSE licensee going forth.

5.60 The person must take those steps within 90 days of being given a copy of the direction or before the end of the longer period where APRA has given written notice allowing a longer period to comply with the direction. *[Schedule 4, item 10, subsection 131ED(2)]*

5.61 Intentionally or recklessly contravening the direction is an offence and results in the person being liable for 400 penalty units. *[Schedule 4, item 10, subsection 131ED(3)]*

AAT merit review

5.62 The decision to give a person the direction is reviewable by the Administrative Appeals Tribunal (AAT). *[Schedule 4, item 3, paragraph(taac) of definition of 'reviewable decision' in subsection 10(1)]*

Interim orders

5.63 Where the AAT has made an order to stay (or otherwise affect the operation or implementation of the decision to give the direction or part of the direction) the direction, APRA may apply to the Federal Court of Australia to seek orders that the person not exercise control until the AAT completes its review of the direction *[Schedule 4, item 10, subsection 131EE(1)]*.

5.64 The Federal Court has the discretion to make such orders, if the court considers that it is appropriate to ensure the person does not exercise

control over the RSE licensee in a way that results in the RSE licensee being unable to satisfy its obligations as trustee of the fund, during the period that the AAT orders to stay the direction. *[Schedule 4, item 10, subsection 131EE(2)]*

5.65 If APRA has reason to believe that the person given the direction may, during the period to comply with direction, exercise control over the RSE licensee in a way that results in the RSE licensee being unable to satisfy its obligations as trustee of the fund, then APRA may apply to the Federal Court to seek orders to deal with the conduct of the person. *[Schedule 4, item 10, subsection 131EE(3)]*

5.66 The Federal Court has the discretion to make such orders, if the court considers that it is appropriate to ensure the person does not exercise control over the RSE licensee in a way that results in the RSE licensee being unable to satisfy its obligations as trustee of the fund, during the period to comply with direction. *[Schedule 4, item 10, subsection 131EE(4)]*

Remedial orders

5.67 If the direction is in force, APRA may apply to the Federal Court to seek an order to enforce the direction. *[Schedule 4, item 10, subsection 131EF(1)]*

5.68 The Federal Court has the discretion to make such orders, if the court considers that it is appropriate to ensure that:

- the directors of the RSE licensee are not accustomed or under an obligation (formal or informal) to act in accordance with the directions, instructions or wishes of the person (either alone or together with associates);
- the person (either alone or together with associates) is not in a position to exercise control over the RSE licensee; and
- the person does not hold a controlling stake in the RSE licensee.

[Schedule 4, item 10, subsection 131EF(2)]

5.69 That is, the Federal Court can make an order to ensure that the person does not hold a controlling stake or have practical control of the RSE licensee going forth.

5.70 However, the Federal Court may only make such orders if it is satisfied that:

- the person holding a controlling stake in or having practical control of the RSE licensee has been, is or is likely to exercise control over the RSE licensee in a way that results in the RSE licensee being unable to satisfy its obligations as trustee of the fund;
- the person holding a controlling stake in the RSE licensee does not have approval to do so; or
- the person holding a controlling stake in the RSE licensee has approval from APRA, but the information given in the application was false or misleading in a material particular.

[Schedule 4, item 10, subsection 131EF(3)]

5.71 These are the same grounds on which APRA can give a person to a direction to relinquish control.

5.72 The types of orders the Federal Court may make include:

- directing the disposal of shares;
- restraining the exercise of any rights attached to the shares;
- prohibiting or deferring the payment of any amount due to a person in respect of shares held by the person; and
- disregarding any exercise of rights attached to shares.

[Schedule 4, item 10, subsection 131EF(4)]

5.73 The Federal Court has the discretion to make other orders in addition to the ones listed above. *[Schedule 4, item 10, subsection 131EF(5)]*

5.74 The Federal Court also has the power to:

- make an order to direct any person to do or refrain from doing a specific act for the purpose of securing compliance with any order the court has made; and
- make an order containing ancillary or consequential provisions that the court thinks just.

[Schedule 4, item 10, subsection 131EF(6)]

5.75 Before making an order, the Federal Court may direct that the notice of APRA's application for the order be given to any person that the court thinks fit or be published in any manner that the court thinks fit. The

court may also direct both actions to be taken. *[Schedule 4, item 10, subsection 131EF(7)]*

5.76 The Federal Court may rescind, vary or discharge the order made or suspend the operation of the order. *[Schedule 4, item 10, subsection 131EF(8)]*

Suspension or removal of trustee of superannuation entity

5.77 APRA may suspend or remove a trustee of a superannuation entity on largely the same grounds as those required for APRA to give a direction to a person to relinquish control.

5.78 That is, APRA may suspend or remove the RSE licensee if it has reason to believe that:

- the person has a controlling stake in or has practical control of the RSE licensee; and
- APRA has reason to believe that the RSE licensee has been, is or is likely to be unable to satisfy one or more the trustee's obligations contained in a covenant set out in section 52 to 53, or prescribed under section 54A, or referred to in section 29VN or 29VO, because of:
 - the person's controlling stake in or practical control of the RSE licensee; or
 - the way in which that control is likely to be exercised.

[Schedule 4, item 11, paragraph 133(1)(f)]

5.79 APRA may also suspend or remove the RSE licensee if it has reason to believe that the person has a controlling stake in the RSE licensee and the person does not have approval from APRA to hold a controlling stake. *[Schedule 4, item 11, paragraph 133(1)(g)]*

5.80 This is in addition to existing powers to suspend or remove an RSE licensee under section 133.

Consequential amendments

5.81 The current condition imposed on the RSE licensee to notify APRA of any change in the composition of the RSE licensee is broadened to capture the concept of control. *[Schedule 4, items 5 and 6, paragraph 29E(1)(f) and subsection 29E(2)]*

5.82 That is, for the purposes of the obligation to notify APRA, any change to the composition of the RSE licensee includes when a person's stake in the RSE licensee changes. *[Schedule 4, item 7, paragraph 29E(2)(a)]*

5.83 A definition of *stake* is inserted to ensure consistency in the meaning with the concept in the FSSA. *[Schedule 4, item 4, definition of 'stake' in subsection 10(1)]*

Application and transitional provisions

5.84 Schedule 4 commences on the day after the exposure draft Bill receives the Royal Assent.

5.85 The amendments apply to a person holding a controlling stake from commencement day. *[Schedule 4, item 13]*

5.86 However, if a person holds a controlling stake in an RSE licensee before that day and continues to hold a controlling stake on or after that day, the person is deemed to have approval from APRA to hold a controlling stake in the RSE licensee. This approval is deemed for the period from the commencement day until when the person no longer holds a controlling stake. *[Schedule 4, item 14]*

5.87 This is to ensure that the need to seek APRA approval to hold a controlling stake in an RSE licensee will only apply to persons who do not have an existing controlling stake in an RSE licensee at the date of commencement.

5.88 The offence for holding a controlling stake in an RSE licensee without approval applies only to a person that begins to hold a controlling stake on or after the day that is three months after the commencement day. *[Schedule 4, item 15]*

Chapter 6

APRA directions power

Outline of chapter

6.1 Schedule 5 to the exposure draft Bill amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to strengthen APRA's supervision and enforcement powers to issue a direction to an RSE licensee where APRA has prudential concerns. These changes align the directions powers in the SIS Act with similar reforms being made across the banking and insurance laws.

