2019-2020

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE NO. 2) BILL 2020

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon Josh Frydenberg MP)

Table of contents

Glossary

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

Abbreviation	*Definition*
APRA	Australia Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Bill	Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020
Corporations Act	*Corporations Act 2001*
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
Financial Services Royal Commission Final Report	The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
Ongoing fee arrangement	A type of arrangement defined in section 962A of the Corporations Act and the subject of amendments implementing recommendation 2.1 (see Schedule 1 to this Bill).
SIS Act	*Superannuation Industry (Supervision) Act 1993*

General outline and financial impact

Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020

On 4 February 2019, the Government released its response to the Financial Services Royal Commission Final Report entitled *Restoring trust in Australia's financial system*. The Government's response committed to taking action on all the recommendations of the Financial Services Royal Commission, and made additional commitments to address the issues identified by Commissioner Hayne.

This package implements a further four recommendations of the Financial Services Royal Commission to improve consumer protections.

The Financial Services Royal Commission Final Report has been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this reform.

The Financial Services Royal Commission Final Report can be accessed through the Australian Parliament House website.[1]

The following table provides a summary of the reforms implemented by this package and the primary area of law that is being amended:

Chapter	Recommendation implemented	Primary area of law amended
1	2.1 – Annual renewal and payment	Chapter 7 of the Corporations Act.
2	2.2 – Disclosure of lack of independence	Chapter 7 of the Corporations Act.
3	3.2 – No deducting advice fees from MySuper accounts 3.3 – Limitations on deductive advice fees from choice accounts	Part 2C and 11A of the SIS Act.

[1] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2Fbc83795c-b7fa-4b42-a93b-fa012cffffc2%22

Schedule 1 - Ongoing fee arrangements (recommendation 2.1)

Schedule 1 to the Bill amends the Corporations Act to require financial services providers that receive fees (fee recipients) under an ongoing fee arrangement to:

- provide clients with a single document each year which outlines the fees that will be charged and the services which the client will be entitled to in the following 12 months and which seeks annual renewal from clients for all ongoing fee arrangements; and
- obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account.

Date of effect: Schedule 1 commences on 1 July 2021.

Proposal announced: The proposal was announced on 4 February 2019 as part of the Government's response to the Financial Services Royal Commission.

Financial impact: Nil.

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* —Chapter 4, paragraphs 4.1 to 4.6.

Compliance cost impact: The Office of Best Practice Regulation has agreed to an estimated average annual compliance cost of $28.4 million for the measures relating to recommendation 2.1. This includes $11.7 million of upfront costs in the year of commencement, followed by an annual compliance cost of between $21.2 million and $33.7 million in subsequent years.

Schedule 2 - Disclosure of lack of independence (recommendation 2.2)

Schedule 2 to the Bill amends the Corporations Act to require a providing entity (a financial services licensee or authorised representative) to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client.

Date of effect: Schedule 2 commences on 1 July 2021.

Proposal announced: The proposal was announced on 4 February 2019 as part of the Government's response to the Financial Services Royal Commission.

Financial impact: Nil.

Human rights implications: Schedule 2 does not raise any human rights issues. See *Statement of Compatibility with Human Rights*—Chapter 4, paragraphs 4.7 to 4.10.

Compliance cost impact: This measure results in low increases to compliance costs.

Schedule 3 - Advice fees in superannuation (recommendations 3.2 and 3.3)

Schedule 3 to the Bill amends the SIS Act to provide greater protection for superannuation members against paying fees for no service. The amendments increase the visibility of advice fees for all superannuation products and prohibit the charging of ongoing advice fees from MySuper products.

Date of effect: Schedule 3 applies from 1 July 2021, with a 12-month transitional period commencing 1 July 2021 for arrangements entered into before 1 July 2021.

Proposal announced: The proposal was announced on 4 February 2019 as part of the Government's response to the Financial Services Royal Commission. Some changes to the Government's response concerning the charging of fees to MySuper products have not previously been announced.

Financial impact: Nil.

Human rights implications: Schedule 3 does not raise any human rights issues. See *Statement of Compatibility with Human Rights*—Chapter 4, paragraphs 4.11 to 4.14.

Compliance cost impact: This measure will result in a small increase to compliance costs.

Chapter 1
Ongoing fee arrangements (recommendation 2.1)

Outline of chapter

1.1 Schedule 1 to the Bill amends the Corporations Act to require financial services providers that receive fees (fee recipients) under an ongoing fee arrangement to:

- provide clients with a single document each year which outlines the fees that will be charged and the services which the client will be entitled to in the following 12 months and which seeks annual renewal from clients for all ongoing fee arrangements; and
- obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account.

1.2 These amendments implement the Government's response to recommendation 2.1 of the Financial Services Royal Commission.

Context of amendments

Existing law

1.3 Division 3 of Part 7.7A of the Corporations Act sets out the requirements for charging ongoing fees.

1.4 Section 962A of the Corporations Act provides that an ongoing fee arrangement exists if:

- a financial services licensee or their representative gives personal advice to a person who is a retail client;
- that person enters into an arrangement with the financial services licensee or a representative of the financial services licensee; and
- under that arrangement a fee is to be paid during a period of more than 12 months.

1.5 Section 962B of the Corporations Act provides that an ongoing fee is any fee which is payable under an ongoing fee arrangement.

Disclosure obligation

1.6 Sections 962G, 962H (for ongoing fee arrangements entered into on or after 1 July 2013) and 962S (for all other ongoing fee arrangements) of the Corporations Act provide that where there is an ongoing fee arrangement, the fee recipient must provide the client with a fee disclosure statement within 60 days of the disclosure day for the arrangement.

1.7 Section 962H of the Corporations Act provides that the fee disclosure statement is a backward looking document which includes details about the services provided to the client, any services that the client received and was entitled to receive and the amount of any fees charged during the previous 12 month period. Under the existing law the fee disclosure statement does not include any information about the services or fees being paid for the upcoming 12 month period.

1.8 Section 962F of the Corporations Act provides that an ongoing fee arrangement entered into on or after 1 July 2013 terminates if the fee recipient does not comply with the disclosure obligations in section 962G of the Corporations Act.

Renewal notice

1.9 Section 962K of the Corporations Act provides that a fee recipient must give the client a renewal notice and fee disclosure statement in relation to the ongoing fee arrangement before the end of a period of 60 days beginning on the 'renewal notice day' for the arrangement.

1.10 To renew the ongoing fee arrangement, the client must elect in writing to renew it within 30 days of being given the renewal notice and fee disclosure statement. If the client notifies the fee recipient that they do not wish to renew the ongoing fee arrangement, then the arrangement terminates and no further advice will be provided to the client and no further fees will be charged under the ongoing fee arrangement. If the client does not notify the fee recipient whether or not they wish to renew the ongoing fee arrangement, then the arrangement terminates 30 days after the end of the renewal period.

1.11 ASIC also has the power to exempt a person, or class of persons, from compliance with the requirement to provide a renewal notice if they are subject to a code of conduct approved by ASIC.

1.12 Section 962E of the Corporations Act provides that a client may, at any time, terminate the ongoing fee arrangement, and cannot be required to pay any amount that is more than the amount accrued under the ongoing fee arrangement at the time of termination and any other costs incurred by the fee recipient as a result of the termination.

1.13 Section 962F of the Corporations Act provides that the ongoing fee arrangement terminates if the fee recipient does not comply with the renewal notice obligation in section 962K.

1.14 Ongoing fee arrangements entered into before the Future of Financial Advice reforms that took effect from 1 July 2013 are not currently required to comply with renewal requirements, but are required to comply with the fee disclosure statement requirements.

