

Chapter 2

Overview of the proposed legislation

2.1 This chapter provides an overview of the MySuper Core Provisions Bill (paragraphs 2.2–2.23) and the Trustee Obligations and Prudential Standards Bill (paragraphs 2.24–2.35). It also canvasses concerns raised regarding the staggered introduction of the legislation necessary to transfer Australia's superannuation system to the choice architecture model (paragraphs 2.40–2.48).

Overview of the MySuper Core Provisions Bill

2.2 The MySuper Core Provisions Bill is intended to introduce the core framework for the new superannuation regulatory paradigm. As outlined in the Explanatory Memorandum (EM), the Bill would:

- define a MySuper product;
- set out the framework for trustees to obtain APRA approval to provide a MySuper product;
- limit a regulated superannuation fund to offering only one MySuper product except in certain circumstances;
- establish the standard set of available fees;
- determine the rules regarding contribution payments and account transfers for MySuper products; and
- underpin the MySuper framework with strict liability offences.¹

Definition of 'MySuper product'

2.3 The Bill would define a 'MySuper product' as a class of beneficial interest in a regulated superannuation fund that a registrable superannuation entity (RSE) licensee is authorised by APRA to offer as a MySuper product.²

APRA authorisation to classify a product as a 'MySuper product'

2.4 This circuitous definition of 'MySuper product' would be clarified by the procedures for trustees to obtain APRA approval to offer a product as a MySuper product. The MySuper Core Provisions Bill would introduce a section 29T of the

1 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, p. 3.

2 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Item 1, clause 6.

Superannuation Guarantee (Administration) Act, which would require APRA to provide authorisation if certain conditions are met. To meet the definition of 'MySuper product', funds must be registered, have five or more members and, unless certain exceptions are met, be the only MySuper product in the fund. In addition, APRA must be satisfied that the RSE licensee:

- is likely to comply with the fee charging rules in relation to MySuper products;
- is likely to comply with the enhanced trustee obligations;
- is not likely to represent a product as a MySuper product when they are not authorised to do so; and
- is not likely to place contributions of a member that does not have a chosen product into a product that is not a MySuper product.³

2.5 Accordingly, the definition of 'MySuper product' encompasses not only the characteristics of the product but also the 'likely' actions of the product provider. The Bill would provide APRA 60 days to assess an application from the date of its receipt or from the date APRA receives any additional information requested.⁴ This timeframe may be extended a further 60 days.⁵

2.6 In addition, where an RSE licensee is seeking to offer a MySuper product before 1 July 2013, APRA will have 120 days to process applications made before 1 July 2013. The 120 day period may be extended by an additional 60 days. The EM states that:

[t]his period will commence on 1 July 2012 if the application is made prior to that date...Any application received by APRA after 1 July 2013 will mean that APRA does not have the extended period to make a decision but also means that the RSE licensee will not have the transitional arrangements to continue to pay contributions to that product after 1 October 2013 until a decision is made by APRA.⁶

2.7 Once granted, APRA may revoke an authorisation to offer a product as a MySuper product if the regulator 'is no longer satisfied' that the fund or the trustee will

3 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 3.31.

4 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 9: Part 2C, Division 1, proposed section 29SB.

5 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 9: Part 2C, Division 1, proposed section 29SB.

6 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 12; Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 3.29.

meet the conditions required under proposed section 29T.⁷ The MySuper Core Provisions Bill would recognise potential links between the regulation of the financial services industry and the superannuation regulatory framework. APRA would be required to consult the Australian Securities and Investments Commission (ASIC) 'if it believes that the cancellation will affect the RSE licensee's ability to offer one or more financial products'. However, nothing in the Bill requires ASIC to approve the proposed cancellation prior to APRA cancelling the authority. Furthermore, failure to consult ASIC does not invalidate the cancellation of an authority to offer a product as a MySuper product.⁸

