
SUPERANNUATION LEGISLATION AMENDMENT (FURTHER MEASURES)
BILL 2012

Exposure Draft

(Circulated by the authority of the
Minister for Financial Services and Superannuation, the Hon Bill Shorten MP)

Table of contents

Glossary	v
General outline and financial impact	1
Chapter 1 Service providers	3
Chapter 2 Infringement notices	7
Chapter 3 Reasons for decisions and Superannuation Complaints Tribunal time limits.....	11
Chapter 4 Dual regulated entities	15
Chapter 5 Actions for breaches of directors' duties	19
Chapter 6 Other measures and consequential amendments	23

Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
ADI	authorised deposit-taking institution
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i>
FHSA Act	<i>First Home Saver Accounts Act 2008</i>
FSCOD Act	<i>Financial Sector (Collection of Data) Act 2001</i>
Further MySuper and Transparency Measures Bill	Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012
MySuper Core Provisions Bill	Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2012
RIS	regulation impact statement
RSE	registrable superannuation entity
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>
SMSF	Self managed superannuation fund

Glossary (continued)

<i>Abbreviation</i>	<i>Definition</i>
SRC Act	<i>Superannuation (Resolution of Complaints) Act 1993</i>
The Review	The review into the governance, efficiency, structure and operation of Australia's superannuation system or the Super System Review (Cooper Review)
TPD	total and permanent disability insurance
Trustee Obligations and Prudential Standards Act	<i>Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012</i>

General outline and financial impact

Stronger Super

On 16 December 2010, the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, announced the Stronger Super reforms.

Stronger Super represents the Government's response to the review of the governance, efficiency, structure and operation of Australia's superannuation system, the Super System Review (the Review). The Government released the Review's final report on 5 July 2010 and its response on 16 December 2010 (Minister's Media Release No. 024 of 16 December 2010).

To obtain input on the design and implementation of the Stronger Super reforms, the Government undertook extensive consultation with industry, employer and consumer groups. The Government announced its decisions on the key design aspects of the Stronger Super reforms on 21 September 2011 (Minister's Media Release No. 131 of 21 September 2011).

This Bill is the fourth tranche of legislation implementing the Government's MySuper and governance reforms as part of Stronger Super.

The first tranche of legislation, the Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, was introduced to the Parliament on 3 November 2011.

The second tranche of legislation, the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* received Royal Assent on 8 September 2012.

The third tranche of legislation, the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 was introduced to the Parliament on 19 September 2012.

Date of effect: Except for the changes relating to dual regulated entities, and some of the consequential changes, the majority of the provisions take effect from 1 July 2013.

Proposal announced: On 16 December 2010, the Minister announced the government would implement the Stronger Super reforms, and, following consultation, on 21 September 2011, the key design aspects of the Stronger Super reforms were announced.

Financial impact: This Bill has no significant financial impact on Commonwealth expenditure or revenue.

Summary of regulation impact statement

Regulation impact on business

Impact: The regulation impact statement (RIS) for Stronger Super implementation can be found at <http://ris.finance.gov.au>. The relevant sections of the RIS covered in this Bill are MySuper and governance of superannuation (including section 4.4 in the appendix). A RIS exemption was granted for the remainder of the Stronger Super reforms, which will be subject to a post-implementation review.

Chapter 1

Service providers

Outline of chapter

1.1 Schedule 1 to this Bill amends the SIS Act to over-ride any provisions in a fund's governing rules that require the trustee to use a specified service provider, investment entity or financial product. All legislative references in this chapter are to the SIS Act unless otherwise stated.

Context of amendments

1.2 The Review was concerned that some trust deeds require a trustee to use a particular service provider, investment entity or financial product, effectively removing a trustee's discretion to ensure such arrangements are in the best interests of fund members. The Review recommended (recommendation 2.14) that any such provisions in trust deeds should be overridden.

Summary of new law

1.3 The SIS Act will be amended to over-ride any provision in the governing rules of an RSE that requires the trustee to use a specified service provider, investment entity or financial product.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>A provision in the governing rules of an RSE will be void to the extent that it specifies the trustee use particular service providers, entities in which funds may or must be invested or financial products.</p> <p>An exception will apply in the case where the arrangement is specified by law.</p>	<p>The SIS Act allows the governing rules of an RSE to limit choices available to trustees.</p>

Detailed explanation of new law

1.4 This Bill amends the SIS Act to void any provisions in a fund's governing rules that requires the trustee to use a specified service provider investment entity or financial product. [*Schedule 1, item 68, subsections 58A(2), (3) and (4)*]

1.5 The amendments will restore a trustee's discretion to enter into relevant arrangements in the best interests of members.

1.6 The amendments do not require termination of contracts giving effect to arrangements required under a fund's governing rules. However, trustees will be required to determine whether the arrangements are consistent with the obligation to act in the best interests of members. Arrangements that can be demonstrated to be in the best interests of members can continue. Arrangements determined not to be in members' best interests will not be able to continue when the current period of a relevant contract comes to an end.

1.7 If the costs of changing from the current service provider outweigh potential benefits to members then it is possible for trustees to conclude that the arrangement is in the best interests of members and no change would be required.

1.8 The requirements for selecting service providers in the members' best interests will be supported by prudential standards. APRA has released its draft superannuation prudential standards on a range of topics including conflicts of interest and outsourcing.

1.9 The amendment will not apply to self managed superannuation funds (SMSFs). [*Schedule 1, item 68, subsection 58A(1)*]

1.10 An exception will apply in the case where the limitation is specified by law. [*Schedule 1, item 68, subsection 58A(5)*]

Application and transitional provisions

1.11 The amendment will apply from 1 July 2013.

Chapter 2

Infringement notices

Outline of chapter

- 2.1 Schedule 1 to this Bill amends the SIS Act to provide APRA with the power to issue infringement notices for certain breaches of the SIS Act.
- 2.2 All legislative references in this chapter are to the SIS Act unless otherwise stated.

Context of amendments

- 2.3 APRA currently has the power to issue infringement notices under the *Financial Sector (Collection of Data) Act 2001* (FSCOD Act). The use of infringement notices in this context has resulted in substantial improvement in the timeliness of lodgement of regulatory returns.
- 2.4 The Review recommended (recommendation 10.4) that APRA be given an administrative power to impose infringement notices as an alternative to criminal prosecution for selected SIS Act provisions.
- 2.5 Infringement notices provide regulators with a simple and flexible tool for dealing with non-compliance as an alternative to court action, which can be costly and time consuming for all parties.

Summary of new law

- 2.6 APRA will be able to issue infringement notices for minor and straight-forward breaches of the SIS Act.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
APRA will have an administrative power to issue infringement notices for a broader range of breaches of the	APRA currently has a power under Division 3 of the FSCOD Act to issue infringement notices in lieu of

<i>New law</i>	<i>Current law</i>
SIS Act.	prosecution for certain offences under that Act. APRA also has power (along with the Commissioner of Taxation) to issue infringement notices under section 252B of the SIS Act in relation to trustees of funds that have not notified their status as either an SMSF or APRA-regulated fund.

Detailed explanation of new law

2.7 This Bill inserts a new Part 22 into the SIS Act to provide APRA with the power to issue infringement notices for certain breaches of the SIS Act. *[Schedule 1, item 109, Part 22]*

2.8 A person who receives an infringement notice can choose to pay the amount as an alternative to having court proceedings brought against them for contravention of the provision. If the person chooses not to pay the amount, proceedings can be brought against them in relation to the contravention.