6.2 These amendments enable APRA to intervene at an early stage to address prudential concerns in a manner that ensures the required actions are in the best interests of members. Early intervention may be necessary due to the serious consequences for fund beneficiaries which can flow from actions and matters that give rise to prudential risk.

6.3 Flexible directions powers allow APRA to respond appropriately in a variety of circumstances, not all of which can be foreseen.

6.4 All legislative references in this chapter are to the SIS Act unless otherwise stated.

Context of amendments

APRA's existing directions powers

6.5 APRA currently has broad general powers of direction under the Acts it administers in the banking and insurance industries. However, the directions powers available to APRA in respect of the superannuation industry are much narrower. In this regard, APRA can only issue directions to an RSE licensee for it to:

- comply with a condition of an RSE licence;
 - including a direction to comply with a particular provision of the SIS Act, *Superannuation Industry*

(Supervision) Regulations 1994 (SIS regulations) or prudential standards;

- not accept contributions from employer sponsors where there has been a contravention of the equal representation rules;
- remove an auditor or approved actuary; or
- not acquire or dispose assets.

6.6 APRA also has power to remove an RSE licensee and appoint an acting RSE licensee in certain circumstances and can give a direction to the acting RSE licensee.

6.7 Given the limited scope of APRA's capacity to direct RSE licensees, APRA may not have power to resolve or address a prudential concern before it results in significant detriment to fund beneficiaries.

6.8 The Final Report of the Financial System Inquiry (FSI) contained a recommendation that existing processes for strengthening crisis management powers be completed. The existing processes included strengthening APRA's directions powers across the industries that it regulates, including superannuation.

6.9 The amendments in Schedule 5 align APRA's directions powers in relation to the superannuation industry with its broader directions powers in the banking and insurance industries.

6.10 Providing APRA with powers similar to other financial service industries strengthens APRA's ability to quickly intervene in prudential matters to ensure that actions which protect the interests of beneficiaries in circumstances of prudential concern can be taken.

Summary of new law

6.11 The amendments provide APRA the power to give a direction to:

- an RSE licensee where it has concerns about one of the RSE licensee's connected entities which raise prudential concerns; and/or
- a connected entity of the RSE licensee directly.

6.12 APRA may also issue a direction to an acting RSE licensee in circumstances in which that direction can be made.

6.13 An RSE licensee will commit an offence if it contravenes a direction from APRA. The offence is a strict liability offence subject to a penalty of 100 units, consistent with the current penalty for breach of a direction by an acting trustee.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>APRA may give a direction to an RSE licensee to:</p> <ul style="list-style-type: none"> • comply with a condition of an RSE license; • not accept certain contributions; • remove an auditor or an actuary; or • not acquire or dispose of assets; <ul style="list-style-type: none"> • address contraventions of prudential obligations; • protect the interests of beneficiaries; or • address certain financial risks. 	<p>APRA may give a direction to an RSE licensee to:</p> <ul style="list-style-type: none"> • comply with a condition of an RSE license; • not accept certain contributions; • remove an auditor or an actuary; or • not acquire or dispose of assets.
<p>APRA may give directions to an RSE licensee to cause a connected entity to:</p> <ul style="list-style-type: none"> • address contraventions of prudential obligations; • protect the interests of beneficiaries; or • address certain financial risks. <p>Where APRA can give one of these directions in respect of a connected entity to an RSE licensee, it may also give a direction to the connected entity.</p>	<p>No equivalent.</p>

Detailed explanation of new law

6.14 Schedule 5 to the exposure draft Bill inserts Part 16A into the SIS Act to provide APRA with powers to issue directions.

6.15 The directions available to APRA are contained in Division 1. APRA may give a direction to an RSE licensee where:

- APRA has a reason to believe that the RSE licensee either has, or is reasonably likely to, contravene its prudential obligations; or
- certain financial risks are present, or there are risks to the interests of the beneficiaries of a superannuation entity or the financial system more generally.

[Schedule 5, item 10, subsection 131D(1)]

6.16 Issuing directions in these circumstances allows APRA to require that actions be taken to address or avoid a contravention, or to mitigate risks.

6.17 Directions may also be issued to an RSE licensee where the conduct of a connected entity of the RSE licensee is of the kind that described above. Where APRA is able to give a direction to an RSE licensee because of the conduct of one of its connected entities, as it relates to a prudential matter, APRA may also give a direction to the connected entity of the licensee. *[Schedule 5, item 10, subsections 131DA(1) and (2)]*

6.18 Extending the directions powers to these circumstances recognises that in some situations, it is the conduct of an entity that undertakes particular functions of an RSE licensee that can result in particular contraventions or risks.

6.19 The circumstances in which directions can be issued and the types of directions that can be issued are explained below.

6.20 A decision of APRA to give or vary a direction under Division 1 of Part 16A is a reviewable decision for the purposes of SIS Act. *[Schedule 5, item 3, subsection 10(1), paragraphs (taaa) and (taab) in the definition of 'reviewable decision']*

6.21 As such, the standard processes for internal and external review in the Administrative Appeal Tribunal that are prescribed under section 344 apply in respect of a decision by APRA to issue a direction.

Directions to RSE licensee about the conduct of the licensee

Directions for contraventions of regulatory or prudential obligations

6.22 RSE licensees have obligations to comply with a number of provisions contained in the SIS Act, the SIS Regulations, the prudential standards (which are a standard determined by APRA under subsection 34C(1)), and the *Financial Sector (Collection of Data) Act 2001* (FSCODA). RSE licensees are also obliged to comply with certain conditions and directions under the SIS Act and the FSCODA.

6.23 APRA may issue a direction to an RSE licensee if it has reason to believe that the licensee has contravened one of these provisions, conditions or directions. [*Schedule 5, item 10, paragraphs 131D(1)(a) and (c)*]

6.24 Whether or not an RSE licensee has contravened a provision, condition or direction is a matter of fact. However, the requirement that APRA has ‘reason to believe’ (in this, and other conditions for giving directions) means that all of the formal proceedings that must be undertaken to establish that a contravention has actually occurred do not need to be resolved. This approach ensures that APRA is able to take early action to remedy or mitigate the impact of a contravention.

6.25 APRA may also issue a direction to an RSE licensee if it has reason to believe that the licensee is likely to contravene a provision of the SIS Act, the SIS Regulations, the prudential standards or the FSCODA. However, directions can only be issued in these circumstances where the direction is reasonably necessary to deal with one or more prudential matters in relation to the RSE licensee. [*Schedule 5, item 10, paragraph 131D(1)(b)*]

6.26 The additional condition in respect of likely contraventions strengthens APRA’s ability to intervene to prevent a contravention from occurring. The additional requirement around prudential matters limits the scope of the ground for giving directions. Prudential matters are defined by subsection 34C(4) and relate to matters such as the conduct of an RSE licensee or a connected entity required to protect the interests of beneficiaries, or ensure the financial stability of the superannuation entity.

Directions to protect the interests of beneficiaries

6.27 APRA may issue directions to an RSE licensee if it has reason to believe that the direction is necessary in the interests of beneficiaries of an RSE of the licensee, or where the failure to issue a direction would materially prejudice the interests or reasonable expectations of those beneficiaries. [*Schedule 5, item 10, paragraphs 131D(1)(d) and (i)*]

6.28 Giving directions in these circumstances requires APRA to form a view about the interests and expectations of beneficiaries, and why the relevant direction is necessary to protect those interests or expectations.