2.8 Consistent with the recommendations of the Super System Review,⁹ the MySuper Core Provisions Bill would also create a second stream of superannuation products. All superannuation products not meeting the definition of 'MySuper product' would be classed as 'choice products',¹⁰ and therefore would not be subject to the MySuper requirements. The EM notes that the MySuper Core Provisions Bill would not restrict trustees from charging fees that differ from the fees disclosed in the product disclosure statement.¹¹

Characteristics of a MySuper product, including contributions and account transfers

2.9 The MySuper Core Provisions Bill would require MySuper products to have the following elements:

- a single, diversified investment strategy;
- equal access to options, benefits and facilities for all members;
- processes for amounts to be attributed to members in a way that does not stream gains or losses to only some members of the MySuper product, with an exemption for lifecycle investment strategies;
- no differences in the extent of fee subsidisation of employees of a certain employer if fee subsidisation is allowed by employers;
- no limits on the source or kinds of contributions made by or on behalf of members;

7 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 9: Part 2C, Division 4, proposed section 29U.

8 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 9: Part 2C, Division 4, proposed section 29UA.

9 Cooper et al, *Super System Review: Final Report; Part two – Recommendation packages, Chapter one*, pp 6 – 7.

10 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Item 1, clause 4.

11 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 5.12.

- no pension benefits paid from the assets of the MySuper product; and
- a prohibition on replacing a member's interest in that MySuper product without the member's consent, other than with an interest in another MySuper product in the fund, an interest in a MySuper product in another fund and the replacement is permitted by a law of the Commonwealth, or an interest in another fund if that transfer is otherwise permitted or required by a law of the Commonwealth.¹²

Limitations on the number of MySuper products within a superannuation fund

2.10 The MySuper Core Provisions Bill would provide an exception to the general rule that a fund may provide only one MySuper product.¹³ Two or more MySuper products may be offered where:

- the RSE licensee is already authorised to offer a generic MySuper product in the fund, however the proposed MySuper product satisfies either the goodwill or large employer requirements; or
- the RSE licensee is seeking to apply for authorisation of a generic MySuper product and is already authorised to offer one or more MySuper products in the fund but each of those authorised products would satisfy either of the goodwill or large employer requirements.¹⁴

Tailored products for large employers

2.11 Proposed section 29TB of the Bill would allow trustees to provide tailored MySuper products for large employers. An employer with 500 or more members of a superannuation fund would fall within the definition of 'large employer'.¹⁵ The EM clarifies the parameters of the definition of 'large employer':

To qualify as a large employer, an employer or associate of that employer must contribute or would, apart from a temporary cessation of contributions, contribute to the fund for the benefit of at least 500 members who are either employees of that employer or employees of associates of that employer. For an employer that is not currently contributing to that fund, they may qualify if APRA expects that the employer and its associates will contribute for 500 members by the end of a time period specified by APRA. This excludes any employee of the employer or

12 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 9: Part 2C, Division 3, section 29TC.

13 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 9: Part 2C, Division 3, subsection 29T(1)(f).

14 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 3.33.

15 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, Schedule 1, item 9: Part 2C, Division 3, proposed subsection 29TB(2).

associate in respect of whom the employer or its associates does not make contributions on their behalf to the fund as well as employees that have a chosen fund different to the fund offering the tailored MySuper product.¹⁶

Permissible fees

2.12 Part 2C, Division 5 sets out the permissible fee structure for MySuper products. Consistent with the government's response to the Super System Review, proposed section 29V provides that trustees may charge administration fees, investments fees, buy-sell spread fees, switching fees, exit fees and activity fees.

2.13 As noted in the EM, the Core Provisions Bill would also require that, for MySuper products which include a lifecycle investment strategy, all members will be charged the same investment fee irrespective of their lifecycle stage.¹⁷

2.14 The Core Provisions Bill does not contain the complete framework for the standard set of permissible fees. As noted in the EM, further legislative tranches will introduce provisions to require exit fees, switching fees and buy-sell spreads to be charged on a cost recovery basis. The EM further notes that additional tranches will 'define those fees for financial advice that can be deducted from member accounts',¹⁸ as well as the parameters for offering discounted administration fees.¹⁹ The EM does not clarify why these measures could not be included with related measures in the Core Provisions Bill.