Financial Services Royal Commission

1.15 The Financial Services Royal Commission highlighted problems with clients being charged for services that were not provided, especially in relation to clients who were provided services under ongoing fee arrangements.

1.16 Commissioner Hayne considered that major causes of the fees for no service being charged included the desire for profit, the uncertain content of what was promised and the capacity to deduct fees invisibly. He considered that changes to the ongoing fee arrangement framework should address these causes by focussing on:

- the information that an adviser must give a client about the services to be provided under such arrangement;
- the frequency with which clients must opt in to these arrangements; and
- the mechanism by which advisers should be permitted to charge ongoing fees to clients so that fees can no longer be charged 'invisibly'.

1.17 On that basis, Commissioner Hayne recommended three changes to the ongoing fee arrangement framework that should apply to any ongoing fee arrangement, whenever made:

- the client should be required to opt-in to the arrangement annually;
- the client should receive a forward looking summary of the services they are entitled to receive and the fees payable for those services (in addition to the existing disclosure of fees and services); and
- the client's express written authority should be obtained prior to the deduction of fees from accounts held for or on behalf of the client, and this authority must be renewed annually.

1.18 Commissioner Hayne considered that these changes would reduce the likelihood of ongoing fee arrangements giving rise to the 'fee for no service' issue that was the subject of evidence before the Financial Services Royal Commission. These changes would provide clients with

more frequent opportunities to assess whether the services they were receiving were commensurate with the ongoing fees they were paying, and provide greater visibility around the nature and amount of fees being deducted automatically from their accounts.

Industry feedback

1.19 Industry stakeholders raised concerns that Commissioner Hayne's proposal to amend the requirements for ongoing fee arrangements would give rise to a degree of duplication and unnecessary legislative complexity that may result in higher compliance costs for the financial advice industry and potentially adverse impacts on the affordability of advice.

Summary of new law

1.20 The new law implements the Government's response to recommendation 2.1 of the Financial Services Royal Commission. The Corporations Act is amended to require all financial services providers that receive fees (fee recipients) under an ongoing fee arrangement to:

- provide clients with a fee disclosure statement during the same period each year which:
  - includes the fees that will be charged in the following 12 month period;
  - outlines the services that the client is entitled to receive in the following 12 month period;
  - seeks annual renewal from clients for all ongoing fee arrangements; and
- obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account.

1.21 Extending the annual renewal requirement to all ongoing fee arrangements means that regardless of when an ongoing fee arrangement was entered into, an annual renewal is required for the ongoing fee arrangement to continue.

1.22 Fee recipients are required to detail in writing the fees that will be charged under an ongoing fee arrangement and the services that will be provided under the ongoing fee arrangement. This gives clients a greater understanding of what they are paying for.

1.23 Fee recipients need to obtain written consent from a client before fees can be deducted under an ongoing fee arrangement and this consent cannot last longer than 150 days after the next 'anniversary day'. This ensures that clients are providing consent to the fees being deducted

each year, and that the consent is informed by the information in the fee disclosure statement about fees previously charged and those that will be charged for the following year.

Comparison of key features of new law and current law

New law	*Current law*
Fee recipients must seek renewal of ongoing fee arrangements by clients annually.	Ongoing fee arrangements must be renewed every two years. Ongoing fee arrangements entered into before 1 July 2013 are not required to be renewed.
The renewal period begins and ends on the same date each year.	The renewal period could begin and end on different dates to the previous renewal period depending on when the fee recipient last provided the client with a renewal notice.
Fee recipients are no longer required to provide clients with a separate renewal notice. Fee disclosure statements must be provided annually and include information about the fees to be paid and services to which the client is entitled to receive in the upcoming year, in addition to the information that is already required to be provided regarding the previous year. They must also include information about renewing the arrangement.	The fee recipient must provide the client with a fee disclosure statement annually and a renewal notice every two years. Fee disclosure statements are retrospective, providing a summary of the fees paid, services to which the client was entitled to receive and services that the client received during the previous year.
Written consent must be obtained prior to fees being deducted under an ongoing fee arrangement and consent cannot be obtained for a period which extends past 30 days after the end of the next renewal period. Fee recipients must obtain written consent to continue an ongoing fee arrangement annually.	There is no requirement to renew or obtain a new consent from the client in relation to the deduction of ongoing fees after the client has given initial consent.

Detailed explanation of new law

New and existing ongoing fee arrangements to be renewed annually

1.24 Previous exemptions that applied for ongoing fee arrangements entered into prior to the Future of Financial Advice reforms are removed. These ongoing fee arrangements are subject to the application of the new provisions. A fee recipient with an existing ongoing fee arrangement must also seek a client's renewal of an ongoing fee arrangement annually, rather than every two years and will not need to give the client a separate renewal notice. ***[Schedule 1, items 7, 20 and 24, sections 962D, 962L and sections 962R to 962X of the Corporations Act]***

1.25 The ability for a person or class of persons to be exempted from the requirement to give a renewal notice is also removed. ***[Schedule 1, item 4, section 962CA of the Corporations Act]***

Enhanced fee disclosure statements

Removing the requirement to provide a renewal notice

1.26 Under the new law a fee recipient is no longer required to provide a client with a renewal notice. The client must 'opt-in' or renew the arrangement every year but this process is now outlined in the enhanced fee disclosure statement. The provision of one document, the fee disclosure document, with all of the relevant information about fees, services and renewal, decreases the administrative burden on fee recipients. ***[Schedule 1, item 19, section 962K of the Corporations Act]***

'Anniversary day' and 'renewal period'

1.27 To reduce complexity and increase certainty for both fee recipients and clients, fee disclosure statements must be provided to a client during the same period each year. That is, the fee recipient must provide the client with a fee disclosure statement within the first 60 days of the renewal period each year.

1.28 The renewal period is a period of 120 days which begins on the anniversary day for the arrangement. The anniversary day is the anniversary of the day on which the arrangement was entered into. For example, if a client entered into an arrangement with a fee recipient on 1 July 2021 then the renewal period for that arrangement begins on 1 July in 2022 and each year after that. ***[Schedule 1, items 1, 3, 9, 10, 11 and 20, sections 962G, 962H and 962L of the Corporations Act]***

1.29 If a fee recipient fails to provide a client with a fee disclosure statement within the first 60 days of the renewal period for the arrangement then the fee recipient is subject to a civil penalty. ***[Schedule 1, item 10, section 962G of the Corporations Act]***

Disclosure of fees to be charged and services available during the upcoming 12 month period

1.30 A fee recipient must provide a client with an annual fee disclosure statement that, in addition to the prescribed information in the existing law, includes the following information in relation to the upcoming year:

- information about the services the client is entitled to receive under the ongoing fee arrangement;
- the amount of each ongoing fee that the client will be required to pay, including any fees payable after the end of the upcoming year; and
- any other prescribed information.

[Schedule 1, items 11, 12, 13, 15 and 16, section 962H of the Corporations Act]

1.31 This ensures that clients are aware of the services that they are entitled to receive under ongoing fee arrangements and the fees payable for those services. The services that clients are entitled to receive are the services that the client pays for under the ongoing fee arrangement. The requirement to include any fees that the client will be charged after the end of the upcoming year ensures that clients are aware of all fees and that there are no time gaps in the disclosure requirements. ***[Schedule 1, items 10, 15, and 16, sections 962H and 962G of the Corporations Act]***

1.32 Fee disclosure statements must express the fee amounts in Australian dollars, unless an alternative is provided in the regulations. Where the amount of an ongoing fee cannot be determined for the upcoming year, the fee disclosure statement must include a reasonable estimate of the fees and an explanation of the method used to work out the estimate. This supplements, rather than replaces, the existing fee disclosure statement regime. ***[Schedule 1, items 14, 16 and 17, section 962H of the Corporations Act]***

1.33 A reasonable estimate should be based on all of the relevant information available to the fee recipient at the time of the estimate, and reflect their most accurate account of the client's position at that time. Fee recipients should factor in information known to them at the time of providing the estimate such as employer contributions that are expected to be made throughout the year to a client's superannuation fund, additional investments that may be made by a client based on the advice provided and any known large withdrawals, such as an asset-based fee that the client is being charged.