2.9 The areas of the SIS Act to which infringement notices will apply include: not putting contributions into a MySuper product in cases where the member has not given the trustee a direction in writing that the contribution is to be invested under one or more specified investment options; not notifying as soon as practicable each beneficiary about an acting trustee's appointment and not meeting APRA's deadline for receipt of a report relating to an investigation. *[Schedule 1, item 109, subsection 223A(1)]*

2.10 Provisions in the SIS Act jointly administered by APRA and the ATO will also be enforceable under this Part, except where the offence relates to an SMSF. These include: certain regulated superannuation funds accepting contributions by an employer-sponsor contrary to the Regulator's written notice to the fund's trustee; and an employer not paying a trustee the amount of the deduction from salary or wages before the end of the 28 day period beginning immediately after the end of the month in which the deduction was made. *[Schedule 1, item 109, subsection 223A(2)]*

2.11 Further offences may be included by way of regulations. *[Schedule 1, item 109, subsection 223A(3)]*

2.12 The Chair of APRA will determine which APRA staff members will have the power to issue infringement notices. Where they are determined by class, the Chair must be satisfied that persons of that class have suitable training or experience to properly exercise the powers of an infringement officer. *[Schedule 1, item 109, sections 223B and 223C]*

2.13 The Chair of APRA may delegate powers and functions for the purpose of determining infringement officers to an APRA member or an executive general manager or equivalent. *[Schedule 1, item 109, section 223D]*

2.14 An infringement notice may be given where an infringement officer has reasonable grounds to believe that a person has contravened an enforceable provision. *[Schedule 1, item 109, section 224]*

2.15 APRA has a 12 month limit within which infringement notices must be given. *[Schedule 1, item 109, subsection 224(2)]*

2.16 An infringement notice must relate to a single contravention of a single provision except in four cases. The first is where the provision requires something to be done within a particular period or before a particular time. The second is where the person fails (or refuses) to do the required thing within the required time. The third is where failure or refusal occurs on more than one day and the fourth is where each contravention is constituted by the failure or refusal on one of those days. *[Schedule 1, item 109, subsections 224(3) and (4)]*

2.17 The notice must include a range of particulars including a unique identifying number, the day on which it is given, the amount that is payable, the name of the person to whom the notice is given, the name of the infringement officer, a statement that payment of the amount is not an admission of guilt or liability, a statement that the person may choose not to pay the amount and what the consequences are, and it must set out how the notice can be withdrawn. *[Schedule 1, item 110, subsection 224A(1)]*

2.18 The amount of an infringement notice is one-fifth of the maximum penalty that a court could impose on the person for that contravention. *[Schedule 1, item 109, subsection 224A(2)]*

2.19 There is a 28 day limit for paying infringement notices. However, it is possible to apply for an extension of time to pay the amount. *[Schedule 1, item 109, paragraph 224A(1)(h) and section 224B]*

2.20 An infringement notice may be withdrawn after taking into account a number of factors including written representations seeking the withdrawal and the circumstances of the alleged contravention. Where a notice is withdrawn, notice must be given to the person. *[Schedule 1, item 109, section 224C]*

2.21 Infringement notices are designed to provide a fast and effective remedy which is in proportion to the alleged breach. Once an infringement notice is paid, any liability of the person for the offence specified in the notice is taken to be discharged, and the person is not regarded as having been convicted of the offence specified in the notice. *[Schedule 1, item 109, section 224D]*

2.22 Amongst other things, new Part 22 does not require an infringement notice to be given to a person for an alleged contravention of an enforceable provision, nor does it prevent the giving of two or more infringement notices to a person or limit the court's discretion to determine penalty amounts. *[Schedule 1, item 109, section 224E]*

2.23 The Bill inserts the definition of 'APRA staff member' into subsection 10(1). *[Schedule 1, item 31, subsection 10(1)]*

2.24 Section 252B, which previously detailed the regime for contravention notices, is repealed as contravention notices have now been replaced with the infringement notice regime at Part 22. *[Schedule 1, item 110, section 252B]*

2.25 Section 194A inserts an additional offence for continuing offences under the Act to discourage continued contravention. Continuing to contravene a civil penalty provision is taken to be a separate contravention of the provision which has been breached each day the breach continues. This section is only applicable to civil penalty provisions. *[Schedule 1, item 108, section 194A]*

2.26 At section 4, an item titled 'infringement notices' is inserted into the table. *[Schedule 1, item 27, section 4]*

2.27 Subparagraph 6(1)(a)(x) is amended to give APRA the general administration of the infringement notice scheme being inserted at Part 22.

Application and transitional provisions

2.28 The changes apply to contraventions that occur on or after 1 July 2013. *[Schedule 1, items 122 and 123]*

Chapter 3

Reasons for decisions and Superannuation Complaints Tribunal time limits

Outline of chapter

3.1 Schedule 1 to this Bill amends the SIS Act to require superannuation trustees to provide eligible persons, on request, with the reasons for decisions made in relation to a complaint.

3.2 The *Superannuation (Resolution of Complaints) Act 1993* (SRC Act) is amended to increase the time limits within which beneficiaries can lodge complaints with the Superannuation Complaints Tribunal (SCT) regarding total and permanent disability (TPD) claims.

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

Context of amendments

3.4 The Review was concerned that fund members frequently were not able to obtain information from trustees in relation to decisions that affected them. The Review recommended (recommendation 2.9) amending the SIS Act to require a trustee to provide members with reasons for its decision in relation to complaints.

3.5 The Review was concerned that time limits for lodging complaints to the SCT were too short and out of alignment with related time limits for making claims through the courts. The Review recommended (recommendation 5.7) amending the SRC Act to allow a longer time for the SCT to consider complaints in respect of TPD claims.

Summary of new law

3.6 The SIS Act is amended to require superannuation trustees to, on request, provide an eligible person with the reasons for decisions in relation to a complaint.

3.7 The SRC Act is amended to increase the time limits for making claims in relation to total and permanent disability to the SCT.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Trustees will be required to provide reasons for decisions in relation to death benefit complaints. In relation to other complaints, require trustees to provide reasons for decisions when requested.	A trustee must ensure they take reasonable steps to ensure an affected beneficiary has the right to make a complaint and for it to be properly considered. Superannuation trustees are not required to provide a reason for their decision in relation to an eligible person's complaint.
The time limit for members to lodge a complaint with the SCT in respect of TPD claims is increased to six years after the decision. Where a person has permanently ceased employment, and lodged a claim within two years of ceasing employment, they will have four years from the decision to make a complaint.	The SCT can only deal with complaints about a trustee's handling of a TPD claim if they lodged it with the SCT within two years of a trustee decision or in the case where a beneficiary permanently ceases employment because of the injury or illness in which the TPD claim relates, that the claim was lodged with the trustee within two years of the beneficiary ceasing employment.

Detailed explanation of new law

Death benefit complaints

3.8 The SIS Act is amended to provide that if an eligible person, which includes a beneficiary, executor of the estate of a former beneficiary, or a person that has an interest in the death benefit, makes a complaint that relates to the payment of a death benefit then the person will be given written reasons for the decision when the person is given notice of the decision. *[Schedule 1, item 70, subsection 101(1)]*

3.9 Where no decision in relation to a death benefit complaint has been made within 90 days, and an eligible person requests reasons for that non-decision, written reasons are to be given to the person within 28 days after the request is made. *[Schedule 1, item 70, subparagraph 101(1)(c)(ii) and paragraph 101(1)(e)]*

3.10 If a trustee does not comply with the provision, they can be given a direction by APRA to comply. Failure to comply with a direction can lead to cancellation of a licence.