Commencement

2.15 The proposed amendments to the Superannuation Industry (Supervision) Act would commence on 1 January 2013, or an earlier date fixed by Proclamation. This would allow APRA to accept applications for authorisation to provide MySuper products from this date. The amendments to the Superannuation Guarantee (Administration) Act, which would require default payments to be made to MySuper products, would commence on 1 October 2013.²⁰

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- 16 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 3.45.
- 17 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 6.12.
- 18 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 5.20.
- 19 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 6.19.
- 20 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, clause 2.

MySuper Core Provisions Bill - Strict liability offences

2.16 Two offences would underpin the core provisions of the MySuper framework. First, under proposed section 29W, it would be an offence for a person to offer a product as a MySuper product when not authorised to do so. Second, under proposed section 29WA, it would be an offence for a trustee to direct a member's contributions to a MySuper product if the member has elected to become a member of a choice product.

2.17 The offences would be strict liability offences. Section 6.1 of the *Criminal Code* explains that the effect of strict liability is to remove all fault elements for an offence. That is, it would be irrelevant whether the person intended to commit the offence, or knew, or was reckless as to whether, he or she was committing the offence.

2.18 Strict liability is purportedly required for the offence at proposed section 29W as the conduct prohibited may 'inadvertently cause' an employer to be in breach of requirements under the Superannuation Guarantee (Administration) Act.²¹ The EM does not provide justification as to why strict liability for the offence at section 29WA is required to secure the efficacy of the MySuper scheme. It does, however, state that it 'is a reasonable expectation' that RSE licensees have appropriate administrative procedures in place to ensure each members' contributions are administered in accordance with the new superannuation framework.²²

2.19 It is apparent that the offence at 29WA is incomplete. As stated in the EM, the scope and application of the offence will be clarified by subsequent draft legislation.²³ This approach appears to be contrary to Commonwealth criminal law best practice, as outlined in the Commonwealth Attorney-General's Department's *A guide to framing Commonwealth criminal offences, infringement notices and enforcement powers*. The guide advises that '[t]he scope of an offence should be clear on its face' and, further, that other provisions should not ordinarily extend the scope of the offence.²⁴

2.20 Further evidence was obtained regarding the strict liability offences at the hearing on 2 March 2012. Treasury officials explained that strict liability:

...does not go to an element of intent by the person who is causing the breach. If objectively on the face that provision, you breach the elements of the provision, it does not matter whether you intended to or not... With

21 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 3.59.

22 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 2.14.

23 Explanatory Memorandum, Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011, paragraph 2.15.

24 Commonwealth Attorney-General's Department, *A guide to framing Commonwealth criminal offences, infringement notices and enforcement powers*, September 2011, p. 25.

respect to this particular provision, I would suggest it is very unlikely that you would accidentally represent yourself as offering a MySuper product when you are not authorised to. You have to apply to APRA to be authorised to offer MySuper, so the element of intent of deliberately breaching this provision is, I think, not as relevant.²⁵

2.21 This explanation did not address the effect of proposed section 6.1 of the Criminal Code, whereby it would also be irrelevant whether the person knew, or was reckless as to whether, he or she was in breach of the MySuper licence requirements.

2.22 However, the imposition of strict liability under the offences at sections 29W and 29WA was considered by the Senate Standing Committee for the Scrutiny of Bills. The committee concluded that 'although the explanatory memorandum does not raise the point, it would be reasonable to expect the licensee to be in a position to guard against the possibility of a contravention.'²⁶

Trustee Obligations and Prudential Standards Bill

2.23 The Trustee Obligations and Prudential Standards Bill contains measures in response to the recommendations of the Super System Review to strengthen trustee duties generally and to impose additional obligations on trustees of MySuper products.²⁷ The Bill would also allow for APRA to make prudential standards to govern Australia's prudential system.²⁸

Trustee obligations

2.24 Section 52 of the Superannuation Industry (Supervision) Act outlines the obligations that apply to superannuation trustees. These obligations will be strengthened by new and expanded obligations. These obligations include that the superannuation trustee must:

25 Mr Adam Hawkins, Policy Analyst, Financial Systems Division, Treasury, *Proof Committee Hansard*, 2 March 2012, p. 66.