Statements about renewing an ongoing fee arrangement

1.34 The fee disclosure statement must also provide the client with the following statements in relation to renewing the agreement:

- a statement that the client may renew the arrangement by giving the fee recipient notice in writing;
- a statement that the arrangement terminates and no further advice will be provided and no further fees will be charged, if the client does not renew the arrangement;
- a statement that the client is deemed not to have renewed the arrangement if the client does not give notice in writing before the end of the renewal period; and
- a statement that the renewal period is a period of 120 days beginning on the anniversary day. ***[Schedule 1, item 24, section 962H of the Corporations Act]***

Written consent for the deduction of fees under ongoing fee arrangements

1.35 Fee recipients must obtain the client's express written consent to deduct, arrange to deduct, or accept an amount for payment of, fees under an ongoing fee arrangement. The consent requirement applies to deductions from accounts that are not a credit card or an account which falls within the definition of basic deposit product in section 761A of the Corporations Act. 'Credit card' takes its ordinary meaning. Deductions made from credit card accounts and basic deposit accounts are not subject to the consent rules because clients generally have more visibility of amounts being deducted from these accounts.

1.36 Where the fee recipient is the account provider of the account to be debited, the consent of the client must be obtained prior to making the deduction. Where the account to be debited is provided by a third party account provider, the fee recipient must obtain express written consent to arrange the deduction and have provided a copy of that consent to the third party prior to, or as part of, arranging the deduction. For example, an authorised representative cannot arrange for a licensee to deduct ongoing fees without the consent of the client, nor can a licensee arrange for an authorised representative to deduct fees without consent. Generally the account provider is the product issuer.

1.37 It is expected that any third party arranging a deduction on behalf of the fee recipient is an agent of the recipient and the third party must only arrange the deduction if the client has consented to it. This means that where the fee recipient is an authorised representative of a financial services licensee and the client has given consent to the fee recipient to arrange a deduction, the licensee can act as an agent for the fee recipient and rely on the fee recipient's consent.

1.38 Where an account is held jointly, the fee recipient must satisfy the consent requirements for all account holders, not only the client. This requirement ensures that the amount and deduction of fees is visible

to all account holders. Where a fee recipient does not comply with the consent requirements, the ongoing fee arrangement terminates. ***[Schedule 1, item 10, section 962FA of the Corporations Act]***

1.39 A fee recipient does not contravene section 962S(5) or section 962S(6) of the Corporations Act if they repay an amount accepted in contravention of those sections into the account holder's account within 10 business days from the day on which the payment was accepted.

1.40 The Court may order that the fee recipient refund amounts deducted without consent. ***[Schedule 1, item 25, section 1317GB of the Corporations Act]***

1.41 Ongoing fee arrangements are not permitted to include conditions that require the client to give consent to deduct fees, nor commitments relating to the variation or withdrawal of consent. Any conditions to that effect are void. ***[Schedule 1, item 24, section 962W of the Corporations Act]***

1.42 Where ASIC has determined requirements for giving consent to deductions in a legislative instrument, the instrument may require a specific form or the form of words that must be used for giving consent, and may also require that the consent include specified information. ***[Schedule 1, item 24, section 962T of the Corporation Act]***

1.43 An account holder may withdraw or vary the consent at any time by providing notice to the fee recipient in writing. If the fee recipient receives notice from the account holder withdrawing or varying the consent, then the fee recipient must:

- give written confirmation to the account holder that notice was received within 10 business days; and
- if the consent was provided to an account provider, the fee recipient must also give the account provider a copy of the notice within 10 business days.

1.44 A contravention of this requirement is subject to a civil penalty provision. ***[Schedule 1, item 24, section 962U of the Corporations Act]***

1.45 The amendments repeal section 962K (the previous requirement to provide a renewal notice) and any associated references, and section 962J (the definition of disclosure day), as these provisions are now not needed. Section 962G requires fee recipients to provide a fee disclosure statement which includes information about renewing an arrangement annually. ***[Schedule 1, items 2, 4, 5, 6 and 13, sections 962F(1), (2) and (3), 962K, and 962J of the Corporations Act]***

1.46 A client's consent ceases to have effect if the ongoing fee arrangement is terminated, or at the end of 30 days after the end of the first renewal period after consent is given for the ongoing fee arrangement.

1.47 Under the new law, a 150 day period to the expiry of consent commences on the anniversary day of the arrangement each year. During this period, a fee recipient is required to again seek the client's written consent for deductions of ongoing fees. It is expected that fee recipients seek the client's consent at the same time that they provide the client with a fee disclosure statement. The new consent operates from the date that it was obtained, and the previous consent automatically terminates at the end of 30 days after the end of the renewal period. In other words, a consent given by a client expires 150 days after the next anniversary day to occur after giving the consent. ***[Schedule 1, item 24 section 962V(1) of the Corporations Act]***

1.48 If the consent ceases to have effect because it has expired or because the ongoing fee arrangement terminates, the fee recipient must notify the account provider of the cessation within 10 business days of the cessation. If the fee recipient fails to give notice of the cessation, they are subject to a civil penalty provision. ***[Schedule 1, item 24, sections 962V(2) and 962V(3) of the Corporations Act]***

1.49 Where a fee recipient wishes to provide fee disclosure statements or receive consent from clients electronically, the general rules for electronic financial services disclosure apply. For example, a fee recipient is able to provide the documents to the client via email if the client has provided the fee recipient with their email address.

Record-keeping requirements

1.50 Fee recipients must keep appropriate records to show their compliance with Division 3 of Part 7.7A. These records must be kept for five years and a failure to do so is a criminal offence with a penalty of up to five years imprisonment. Further records may be specified in the regulations. ***[Schedule 1, item 24, section 962X of the Corporations Act]***

Consequential amendments

1.51 The definition of *civil penalty order* is amended to insert a reference to section 1317GB and to include in the definition penalties in relation to the deduction of ongoing fees without consent, arrangement of the deduction of ongoing fees without consent or acceptance of such deductions, and the confirmation of receipt of variation or withdrawal of consent for deductions of ongoing fees. This means that a contravention of those rules is a civil penalty provision. ***[Schedule 1, items 27, 28 and 29, section 9 of the Corporations Act]***

1.52 The definitions of renewal notice, renewal notice day, disclosure day and the table item referring to the repealed civil penalty provision for section 962S, are repealed. ***[Schedule 1, items 1, 3, 4 and 30, sections 960 and 1317E(3) (table item dealing with section 962S(1)) of the Corporations Act]***

1.53 The amendments provide new table items in section 1317E(3) so that the following provisions are civil penalty provisions:

- a fee recipient failing to comply with the requirement to obtain consent to deduct ongoing fees from an account;
- a fee recipient failing to comply with the requirement to obtain consent to arrange for deductions of ongoing fees from an account;
- a fee recipient failing to comply with the requirement not to accept payment of ongoing fees resulting from a deduction from an account without consent;
- a fee recipient failing to comply with the requirement to confirm receipt of a variation or withdrawal of consent for deductions of ongoing fees; and
- a fee recipient failing to comply with the requirement to give written notice to an account provider that an ongoing fee arrangement has ceased to have effect.