Other complaints

3.11 Superannuation trustees will also be required to provide eligible persons, on request, with reasons for a decision (or non-decision) in relation to complaints other than those relating to death benefits. *[Schedule 1, item 70, paragraph 101(1)(d)]*

3.12 In both instances, the written reasons are to be given to the person within 28 days after the request is made. *[Schedule 1, item 70, paragraph 101(1)(e)]*

3.13 If a trustee does not comply with the provision, they can be given a direction by APRA to comply. Failure to comply with a direction can lead to cancellation of a licence.

Time limits for total and permanent disability claims

3.14 The SRC Act is amended to increase the time limits within which beneficiaries can lodge complaints with the SCT regarding TPD claims.

3.15 Presently, should a member wish to lodge a complaint with the SCT in relation to a trustee decision on a TPD claim, subsection 14(6A) of the SRC Act requires the complaint to be made to the SCT within two years of the trustee's decision to which it relates.

3.16 The amendment increases the time limit within which a beneficiary can lodge a TPD complaint with the SCT from two years to six years from the time the decision to which the complaint relates was made. *[Schedule 1, item 119, subsection 14(6A)]*

3.17 Where a person has permanently ceased employment, the time period will only be increased to four years, because in that case, the person has already had two years from ceasing employment to lodge their claim. *[Schedule 1, item 119, paragraph 14(6A)(a)]*

3.18 The amendment will not change the time limits in subsection 14(6B) of the SRC Act.

Application and transitional provisions

3.19 The changes apply from 1 July 2013.

3.20 This will cover decisions made on or after 1 July 2013 and in the case of no decision being made, where the 90 day period ends on or after 1 July 2013. *[Schedule 1, Part 2, item 121]*

3.21 The amendment made by item 119 applies in relation to decisions made on or after 1 July 2013. *[Schedule 1, Part 2, item 124]*

Chapter 4

Dual regulated entities

Outline of chapter

4.1 The chapter explains the new obligations for RSE licensees that also manage non-superannuation registered managed investment schemes to meet *Corporations Act 2001* (Corporations Act) requirements for adequate resources and risk management systems.

4.2 All references in this chapter are to the Corporations Act unless otherwise specified.

Context of amendments

4.3 Some RSE licensees, in addition to managing RSEs, are also the responsible entities of one or more non-superannuation registered managed investment schemes.

4.4 In addition to complying with the SIS Act and SIS Regulations, these entities are also required to hold an Australian Financial Services Licence issued by the Australian Securities and Investments Commission (ASIC). As a result, these entities are regulated by both APRA and ASIC.

4.5 The holders of financial services licenses must comply with a range of general obligations, set out in section 912A of the Corporations Act. These include obligations to have available adequate resources (including financial, technological and human resources) and to have adequate risk management systems. These requirements are set out in paragraphs 912A(1)(d) and (h) respectively.

4.6 Currently, bodies regulated by APRA, including RSE licensees, are exempt from the requirements set out in paragraphs 912A(1)(d) and (h). RSE licensees are required to satisfy risk management requirements and requirements for adequate resources (human, technological and financial) imposed under the SIS Act and SIS Regulations. These requirements are not, however, designed to ensure that adequate resources or risk management systems are maintained in respect of the non-superannuation business of RSE licensees that also manage registered managed investment schemes. In particular, the Review recommended (recommendation 6.1(e)) that dual regulated entities meet Corporations Act financial resource requirements.

4.7 To address this gap in regulatory coverage, the Corporations Act will be amended so that RSE licensees that also manage non-superannuation registered managed investment schemes must comply with Corporations Act requirements to have available adequate resources and have adequate risk management systems. For these entities, the requirement to have adequate risk management systems will not include risks that relate solely to the operation of an RSE by the entity.

Summary of new law

4.8 The Bill requires RSE licensees that are also responsible entities of registered managed investment schemes to comply with Corporations Act requirements on adequate resources and risk management systems.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
RSE licensees that are also responsible entities for registered managed investment schemes must comply with Corporations Act requirements to have available adequate resources and have adequate systems for managing their risks, except for those risks that relate solely to the operation of an RSE by these entities.	RSE licensees that are also responsible entities for registered managed investment schemes are exempt from Corporations Act requirements to have available adequate resources and have adequate risk management systems.

Detailed explanation of new law

Requirement to have adequate resources

4.9 Existing paragraph 912A(1)(d) requires financial services licensees (which include the responsible entities of non-superannuation registered managed investment schemes) to have adequate resources (including financial, technological and human resources), unless they are a body regulated by APRA.

4.10 The effect of the exemption for APRA-regulated bodies is that an RSE licensee which also manages one or more non-superannuation registered managed investment schemes only has to satisfy requirements for adequate resources (human, technological and financial) imposed

under the SIS Act and SIS Regulations. These requirements are not designed to ensure that adequate resources are maintained in respect of the non-superannuation business of the entity that is the RSE licensee. Removing the exemption from the Corporations Act adequate resources requirement for these entities will address this regulatory gap. *[Schedule 1, item 4, paragraph 912A(1)(d) and item 6, subsections 912A(4) and (6)]*

Requirement to have adequate risk management systems

4.11 Existing paragraph 912A(1)(h) requires financial services licensees to have adequate risk management systems, unless they are a body regulated by APRA. An RSE licensee which also manages registered managed investment schemes only has to satisfy risk management requirements imposed under the SIS Act. As above, these requirements are focused on the risks relating to the RSE business and do not fully capture risks relating to the non-superannuation business of the entity that is the RSE licensee. Amending the Corporations Act to require these entities to have adequate systems for managing their risks, except for those that relate solely to the operation of an RSE by these entities will address this regulatory gap. *[Schedule 1, item 5, paragraph 912A(1)(h) and item 6, subsections 912A(5) and (6)]*

4.12 The Bill does not alter the arrangements for APRA-regulated bodies other than RSE licensees that are also responsible entities of registered managed investment schemes.

Application and transitional provisions

4.13 The obligations to comply with Corporations Act requirements for adequate resources and risk management systems will begin on 1 July 2014.

Chapter 5

Actions for breaches of directors' duties

Outline of chapter

- 5.1 This Chapter outlines amendments that will:
- require persons who have suffered a loss due to a director's contravention of duties under the SIS Act to seek leave from the Court before bringing action against directors.
 - Extend the legal defence available for trustees and directors in court proceedings to include proceedings involving breaches of MySuper obligations.
- 5.2 All references in this Chapter are to the SIS Act unless otherwise stated.

Context of amendments

5.3 The Trustee Obligations and Prudential Standards Act separately identifies the duties of directors of superannuation funds and imposes extra obligations on directors and trustees of funds with MySuper products.

5.4 The aim of the changes, which will apply from 1 July 2013, is to improve the governance of superannuation funds. This was in response to concerns raised in the Review that accountabilities in the system had become obscured by the corporate trustee structure, and that there have been difficulties for trustees and their directors in understanding what is expected of them.

5.5 While the superannuation industry has supported heightened obligations and the need for improved accountability of directors, concerns have been raised about the potential for frivolous and vexatious legal actions being brought against directors.

Summary of new law

5.6 This Bill will require persons who have suffered a loss due to a director's contravention of duties under the SIS Act to seek leave from the Court before bringing action against directors.