26 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 14 of 2011*, 23 November 2011, p. 36.

27 Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, Schedule 1.

28 Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, Schedule 2.

- exercise the same degree of care, skill and diligence as a prudent superannuation trustee;²⁹
- act fairly in dealing with classes of members and members within a class;
- give priority to the interest of members where a conflict exists;
- formulate, review and give effect to an insurance strategy for the benefit of the fund's members;
- formulate, review and give effect to a risk management strategy and manage financial resources to cover operational risk;
- in addition to the existing requirements regarding investment strategies—which relate to the fund as a whole—trustees must formulate investment strategies for each investment option and offer a range of options to allow adequate diversification. Trustees will also be obliged to have regard to valuation information, expected tax consequence and costs in their investment strategies.

2.25 Additional obligations will be introduced in respect of trustees that offer MySuper products. This reflects the unique nature of MySuper as a default product; as noted by the Minister in his second reading speech, members of MySuper products 'have effectively delegated all decisions for their superannuation to the trustee'.³⁰ Trustees of a registrable superannuation fund that includes a MySuper product will be required to:

- promote the financial interests of MySuper members (in particular returns after the deduction of fees, costs and taxes);
- assess on an annual basis whether the fund has sufficient assets and members to enable it to continue to promote the financial interests of MySuper members; and
- include in the investment strategy for the MySuper product, and update on an annual basis, the target investment return and level of risk for the product.

29 At present, paragraph 52(2)(b) of the Superannuation Industry (Supervision) Act refers to same degree of care, skill and diligence as an ordinary prudent person would exercise...'. The EM notes that this amendment brings the standard of care, skill and diligence 'into line with the existing State and Territory trustee legislation applying to professional trustees'. Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, paragraph 1.62.

30 The Hon Bill Shorten MP, Second Reading Speech, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, *House of Representatives Hansard*, 16 February 2012, p. 3.

2.26 The duties that will apply to directors of corporate trustees of superannuation funds in relation to a MySuper product and more generally are separately outlined.³¹ These obligations are largely similar to those applying to superannuation trustees but focus on the directors as individuals. The EM also notes that APRA will provide specific guidance on some standards that are 'objective', noting for example that 'new directors will not be expected to have the level of skill and knowledge of an experienced director immediately'.³²

2.27 The new trustee obligations will commence from 1 July 2013.³³ With some minor exceptions, the new obligations will not apply to self-managed superannuation funds.

2.28 Issues relating to the proposed trustee obligations are explored further in chapter 4.

Prudential standards

2.29 The operating standards in relation to superannuation are currently outlined in Part 3 of the Superannuation Industry (Supervision) Act, with additional standards prescribed in regulations.

2.30 The reliance on primary and subordinate legislation to form the system of standards that governs the superannuation industry differs from the frameworks which apply to other areas of the financial system. While APRA has the power to issue standards in relation to authorised deposit-taking institutions, life insurance companies and general insurance companies, it does not have a similar power that covers superannuation funds. The Stronger Super Review argued that APRA should be given a general standards-making power in relation to superannuation.³⁴ The Review observed:

Standards can be made and varied more quickly than regulations which means that, if required, the law can be quickly adjusted to respond to developments in the industry. Further, complete topics could be addressed under a single standard whereas, at present, a topic may be found in several places in the SIS Regulations ... the Panel believes that it is important that trustee duties not be sprinkled across several places but, rather, be readily available to trustee-directors in one place. This also means that a standard

31 Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, proposed sections 29VO and 52A.

32 Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, paragraph 1.133.

33 Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, clause 2.