[Schedule 1, items 31 and 32, section 1317E(3) of the Corporations Act]

1.54 Where a civil penalty order is made, the court must give preference to and have regard for any refund amounts payable to persons who suffer damage as a result of a contravention of the provisions. ***[Schedule 1, items 32 and 33, sections 1317QF(2)(a)(ii) and 1317QF(3)(b) of the Corporations Act]***

1.55 A court may provide relief from liability for a contravention of a civil penalty provision where a person meets the requirements of section 1317S. This means that a court may provide relief from a civil penalty provision in this Chapter if the person has contravened a civil penalty provision but has acted honestly and having regard to all of the circumstances, the person ought fairly to be excused**.** ***[Schedule 1, item 32, section 1317S(1) of the Corporations Act]***

1.56 The amendments insert a reference to section 962X into the table in Schedule 3 of the Corporations Act so that it is a criminal offence provision with a maximum penalty of five years imprisonment. ***[Schedule 1, item 35, Schedule 3 to the Corporations Act]***

Application and transitional provisions

Existing ongoing fee arrangements

1.57 The transitional provisions apply to ongoing fee arrangements which are in force immediately before 1 July 2021. ***[Schedule 1, item 26, section 1673B of the Corporations Act]***

1.58 For all ongoing fee arrangements that are in force immediately before 1 July 2021, the transitional provisions provide that from 1 July 2021 until 30 June 2022, section 962G applies in relation to the ongoing fee arrangement as if it were replaced with section 1673C(3). This section requires a fee recipient to give the client a fee disclosure statement in relation to the ongoing fee arrangement before the end of the 12 month transition period. The day that fee recipient provides the client with a fee disclosure statement during this period is the anniversary day for that arrangement in each subsequent year. ***[Schedule 1, item 26, sections 1673 and 1673C of the Corporations Act]***

1.59 Where an obligation exists under section 962G or section 962K before 1 July 2021 that was not discharged before that date, the obligations cease on 1 July 2021, however fee recipients are required to comply with the fee disclosure statement requirements during the transition period. This means that only one fee disclosure statement needs to be provided between 1 July 2021 and 30 June 2022. ***[Schedule 1, item 26, sections 1673D and 1673E of the Corporations Act]***

1.60 The fee disclosure statement which is provided to the client during the transitional period must include information about the fees charged and services provided to the client before the day that the fee disclosure statement was given to the client if that information was not included in the last fee disclosure statement provided to the client. This ensures that there are no gaps in the disclosure to clients because of the change in timing for the provision of fee disclosure statements. The fee disclosure statement must also include information about the fees to be charged and services to be provided to the client for the coming year and the prescribed statements about renewal. ***[Schedule 1, item 26, sections 1673D and 1673E]***

1.61 The requirement for a fee recipient to obtain consent for the deduction of fees applies from 1 July 2022. If the client provides the fee recipient with consent for the purposes of the new Subdivision C prior to 1 July 2022, then sections 962U and 962X apply from the date the consent is given. ***[Schedule 1, item 26, section 1673F of the Corporations Act]***

1.62 The transitional provisions provide that section 1350 of the Corporations Act does not apply to the operation of Subdivision B of Division 3 of Part 7.7A, in respect of the ongoing fee arrangement. ***[Schedule 1, item 26, section 1673C(7) of the Corporations Act]***

1.63 The rules for keeping records of a fee recipient's compliance with the requirements in Division 3 of Part 7.7A of the Corporations Act apply to all ongoing fee arrangements from 1 July 2021. ***[Schedule 1, item 26, section 1673G of the Corporations Act]***

1.64 Fee recipients must comply with all of the rules under the new law from 1 July 2021 in relation to ongoing fee arrangements entered into on or after 1 July 2021.

Chapter 2
Disclosure of lack of independence (recommendation 2.2)

2.1 Schedule 2 to the Bill amends the Corporations Act to require a providing entity (a financial services licensee or authorised representative) to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client. ASIC may by, legislative instrument, determine requirements for the purposes of the disclosure.

Context of amendments

Existing law

2.2 Entities providing financial services are subject to a range of regulatory requirements to protect clients. These obligations include restrictions on the use of terms that imply that the entity is independent (if this is not the case) and to provide disclosure documents.

Lack of independence

2.3 Under section 923A(1) of the Corporations Act, the assumption and use of certain words or expressions (including 'independent', 'impartial' and 'unbiased') by or on behalf of entities providing financial services or carrying on a financial services business is restricted.

2.4 Under section 923A(2) of the Corporations Act, a person may only use a restricted word or expression in relation to a financial services business or financial service if, broadly:

- the person (or anyone providing a financial service on their behalf or anyone on whose behalf they are providing a financial service) does **not** receive:
  - a commission (other than a commission that is rebated in full);
  - remuneration calculated based on the volume of business placed by the person with the issuer of the product; or
  - other gifts or benefits from the product issuers that may reasonably be expected to influence the person; and
- the person is **not** directly or indirectly restricted in relation to the financial products in respect of which they provide

financial services (disregarding certain regulatory restrictions under section 923A(3) of the Corporations Act); and

- the person does **not** have a conflict of interest arising from a connection with an issuer of financial products that could reasonably be expected to influence the person in carrying on the business or providing the service.

2.5 Otherwise, if a person uses a restricted term in relation to a financial services business or financial services under section 923A(1) of the Corporations Act, the person is guilty of an offence. The offence is subject to a fine of up to 10 penalty units for an individual or 100 penalty units for a corporation for each day or part of a day in which the offence was committed (see Schedule 3 of the Corporations Act).

Disclosure

2.6 Part 7.7 of the Corporations Act, together with the related regulations, imposes a range of disclosure obligations on entities that provide financial services. These obligations include the requirement to provide a Financial Services Guide.

2.7 A financial services licensee or authorised representative (a providing entity) is generally required to provide a Financial Services Guide to a retail client before providing financial services to that client (see sections 941A, 941B and 941D of the Corporations Act).

2.8 The main requirements for what a Financial Services Guide must contain are set out in sections 942B and 942C of the Corporations Act. Among other things, a Financial Services Guide must:

- identify who the entity acts for in providing the relevant financial services;
- provide information about the remuneration received by the entity and certain related entities as a result of the provision of the services;
- provide the level of information on the specified matters necessary for a reasonable person to make an informed decision about acquiring the financial services; and
- be presented clearly and concisely.

2.9 There are a range of other requirements for Financial Services Guides and other disclosure documents set out in Part 7.7 of the Corporations Act and the related regulations.

2.10 A providing entity that fails to provide a satisfactory Financial Services Guide is subject to a civil penalty (see section 1317E of the Corporations Act). Under section 1317G of the Corporations Act, the maximum amount of the penalty for an individual is the greater of

5,000 penalty units and three times the benefit derived and detriment avoided from the failure to disclose. The maximum amount of penalty for a body corporate is the greater of:

- 50,000 penalty units;
- three times the benefit derived and detriment avoided; and
- 10 per cent of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision (up to an amount of no more than 2.5 million penalty units).

Financial Services Royal Commission

2.11 Commissioner Hayne considered whether there were additional means by which conflicts of interest could be better managed.

2.12 One such means was to improve the disclosure of conflicts of interest. Commissioner Hayne noted that currently there is no requirement for financial advisers who are not independent to explain to a client that they are not independent.

2.13 Commissioner Hayne noted that a client may be able to infer from some of the matters disclosed in a Financial Services Guide that a financial adviser was not independent, and why. However, he considered that this is not sufficient, and that the adviser's lack of independence should be brought to the client's attention in a prominent, clear and concise manner.