5.7 In deciding whether to grant an application for leave, the Court must take into account whether the applicant is acting in good faith and there is a serious question to be tried.

5.8 The Bill also extends the defence of having acted with reasonable precaution in section 323 to cover breaches of MySuper obligations by trustees and directors.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Before being able to bring an action against an individual director for a breach of a director duty or MySuper obligation, a member must be granted leave by the Court.</p> <p>In making its decision, the Court will take into account whether the member is acting in good faith and that there is a serious question to be tried.</p>	<p>Members can take action against directors for breach of duties or MySuper obligations.</p>
<p>Trustees and directors have a defence to a contravention of a duty or MySuper obligation if the contravention was due to reasonable mistake or due to the fault of another and they acted with reasonable precaution and applied due diligence.</p>	<p>Trustees and directors have a defence to a contravention of a duty if the contravention was due to reasonable mistake or due to the fault of another and they acted with reasonable precaution and applied due diligence.</p>

Detailed explanation of new law

Requirement to seek leave for pursuing a breach of directors' duties

5.9 If a person seeks to bring an action against a director under subsection 55(3) for loss due to contravention by a director of their duties

at section 52A, that person needs to seek leave from the Court. *[Schedule 1, item 65, subsection 55(3) and item 66, subsection 55(4A)]*

5.10 Before granting leave, the Court will take into account whether the person is bringing the action against the director in good faith and that in bringing the action there is a serious question to be tried. This is separate from demonstrating there is a prima facie case for the action, as the Court only needs to be satisfied that there is a serious legal question to be asked. A failure to demonstrate these two elements to the Court will result in an inability of the affected person to bring action against the individual director for the breach of duties as alleged. *[Schedule 1, item 66, subsection 55(4B)]*

5.11 The existing provisions for members taking action against trustees for breach of their duties remain. *[Schedule 1, item 62, before subsection 55(1), item 63 before subsection 55(2), item 64 before subsection 55(3) and item 67 before subsection 55(5)]*

Requirement to seek leave for pursuing a breach of directors' MySuper obligations

5.12 The MySuper obligations for directors are contained in section 29VO and require directors of funds with a MySuper product to exercise a reasonable degree of care and diligence to ensure that the corporate trustee carries out its MySuper obligations.

5.13 The Bill introduces a requirement to seek leave from the Court where a person seeks to bring an action against a director under subsection 29VPA(4) for loss due to contravention by a director of their MySuper obligations at section 29VO. *[Schedule 1, item 43, section 29VPA]*

5.14 In deciding whether to grant leave, the Court will take into account two things. The first is whether the person is bringing the action against the director in good faith and the second is that in bringing the action, there is a serious question to be tried. *[Schedule 1, item 43, subsection 29VPA(5)]*

5.15 The existing provisions for members taking action against trustees for breach of their MySuper obligations remain. *[Schedule 1, item 43, section 29VP]*

5.16 The MySuper obligations for trustees are contained in section 29VN and include a requirement for trustees to promote the financial interests of the beneficiaries of the fund that hold the MySuper product. For clarity, this requirement applies to the financial interests of the membership of the MySuper product as a whole, rather than the interests of each individual member.

Defences for a breach of MySuper obligations

5.17 The Bill expands the defence in section 323 to cover MySuper obligations.

5.18 Directors will be able to utilise the defence where a person brings legal action under subsection 29VPA(4) for a breach of the director's MySuper obligations if their contravention was due to reasonable mistake, reasonable reliance on information supplied by another, or the contravention was due to the act of another, an accident or something outside of the director's control. Where a director or trustee seeks to rely on one of last three reasons to explain contravention, then it must also be demonstrated that the director took reasonable precautions and exercised due diligence to avoid the contravention. *[Schedule 1, item 111, paragraph 323(1)(b)]*

5.19 Access to the defence in section 323 will also be expanded to cover trustees MySuper obligations in subsection 29VP(3). *[Schedule 1, item 111, paragraph 323(1)(b)]*

5.20 If a director or trustee seeks to rely on reasonable mistake or reasonable reliance on information supplied by another, there is no requirement to also prove there were reasonable precautions taken and due diligence was exercised.

Application and transitional provisions

5.21 These provisions commence on 1 July 2013.

Chapter 6

Other measures and consequential amendments

Outline of chapter

- 6.1 This Chapter outlines the remaining changes contained in the Bill.
- 6.2 All legislative references in this chapter are to the SIS Act unless otherwise stated.

Context of amendments

- 6.3 The Review recommended the removal of restrictions on director voting (recommendation 2.8) and clarifying the definition of superannuation contributions in the Corporations Act (recommendation 6.12).
- 6.4 As this Bill is the fourth tranche of legislation implementing the Stronger Super, MySuper and governance reforms, it also includes a number of changes to reflect requirements that are moving to prudential standards, as well as a number of other consequential amendments.

Summary of new law

- 6.5 The Bill ensures that directors of corporate trustees (and individual trustees) are only prohibited from voting on any company business in limited circumstances including where a conflict of interest arises and also clarifies the definition of 'superannuation contribution'.
- 6.6 It also makes consequential amendments (including in relation to acting trustees, administration fee discounts, moving fitness and propriety and auditor and actuary requirements to the prudential standards, the FHSA Act and the Corporations Act).

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<u>Removing voting limitations</u>	
Provisions in a corporate trustee's governing rules that prohibit a director or individual trustee from voting on a matter relating to the superannuation fund (except where a conflict of interest or duty exists) will be made ineffective.	A director of a corporate trustee may be prohibited from voting on company business in the event of a conflict of duty or interest. In addition, nothing in the SIS Act prevents a corporate trustee's governing rules from prohibiting directors from voting on company business in other circumstances. Similarly nothing in the SIS Act prevents an individual trustee's governing rules from prohibiting an individual trustee from voting on business in other circumstances as well.
<u>Definition of superannuation contribution</u>	
For the avoidance of doubt, the definition of superannuation contribution in the Corporations Act is clarified to ensure it includes defined benefits.	Superannuation contribution is defined in subsection 556(2) of the Corporations Act.
<u>Consequential — First Home Saver Accounts Act (FHSA Act)</u>	
Consequential amendments to the FHSA Act, including amendments to reflect the changes to the covenants and introduction of prudential standards as a result of the Trustee Obligations and Prudential Standards Act.	The FHSA Act contains references to provisions of the SIS Act prior to legislation implementing the Government's Stronger Super reforms, including the Trustee Obligations and Prudential Standards Act.
<u>Consequential — MySuper</u>	
Authorisation for a particular MySuper product given to an RSE licensee will continue in effect where an acting trustee is appointed. Similarly, acting trustees are allowed to operate eligible roll over funds in place of the trustee who has been removed.	Authorisation for a MySuper product is given to the RSE licensee of a fund. Where an acting trustee is appointed, this would constitute a new RSE licensee who is not authorised to offer the MySuper product.
Where a trustee offers a tailored	A trustee must place a member's