34 Cooper et al, *Super System Review: Final Report; Part two – Recommendation packages, Chapter ten*, p. 310.

has the capacity to leave less room for uncertainty than the promulgation of regulations on the same topic.³⁵

2.31 Schedule 2 to the Trustee Obligations and Prudential Standards Bill will give APRA the power to issue prudential standards in relation superannuation prudential matters. These standards must be complied with by RSE licensees and 'connected entities'—the RSE licensees' subsidiaries and other entities prescribed in regulations.

2.32 APRA will be able to determine prudential standards on any matter that includes:

- protecting the interests of members;
- ensuring that the conduct of an RSE licensee or connected entity meets the reasonable expectation of members;
- keeping an RSE licensee or connected entity in a sound financial position;
- ensuring the conduct of an RSE licensee does not cause or promote instability;
- the appointment of auditors and actuaries and the conduct of audits and actuarial investigations.³⁶

2.33 APRA will have the prudential-making power from the date of Royal Assent. The EM states that this will allow time for the standards to be developed and for industry to transition to them, generally by 1 July 2013—although some standards that relate to MySuper may apply from 1 January 2013.³⁷

Committee view

2.34 The committee did not receive evidence on the standards-making power that the Trustee Obligations and Prudential Standards Bill proposes to give APRA. The power for APRA to make prudential standards will give it greater flexibility in performing its role as a prudential regulator and responding to developments in the superannuation industry, and the industry will benefit from the clearer and better-targeted rules that will result. The committee notes that the framework for the proposed powers appears similar to those that apply to the other industries prudentially-regulated by APRA, and the standards will still be subject to Parliamentary oversight through the disallowance process. Accordingly, the committee supports the prudential standards provisions and this report does not examine them further.

35 Cooper et al, *Super System Review: Final Report; Part two – Recommendation packages, Chapter ten*, p. 310.

36 Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, proposed subsection 34C(4).

37 Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, paragraph 1.145 and 2.43.

Commencement of the MySuper superannuation system

2.35 A number of submitters to the inquiry raised concerns with the commencement date of the compulsory contributions to default MySuper products. It was put to the committee that a date of 1 October 2013 for the commencement of MySuper products as the default superannuation vehicle is not feasible. Sunsuper noted that the changes may require 'lengthy computer system change lead times' and accordingly recommended Parliament promptly address the draft legislation.³⁸ Similarly, Mercer submitted that the timeframe for the transition to the new superannuation regime is 'extremely tight', positing that the legislation would not pass parliament until the Spring 2012 sittings.³⁹ Accordingly, Mercer recommended the 1 October 2013 start date be deferred until July 2014.⁴⁰ The Association of Superannuation Funds of Australia also proposed a 1 July 2014 commencement date, arguing that 'October 2013 does not give the industry or employers enough time to adjust to the changes'.⁴¹

2.36 In contrast, the Australian Institute of Superannuation Trustees (AIST) supported the proposed 1 October 2013 commencement date, submitting that the date allows sufficient time for industry to transition to the new superannuation framework:

We support the timetable that is in place at the moment. We think it is in the nature of the superannuation industry, which is a large and sophisticated industry, to be able to cope with change. It is one of the criticisms that are often levelled at the creators of the superannuation system that change rolls about every year or two. As a consequence of that I think the industry is actually quite used to implementing quite significant changes on relatively short time lines, including in circumstances where the full details of the change are coming from a number of different directions.⁴²

2.37 However, the AIST further commented that a prompt introduction of all legislative measures required to introduce the superannuation reforms is required to ensure a smooth transition to the new superannuation regulatory framework.⁴³

38 Sunsuper, *Submission 4*, p. 2.

39 Dr David Knox, Senior Partner, Mercer (Australia) Pty Ltd, *Proof Committee Hansard*, 2 March 2012, p. 37.

40 Dr Knox, Mercer (Australia) Pty Ltd, *Proof Committee Hansard*, 2 March 2012, p. 37.

41 Ms Pauline Vamos, Chief Executive Officer, Association of Superannuation Funds of Australia, *Committee Hansard*, 2 March 2012, p. 30.