Directions to address certain financial risks

6.29 APRA may issue directions to an RSE licensee if it has reason to believe that one of the following applies, or is likely to apply:

- the licensee is unable to meet its liabilities;
- there is a material risk to the security of the assets of the licensee; or
- there has been a material deterioration in the financial condition of the licensee or the registerable superannuation entity of which it is a trustee.

[Schedule 5, item 10, paragraphs 131L(1)(e) to (g)]

6.30 APRA may also issue directions if it has reason to believe that an RSE licensee is conducting its affairs, or the affairs of the registerable superannuation entity (RSE) of which it is a trustee, in an improper or financially unsound way, or in a way that may cause or promote instability in the Australian financial system. *[Schedule 5, item 10, paragraphs 131D(1)(h) and (j)]*

6.31 Directions in the above circumstances ensure that APRA can require action to prevent a further deterioration in the financial position of the trustee (or the RSE), or to minimise the impact on the beneficiaries of the RSE.

6.32 In addition, the direction about conduct that may adversely affect the stability of the Australian financial system allows APRA to take into account the broader implications of the conduct of an RSE licensee, and require that appropriate action be taken to prevent or reduce the adverse consequences of such actions.

6.33 In assessing whether an RSE licensee is unable to meet its liabilities, or whether there is a material risk to the security of its assets, it does not matter whether the liability or assets relates to the licensee's position as a trustee of an RSE or not. *[Schedule 5, item 10, paragraphs 131D(1)(e) and (f)]*

6.34 This scope is appropriate because the general financial position of an RSE licensee is relevant to its ability to comply with its specific duties as the trustee of an RSE.

Types of directions that may be given

6.35 Where one of the above conditions about the conduct of an RSE licensee is satisfied, APRA may give one or more of the directions outlined below.

6.36 While the type of direction that APRA issues will depend on the facts and circumstances of a particular case, some of these directions are directly relevant to the ground on which directions can be issued.

6.37 APRA may give a direction to an RSE licensee that covers only some of the matters to which a direction relates, deals only with particular classes of matters, or requires different actions to be taken in respect different classes of matters. *[Schedule 5, item 10, subsection 131D(4)]*

6.38 Directions may also contain particulars about the timing for complying with the direction. *[Schedule 5, item 10, subsection 131D(5)]*

Directions to comply with regulatory or prudential obligations

6.39 APRA may give a direction to an RSE licensee to comply with the whole or part of one of the regulatory or prudential obligations in relation to which a contravention is a ground for giving a direction. *[Schedule 5, item 10, paragraphs 131D(2)(a) and (b)]*

6.40 As noted above, these regulatory and prudential obligations relate to provisions of the SIS Act, SIS Regulations, prudential standards and FSCODA, as well as certain conditions and directions under the SIS Act and FSCODA.

6.41 A direction to comply with one of the obligations would generally be relevant where the basis for issuing a direction was related to the contravention of one of these obligations.

Directions about responsible officers

6.42 APRA may give a direction to an RSE licensee that is a body corporate to remove a responsible officer from office, to ensure that a responsible officer does not take part in the management or conduct of the business of the RSE licensee or the business of an RSE, or to appoint a person as a responsible officer on certain terms. *[Schedule 5, item 10, paragraph 131D(2)(c)]*

6.43 Directions of this kind will generally be relevant where the conduct of a particular responsible officer of an RSE licensee has formed the basis of one or more of the grounds on which directions can be issued.

6.44 The term *responsible officer* is defined by subsection 10(1), and relates to a director, secretary or executive officer of a body corporate. Restricting such directions to RSE licensees that are body corporates reflects that body corporates are the only entities that have responsible officers.

Directions about audits or actuarial investigations

6.45 APRA may give a direction to an RSE licensee to order the audit of the affairs of the licensee or an RSE. Such audits are to be made at the expense of the RSE licensee and be undertaken by an auditor that is chosen by APRA. APRA may also remove an auditor from office and appoint another auditor to hold office on particular terms. [Schedule 5, item 10, paragraphs 131D(2)(d) and (e)]

6.46 APRA may also give a direction to an RSE licensee to order an actuarial investigation of the affairs of a RSE. Such investigations are to be made at the expense of the RSE licensee and be undertaken by an actuary that is chosen by APRA. APRA may also remove an actuary from office and appoint another actuary to hold office on particular terms. [Schedule 5, item 10, paragraphs 131D(2)(f) and (g)]

6.47 These types of directions are most relevant where APRA requires additional information about the affairs of an RSE licensee or an RSE, or has reason to believe that audit or actuarial information provided by an RSE licensee does not reflect the true position of the licensee or RSE.

6.48 Removing an existing auditor or actuary, as well as replacing them with another auditor or actuary, enables APRA to ensure that the financial position of a licensee or RSE is accurately reported in the future.

Directions about certain actions

6.49 APRA may give a direction to an RSE licensee to not do any of the following:

- accept contributions to an RSE:
- borrow any amount;
- pay or transfer any amount or asset (or create an obligation to do so);
- undertake a financial obligation; or
- discharge a liability of the licensee or an RSE.

[Schedule 5, item 10, paragraphs 131D(2)(h) to (l)]

6.50 Directions of this kind are most relevant where there are substantial issues in respect of the financial position of an RSE licensee or the RSE.

6.51 Preventing contributions being made to an RSE ensures that members are not put at further risk by contributing amounts to the entity.

6.52 Enabling APRA to direct an RSE licensee to suspend further actions that it would ordinarily take in respect of its assets or liabilities would generally only be done where there is a substantial risk that continued actions would be to the detriment of the beneficiaries of the RSE, or would substantially increase the financial risks that were relevant to the direction.

6.53 However, a direction to not pay or transfer an amount or an asset does not apply to payments or transfer of money pursuant to an order of the court or a process of execution. *[Schedule 5, item 10, subsection 131D(3)]*

6.54 This limitation ensures that court orders and processes of execution take priority over any directions that APRA gives to an RSE licensee.

6.55 APRA may also direct an RSE licensee to do, or refrain from doing, anything else in relation to its affairs, or the affairs of the RSE of which it is a licensee. *[Schedule 5, item 10, paragraph 131D(2)(n)]*

6.56 Enabling APRA to issue directions about the affairs of a licensee or RSE ensures sufficient flexibility for APRA to make the directions that are necessary to prevent or mitigate the risks associated with the various grounds on which directions can be made.

Directions about the RSE licensee

6.57 APRA may give directions to an RSE licensee to make changes to its system, business practices or operations. *[Schedule 5, item 10, paragraph 131D(2)(m)]*

6.58 These directions cover organisational matters that are relevant to an RSE licensee's internal business structures. Enabling APRA to make directions of this kind enables actions to be undertaken to address broader issues that may arise as a result of the way an RSE licensee conducts its business.

Directions to RSE licensee about the conduct of a connected entity

6.59 In certain circumstances, the conduct of a connected entity of an RSE will give rise to the same sorts of contraventions and risks that are outlined above.