<i>New law</i>	<i>Current law</i>
MySuper product, the trustee must direct all contributions from members eligible to hold a beneficial interest in that tailored MySuper product into that tailored MySuper product, unless the member has directed the trustee that all or part of their contributions be invested in one or more other investment options.	contributions into a MySuper product unless the member has directed the trustee that all or part of their contributions be invested in one or more other investment options.
A trustee cannot charge different administration fees to members of a tailored large employer MySuper product.	A trustee may charge a different administration fee with respect to employees of a particular employer.
The switching advice requirements in the Corporations Act apply where advice is given to reduce or dispose of interest in a MySuper product.	The switching advice requirements in the Corporations Act apply where advice is given to reduce, replace or dispose of an interest in a financial product.
Where a MySuper member has died, the trustee will be able to move the member's interest in a MySuper product to another class of beneficial interest in the fund.	It is not possible to move MySuper amounts without written consent of the member.
The RSE licensee will have to pay contributions to a MySuper product unless the member has directed the RSE licensee to pay the contributions into one or more specified investment options.	The RSE licensee is to pay contributions to a MySuper product unless the member has directed the RSE licensee to pay the contributions to a specified choice product.
<u>Consequential — Fit and proper</u>	
Reference to the criteria for fitness and propriety, as set out in the prudential standard are inserted into certain SIS Act provisions. These include: provisions relating to disqualification (sections 126H and 130D), to enable the court to take those criteria into account; provisions relating to the removal of member representative and independent trustees (sections 107 and 108); and certain other provisions concerning the removal or appointment of persons (sections 131AA and 134) and referral to a professional association	The Court can disqualify an individual if it is not satisfied that the individual is a fit and proper person. 'Fit and proper' is not defined in the SIS Act.

<i>New law</i>	<i>Current law</i>
(section 131A).	
<u>Consequential — Auditor and actuary</u>	
<p>APRA will make a prudential standard in relation to the audit of RSEs and will also determine eligibility criteria for, and functions and duties of, auditors and actuaries in the prudential standards.</p> <p>As a result there will be a number of consequential amendments to the SIS Act to: differentiate between auditors and actuaries of RSEs and SMSFs so that (among other things) APRA can determine audit requirements for RSEs in a prudential standard; separate out the auditing and record-keeping requirements in relation to RSEs and SMSFs; allow APRA to determine eligibility criteria for auditors and actuaries who perform work in relation to RSEs; and make consequential amendments to other provisions relating to auditors and actuaries to reflect the fact that RSE licensees and auditors and actuaries will be required to comply with the prudential standards.</p>	<p>Audit and record-keeping requirements for RSEs (and SMSFs) are currently set out in the SIS Act. The Act currently defines ‘approved auditor’ and ‘actuary’.</p>
<u>Consequential- MySuper Core Provisions Act</u>	
<p>APRA will have the ability to assess applications for MySuper against the enhanced trustee obligations for MySuper products based on expected compliance with those obligations.</p>	<p>The enhanced trustee obligations in relation to MySuper products will come into effect on 1 July 2013.</p>

Detailed explanation of new law

Removing voting limitations

6.7 The SIS Act will be amended to ensure directors of corporate trustees (and individual trustees) are only prohibited from voting on company business when the prohibition relates to a conflict of interest.

6.8 These amendments provide that a provision in the governing rules of the regulated superannuation fund is void to the extent that it precludes a director of a corporate trustee or an individual trustee from voting on a matter relating to the fund. *[Schedule 1, item 69, subsections 68C(1) and (2) and 68D(1) and (2)]*

6.9 Exceptions to this general rule exist where the person has a material personal interest or a conflict of duty or interest. *[Schedule 1, item 69, subsections 68C(3) and 68D(3)]*

6.10 The changes do not over-ride the requirements in Part 9 of the SIS Act. *[Schedule 1, item 69, paragraphs 68C(3)(e) and 68D(3)(e)]*

Definition of superannuation contributions

6.11 The definition of ‘superannuation contribution’ in the Corporations Act is clarified to ensure it includes defined benefits. *[Schedule 1, item 2, subsection 556(2)]*

6.12 Both funds and schemes including defined benefits are covered in the definition of superannuation contribution at subsection 211(3) of the Corporations Act. *[Schedule 1, item 1, paragraph 211(3)(a)]*

6.13 The Bill makes the same amendment at paragraph 596AA(2)(b) to update the reference to include fund or scheme, including defined benefit. *[Schedule 1, item 3, paragraph 596AA(2)(b)]*

First Home Saver Accounts Act

Amendments to the First Home Saver Accounts Act 2008

6.14 Section 18 of the FHSA Act is amended to include a definition of responsible officer. *[Schedule 1, item 13, section 18]*

6.15 The Bill repeals existing section 93 of the FHSA Act and replaces the existing capital requirements for applicants seeking authorisation as an FHSA provider with a requirement that an applicant satisfy the financial requirements set out in prudential standards under the FHSA Act. The existing capital requirements employ capital requirements for the trustees of public offer superannuation funds which have been repealed by the Trustee Obligations and Prudential Standards Act. *[Schedule 1, item 14, section 93]*

6.16 Subsection 114(2) of the FHSA Act is amended to apply the provisions of the SIS Act to persons involved in the management of an FHSA provider in the same way that the SIS Act provisions apply to a

responsible officer of an RSE licensee that is a trustee of a public offer superannuation fund. *[Schedule 1, item 15, paragraph 114(2)(aa)]*

6.17 The Bill amends paragraph 115(b) of the FHSA Act and inserts a new paragraph 115(ba) to include parts 2C, 3A and 3B of the SIS Act, which deal respectively with MySuper products, prudential standards and data and payment regulations and standards, in the list of SIS Act provisions that do not apply for the purposes of the FHSA Act. *[Schedule 1, item 16, paragraph 115(b), item 17, paragraph 115(ba), and item 18, paragraph 115(b)]*

6.18 Paragraph 115(d) of the FHSA Act is amended to include subsection 52(7) and section 55B of the SIS Act in the list of SIS Act provisions that do not apply for the purposes of the FHSA Act. Subsection 52(7) of the SIS Act deals with the requirement for superannuation fund trustees to comply with insurance covenants. Section 55B of the SIS Act requires the governing rules of superannuation funds to be read to permit certain elections. *[Schedule 1, items 19 and 20, paragraph 115(d)]*

6.19 The Bill amends paragraph 115(g) of the FHSA Act to include Part 11A of the SIS Act, which deals with fee rules, in the list of SIS Act provisions that do not apply for the purposes of the FHSA Act. *[Schedule 1, item 21, paragraph 115(g)]*

6.20 Paragraph 115(k) of the FHSA Act is amended to include Parts 33 and 34 of the SIS Act, which deal respectively with transitional arrangements for MySuper products and eligible rollover funds, in the list of SIS Act provisions that do not apply for the purposes of the FHSA Act. *[Schedule 1, items 22 and 23, paragraph 115(k)]*

6.21 The Bill amends section 116 of the FHSA Act to treat references to prudential standards in applied provisions of the SIS Act as references to prudential standards made under the FHSA Act. *[Schedule 1, item 24, paragraph 116(ba)]*

6.22 Subsection 119(3) of the FHSA Act is amended to replace the reference to paragraph 146(1)(d) of the SIS Act with a reference to paragraph 146(d) of the SIS Act. *[Schedule 1, item 25, subsection 119(3)]*

6.23 The Bill repeals subsections 120(2) to 120(7) of the FHSA Act and substitutes a new subsection 120(3). This reflects changes to the investment covenants which superannuation fund trustees must comply with as a result of the Trustee Obligations and Prudential Standards Act. *[Schedule 1, item 26, subsection 120(3)]*