2.14 Commissioner Hayne recommended that the law be amended to require that a financial adviser who would contravene section 923A of the Corporations Act must, before providing personal advice to a retail client, give the client a written statement (in or to the effect of a form to be prescribed) explaining simply and concisely why the adviser is not independent, impartial and unbiased.

Summary of new law

2.15 Schedule 2 amends the Corporations Act to require a providing entity (a financial services licensee or authorised representative) to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client. ASIC may, by legislative instrument, determine requirements for the purposes of the disclosure.

Comparison of key features of new law and current law

New law	*Current law*
Entities (financial services licensees or authorised representatives) who are not acting independently (that is, who would contravene section 923A of the Corporations Act by assuming or using any of the restricted words or expressions identified in section 923A(5) of the Corporations Act (including 'independent', 'impartial' and 'unbiased')) must give to a retail client a written statement in the form prescribed by ASIC disclosing their lack of independence before providing personal advice to the client. The statement is included in the list of statements and information that must be included in the Financial Services Guide.	No equivalent.

Detailed explanation of new law

Disclosure of lack of independence by providing entities

2.16 Schedule 2 amends the Corporations Act to require a providing entity to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client.

2.17 Schedule 2 also amends the Corporations Act to allow ASIC to prescribe, by legislative instrument, requirements for the disclosure statement. ***[Schedule 2, items 6 and 8, sections 942B(7A), 942B(7B), 942C(7A) and 942C(7B) of the Corporations Act]***

2.18 This new obligation is added to the existing Financial Services Guide disclosure obligations under Division 2 of Part 7.7 of the Corporations Act. The lack of independence disclosure statement is included in the list of statements and information to be included in a Financial Services Guide.

2.19 Specifically, Schedule 2 amends the main requirements for a Financial Services Guide in sections 942B and 942C of the Corporations Act. As a result of these amendments, a providing entity that is not independent (that is, an entity that would contravene section 923(1)

if they used the word 'independent' or a similar term) must include a statement in the Financial Services Guide that:

- sets out that the providing entity is not independent, impartial or unbiased (which are restricted words or expressions within the meaning of section 923A(5)) in relation to the provision of personal advice, and explains the reasons why; and
- if any other word or expression has been specified as a restricted word or expression for the purposes of section 923A(5)(a)(ii)—sets out that the providing entity is not able to assume or use the restricted word or expression in relation to the provision of personal advice, and explains the reasons why, and
- meets the requirements (if any) determined in an ASIC legislative instrument under section 942B(7A).

[Schedule 2, items 5 and 7, sections 942B(2)(fa) and 942C(2)(ga) of the Corporations Act]

2.20 This ensures that retail clients receive a disclosure statement about independence that explains clearly and concisely why the providing entity is not independent.

2.21 The penalty for failing to provide the disclosure statement is a civil penalty. As the disclosure statement is part of the statements and information to be provided in a Financial Services Guide, the penalty for failing to provide a lack of independence disclosure statement is the same penalty that applies if a providing entity fails comply with the requirement to provide a satisfactory Financial Services Guide (see paragraph 2.10 and section 1317E of the Corporations Act).

2.22 The disclosure statement must be consistent with any requirements about the disclosure prescribed by ASIC by legislative instrument (if such a legislative instrument has been made). This enables ASIC to ensure that a providing entity's lack of independence is explained prominently, clearly and concisely to clients. The requirement to be consistent with requirements prescribed by ASIC also ensures that there will be a consistent approach taken to how information about a lack of independence is presented in disclosure statements from all providing entities in Australia who must comply with the new obligation. ***[Schedule 2, items 5 and 7, sections 942B(2)(fa)(iii) and 942C(2)(ga)(iii) of the Corporations Act]***

2.23 Where ASIC has not made a legislative instrument prescribing requirements for the disclosure statement, a providing entity must still provide the disclosure statement. In such circumstances, providing entities have discretion on the form of the statement but the statement must still satisfy the other two requirements set out in paragraph 2.19.

2.24 Under the current law, a providing entity is generally required to provide a Financial Services Guide to a retail client before providing a financial service to that client. Where a financial adviser is giving advice as an employee of a providing entity, the lack of independence disclosure must still relate to the providing entity, not the employee.

Disclosure where a providing entity is not required to provide a Financial Services Guide

2.25 Schedule 2 also changes the information that must be provided in circumstances where a providing entity does not provide a Financial Services Guide. The specific amendments are:

- an amendment to include the disclosure of lack of independence in the list of required information that must be provided where financial product advice is given about certain basic deposits and other products ***[Schedule 2, item 3, section 941C(7) of the Corporations Act]***; and
- an amendment to include the disclosure of lack of independence in the list of required information that must be provided in time critical cases where the client expressly instructs that they require financial services to be provided immediately or by a specified time and, it is it not reasonably practicable to give the Financial Services Guide before the service is provided. ***[Schedule 2, item 4, section 941D(3)(a) of the Corporations Act]***

Consequential amendments

2.26 Schedule 2 makes amendments as a consequence of amending the obligations to provide Financial Services Guides by linking the obligation to the restriction in section 923A(1) of the Corporations Act. This includes inserting a note outlining that a Financial Services Guide may need to include a statement relating to the restriction in this section, and a provision for avoidance of doubt in section 923A of the Corporations Act. ***[Schedule 2, items 1 and 2, section 923A of the Corporations Act]***

2.27 The avoidance of doubt provision clarifies that the use of a restricted word or expression in the lack of independence disclosure statement does not contravene section 923A of the Corporations Act. This makes clear that a providing entity will not be penalised for complying with the disclosure requirements and stating that they are not independent, unbiased or impartial. ***[Schedule 2, item 2, section 923A(6) of the Corporations Act]***

Application and transitional provisions

2.28 Financial Services Guides provided to new clients on or after 1 July 2021 must include the lack of independence disclosure statement. ***[Schedule 2, item 9, section 1674 of the Corporations Act]***

2.29 A transitional rule applies providing that the disclosure of lack of independence must be provided if the providing entity has given a Financial Services Guide to the client before 1 July 2021 and the financial services are provided to the client on or after 1 July 2021. The statement must be provided whether or not the failure to disclose would be materially adverse from the point of view of a reasonable person. This avoids any ambiguity about whether the statement must be provided for services that have been provided with an existing Financial Services Guide. ***[Schedule 2, item 9, sections 1674 and 1674A of the Corporations Act]***

2.30 Where the providing entity has already given a Financial Services Guide before 1 July 2021, the providing entity does not need to release a new Financial Services Guide that contains the disclosure of lack of independence from 1 July 2021. In line with existing obligations about updating Financial Services Guides (see section 941F of the Corporations Act) the providing entity may choose to provide it in a Supplementary Financial Services Guide. ***[Schedule 2, item 9, sections 1674A(1)(d) and 1674A(1)(e) of the Corporations Act]***

Chapter 3
Advice fees in superannuation (recommendations 3.2 and 3.3)

Outline of chapter

3.1 Schedule 3 to the Bill amends the SIS Act to provide greater protection for superannuation members against paying fees for no service. The amendments increase the visibility of advice fees for all superannuation products and prohibit the charging of ongoing fees for financial product advice from MySuper products.

3.2 These amendments will protect superannuation members and provide them with the opportunity to make informed assessments about the value of the advice they are receiving and paying for out of their superannuation interest.

3.3 The amendments implement the Government's response to recommendations 3.2 and 3.3 of the Financial Services Royal Commission.

Context of amendments

3.4 The SIS Act sets out the general fee charging rules in Part 11A (general fee rules) on charging and deducting fees from a superannuation interest, including:

- prohibiting the charging of entry fees and exit fees;
- applying a fee cap on low balance products; and
- prohibiting the cost of advice provided to employers being borne by members.