6.60 Where this is the case, the general requirements for issuing a direction on the basis of actions or risks that result from the conduct of the RSE licensee may not be able to be satisfied, because the conduct of a connected entity that is relevant.

6.61 A *connected entity* is defined in subsection 10(1) as being the subsidiary of an RSE licensee that is a body corporate, or another entity of the kind prescribed by regulation. Currently, no regulations have been prescribed meaning that connected entities are the subsidiaries of body corporates.

6.62 These amendments ensure that APRA is also able to give a direction to an RSE licensee in respect of the conduct of one of its connected entities.

6.63 The grounds on which such directions may be given are based on the ground on which directions about the conduct of an RSE licensee can be given.

6.64 APRA may give a direction where it has reason to believe that:

- a connected entity has contravened, or is likely to contravene, a provision of the SIS Act, the SIS Regulations, the prudential standards, or the FSCODA;
- the direction relates to the connected entity and is necessary to protect the interests of beneficiaries;
- the direction is required to prevent the interests of beneficiaries from being materially prejudiced;
- the connected entity is unable to meet its liabilities;
- there is a material risk to the security of the assets of the connected entity;
- there has been a material deterioration in the financial condition of the connected entity; or

- the connected entity is conducting its affairs in an improper or financially unsound way or in a way that negatively affects the stability of Australia's financial system.

[Schedule 5, item 10, paragraphs 131DA(1)(a) to (h) and (j)]

6.65 Each of these grounds for issuing a direction in respect of a connected entity are based on the grounds that apply in respect of the conduct of an RSE licensee. The matters set out above in respect of the equivalent grounds are also relevant for connected entities.

6.66 However, unless the grounds relate to contraventions of particular provisions or to the interests of beneficiaries, APRA can only give a direction in respect of the conduct of a connected entity if APRA considers that the direction reasonably necessary to ensure that the RSE licensee's duties as trustee of an RSE are properly performed. *[Schedule 5, item 10, subsection 131DA(2)]*

6.67 This additional requirement about the performance of the RSE licensee's duties ensures that there is a nexus between the functions of the RSE licensee that are regulated and the activities of, or conduct undertaken, by the connected entity. This means that there will not be grounds for issuing a direction in respect of the conduct of a connected entity where that conduct relates to something that has no impact on an RSE licensee or its ability to perform its functions.

6.68 The additional requirement is not explicitly applied to the grounds about contravening certain provisions or protecting the interests of beneficiaries because those grounds already relate to matters that are directly relevant to the RSE licensee's duties or obligations that are separately imposed on the connected entity.

6.69 In addition to the above grounds for giving a direction, APRA may also give a direction if it has reason to believe that a connected entity of an RSE licensee is conducting its affairs in a way that may cause the connected entity to be unable to continue to supply products or services to the licensee or an RSE of the licensee. *[Schedule 5, item 10, paragraphs 131DA(1)(i)]*

6.70 This additional ground recognises that in certain circumstances, a connected entity provides products and services that are integral to an RSE licensee complying with its own obligations.

Types of directions that may be given

6.71 Consistent with directions in relation to the conduct of RSE licensees, APRA may give one or more direction where the grounds for doing so are satisfied.

6.72 However, for directions about the conduct of a connected entity, APRA may give the direction to the RSE licensee to cause the connected entity to do or not do a particular thing. *[Schedule 5, item 10, subsection 131DA(1)]*

6.73 In certain circumstances, it may be more efficient for APRA give a direction directly to the connected entity. However, APRA may do so only in circumstances where it is able to give a direction to the RSE licensee in respect of the conduct of a connected entity (including where it has already given such a direction). *[Schedule 5, item 10, subsection 131DA(3)]*

6.74 Based on the current definition, all connected entities are the subsidiaries of an RSE licensee that is a body corporate. Given this parent-subsidiary relationship, an RSE licensee has the ability to direct its connected entities to take, or not take, the action specified in a direction.

6.75 To ensure that directions powers in respect of connected entities under Division 1 of Part 16A continues to operate appropriately, regulations may be made to prevent APRA from giving directions to any prescribed connected entities. *[Schedule 5, item 10, subsection 131DA(4)]*

6.76 As with the directions for the conduct of RSE licensees, APRA may give a direction that covers only some of the matters to which a direction relates, deals only with particular classes of matters, or requires different actions to be taken in respect different classes of matters. *[Schedule 5, item 10, subsection 131DA(7)]*

6.77 Directions may also contain particulars about the timing for complying with the direction. *[Schedule 5, item 10, subsection 131DA(8)]*

6.78 As with the directions in respect of the conduct of an RSE licensee, APRA may give a direction in respect of a connected entity that requires the connected entity to:

- comply with certain regulatory or prudential obligations;
- remove or appoint responsible officers, or to prevent responsible officers from taking part in certain activities;
- order an audits or actuarial investigation;
- remove or appoint an auditor or actuary;
- not undertake particular actions, including:
 - borrowing any amount;

- paying or transferring any amount or asset (or create an obligation to do so);
- undertaking a financial obligation; or
- discharging a liability of the connected or a registrable superannuation entity;
- take actions in respect of the connected entity’s systems, business or operations; or
- do, or refrain from doing, particular things in relation to the affairs of the connected entity or an RSE.

[Schedule 5, item 10, section 131DA(5)]

6.79 As with the grounds on which these directions can be made, the particulars of each type of direction are based on the types of directions that can be issued to RSE licensees in respect of their conduct. The matters set out above in respect of the equivalent directions for RSE licensees are also relevant for connected entities.

Requirements for giving a direction

6.80 To be a valid direction under Division 1 of Part 16A, the direction must be given by notice in writing. For directions about the conduct of an RSE licensee, the notice must be given to the licensee. For directions about the conduct of a connected entity, the direction must be given by notice to both the connected entity and the RSE licensee.
[Schedule 5, item 10, paragraph 131DB(1)(a)]

6.81 The notice must specify the ground on which the direction was given. *[Schedule 5, item 10, paragraph 131DB(1)(b)]*

6.82 These requirements ensure that RSE licensees and connected entities are provided with the information that is necessary for them to understand the basis on which a direction is given, and to comply with the direction that APRA has given.

6.83 A direction given under Division 1 of Part 16A is not a legislative instrument. *[Schedule 5, item 10, subsection 131DB(2)]*

6.84 Directions that are made by APRA are not legislative instruments within the meaning of subsection 8(1) of the *Legislation Act 2003* as they merely apply provisions of the SIS Act to an RSE licensee or connected entity (rather than determining the content of the law). Subsection 131DB(2) does not alter the scope of this existing

exclusion and therefore is not strictly necessary. However, it is being inserted to clarify this position for RSE licensees and connected entities.

6.85 In deciding whether to give a direction to an RSE licensee or a connected entity, APRA may disregard any external support for the RSE licensee or the connected entity. *[Schedule 5, item 10, subsections 131DB(3) and (4)]*

6.86 External support includes particular guarantees or assurances, and are required to support the stability of the superannuation system.

6.87 Regulations may also specify that particular types of support are not external support for these purposes. *[Schedule 5, item 10, subsection 131DB(5)]*

Varying or revoking directions

6.88 APRA may vary or revoke a direction under Division 1 of Part 16A where it considers that it is necessary or appropriate to do so. *[Schedule 5, item 10, subsections 131DC(1) and (3)]*

6.89 Directions continue to have effect according to their terms up until the time that APRA revokes the direction. *[Schedule 5, item 10, subsection 131DC(2)]*

6.90 Variations and revocations may be necessary where APRA's view about particular contraventions or risks has changed, based on the available information or actions that an RSE licensee or connected entity has undertaken. For example, some directions to not do particular things may not be required if corrective action is taken by an RSE licensee or connected entity.