6.24 The Bill also introduces new subsections 120(2) and (4) of the FHSA Act so that references to a prudent superannuation trustee in paragraph 52(2)(b) of the SIS Act and to a prudent superannuation entity

director in paragraph 52A(2)(b) of the SIS Act are references, respectively, to a prudent FHSA provider and a prudent director of an FHSA provider. *[Schedule 1, item 26, subsections 120(2) and (4)]*

Consequential- MySuper

Acting trustees

6.25 In some cases, APRA may remove or suspend a trustee. Where the suspended or removed trustee was authorised for a particular MySuper fund that authorisation will continue to be effective for the acting trustee. Section 139A facilitates the appointment of acting trustees and allows contributions to continue to be made to the fund. This continuation of authorisation is limited to the time the RSE licensee is the acting trustee. An acting trustee must make the elections in sections 29SAA, 29SAB and 29SAC (which includes the election to transfer accrued default amounts) before it will be able to be appointed as an acting trustee. *[Schedule 1, item 106, section 139A]*

6.26 New section 139B allows acting trustees to operate eligible roll over funds in place of the trustee who has been removed, where they have made the elections in section 242B (to transfer amounts if authorisation is cancelled) and 242C (not to charge members for payment of conflicted remuneration). *[Schedule 1, item 107, section 139B]*

6.27 Paragraph 29U(2)(b) omits 'the RSE licensee was authorised' to substitute it with 'authority was given'. *[Schedule 1, item 40, paragraph 29U(2)(b)]*

Large employer exemption

6.28 Where a trustee is authorised to offer a tailored MySuper product for employees of a particular employer, contributions made by the employer for those employees must be paid into that tailored MySuper product unless the employee has directed the trustee in writing that all or part of their contributions to be invested in one or more investment options. A contravention of subsection 29WB(2) is an offence of strict liability. This ensures that employees appropriately have their contributions placed in the MySuper product tailored for their benefit, rather than any other MySuper product offered by the trustee. This is to prevent contributions of a sub-set of employees being paid into a tailored MySuper product while other employees of the same employer have their contributions paid into a generic MySuper product. *[Schedule 1, item 47, section 29WB]*

6.29 References are updated to include both 29WA and 29WB. *[Schedule 1, item 38, paragraph 29T(1)(j) and item 41, paragraph 29U(2)(e)]*

Administration fee exemption

6.30 Section 29VB of the MySuper Core Provisions Bill allows RSE licensees to charge a different administration fee to MySuper members who are employees of a particular employer. This Bill prevents different administration fees being charged in relation to a tailored large employer product. For example, the employees of an associate of the large employer will not be able to have a different administration fee to the employees of the large employer. For these MySuper products, all members of the product must be charged the same administration fee.

[Schedule 1, item 42, paragraph 29VB(1)(aa)]

Obligation to pay contributions to a MySuper product

6.31 The MySuper Core Provisions Bill requires an RSE licensee to pay contributions to a MySuper product unless the member has directed the RSE licensee to pay the contributions to a specified choice product. This provision is amended so that an RSE licensee must pay contributions to a MySuper product unless the member has directed the RSE licensee to pay the contributions into one or more specified investment options.

[Schedule 1, item 44, paragraph 29WA(1)(c) and item 46, subsection 29WA(4)]

6.32 This amendment clarifies that it is necessary for a member to make a direction to have contributions placed in a particular investment option, and it is not sufficient that the member has joined the fund by selecting one product offered by the fund. This is necessary because a product offered by a superannuation fund is one way in which a member may have joined the fund and does not represent a decision to have contributions made to an investment option other than a MySuper product. However, to be clear, this amendment does not prevent a member providing a direction to pay contributions to a MySuper product.

6.33 Subsection 29WA(2) is amended to omit “election has been made” to substitute it with “direction has been given”. *[Schedule 1, item 45, subsection 29WA(2)]*

Switching advice

6.34 Section 947D of the Corporations Act requires a provider of financial advice that recommends a client replace a financial product with another financial product to include certain things in their Statement of Advice to their client, including a description of the charges that the client will incur, any benefits they will receive from switching financial products and any other significant consequences for the client (this is referred to as switching advice).

6.35 A MySuper product and investment options of a choice product can be offered to members within a single financial product. Therefore, subsection 947D(1) is amended to ensure that these switching advice requirements apply where advice is given to reduce or dispose of an interest in a MySuper product. *[Schedule 1, item 7, paragraph 947D(1)]*

Deceased members

6.36 The SIS Act will be amended to permit a member's beneficial interest in the MySuper product to be moved to another class of beneficial interest in the fund where the member has died and the replacement meets any criteria prescribed in the regulations. *[Schedule 1, item 39, paragraph 29TC(1)(g)]*

6.37 Giving trustees discretion will mean the trustee could put the money into a cash option such as bank deposits or Government bonds. This could be done to reduce risk and preserve the balance accumulated by the member until a beneficiary can be identified and the benefits paid out, which in some cases may take several years.

6.38 The definition of 'MySuper product' is inserted into subsections 947D(5) and 1017B(9). *[Schedule 1, item 8, subsection 947D(5) and item 10, subsection 1017B(9)]*

Consequential - fit and proper requirements

6.39 The Trustee Obligations and Prudential Standards Act introduced the power for APRA to make prudential standards.

6.40 APRA released draft prudential standards in April 2012 for consultation including the fit and proper prudential standard. The intended release date for the standards is December 2012 and they will come into effect on 1 July 2013.

6.41 Trustees will be required to ensure that rules relating to the removal of a member representative, and any independent trustees or director, allow the persons to be removed for failing to meet fitness and propriety criteria set out in the prudential standards. This change is necessary to align with the appointment and removal procedures in the Act with the requirements under the fit and proper prudential standard for RSE licensees. *[Schedule 1, item 71, subparagraph 107(2)(a)(ii)(DA) and item 72, subparagraph 108(2)(a)(iia)]*

6.42 The Court is currently able to take into account fitness and propriety when deciding on disqualification of an individual from being or acting as a trustee or responsible officer listed at subsection 126H(2). The section will be amended to ensure that the Court may give consideration

to any criteria for fitness and propriety in the prudential standards relevant to the trustee or responsible officer under the prudential standards.

[Schedule 1, item 73, subsection 126H(6A)]

6.43 Similarly, the Court is able to take into account fitness and propriety in deciding whether an auditor or actuary should be disqualified under section 130D. The section will be amended to ensure that the Court has power to take into account relevant criteria for fitness and propriety, as well as relevant eligibility criteria, in the prudential standards. *[Schedule 1, item 86, subsection 130D(5A)]*

6.44 APRA will be able to take into account any criteria for fitness and propriety in the prudential standards that are relevant to the appointment of an auditor or actuary in deciding whether grounds to end appointment are present under paragraph 131AA(2)(b). APRA's prudential standard on fitness and propriety is expected to include the following criteria: competence, character, diligence, experience, honesty, integrity and judgment to perform properly the duties of the responsible person's position. As noted above, the final prudential standard is expected to be released in December 2012. *[Schedule 1, item 91, subsection 131AA(2A)]*

6.45 Under section 134, if APRA removes an RSE licensee that comprises a group of individuals from being the trustee of a particular RSE, but APRA is satisfied that one or more members of that group are fit and proper, APRA may appoint those fit and proper persons to be acting trustee. Section 134 is amended so that APRA can take into account any relevant criteria for fitness and propriety in the prudential standards when deciding whether to appoint these persons as acting trustee. *[Schedule 1, item 104, section 134(5)]*

6.46 A number of consequential amendments are being made to ensure the SIS Act contains references to the prudential standards. *[Schedule 1, item 74, subparagraph 129(1)(a)(i), item 75, paragraph 129(1)(b), item 76, paragraph 130(1)(b), item 77, paragraph 130A(ba), item 78, section 130A, item 79, subparagraphs 130C(1)(a)(i) and (ii), item 80, paragraph 130C(1)(b), item 82, subparagraph 130D(4)(a)(i), item 83, subparagraph 130D(4)(a)(iii), item 85, paragraph 130D(5)(a), item 87, paragraph 130D(6)(a), item 90, paragraph 131AA(2)(c), item 93, subparagraph 131A(1)(a)(i), and item 94, subparagraph 131A(1)(a)(iii)]*

Consequential - actuaries and auditors

6.47 The Trustee Obligations and Prudential Standards Act introduced the power for APRA to make prudential standards. It is expected that APRA will make prudential standards going to the conduct of audits of RSEs and setting out eligibility requirements for auditors and actuaries of FSEs. As a result of this, a number of consequential amendments to the SIS Act are required.