42 Mr David Haynes, Project Director, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 2 March 2012, p. 47.

43 Mr Haynes, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 2 March 2012, p. 47.

Committee view

2.38 The committee acknowledges concerns with the timeframe to transition to the MySuper system. However, the committee notes that the reforms were formally announced in December 2010,⁴⁴ and have been the subject of extensive industry consultation that included the release of exposure draft legislation for public comment.⁴⁵ The committee concurs with the views of the AIST that the industry is well-placed to adapt to the new superannuation framework in time for a 1 October 2013 start date. However, the committee also notes the views of the AIST and other submitters that it is imperative that the legislation be confirmed and addressed by parliament as soon as possible. As will be considered, the introduction of the legislative measures in tranches undermines the timely consideration of the MySuper legislation.

Further tranches—additional legislation to introduce the MySuper system

2.39 As the Bill's title indicates, the MySuper Core Provisions Bill would establish the framework for the MySuper system. As noted in the EM, further legislative measures are required to establish the MySuper system.

2.40 With the introduction of the Trustee Obligations and Prudential Standards Bill, the following 17 measures are yet to be provided for the Parliament's consideration:

- further requirements in respect of insurance;
- allowing defined benefit funds and schemes to continue to be a default superannuation product;
- rules for the charging of financial advice deducted from member accounts and charging for intra fund advice;
- arrangements for the transition of member accounts from existing default superannuation products to MySuper products;
- trustee duties for eligible rollover fund licensees that will be similar to the specific trustee duties in relation to MySuper products;
- prohibition on deduction of commissions from MySuper member accounts;
- rules for the payment of performance based fees by RSE licensees to investment managers in relation to the assets of a MySuper product;
- limitation of certain fees to cost recovery;

44 The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, 'Government super reforms mean more money in retirement', Media release 024, 16 December 2010.

45 The Treasury, *Stronger Super – Consultation*, <http://strongersuper.treasury.gov.au/content/Content.aspx?doc=consultation.htm> (accessed 5 March 2012).

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- a rule for the fair and reasonable allocation of costs between each MySuper product and each choice product within a fund;
 - additional governance measures (relating to selection of service providers, not preventing directors of trustees from voting other than in certain limited circumstances, increasing the time limits for which members can lodge complaints to the Superannuation Complaints Tribunal in relation to total and permanent disability (TPD) insurance claims, requiring trustees to provide members with reasons for decisions in respect to formal complaints and providing APRA with the administrative power to impose fines);
 - ensuring APRA has the ability to determine prudential standards to facilitate the transition process;
 - enhanced data collection and data publication powers for APRA;
 - additional disclosure requirements in relation to MySuper and choice products;
 - consequential amendments to deal with the nomination of superannuation funds in modern awards and enterprise agreements;
 - consequential amendments to the *Corporations Act 2001* to ensure the necessary obligations of that Act apply to MySuper products;
 - consequential amendments to move requirements for fitness and propriety, actuaries and auditors from the legislation to prudential standards; and
 - amendments to the Corporations Act so that RSE licensees that are also responsible entities of managed investment schemes are no longer exempt from the Corporations Act requirements to have available adequate financial resources.⁴⁶

Concerns with the staggered approach

2.41 Evidence before the committee is highly critical of this staggered approach to introducing the MySuper reforms.⁴⁷ The views expressed by the Financial Services Council are representative of the concerns raised:

The FSC wishes to highlight the difficulty in commenting on and legislating significant reforms, such as MySuper, in multiple phases. Many questions arise in relation to the Bill, which may be answered in later tranches. Further, subsequent tranches may give rise to additional issues with this Bill. It is therefore very difficult to properly assess the full impact

46 Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012, pp 4–5.

47 See, for example, the Association of Superannuation Funds of Australia, *Submission 12*, p. 2; Association of Financial Advisors, *Submission 15*, p. 3

of the Bill without the benefit of the related tranches of legislation, regulations and prudential standards.⁴⁸

2.42 Reflecting these concerns, AIST submitted that additional elements fundamental to the operation of the MySuper scheme could appropriately have been included in the MySuper Core Provisions Bill:

AIST notes that the issues it identifies with the Bill may be addressed in the subsequent tranches of legislation. Conversely, matters that appear settled in the Bill may be disturbed in the subsequent tranches and require additional and possibly modified comment on the Bill. This is not an ideal way for either Parliament or bodies with an interest in the legislation to consider a highly important reform package.