Consequences of failing to comply with a direction

6.91 A failure to comply with a direction given under Division 1 of Part 16A is an offence that results in a penalty of 100 penalty units. Offences of this kind are strict liabilities. *[Schedule 5, item 10, subsections 131DD(1) to (4) and (6)]*

6.92 A person who commits an offence for not complying with a direction given under Division 1 does so from the day that the offence was committed until the circumstances that caused the offence no longer exist. *[Schedule 5, item 10, subsections 131DD(5)]*

6.93 The entity that commits an offence for a failure to comply with a direction will depend on the type of direction.

6.94 For directions given to RSE licensees, a person commits an offence if they are the RSE licensee, or if they are a member of a group of individual trustees that is an RSE licensee, and the RSE licensee does or fails to do something that results in a contravention of the direction. [Schedule 5, item 10, subsection 131DD(1)]

6.95 A person also commits an offence if they are an officer of an RSE licensee who is responsible for ensuring the licensee complies with directions, and the person fails to take reasonable steps to ensure that the licensee complies with a direction. [Schedule 5, item 10, subsection 131DD(2)]

6.96 For directions given to a connected entity, the connected entity commits an offence if it fails to do something that results in a contravention of the direction. [Schedule 5, item 10, subsection 131DD(3)]

6.97 A person also commits an offence if they are an officer of a connected entity who is responsible for ensuring the entity complies with directions, and the person fails to take reasonable steps to ensure that the connected entity complies with a direction. [Schedule 5, item 10, subsection 131DD(4)]

6.98 For the purposes of working out whether a person is an officer of an RSE licensee or a connected entity, the definition of *officer* in section 9 of the *Corporations Act 2001* (Corporations Act) applies. [Schedule 5, item 10, subsection 131DD(7)]

Provision relating to all directions under the SIS Act

6.99 In addition to the directions that may be issued under Division 1 of Part 16A, Schedule 5 introduces provisions that relate to all directions that may be issued under the SIS Act.

6.100 These rules insert Division 3 into Part 16A to:

- ensure that APRA can give more than one direction;
- ensure that RSE licensees and connected entities can comply with directions;
- provide protections from liability for complying with directions;
- provide for information about directions to be provided to the Treasurer; and

- ensure that a person does not have to comply with a direction that would result in the acquisition of property, other than on just terms.

APRA may give more than one direction

6.101 These amendments clarify that APRA’s ability to give a direction is not affected by the fact it has given, or can give, another direction under any provision of the SIS Act. *[Schedule 5, item 10, subsection 131F(1)]*

6.102 This ensures that APRA is able to use a combination of directions, where it is appropriate to do so, and clarifies that an earlier direction does not prevent APRA from issuing another direction.

6.103 The amendments also clarify that the types of directions that may be given under a particular provision do not affect the type of connection that can be given under a different provision of the Act. *[Schedule 5, item 10, subsection 131F(2)]*

RSE licensees and connected entities can comply with directions

6.104 If an RSE licensee is required to comply with any direction issued under the SIS Act, the licensee has the power to comply with the direction despite anything in its constitution or any contract or arrangement that it has with another entity. *[Schedule 5, item 10, subsection 131FA(1)]*

6.105 A connected entity that is required to comply with direction issued under the SIS Act has the power to comply with the direction despite anything in its constitution or any contract or arrangement that it has with another entity. *[Schedule 5, item 10, subsection 131FA(3)]*

6.106 RSE licensees also have the power to cause a connected entity to do, or not to do, something in accordance with a direction. Similarly, the connected entity has the power to do the thing, or not do the thing, that is required of it. These powers exist irrespective of anything in the connected entity’s constitution, or any contract or arrangement to which it is a party. *[Schedule 5, item 10, subsection 131FA(2)]*

6.107 These amendments ensure that any obligation to comply with a direction takes priority over other requirements that an RSE licensee or connected entity would otherwise be subject to that would prevent them from complying with the direction.

Protection from liability

General protection from liability

6.108 The amendments also prevent a person from being subject to any liability that would otherwise arise from any act or omission that is performed in good faith and without negligence in complying with the performance of powers, functions or duties under the SIS Act. [*Schedule 5, item 10, subsection 131FB(1)*]

6.109 This general protection from liability ensures that persons who genuinely comply with the provisions of the SIS Act are not subject to liability for having done so.

6.110 The general protection extends to the provision of any information by an auditor or actuary to APRA under section 130A of the SIS Act (which relates to circumstances in which an auditor or actuary considers that giving the information will assist APRA in performing its function under the SIS Act). [*Schedule 5, item 10, subsection 131FB(2)*]

6.111 However, this general protection does not apply persons referred to in section 58 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) or affect the operation of that section. [*Schedule 5, item 10, subsection 131FB(3)*]

6.112 Section 58 of the APRA Act provides a protection from liability to APRA, its staff members and its agents. Limiting the general protection in the SIS Act to persons that are not covered by section 58 is appropriate because the protections in section 58 are specifically targeted towards APRA, its staff members and agents.

Protection from liability for complying with direction

6.113 In addition to the general protection with complying with the SIS Act, these amendments also prevent any action, suit or proceeding (whether criminal or civil) from being brought against a person who does something, or omits doing something, in compliance with a direction given by APRA to an RSE licensee or a connected entity. [*Schedule 5, item 10, paragraphs 131FC(1)(a)*]

6.114 For this protection to apply, it must have been reasonable for the person to do the thing, or omit to do thing, and the person must be an officer, agent or employee of the RSE licensee or connected entity. [*Schedule 5, item 10 paragraphs 131FC(1)(b) and (c)*]

6.115 These protections are necessary to ensure that persons can take the action that is required to ensure compliance with a direction given under the SIS Act. The protections are particularly relevant given the

penalties that apply for not complying with a direction, and the fact that RSE licensees and connected entities are empowered to comply despite provision in their constitution, or any other contract or arrangement, that would otherwise prevent them from complying.

6.116 For the purposes of this protection from liability, the term *officer* has the meaning given by section 9 of the Corporations Act, and the term *employee* means a person who is engaged to provide advice or services to the RSE licensee or connected entity. *[Schedule 5, item 10, subsection 131FC(2)]*

6.117 This meaning of employee is an expansive one, and enables the protection from liability to extend to persons who undertake a range of functions on behalf of a licensee or connected entity.

Protections do not limit each another

6.118 The amendments also clarify that the various protections offered by section 336B (protections for disclosure by whistleblowers), section 131RA (the general protection for compliance with the SIS Act), section 131S (protection for complying with a direction) and section 58 of the APRA Act (protection for APRA, APRA members or agent) do not limit each other. *[Schedule 5, item 10, section 131FD]*

6.119 As a result, a person who is covered by more than one of the above protections can be protected by liability under more than one provision. Similarly, a failure to be protected by one of the provisions does not affect the protection that a person may receive under another provision.