6.48 APRA released draft prudential standards in April 2012 for consultation including the audit and related matters prudential standard. The intended release date for the standards in December 2012 and they will come into effect on 1 July 2013.

6.49 In addition to moving requirements to prudential standards, many of the amendments relating to auditors and actuaries are largely as a consequence of the separation of the auditor provisions applying to RSEs and SMSFs. This will require changes to definitions in the SIS Act and also amendments to Part 4.

6.50 This Bill repeals existing section 35A (accounting records of all regulated superannuation entities, including SMSFs) to substitute a new Division 2 which will comprise new sections 35A, 35AB, 35AC and 35AD. These provisions will only apply to RSEs. The new section 35A will therefore deal with accounting records of RSE licensees only. The SMSF accounting record provisions will be contained in section 35AE in Division 3 and section 35C will be amended so that it only applies to SMSFs. The Bill does not affect the operation of the existing provisions relating to SMSFs. *[Schedule 1, item 48, before section 35 item 49, sections 35A, 35AB, 35AC and 35AD]*

6.51 Non-compliance with the new section 35A will be an offence of strict liability. This is not a new strict liability offence as the same treatment is afforded to the existing section 35A. A strict liability offence is necessary as the consequences of contravening this requirement significantly impact APRA's ability to monitor superannuation funds. The consequence of hindered auditing could have a detrimental impact on tracking financial decisions which impacts the fund's members. It is a reasonable expectation that records are kept in an appropriate manner for audit. *[Schedule 1, item 49, subsection 35A(8)]*

6.52 New section 35AB gives auditors of RSEs the power to seek, in writing, documents pertaining to operations of the entity or the RSE licensee of the entity. This new section reflects the existing situation in subsection 35C(2), which will be amended so that it only applies to SMSFs. *[Schedule 1, item 49, section 35AB and item 57, subsection 35C(2)]*

6.53 Non-compliance with the new section 35AB will be a strict liability offence, as it is for trustees of RSEs and SMSFs under the current subsection 35C(2). The audit of superannuation entities provides beneficiaries with a level of assurance that the claimed assets will be available to meet their retirement needs. The auditor has a limited time in which to prepare the audit report. Failure by the trustee to provide necessary records within the time specified in the request would undermine confidence in the audit process. The consequence of hindered auditing could have a detrimental impact on tracking financial decisions

which impacts the fund's members, thus it is appropriate that this remain a strict liability offence in section 35AB. [*Schedule 1, item 49, subsection 35AB(3)*]

6.54 In addition to non-compliance with section 35AB being an offence of strict liability, section 126L of the SIS Act will apply to the obligation to provide a document under the section. Section 126L provides that a person is not entitled to refuse to comply with a requirement under the Act to produce books or information on the ground that this might make the person liable to a penalty by way of disqualification, and the material produced may be admissible in disqualification proceedings. This is necessary for the same reason a strict liability offence is necessary; that the required records are essential to the audit process which is to ensure efficient functioning of the superannuation fund in accordance with the law.

6.55 New section 35AC will apply if an auditor of an RSE is required to be appointed under the prudential standards, or is otherwise required or permitted to be appointed or perform a function or duty under the RSE licensee law. The section will provide that the auditor must meet eligibility criteria specified in the prudential standards and not have been disqualified. The auditor will be required to perform the functions and duties of an auditor that are set out in the RSE licensee law. The RSE licensee law includes the prudential standards. APRA's draft prudential standard on audit, released in April 2012 set out relevant functions and duties of auditors. Section 35AC also requires the trustee to make arrangements necessary to enable the auditor to perform their functions and duties and to ensure that they are removed if the trustee becomes aware that the auditor has ceased to meet the relevant eligibility criteria set out in the prudential standards or is disqualified. [*Schedule 1, item 49, section 35AC*]

6.56 New section 35AD mirrors section 35AC but applies to appointed actuaries rather than auditors. This section also allows the separation of auditor duties from actuary duties and consequently, RSEs and SMSFs. [*Schedule 1, item 49, section 35AD*]

6.57 The Court will have the power to disqualify a person if they acted previously, or are currently acting as the auditor or actuary of an RSE while knowing that they did not meet the criteria set out in the prudential standards. [*Schedule 1, item 84, paragraph 130D(4)(aa)*]

6.58 Paragraph 131AA(2)(ba) mirrors the changes at paragraph 130D(4)(aa) relating to what grounds APRA may find for disqualifying an auditor or actuary. If a person has acted or is acting as an auditor or actuary of an RSE and in addition, knew at the time he or she was acting, that they did not meet the relevant eligibility criteria set out in the

prudential standards, APRA may give a direction requiring the trustee to end the appointment of the person as an auditor or actuary. *[Schedule 1, item 89, paragraph 131AA(2)(ba)]*

6.59 If a person has acted or is acting as an auditor or actuary of an RSE and in addition, knew at the time he or she was acting, that they did not meet the relevant eligibility criteria set out in the prudential standards, APRA may refer the details of the matter to a professional association. *[Schedule 1, item 95, paragraph 131A(1)(aa)]*

6.60 Subsection 131A(1A) provides that APRA may consider any criteria for fitness and propriety in the prudential standards when deciding whether to refer details of a matter to a professional association. APRA may consider any criteria for fitness and propriety that are relevant to the auditor or actuary. *[Schedule 1, item 97, subsection 131A(1A)]*

6.61 Section 36 is repealed as it previously referred to RSEs exclusively. This is no longer necessary given auditors will now need to comply with obligations to provide reports to APRA through prudential standards. Section 35AC now contains a requirement that all auditors to comply with the prudential standards. *[Schedule 1, item 61, section 36 and item 49, section 35AC]*

6.62 Paragraphs 327(aa) and (b) are repealed as a consequence of the repeal of section 36 and the amendments to section 35C. *[Schedule 1, item 112, section 327]*

6.63 ‘Division 3- Obligations for self managed superannuation funds’ and section 35AE is inserted by the Bill. This outlines the type of accounting records SMSFs must keep and mirrors section 35A which now applies only to RSEs. Non-compliance with new section 35AE is not a new strict liability offence as the same treatment has and continues to apply under section 35A. A strict liability offence is necessary as the consequences of contravening this requirement and hindering auditing could have a detrimental impact on tracking financial decisions. It is a reasonable expectation that records are kept in an appropriate manner for audit. *[Schedule 1, item 49, section 35AE and item 49, section 35A]*