It would have been preferable for key elements of MySuper (eg, trustee duties, protections for members transferred between funds when they change jobs, and the prohibition on commissions) to have been included in the first tranche.⁴⁹

2.43 The Corporate Super Association questioned whether a tranche approach will deliver the new superannuation framework effectively:

We do acknowledge that the scale of the legislative task that has been undertaken is considerable, but we are not happy with piecemeal introduction of legislation that is intended to work as a package. If the operation of the part that has been introduced depends on the subsequent introduction of a later tranche, it is undesirable. Later tranches may not be passed if parliament does not sit as anticipated or the timetable is delayed; hence, the legislation may remain incomplete and either ineffective or hard to enforce. And piecemeal introduction does not give the public or parliament a full and complete understanding of the legislation which is being considered.⁵⁰

2.44 It was evident that the introduction of the MySuper scheme in tranches has resulted in Bills that are not self-contained. It was put to the committee that matters contained in one Bill cannot be evaluated on the basis of the provisions in that Bill alone. Rather, understanding one concept requires reference to all tranches of the MySuper legislation. This includes the regulation of intra-fund advice.

48 Financial Services Council, *Submission 3*, p. 3.

49 Australian Institute of Superannuation Trustees, *Submission 9*, p. 1.

50 Mrs Elizabeth Goddard, Research Officer, Corporate Super Association, *Proof Committee Hansard*, 2 March 2012, p. 26.

Intra-fund advice

2.45 Several submitters brought the matter of intra-fund advice to the committee's attention.⁵¹ Strong views were expressed regarding the regulation of intra-fund advice, and it was noted with concern that the form of the regulation is currently unclear as later tranches of MySuper legislation will affect the parameters in which intra-fund advice may be provided.⁵² Treasury confirmed that the approach to regulating intra-fund advice is a matter that has yet to be settled. Treasury officers advised that '[w]e have not got to the detailed drafting yet', with one adviser stating 'I do not have any more detail than was outlined in the press release of 8 December.'⁵³

Committee view

2.46 The committee acknowledges stakeholder concerns about a staggered approach to introducing legislative measures to comprehensively modernise Australia's superannuation system. The committee appreciates the details provided in the Explanatory Memoranda to the Bills regarding the measures required to wholly implement the MySuper system.

2.47 The committee agrees with stakeholders' views that introducing the measures in various legislative tranches diminishes stakeholders', and the Parliament's, capacity to comprehensively review the measures proposed. The introduction of the MySuper legislation in numerous tranches in effect asks Parliament to pass a segment of an overall policy scheme, in reliance on statements by the Executive on the final form of the scheme. It is also of concern to the committee that measures in tranches yet to be introduced, and apparently still under development, will affect the measures in the two Bills that are the subject of a parliamentary inquiry. However, given the extensive nature of the policy changes announced, and the need for lengthy consultation with industry (which they themselves have requested and been given), these significant reforms require a practical response. While the approach taken may not be best practice, it is the most practical.

51 See, for example, Ms Pauline Vamos, Chief Executive Officer, Association of Superannuation Funds of Australia, *Committee Hansard*, 2 March 2012, p. 32; Mr Gareth Hall, Treasurer, Corporate Super Specialist Alliance, *Committee Hansard*, 2 March 2012, p. 18.

52 See, for example, Mr Andrew Bragg, Senior Policy Manager, Financial Services Council, *Committee Hansard*, 2 March 2012, p. 4; Mr Matthew Linden, Chief Policy Adviser, Industry Super Network, *Committee Hansard*, 2 March 2012, p. 14.

53 Ms Sue Vroombout, General Manager, Retail Investor Division, Treasury, *Proof Committee Hansard*, 2 March 2012, p. 63.