Providing information to the Treasurer

6.120 APRA must comply with a request that is made by the Treasurer to provide information about any directions given under the SIS Act to a particular entity, or about any directions given over a specified period to an entity of a specified kind. *[Schedule 5, item 10, subsection 131FE(1)]*

6.121 APRA may also provide the Treasurer with any information that it considers appropriate about directions that it has given, or revocations about any such directions. *[Schedule 5, item 10, subsection 131FE(2)]*

6.122 Where APRA has provided the Treasurer with information about a direction but later revokes that direction, it must notify the Treasurer of the revocation as soon as is practicable. However, a failure to notify the Treasurer of a revocation does not affect its validity. *[Schedule 5, item 10, subsection 131FE(3)]*

6.123 Requiring APRA to make notifications about revocations ensures that the Treasurer is made aware that a direction is no longer in effect.

Acquisitions of property

6.124 Despite the general obligation to comply with a direction given under the SIS Act, a person is not required to comply with a direction in circumstances that would result in an acquisition of property otherwise than on just terms. *[Schedule 5, item 11, subsection 349B(6A)]*

6.125 This limitation supplements the general restriction contained in subsection 349B(1) about acquisitions of property and ensures that the rules about directions in the SIS Act do not purport to require a person to comply with a direction that would otherwise be inconsistent with paragraph 51(xxxi) of the Constitution.

6.126 The amendments also clarify that any provision that requires a person to comply with a direction that does not result in an acquisition of property continues to apply in relation to a direction given under the SIS Act. *[Schedule 5, item 12, paragraph 349BN(7)(f)]*

Consequential amendments

6.127 Schedule 5 makes consequential amendments to repeal the provision that permitted APRA to issue a direction to an RSE licensee to comply with the conditions of its licence, and the provisions that specified that non-compliance with such a direction was constituted an offence. *[Schedule 5, items 6 and 8, sections 29EB and 29JB]*

6.128 These specific provisions are no longer required as APRA can now issue such directions under Division 1 of Part 16A.

6.129 Schedule 5 also makes consequential amendments to update references to the direction to comply with the conditions of an RSE license to reflect the relevant provisions in Division 1. *[Schedule 5, items 4, 5, 7 and 9, note 1 to subsection 29E(1), note 1 to subsection 29EA(2), paragraphs 29G(2)(e) and (f), and note to subsection 29K(2)]*

6.130 Amendments to the summary of provisions and the allocation of administrator for specific provisions are made to reflect the insertion of Part 16A (including those directions about relinquishing controlling stakes described in Chapter 6) and that APRA has general administration of those provisions. *[Schedule 5, items 1 and 2, section 4 and subparagraph 6(1)(a)(vii)]*

Application and transitional provisions

6.131 The amendments in Schedule 5 apply to events that occur on or after the commencement of the Schedule, being the day after the Schedule receives the Royal Assent. *[Schedule 5, item 13]*

Chapter 7

Annual members' meeting

Outline of chapter

7.1 Schedule 6 to the exposure draft Bill amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to require RSE licensees to hold annual members' meetings (AMMs), to discuss the key aspects of the fund and provide members with a forum to ask questions about all areas of the fund's performance and operations.

7.2 All legislative references in this chapter are to the SIS Act unless otherwise stated.

Context of amendments

7.3 Many superannuation fund members seek to ask questions of their funds concerning their operation and performance. However, in most cases members have little or no ability to have their questions asked or answered.

7.4 The 2010 Cooper Review recognised that given the special public purpose that superannuation plays, any effective trustee governance model would need to guarantee trustees are accountable to their members.

Summary of new law

7.5 The amendments require the RSE licensee of a registrable superannuation entity to hold an AMM for which a notice of the AMM is to be given 21 days prior to the meeting. The annual report is to be included in the notice.

7.6 To ensure that members have useful information on fund performance and fund operations, regulations may require other information to be included in the notice.

7.7 A responsible officer of an RSE licensee, an individual trustee (if the RSE licensee is a group of individual trustees), relevant auditors

and actuary must attend the AMM. The notice of the meeting is to be given to them and the members of the registrable superannuation entity.

7.8 At the AMM, the members must be given reasonable opportunity to ask questions about the registrable superannuation entity, the RSE licensee (and its responsible officers) or each individual trustee, the audit or the actuarial investigation of the entity, and any other information included with the notice of the meeting.

7.9 To minimise compliance costs, superannuation funds can hold the AMM by electronic means.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
An RSE licensee is required to hold an AMM which provides members of the RSE with the opportunity to ask questions of the responsible officers of the RSE licensee, individual trustees, and relevant auditors and actuaries.	No equivalent.
The responsible officers of an RSE licensee, individual trustees, and relevant auditors and actuaries must attend the AMM, unless they have a reasonable excuse for not attending.	No equivalent.
A responsible officer of an RSE licensee, an individual trustee, an auditor or an actuary must answer the question at the AMM, and unless it is not reasonably practicable to do so, in which case the question must be answered within one month.	No equivalent.
A responsible officer of an RSE licensee or an individual trustee does not need to answer a question if: <ul style="list-style-type: none"> • the question is not relevant to an action or failure or act by the RSE licensee in relation to the registrable superannuation entity or one or more of its members; • the question is not relevant to the registrable superannuation entity; • it would be in breach of the 	No equivalent.

<p>governing rules of the registrable superannuation entity, the SIS Act or any other law to answer the question;</p> <ul style="list-style-type: none"> • answering the question would result in detriment to the members taken as a whole; or • any other circumstances prescribed by regulations. 	
<p>An auditor does not need to answer a question if:</p> <ul style="list-style-type: none"> • the question is not relevant to an action or failure or act by the RSE licensee in relation to the registrable superannuation entity or one or more of its members; • the question is not relevant to the registrable superannuation entity; • the question is not relevant to an audit of the registrable superannuation entity; • the question is not relevant to any matter that might reasonably be expected to be apparent to the auditor in relation to the entity; • it would be in breach of the governing rules of the registrable superannuation entity, the SIS Act or any other law to answer the question; • answering the question would result in detriment to the members taken as a whole; or • any other circumstances prescribed by regulations. 	<p>No equivalent.</p>
<p>An actuary does not need to answer a question if:</p> <ul style="list-style-type: none"> • the question is not relevant to an action or failure or act by the RSE licensee in relation to the registrable superannuation entity or one or more of its members; • the question is not relevant to the registrable superannuation entity; • the question is not relevant to an actuary investigation of the 	<p>No equivalent.</p>

<p>registrable superannuation entity;</p> <ul style="list-style-type: none">• the question is not relevant to any matter that might reasonably be expected to be apparent to the actuary in relation to the entity;• it would be in breach of the governing rules of the registrable superannuation entity, the SIS Act or any other law to answer the question;• answering the question would result in detriment to the members taken as a whole; or• any other circumstances prescribed by regulations.	
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Detailed explanation of new law

7.10 The amendments require the RSE licensee of a registrable superannuation entity to hold an AMM within five months of the end of the entity's income year. *[Schedule 6, item 5, subsections 29P(1) and (2)]*

7.11 However, this does not apply in relation to:

- a superannuation fund with less than five members;
- an excluded approved deposit fund;
- a pooled superannuation trust; or
- an eligible rollover fund.