3.5 Part 2C of the SIS Act contains additional rules about the fees that can be charged to a MySuper product (MySuper fee rules), including a list of allowable fees and how these fees can be charged. These rules apply in conjunction with the general fee rules.

3.6 MySuper products are simple products with basic features and one investment option or a lifecycle investment strategy. These products are designed as 'default' options suitable for, but not limited to, disengaged members.

3.7 Section 99F of the SIS Act prohibits a superannuation trustee from passing the costs of particular types of financial product advice incurred by one member on to any other member.

3.8 Financial product advice that is collectively charged to members (because it is *not* prohibited by section 99F of the SIS Act) is generally referred to as 'intra-fund advice', although this is not defined as such in the Act. Such advice usually involves less complex, non-ongoing personal advice available to all members about their interest in the fund.

3.9 Under the MySuper fee rules, fees can only be charged to a MySuper product if they fall within one of seven categories and comply with applicable 'charging rules' (see sections 29V and 29VA of the SIS Act). The seven categories are: administration fees, investment fees, buy-sell spreads, switching fees, activity fees, advice fees and insurance fees.

3.10 It is a general expectation that superannuation trustees have in place appropriate systems for ensuring compliance with the general fee rules and MySuper fee rules.

Financial Services Royal Commission

3.11 Recommendations 3.2 and 3.3 of the Financial Services Royal Commission were to prohibit the deduction of advice fees (other than for infra-fund advice) from MySuper products and limit the deduction of advice fees from choice products.

3.12 A key concern of Commissioner Hayne about advice fees charged to superannuation products is that members have little visibility over ongoing advice fees and that there were instances where these fees were charged without the member's awareness or informed consent. Commissioner Hayne also emphasised that advice fees should only be paid for the actual provision of a service.

3.13 In recommendation 3.2, Commissioner Hayne suggested removing the ability for superannuation trustees to deduct advice fees (other than for intra-fund advice) from a MySuper product, consistent with the status of MySuper as a simple product with basic features. Commissioner Hayne's view was that members who wish to obtain financial advice about their superannuation should pay for that advice directly.

3.14 There is no reason to suggest that advice needs, particularly for those approaching retirement, would be any different for members in a MySuper or choice product. Having different fee rules for deducting advice fees from MySuper and choice products may have prevented individuals with MySuper accounts from accessing advice or have created incentives for members to move from MySuper to choice products in order to pay for financial advice using superannuation.

3.15 The amendments to Part 2C of the SIS Act prohibit ongoing advice fees from being deducted from MySuper accounts, but allow non-ongoing client-authorised advice fees (including multiple instances of one-off advice) to be deducted. The amendments allow MySuper members to continue to access once-off financial advice, with fees charged to their superannuation interest if the requirements set out in Part 2C (MySuper) and Part 11A (General fees rules) of the SIS Act are satisfied.

3.16 The implementation approach adopted prohibits ongoing advice fees in MySuper, which Commissioner Hayne identified as carrying the most risk of fees being charged for no service.

3.17 Recommendation 3.3 was to prohibit the deduction of an advice fee (other than for intra-fund advice) from superannuation accounts, except where the requirements about annual renewal, prior written identification of services and provision of the client's express written authority have been met. These requirements were set out in recommendation 2.1 in connection with ongoing fee arrangements (see Chapter 1).

3.18 Commissioner Hayne made clear that intra-fund advice should not be subject to the prohibitions on advice fees that he recommended and noted that during the Financial Services Royal Commission there was no suggestion of misconduct associated with intra-fund advice.

Summary of new law

3.19 Schedule 3 to the Bill amends Part 11A of the SIS Act to ensure that a superannuation trustee can only charge advice fees (other than fees for intra-fund advice) to a member where certain conditions are satisfied. These conditions are that:

- the fee is in accordance with an arrangement that the member has entered into;
- the member has consented in writing to being charged the fee; and
- the trustee has the written consent or a copy of it.

3.20 These requirements apply to all advice fees that are charged to a member, irrespective of whether they are charged on an ongoing basis. This is consistent with superannuation trustees' existing obligations, including the best interests duty and the sole purpose test, as well as the expectation that trustees have appropriate oversight of fees that are deducted from members' accounts.

3.21 The Schedule also amends Part 2C of the SIS Act to remove a superannuation trustee's ability to charge fees under an ongoing fee arrangement for financial product advice from MySuper products. Trustees are still permitted to charge fees related to a non-ongoing fee arrangement from a MySuper product. Trustees are required to comply with the MySuper fee rules and the fee arrangement consent requirements set out in the amendments to Part 11A of the SIS Act.

3.22 Superannuation trustees are still permitted to charge fees in relation to intra-fund advice as administration fees (which must be collectively charged in accordance the charging rules in section 29VA of the SIS Act).

3.23 These amendments implement the Government's response to recommendations 3.2 and 3.3 of the Financial Services Royal Commission.

Comparison of key features of new law and current law

New law	*Current law*
The general fee rules prohibit a superannuation trustee from charging a member fees for advice provided to that member (other than advice that may be collectively charged, such as intra-fund advice) unless: • the fee is charged in accordance with an arrangement that the member has entered into; • the member has consented to being charged the fee in accordance with the arrangement; and • the trustee has the consent or a copy of the consent from the member.	The general fee rules do not include requirements for superannuation trustees charging a member for advice provided to that member.
A superannuation trustee cannot charge a fee under an ongoing fee arrangement (fee for personal advice paid for a period over 12 months) to a MySuper product.	A superannuation trustee can charge a fee in relation to an ongoing fee arrangement to a MySuper product.

Detailed explanation of new law

Advice fees

3.24 The amendments introduce new requirements into Part 11A of the SIS Act for charging fees in respect of financial advice.

3.25 A superannuation trustee cannot charge a member for the cost of financial product advice provided to the member, unless:

- the cost is to be paid in accordance with the terms of an arrangement entered into by the member;
- the member has expressly consented in writing to being charged for the cost of providing the financial advice; and
- the trustee has the written consent, or a copy of the written consent.

[Schedule 3, items 2 and 3, section 99FA of the SIS Act]

3.26 These requirements apply to the trustee when the cost of providing financial product advice in relation to a member is paid from the member's superannuation interest, and not where the member is paying those costs from funds held outside the superannuation system.

3.27 The amendments to the general fee rules relate to charging a member for the cost of providing financial product advice to the member. It does not matter whether or not a particular fee is described as an 'advice fee'. This approach is consistent with other fee rules such as section 99F of the SIS Act (which applies to costs of financial advice that are collectively charged, irrespective of how they are labelled).

3.28 Similarly for MySuper products, the definition of advice fees for the purposes of the MySuper fee rules are any fees that relate directly to costs incurred in the course of providing financial advice to the member.

3.29 The new requirements contained in the amendments to the general fee rules apply to all advice fees that are not collectively charged, including those charged in relation to MySuper products.

3.30 The new requirements apply to a superannuation trustee any time the cost of advice is to be deducted from a member's superannuation account in relation to advice provided to the member. It does not matter whether the trustee provided the advice directly to the member, or whether the advice was provided by a third party if the cost is deducted from the member's superannuation account.

Fees must be charged in accordance with an arrangement

3.31 The term 'arrangement' takes its ordinary meaning and includes both ongoing fee arrangements and non-ongoing arrangements. The use of

the term arrangement ensures that the new requirements in the SIS Act are appropriately linked to the requirements for ongoing fee arrangements in the Corporations Act.