6.64 The Bill repeals the definition of ‘approved auditor’ to substitute it with ‘superannuation auditor’ which covers both an ‘RSE auditor’ and an ‘approved SMSF auditor’. *[Schedule 1, items 30, 34 and 37, subsection 10(1)]*

6.65 Item 53 omits the term ‘approved auditor’ and replaces it with ‘approved SMSF auditor’. This change in use of terms is due to the repeal of the definition of ‘approved auditor’ in this Bill and the use of the term ‘approved SMSF auditor in the Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012

which was introduced on 19 September 2012. *[Schedule 1, item 53, subsection 35C(1)]*

6.66 The Bill omits an 'approved auditor (other than an approved SMSF auditor) or actuary' to substitute it with 'an RSE auditor or a superannuation actuary'. This change is necessary to reflect the repeal of the term 'approved auditor' in this Bill. *[Schedule 1, item 92, subsection 131A(1)]*

6.67 The Bill omits a reference to 'approved auditor' to replace it with 'auditor' at paragraphs 131AA(1)(a) and 131AA(2)(a) and subsection 130D(3). This reflects the repeal of the term 'approved auditor' in this Bill. *[Schedule 1, item 88, paragraphs 131AA(1)(a) and 131AA(2)(a) and item 81, subsection 130D(3)]*

6.68 The Bill repeals the definition of 'actuary' to substitute it with specific definitions of 'RSE actuary' and 'SMSF actuary' and also 'superannuation actuary' which covers both RSE and SMSF actuaries. *[Schedule 1, items 29, 33, 35 and 36, subsection 10(1) and item 101, paragraphs 131B(1)(a) and (b)]*

6.69 Paragraph 131A(1)(b) omits 'an approved auditor of a superannuation entity that is not an SMSF, or to be an actuary', to substitute it with 'an RSE auditor or a superannuation actuary'. This reflects the repeal of the term 'approved auditor'. *[Schedule 1, item 96, subsection 131A(1)(b)]*

6.70 Amendments are required to remove references to the term 'approved auditor' which this Bill repeals. Amendments are also required to reflect the new terms inserted in the definitions in subsection 10(1). *[Schedule 1, item 98, subsection 131A(2), item 99, subsection 131A(3), item 100, subsection 131A(4), item 102, paragraph 131B(2A)(a), and item 103, paragraph 131B(2A)(b)]*

6.71 The section 35B heading is repealed to substitute it with 'Audit of accounts and statements' which removes the previous reference in the heading to all superannuation entities. The heading 'Audit of accounts and statements' is repealed in section 35C, and the the section 35D heading is also repealed to remove the reference to SMSFs. *[Schedule 1, item 51, subsection 35C, item 50, section 35B and item 60, section 35D]*

6.72 The Bill inserts a specific reference to SMSFs after 'superannuation entity' at subsection 35C(1) which captures the intention of this provision to only apply to SMSFs. Subsection 35C(1) is also amended to remove ', and the RSE licensee (if any) of the entity'. The note at subsection 35C(1) is also repealed. *[Schedule 1, items 52, 54 and 55, subsection 35C(1)]*

6.73 Subsection 35C(1A) is repealed to remove the description of what an approved auditor is not as the term ‘approved auditor’ has been repealed through this Bill. *[Schedule 1, item 56, subsection 35C(1A)]*

6.74 Subsection 35C(5) is repealed to reflect that the Division now only relates to SMSFs. *[Schedule 1, item 58, subsection 35C(5)]*

6.75 Subsection 35C(7) is repealed to remove the offence provision for contravening the requirement for auditors to give the report to the trustee of the entity within the prescribed period. *[Schedule 1, item 59, subsections 35C(7)]*

Additional consequential

6.76 Consequential amendments to the SIS Act and Corporations Act are required following the MySuper Core Provisions Bill, the Trustee Obligations and Prudential Standards Act and the Further MySuper and Transparency Measures Bill. Many of the consequential amendments relate to APRA’s ability to issue prudential standards which was legislated in the Trustee Obligations and Prudential Standards Act.

6.77 As a consequential change to the Future of Financial Advice changes, subsection 964(3) of the Corporations Act is updated to specify that the reference to custodial arrangement in section 1012IA of the Corporations Act is to include a reference to a direction given by a beneficiary (under paragraph 58(2)(d) of the SIS Act) that involves an acquisition of a particular financial product or a direction to follow an investment strategy of the kind mentioned in section 52B of the SIS Act that will involve an acquisition of a particular financial product. *[Schedule 1, item 9, subsection 964(3)]*

6.78 Subsection 1526(2) of the Corporations Act is also updated to specify that the reference to custodial arrangement is to include a reference to a direction given by a beneficiary. *[Schedule 1, item 11, subsection 1526(2)]*

6.79 Subsections 135(3) and (4) are added to enable acting trustees to provide appointment information to APRA. Subsection 135(3) requires former trustees who have been suspended or removed to do all things reasonably practicable to assist the acting trustee in providing the information to APRA, but only when the acting trustee gives the former trustee notice in writing of their obligation. It is common for APRA to have issues with former trustees facilitating the role of acting trustees due to the difficult circumstances often surrounding the removal or suspension of a trustee. Therefore, there is a high risk of the former trustee obstructing, or failing to facilitate, the role of the acting trustee, thus an

offence of strict liability is required. *[Schedule 1, item 105, subsections 135(3) and (4)]*

6.80 As a result of APRA's power to grant or refuse authority to an RSE licensee to offer a MySuper product, new types of reviewable decisions exist at subsection 344(12). *[Schedule 1, items 113 and 114, subsection 344(12)]*

6.81 The new decisions are: a decision of APRA under subsection 242F(2) to refuse to authorise an RSE licensee to operate a regulated superannuation fund as an eligible rollover fund; a decision of APRA under subsection 242J(1) to cancel an authority to operate a regulated superannuation fund as an eligible rollover fund; a decision of APRA under subsection 29T(2) to refuse to authorise an RSE licensee to offer a class of beneficial interest in a regulated superannuation fund as a MySuper product, or a decision of APRA under subsection 29U(1) to cancel an authority to offer a class of beneficial interest in a regulated superannuation fund as a MySuper product.

6.82 These new types of reviewable decisions are all reviewable by any person affected. This is due to the significant impact the decisions have on members of superannuation funds.

6.83 The paragraph (dq) definition of reviewable decision is amended to take into account the repeal of section 35A in this Bill. Paragraph (dq) now relates to a reviewable decision under subsection 35A(3) instead of 35A(2). *[Schedule 1, item 32, subsection 10(1)]*

Amendments to the *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012*

6.84 An application provision is inserted into the *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012* to ensure that APRA can be satisfied, in authorising a MySuper product, that the trustee is likely to satisfy the enhanced trustee obligations, despite those obligations not taking effect until 1 July 2013. *[Schedule 1, item 115, item 11A of Part 2 of Schedule 1 to the Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012]*

6.85 References to section 29WA are updated to include references to section 29WB which is inserted by this Bill. *[Schedule 1, item 116, subitem 12(3), item 117, paragraph 12(5)(b) and item 118, item 13 of Part 2 of Schedule 1 to the Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012]*

Application and transitional provisions

6.86 The amendment at section 93 of the FHSA Act (item 14) applies in relation to: RSE licensees who apply to be authorised as an FHSA provider on or after the day on which that item commences; and RSE licensees that are authorised as FHSA providers, whether before, on or after the day on which that item commences. *[Schedule 1, item 120]*