[Schedule 6, item 5, subsection 29P(7)]

7.12 It is an offence to contravene the obligation to hold an AMM. The penalty for the RSE licensee or an individual trustee (if the RSE licensee is a group of individual trustees) committing the offence is 50 penalty units. *[Schedule 6, item 5, subsection 29P(8)]*

Notice to be given before the AMM

7.13 21 days before the AMM, the RSE licensee must give notice of the meeting to:

- all members of the registrable superannuation entity;

- all responsible officers of the RSE licensee that is a body corporate;
- any person who has been an auditor of the entity for the income year; and
- any person who has been an actuary of the entity during the income year or within five months after the end of the income year.

[Schedule 6, item 5, subsection 29P(3)]

7.14 A responsible officer is a director, a secretary or an executive officer of the RSE licensee (see subsection 10(1) of the SIS Act).

7.15 The notice of the AMM must include the time and location of the meeting, or if the meeting is held by electronic means the details of how the meeting can be attended electronically. *[Schedule 6, item 5, subparagraphs 29P(4)(a)(i) and (ii)]*

7.16 The notice must also include the agenda of matters to be discussed at the AMM. *[Schedule 6, item 5, subparagraph 29(4)(a)(iii)]*

7.17 The annual report of the registrable superannuation entity for the income year and any other information prescribed by the regulations must be included with the notice. *[Schedule 6, item 5, paragraph 29(4)(b)]*

7.18 The regulations may prescribe that information on operational matters of the fund be included with the notice of the AMM.

7.19 It is an offence to contravene the obligation to provide the notice and the obligation to provide information to be included in or with the notice. The penalty for the RSE licensee or an individual trustee (if the RSE licensee is a group of individual trustees) committing the offence is 50 penalty units. *[Schedule 6, item 5, subsection 29P(8)]*

Obligation to attend the AMM

7.20 All responsible officers of an RSE licensee, relevant auditors and actuaries must attend the AMM, if they were given the notice of the AMM. *[Schedule 6, item 5, subsections 29PA(1), (3) and (4)].*

7.21 Where the RSE licensee is a group of individual trustees, each of the individual trustees must attend the AMM. *[Schedule 6, item 5, subsection 29PA(2)].*

7.22 Unless there is a reasonable excuse for not attending, the responsible officer, individual trustee, auditor or actuary will be subject to a penalty of 50 penalty units for non-attendance of the AMM. [*Schedule 6, item 5, subsection 29PA(5)*].

7.23 Whether a reason for non-attendance is considered a reasonable excuse will be considered on a case-by-case basis in light of the circumstances.

Example 7.1

In the days leading up to XYZ Super Plus's annual members' meeting, the person that undertook the audit of its financial statements fell sick and was subsequently hospitalised the night before the annual members meeting.

In this case the failure for the auditor to attend XYZ Super Plus's annual members' meeting would be considered to be reasonable.

Conduct at the AMM

7.24 At the AMM, the RSE licensee must give members reasonable opportunities to ask questions about:

- the registrable superannuation entity;
- the RSE licensee and its responsible officers, where the RSE licensee is a body corporate;
- each individual trustee where the RSE licensee is a group of individual trustees;
- any audit of the entity for the income year;
- any actuarial investigation of the entity for the income year or within five months after the end of income year; and
- any information included with the notice of the AMM.

[*Schedule 6, item 5, subsection 29P(5)*]

7.25 That includes discussions on the annual report and any other information required by regulation to be included with the notice.

7.26 It is an offence to contravene the obligation to give members reasonable opportunity to ask questions. The penalty for the RSE licensee or an individual trustee (if the RSE licensee is a group of individual

trustees) committing the offence is 50 penalty units. [*Schedule 6, item 5, subsection 29P(8)*]

7.27 If a responsible officer of an RSE licensee is asked a question by a member at the AMM, the responsible officer must answer the question at the AMM, unless it is not reasonably practicable to do so, in which case the question must be answered within one month. [*Schedule 6, item 5, subsections 29PB(1) and (2)*]

7.28 The same obligation applies for an individual trustee, an auditor or an actuary if they are asked a question. [*Schedule 6, item 5, subsections 29PC(1) and (2), 29PD(1) and (2), and 29PE(1) and (2)*]

7.29 Unless a defence is available, the responsible officer, individual trustee, auditor or actuary will be subject to a penalty of 50 penalty units for not answering the questions at the AMM or within one month of the AMM. [*Schedule 6, item 5, subsections 29PB(2), 29PC(2), 29PD(2) and 29PE(2)*]

Defences to not answering the questions

7.30 A responsible officer of an RSE licensee, an individual trustee, an auditor or an actuary does not need to answer a question if:

- the question is not relevant to an action or failure or act by the RSE licensee in relation to the registrable superannuation entity or one or more of its members;
- the question is not relevant to the registrable superannuation entity;
- it would be in breach of the governing rules of the registrable superannuation entity, the SIS Act or any other law to answer the question;
- answering the question would result in detriment to the members taken as a whole; or
- any other circumstances prescribed by regulations.

[*Schedule 6, item 5, subsections 29PB(3), 29PC(3), 29PD(3) and 29PE(3)*]

Example 7.2

A member attending WYE Super's annual members meeting asked the director of WYE Super's RSE licensee a question regarding a potential investment opportunity that the RSE licensee is currently considering.

In order to answer the question, the director would be required to breach confidentiality agreements and in doing so would preclude the RSE licensee from the investment opportunity and may lead to action being taken against the director and the RSE licensee.

In this circumstance, answering this question would result in detriment to the members taken as a whole and as such would not be required to be answered.

7.31 In addition, an auditor also does not need to answer a question if:

- the question is not relevant to an audit of the registrable superannuation entity; or
- the question is not relevant to any matter that might reasonably be expected to be apparent to the auditor in relation to the entity.

[Schedule 6, item 5, subparagraphs 29PD(3)(a)(iii) and (iv)]

7.32 Whereas, an actuary does not need to answer a question if:

- the question is not relevant to an actuarial investigation of the registrable superannuation entity;
- the question is not relevant to any matter that might reasonably be expected to be apparent to the actuary in relation to the entity;

[Schedule 6, item 5, subparagraphs 29PE(3)(a)(iii) and (iv)]

Recording of the AMM

7.33 The RSE licensee must ensure that the minutes of AMM are prepared and made available on the registrable superannuation entity's website to all members, including those that were not able to attend.

[Schedule 6, item 5, subsection 29P(6)]

7.34 It is an offence to contravene the obligation to prepare the minutes or to make them available on the entity's website to all members. The penalty for the RSE licensee or an individual trustee (if the RSE licensee is a group of individual trustees) committing the offence is 50 penalty units. *[Schedule 6, item 5, subsection 29P(8)]*

Consequential amendments

7.35 This exposure draft Bill inserts the definition of **annual members' meeting** into the SIS Act. [Schedule 6, item 3, subsection 10(1)]

7.36 The amendments to the allocation of general administration of the SIS Act ensure that ASIC has administration of the provisions in respect of AMMs. [Schedule 6, items 1 and 2, subparagraphs 6(1)(a)(i) and 6(1)(c)(ia)]

7.37 The amendment to the heading for Division 5 of Part 2B is to reflect the inclusion of the provisions dealing with AMM in the Division. [Schedule 6, item 4, Division 5 of Part 2B heading]

Application and transitional provisions

7.38 The amendments apply in relation to a registrable superannuation entity's income year that begins on or after the day after the exposure draft Bill receives the Royal Assent. [Schedule 6, item 6]

Chapter 8

Reporting standards

Outline of chapter

8.1 Schedule 7 to the exposure draft Bill amends the *Financial Sector (Collection of Data) Act 2001* (FSCODA) to provide APRA with the ability to obtain information on expenses incurred by RSE and RSE licensees in managing/operating the RSE.

