

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001

Superannuation Industry (Supervision) Act 1993

Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020

This instrument amends regulations to implement the Government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Financial Services Royal Commission).

The *Corporations Act 2001* (Corporations Act) governs the activities of corporations and arrangements relating to financial products and services. The *Superannuation Industry (Supervision) Act 1993* (SIS Act) governs the activities of certain entities engaged in the superannuation industry.

Section 1364 of the Corporations Act and section 353 of the SIS Act provide that the Governor-General may make regulations prescribing matters required or permitted by the Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Acts.

The purpose of the *Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020* (the Regulations) is to remove certain exemptions from the requirement to hold an Australian financial services licence to provide financial services, and to make other minor amendments, in support of broader reforms to the roles and responsibilities of superannuation industry regulators.

Those broader reforms are made by Schedule 9 to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (the Bill) and implement recommendations 3.8, 6.3, 6.4 and 6.5 of the Financial Services Royal Commission.

The Bill makes adjustments to the SIS Act relating to the roles and responsibilities of superannuation industry regulators. It expands the role of the Australian Securities and Investments Commission (ASIC) to include the promotion of consumer protection and market integrity in the superannuation industry. The Bill also extends the Australian financial services licensing regime to cover a broader range of activities undertaken by superannuation trustees.

The Regulations repeal the exemption for trustees of non-public offer superannuation funds from the requirement to hold an Australian financial services licence to deal in financial products (including superannuation interests). Consistent with the reforms made by the Bill, this is intended to ensure the regulation of superannuation entities by ASIC on a consistent basis and reflects that members of non-public offer funds should have the same degree of protection as members of other funds. The Regulations also repeal a related exemption.

Reflecting amendments made by the Bill, the Regulations make a number of minor amendments relating to exemptions for pooled superannuation trusts and the submission of certain notices to the Commissioner of Taxation.

Public consultation on the Regulations was conducted between 31 January 2020 and 28 February 2020, together with exposure drafts of several Schedules implementing recommendations of the Financial Services Royal Commission. Eleven submissions were received on these Regulations and Schedule 9 to the Bill. Concerns about impacted trustees having sufficient time to prepare for the repeal of the non-public offer exemption have been addressed by providing a further 6 month transitional period for such trustees.

Details of the Regulations are set out in Attachment A.

The Corporations Act and SIS Act do not specify any conditions that need to be met before the power to make the Regulations is exercised.

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

Part 1 of Schedule 1 to the Regulations commences on the later of the commencement of Schedule 9 to the Bill and 1 January 2021. Part 2 of Schedule 1, which contains amendments relating to non-public offer funds, commences 6 months after the commencement of Part 1.

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 found at this link: <https://financialservices.royalcommission.gov.au/Pages/reports.aspx>

The Regulations result in a small increase in compliance costs for affected financial service providers.

A statement of compatibility with human rights is at Attachment B.

Details of the *Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020*.

Section 2 – Commencement

This section provides that Part 1 of Schedule 1 to the Regulations commence on the later of the commencement of Schedule 9 to the Bill and 1 January 2021. Part 2 of Schedule 1, which contains amendments relating to non-public offer funds, commences 6 months after the commencement of Part 1.

The changes are intended to commence on 1 January 2021 and 1 July 2021 respectively, but the commencement day of each Part has been set in this way to prevent retrospective application in the event the related amendments Bill commence after that time.

The balance of the instrument commences the day after registration.

Section 3 – Authority

This section provides that the Regulations are made under the Corporations Act and the SIS Act.

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1

Amendments to the Corporations Regulations 2001

Item 8 of Schedule 1 repeals the exemption for trustees of non-public offer superannuation funds from the requirement to hold an Australian financial services licence to deal in financial products (including a superannuation interest), effective on the commencement day of Part 2. Non-public offer superannuation funds are superannuation funds that are not offered to the public at large, with membership limited to employees of a particular employer or group of employers.