3.32 In addition to the requirements in section 99FA of the SIS Act, advice fees charged in relation to MySuper products must relate to a fee arrangement that is not an ongoing fee arrangement. ***[Schedule 3, item 7, section 29VA(9A)(d) and (e) of the SIS Act]***

3.33 The requirements oblige superannuation trustees to consider the basis on which a particular fee for financial product advice is charged and be satisfied that the fee relates to a cost that is to be paid in accordance with an arrangement that the member has agreed to. The additional requirements concerning member consent to being charged an advice fee apply in conjunction with the requirements about arrangements.

3.34 Schedule 3 to the Bill amends the definition of an activity fee in the MySuper fee rules in the SIS Act to prevent any fee that satisfies the definition of advice fee in the fee charging rules instead being treated as an activity fee. This ensures that the amendments apply as intended. ***[Schedule 3, items 4, 5 and 6, sections 29V(7)(aa), 29V(7)(b) and 29V(8)(b) of the SIS Act]***

Ongoing fee arrangements

3.35 An ongoing fee arrangement is defined in section 962A of the Corporations Act as an arrangement under which:

- a financial services licensee or their representative gives personal advice to a person as a retail client;
- that person enters into an arrangement with the financial services licensee or a representative of the financial services licensee; and
- under that arrangement a fee is to be paid during a period of more than 12 months.

[Schedule 3, item 1, definition of 'ongoing fee arrangement' in section 10(1) of the SIS Act]

3.36 Division 3 of Part 7.7A of the Corporations Act, as amended by Schedule 1 to the Bill implementing the Government's response to recommendation 2.1 of the Financial Services Royal Commission, contains requirements that must be satisfied in relation to ongoing fee arrangements for any financial product advice. These include the requirement that advisers renew the arrangement annually, and outline to the client both the services that will be provided and the fees that will be charged in the next 12 months.

3.37 A failure to comply with these requirements results in the statutory termination of an ongoing fee arrangement. This means that there will no longer be any arrangement in accordance with which fees

can be charged (see Chapter 1; section 962F(1) of the Corporations Act, as amended by Schedule 1 to the Bill, and new section 962FA, inserted by Schedule 1 to the Bill).

3.38 Superannuation trustees are expected to obtain sufficient information so that they are satisfied that an ongoing fee arrangement exists and the relevant fee is covered by that arrangement. In practice, trustees may be able to rely on information provided in the written consents (described below) that they must obtain before deducting fees. However, this will be a matter for individual trustees to assess, having regard to the information that is provided in those consent forms and any other processes that the trustees have in place.

3.39 Trustees must comply with any other requirements applicable to them (for example, any general requirements under the Corporations Act and the SIS Act).

Non-ongoing fee arrangements

3.40 Non-ongoing fee arrangements are not defined in the Corporations Act but refer to any arrangement that relates to a particular service provided to the member on a one-off basis or over a period of up to 12 months. Fees for financial product advice related to a MySuper product are only able to be charged to a MySuper product in relation to a non-ongoing fee arrangement.

3.41 Superannuation trustees must determine whether there is an arrangement in accordance with which the relevant fee can be charged and must comply with any other requirements applicable to them (for example, any general requirements under the Corporations Act and the SIS Act).

Prohibiting ongoing fee arrangements in respect of MySuper products

3.42 These amendments stipulate that the fees related to financial product advice must be paid in accordance with the terms of an arrangement entered into by the member. Such an arrangement cannot be an ongoing fee arrangement. ***[Schedule 3, item 7, section 29VA(9A)(d) and (e) of the SIS Act]***

3.43 The amendments are not intended to prevent holders of MySuper products from accessing financial product advice through their superannuation account on an ad hoc or once-off basis. The amendments do not prevent a member accessing multiple instances of one-off advice. However, to ensure that members' rights are protected, they need to enter into a new non-ongoing fee arrangement each time they seek advice.

3.44 Superannuation trustees are permitted to continue to charge fees for intra-fund advice without entering into an arrangement under section 99FA. Intra-fund advice cannot be ongoing advice (see section 99F of the SIS Act). Such fees are usually charged as administration fees. The

charging rules in section 29VA(2) to (4) of the SIS Act apply to administration fees and mean that any such fees can only be charged to members on a collective basis. This may be through the same flat fee or as the same percentage of a member's account balance or a combination of both. ***[Schedule 3, item 3, section 99FA(3) of the SIS Act]***

Consent to charge the fee

3.45 In addition to being satisfied that a fee is charged in accordance with an arrangement, superannuation trustees can only pass on the cost of providing financial product advice to a member in accordance with the terms of a written consent from that member. ***[Schedule 3, item 3, section 99FA(1)(b) of the SIS Act]***

3.46 The trustee must either have the member's consent document, or a copy of it. ***[Schedule 3, item 3, section 99FA(1)(e) of the SIS Act]***

Ongoing fee arrangements

3.47 The requirement about ongoing fee arrangement consent complements the additional requirements introduced into Division 3 of Part 7.7A of the Corporations Act by Schedule 1 to the Bill. Those obligations prevent 'fee recipients' from deducting or arranging the deduction of, fees from a client's account without the client's written consent.

3.48 If the fee recipient holds the account from which the fee is to be deducted, new section 962R of the Corporations Act requires that the client has consented to the fee recipient deducting the fee from their account. If the fee recipient does not hold the account (for example because it is held by a third party, such as a superannuation trustee) new section 962S of the Corporations Act requires that the client has consented to the fee recipient arranging to have the fee deducted from their account.

3.49 A failure to comply with the requirement to obtain consent also means that the arrangement is terminated (see new section 962FA of the Corporations Act).

3.50 The new fee rules in the SIS Act require that, for ongoing fee arrangements, the member has consented to the fee being deducted in accordance with the requirements in new section 962R or 962S of the Corporations Act in Schedule 1 to the Bill. Under these sections a fee recipient cannot deduct or arrange for the deduction of ongoing fees without consent. ***[Schedule 3, item 3, section 99FA(1)(c)(i) of the SIS Act]***

3.51 This requirement is separately imposed on superannuation trustees under the SIS Act to ensure that they are always satisfied that the applicable consent is in place for ongoing fee arrangements, and that they obtain the written consent of a member (or a copy of that consent) before determining that a fee can be charged. The requirement is particularly

relevant for trustees who do not provide the advice, as the requirement to obtain consent under the Corporations Act still applies to the fee recipient.

3.52 For fees charged in accordance with ongoing fee arrangements, the consent must also satisfy any requirements specified by ASIC in relation to ongoing fee arrangements under new section 962T of the Corporations Act (requirements relating to consent). This ensures there is symmetry between the consent requirements under the respective regimes in the event that ASIC determines requirements for the giving of consent. ***[Schedule 3, item 3, section 99FA(1)(c)(ii) of the SIS Act]***

Non-ongoing fee arrangements

3.53 For arrangements that are not ongoing fee arrangements (that can apply to fee arrangements for MySuper products) the member's consent must be for the superannuation trustee to directly or indirectly pass the cost onto the member of providing financial product advice in relation to the member. The amendments also allow ASIC to specify requirements about the content of the consent through a legislative instrument. ***[Schedule 3, item 3, sections 99FA(1)(d)(ii) and 99FA(2) of the SIS Act]***

3.54 This instrument making power does not extend to the form in which consent must be provided. This ensures that trustees and advisers have the flexibility to develop consent forms in a way that is compatible with their existing systems to reduce their compliance costs.

3.55 The requirement that the written consent is provided by the member to the fee recipient ensures that third parties, such as an employer, cannot provide consent on the member's behalf. ***[Schedule 3, item 3, section 99FA(1)(b)]***

3.56 It is expected that superannuation trustees would keep records of written consents they receive in relation to both ongoing fee arrangements and non-ongoing fee arrangements to be able to show their compliance with the requirements introduced by these amendments.