8.2 All legislative references in this chapter are to the FSCODA unless otherwise indicated.

Context of amendments

8.3 FSCODA provides APRA with the power to make reporting standards that require RSE licensees to report expenses relating to investments of a registrable superannuation entity (RSE) on a look through basis.

8.4 Look-through reporting involves requiring the RSE licensee to seek information from the third party to which expenses are being paid for reporting purposes.

8.5 Look-through reporting of investment expenses enables APRA to obtain a full picture of how RSEs are investing member contributions and provides APRA with the ability to consider whether the investments of individual RSEs are in line with their obligations under the SIS Act.

8.6 While expenses relating to investments are subject to look through reporting obligations, expenses relating to the management and operation of the RSE are not currently captured.

8.7 The amendments in the exposure draft Bill enable reporting standards to be made that require RSEs to provide APRA with their expenses relating to the management and operation on a look through basis, allowing all RSE expenses to be collected under reporting standards.

8.8 This additional information will enable APRA to understand the full picture of how RSEs are using member contributions and will enable

APRA to consider whether expenses of individual RSEs are in line with the RSE licensee's obligations under the SIS Act, including the obligation to act in the best interests of beneficiaries as per paragraph 52(2)(c).

Summary of new law

8.9 The amendments enhance the ability of APRA to collect information in relation to a transaction between an RSE licensee and another entity where the money, consideration or other benefit originated from the assets of an RSE of the RSE licensee.

8.10 In those situations, the reporting standards may require the RSE licensee to provide information in relation to the transaction including:

- details of the other entity;
- the purpose for the transaction;
- the way the other entity used the money, consideration or benefit received; and
- any entity with which the other entity deals.

8.11 To facilitate the information gathering process in order for the RSE licensee to meet its obligation to report the required information to APRA under the reporting standards, the amendments also require the RSE licensee to notify the other entity and the other entity to provide the required information after being notified.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>If an RSE licensee gives money, consideration or some other benefit out of the assets of its superannuation fund to another entity, the reporting standards may require the RSE licensee to provide information in relation to the transaction including:</p> <ul style="list-style-type: none">• details of the other entity;• the purpose for the transaction;• the way the other entity used the money, consideration or benefit	<p>No equivalent.</p>

<p>received; and</p> <ul style="list-style-type: none"> any entity with which the other entity deals. 	
<p>Where an RSE licensee gives money, consideration or other benefit out of the assets of its superannuation fund to another entity under a contract or arrangement, the contract or arrangement is taken to contain the following terms:</p> <ul style="list-style-type: none"> at the time the money, consideration or other benefit is given, or as soon as reasonably practicable after that time, the RSE licensee must notify the other entity that the transaction is made out of the superannuation fund's assets; and the other entity must, as soon as reasonably practicable after being notified by the RSE licensee, provide the RSE licensee with the required information of which the other entity is aware. 	<p>No equivalent.</p>

Detailed explanation of new law

8.12 The amendments enhance APRA's ability to collect information in relation to a transaction between an RSE licensee and another entity where the money, consideration or other benefit originated from the assets of a registrable superannuation entity of the RSE licensee.

8.13 APRA is able to collect the information through the reporting standards determined by APRA under section 13 of the FSCODA.

8.14 If an RSE licensee gives money, consideration or some other benefit out of the assets of its RSE to another entity, the reporting standards may require the RSE licensee to provide information in relation to the transaction including:

- details of the other entity;
- the purpose for which the money, consideration or other benefit is given;

- the way in which the other entity used the money, consideration or benefit received; and
- any entity with which the other entity deals.

[Schedule 7, item 1, subsection 13(4D)]

8.15 That is, where the money, consideration or benefit received by the other entity was used in its dealings with any further entities, information about the further entities are required to be provided by the RSE licensee in accordance with the reporting standard. This is in addition to the RSE licensee needing to provide information about the details of the other entity, the purpose for the transaction and the way the other entity used the money, consideration or benefit received.

8.16 Where an RSE licensee gives money, consideration or some other benefit out of the assets of its RSE to another entity under a contract or arrangement, the contract or arrangement is taken to contain the following terms:

- at the time of the money, consideration or other benefit is given, or as soon as reasonably practicable after that time, the RSE licensee must notify the other entity that the transaction is made out of the assets of RSE; and
- the other entity must, as soon as reasonably practicable after being notified by the RSE licensee, provide the RSE licensee with the required information of which the other entity is aware.

[Schedule 7, item 1, subsection 13(4E)]

8.17 This mechanism is to facilitate the information gathering process in order for the RSE licensee to meet its obligation to report the required information to APRA under the reporting standards.

8.18 However, if the transaction is in relation to investment assets, or assets derived from assets, of the RSE licensee's RSE by the RSE licensee or a person connected with the RSE licensee, then the amendments do not apply. *[Schedule 7, item 1, subsection 13(4F)]*

8.19 This reflects that APRA can currently determine reporting standards requiring the RSE licensee to provide information in relation to investment assets under subsection 13(4A).

Application and transitional provisions

8.20 These amendments commence on or after the day after the exposure draft Bill receives the Royal Assent, so from that date APRA can determine reporting standards giving effect to the amendments.

8.21 The obligation for the RSE licensee to notify the other entity and the obligation for the other entity to provide the required information will be implied into a contract or arrangement, regardless of whether it is entered into before or after these amendments commence. [*Schedule 7, subitem 2(1)*]

8.22 The ability to imply such terms into existing contracts is to address future transactions under contracts that are currently on foot.

8.23 For example, if a contract or arrangement provides for payments over a period of time, the obligations on the RSE licensee to notify, and the other entity to provide, the required information will only apply to the payments made on or after the day after the exposure draft Bill receives the Royal Assent.

8.24 That is, the RSE licensee does not need to notify the other entity in respect of past transactions made under the contract or arrangement, and the other entity would not have the obligation to provide the information as there is no requirement for the RSE licensee to notify.

8.25 This ensures that all transactions to be made on or after the commencement of the amendments are subject to the same requirements, regardless of whether the transaction is made under an existing contract or a contract entered into after the commencement of the amendments.

8.26 However, to the extent that the operation of the reporting standard would result in an acquisition of property from a person other than on just terms, the obligations will not be implied into a contract or arrangement that is entered into before the commencement of these amendments. [*Schedule 7, subitem 2(2)*]

8.27 This is to recognise the different circumstances in which the contracts are entered into. Where contracts are entered into after the commencement of these amendments, the RSE licensee (and entities it contracts with) would be aware of the requirements under the reporting standards and are able to address the potential acquisition of property matters in the terms of the contract.

8.28 Furthermore, if an RSE licensee is unable to obtain particular required information to provide to APRA due to the obligations not being implied into the contract or arrangement, then the RSE licensee is not

required to comply with the reporting standard to the extent that it is required to provide that particular information. *[Schedule 7, subitem 2(3)]*