The removal of the exemption is intended to ensure the regulation of superannuation entities by ASIC on a consistent basis, and reflects that members of non-public offer funds should have the same degree of protection as members of other funds.

As a result of the amendments in the Bill and items 1 and 8 of Schedule 1 to these Regulations, from the commencement day of Part 2, trustees of non-public offer funds who hold a registrable superannuation entity licence from APRA must also hold Australian financial services licence authorisations both to deal in a superannuation interest and to provide a superannuation trustee service.

Item 1 creates, and item 8 subsequently repeals, a temporary exemption to ensure trustees of non-public offer funds are not required to hold the superannuation trustee service authorisation until the commencement day of Part 2.

Trustees of non-public offer funds lodging an application after Schedule 9 to the Bill commences must comply with the Australian financial services licence application requirements in respect of each financial service they propose to provide.

Trustees of non-public offer funds are advised to lodge their Australian financial services licence applications with ASIC on or before 30 April 2021. If a trustee submits a complete application to ASIC by that date, item 10 of Schedule 1 will deem the trustee compliant with the requirement to be authorised for both financial services from the commencement day of Part 2 until ASIC determines the application. This will ensure that trustees who submit their applications in a timely manner are not in breach of the requirement to hold an Australian financial services licence authorising them to deal in a superannuation interest and provide a superannuation trustee service if ASIC is unable to process their applications before the commencement day of Part 2.

Items 2 to 6 of Schedule 1 extend existing exemptions for trustees of pooled superannuation trusts in the *Corporations Regulations 2001* that already applied in relation to dealing in a financial product (including a superannuation interest). These exemptions only apply where the pooled superannuation trust does not invest the assets of a regulated superannuation fund, which has total assets below a certain amount.

Items 2 to 6 extend the exemptions by amending them to expressly cover the new financial service introduced by the Bill – providing a superannuation trustee service. As a result, an Australian financial services licence is not required for:

- a superannuation trustee service provided by the trustee of a pooled superannuation trust in the following circumstances:
 - the pooled superannuation trust is used for investment of the assets of a regulated superannuation fund;
 - the regulated superannuation fund has net assets of at least \$10 million on the date that it first invests in the pooled superannuation trust;
- a superannuation trustee service provided by the trustee of a pooled superannuation trust in the following circumstances:
 - the pooled superannuation trust is used for investment of the assets of a regulated superannuation fund;

- the regulated superannuation fund has net assets of at least \$5 million, but less than \$10 million, on the date that it first invests in the pooled superannuation trust;
- the trustee has a reasonable expectation that the net assets of the regulated superannuation fund will equal or exceed \$10 million not later than 3 months of the date on which it first invests in the pooled superannuation trust; or
- a superannuation trustee service provided by the trustee of a pooled superannuation trust in circumstances in which the pooled superannuation trust is not used for the investment of the assets of a regulated superannuation fund.

Item 9 of Schedule 1 repeals the exemption from requiring an Australian financial services licence to deal in a financial product that consists only of a trustee of a superannuation fund paying the benefits of a member into a superannuation product or retirement savings account product, effective from the commencement day of Part 2. This exemption is made redundant by the repeal of the exemption for trustees of non-public offer superannuation funds from requiring an Australian financial services licence to deal in a superannuation product (see item 1 of Schedule 1).

Amendment to the Superannuation Industry (Supervision) Regulations 1994

Item 7 of Schedule 1 repeals regulation 1.04A of the *Superannuation Industry (Supervision) Regulations 1994*, which is made redundant by the Bill's clarification that the Commissioner of Taxation is responsible for receiving written notices from trustees of their elections to have the SIS Act apply to them as a regulated superannuation fund.

Statement of Compatibility with Human Rights

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

Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020

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

Overview of the legislative instrument

The Regulations remove certain exemptions from the requirement to hold an Australian financial services licence to provide financial services, and make other minor amendments, in support of broader reforms to the roles and responsibilities of superannuation industry regulators.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.