Withdrawal and variations of consent

3.57 A member may notify a superannuation trustee, in writing, that they withdraw or vary their consent for the trustee to charge the costs of financial product advice for the member to their superannuation account. A trustee may also be notified of a withdrawal or variation of consent by a fee recipient.

3.58 In relation to ongoing fee arrangements, under Division 3 of Part 7.7A of the Corporations Act fee recipients must also provide notice to trustees within 10 business days if the ongoing fee arrangement ceases to have effect (new section 962V of the Corporations Act).

3.59 From the date a trustee is notified of withdrawal of consent, the trustee cannot charge any further costs for financial product advice to a member (unless the charge is permitted under another consent). Similarly,

if a trustee is notified that an ongoing fee arrangement has ceased, they cannot charge any further costs to the member under that arrangement. From the date a trustee is notified of a variation to a consent, the trustee can only charge further costs for financial product advice to the member in accordance with the varied consent.

3.60 For an ongoing fee arrangement, merely informing a trustee (where the trustee is not the fee recipient) of notice to withdraw does not affect whether a valid consent exists for the purpose of the Corporations Act. If a member wishes to withdraw their consent and terminate an ongoing fee arrangement, they must do so in accordance with new section 962U of the Corporations Act which requires the member to provide notice in writing to the fee recipient.

Fees for intra-fund advice

3.61 The new requirements do not apply to the cost of financial advice that is shared by passing it on to the individual member and other members of the fund. ***[Schedule 3, item 3, section 99FA(3) of the SIS Act]***

3.62 This ensures that superannuation trustees retain their existing ability to collectively charge members for intra-fund advice. The existing requirements in section 99F of the SIS Act must continue to be complied with in relation to intra-fund advice.

3.63 Where a member is charged for a combination of costs that are individually and collectively charged, the new requirements only apply to the extent that the costs are individually charged. Notwithstanding that they may be charged at the same time, individual and collectively charged costs continue to be separately identifiable and the character of one does not affect the character of the other.

3.64 In addition to the prohibition in section 99F of the SIS Act, the inappropriate passing of costs from a member to other members is generally prohibited by the duties and covenants contained in the SIS Act, including the best interests duty and requirement to fairly distribute costs between classes of beneficial interests.

General administration of the new fee rule

3.65 Consistent with section 99F of the SIS Act, the new fee charging rule is administered by ASIC. This outcome is achieved through separate amendments to table item 32 of section 6(1) of the SIS Act that are being made by Schedule 9 to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 in respect of the Government's response to recommendations 3.8, 6.3, 6.4 and 6.5 of the Financial Services Royal Commission.

Consequences of contravening the new fee rules

3.66 There are a range of existing enforcement tools available to APRA and ASIC under the SIS Act to enforce compliance with the general fee rules and the MySuper fee rules.

3.67 A standard condition on all RSE licenses that are held by superannuation trustees is compliance with the 'RSE licensee law', which includes the general fee rules and MySuper fee rules.[2]

3.68 If a superannuation trustee fails to comply with a provision of the SIS Act, including the general fee rules and the MySuper fee rules, APRA can issue directions under section 131D or 131DA of the SIS Act requiring the trustee to comply.

3.69 Failure to comply with directions made by APRA is an offence with a maximum penalty of 100 penalty units (see section 131DD of the SIS Act). If a body corporate trustee is convicted of an offence, section 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 500 penalty units.

3.70 Furthermore, if a superannuation trustee becomes aware that it has breached or will breach a licence condition, and is of the view that the breach is or will be significant, the trustee must report that to APRA. Failure to comply with this requirement is an offence with a maximum penalty of 50 penalty units. Such breaches may also be reportable to ASIC under the Corporations Act.

3.71 Currently, a superannuation trustee who has authorisation to offer a MySuper product must comply with the general fee rules and the MySuper fee rules. If a trustee does not comply with these rules, or APRA has reason to believe that they cannot continue to comply with these fee rules, APRA may remove their authorisation to offer a MySuper product.

3.72 A failure to comply with the general fee rules and MySuper fee rules can constitute a breach of the 'financial services law', compliance with which is a standard obligation on an Australian financial service licensee (see section 912A(1)(c) of the Corporations Act).

3.73 ASIC may take action in relation to entities that hold an Australian financial service licence through the enforcement and regulatory tools available to them under the Corporations Act. These include imposing additional conditions on a licence, issuing banning orders and suspending or cancelling a licence.

[2] Note, the terms 'RSE licence' and 'RSE licensee law' are defined terms in section 10 of the SIS Act. The term 'RSE' refers to a 'registerable superannuation entity'.

Application and transitional provisions

3.74 The amendments apply from 1 July 2021 in relation to any fees payable under an arrangement entered into on or after that time.
[Schedule 3, item 8(a)]

3.75 The amendments apply 12 months from 1 July 2021 in relation to any existing arrangements that were entered into before 1 July 2021.
[Schedule 3, item 8(b)]

3.76 This ensures that any existing arrangements, including ongoing fee arrangements, have a transitional period before the amendments begin to apply.

3.77 This transitional period is consistent with the 12 month period for existing ongoing fee arrangements in Schedule 1 to the Bill. For existing ongoing fee arrangements, the transitional requirements in section 1673F(2) of the Corporations Act apply, as inserted by Schedule 1 to the Bill (see Chapter 1).

Chapter 4
Statement of Compatibility with Human Rights

Schedule 1—Ongoing fee arrangements (recommendation 2.1)

4.1 Schedule 1 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

4.2 Schedule 1 amends the Corporations Act to protect clients with an ongoing fee arrangement from being charged fees for services that they are not using or are not aware that they are entitled to. The Schedule achieves this by providing that financial service providers who receive fees under ongoing fee arrangements must:

- seek annual renewal from clients for all ongoing fee arrangements;
- require fee recipients to disclose in writing the total fees that will be charged;
- set out the services that will be provided during the following 12 month period; and
- obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account.

Human rights implications

4.3 Schedule 1 does not engage any of the applicable rights or freedoms.

4.4 The civil penalty provisions contained in the Schedule are not 'criminal' for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary. Further, the provisions do not apply to the general public, but to a sector or class of people who should reasonably be aware of their obligations under the Corporations Act (for example, persons who hold an Australian Financial Services Licence).

4.5 Imposing the civil penalties will enable an effective disciplinary response to non-compliance. Finally, the civil penalties are for small amounts, with no sanction of imprisonment for non-payment of the penalty. Based on the above factors, the cumulative effect and the nature and severity of the civil penalties in the Schedule is not 'criminal' for the purposes of human rights law.

Conclusion

4.6 Schedule 1 is compatible with human rights as it does not raise any human rights issues.

Schedule 2—Disclosure of lack of independence (recommendation 2.2)

4.7 Schedule 2 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

4.8 Schedule 2 amends the Corporations Act to require a providing entity (a financial services licensee or authorised representative) to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client.

Human rights implications

4.9 Schedule 2 does not engage any of the applicable rights or freedoms.

Conclusion

4.10 Schedule 2 is compatible with human rights as it does not raise any human rights issues.

Schedule 3—Advice fees in superannuation (recommendations 3.2 and 3.3)

4.11 Schedule 3 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

4.12 Schedule 3 amends the SIS Act to provide greater protection for superannuation members against paying fees for no service. The amendments increase the visibility of advice fees for all superannuation products and prohibit the charging of ongoing advice fees from MySuper products.

Human rights implications

4.13 Schedule 3 does not engage any of the applicable rights or freedoms.

Conclusion

4.14 Schedule 3 is compatible with human rights as it does not raise any human rights issues.