

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Superannuation, Financial Services and Financial Technology

Corporations Act 2001

Electronic Transactions Act 1999

Financial Sector Reform (Hayne Royal Commission Response – Advice Fees) Regulations 2021

Section 1364 of the *Corporations Act 2001* and section 16 of the *Electronic Transactions Act 1999* provide that the Governor-General may make regulations prescribing matters required or permitted by the respective Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to those Acts.

Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response – Advice Fees) Regulations 2021* (the Regulations) supports the operation of Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* (the Act) which implements the ongoing fee arrangement changes from recommendation 2.1 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

The amendments in Schedule 1 to the Act require that ongoing fee arrangements be renewed annually by clients, provide for an enhanced fee disclosure regime and require written consent from clients to be renewed annually. Schedule 1 to the Regulations supports the amendments in Schedule 1 to the Act by specifying the records that fee recipients must keep to evidence compliance with the obligations for ongoing arrangements.

Schedule 2 to the Regulations supports the operation of Schedule 3 to the Act, which amended the *Superannuation Industry (Supervision) Act 1993* to implement the Government's response to recommendations 3.2 and 3.3 of the Financial Services Royal Commission Final Report. The amendments in Schedule 2 to the Regulations amend the *Electronic Transactions Regulations 2020* to enable written consents in relation to financial product advice fees paid out of a superannuation interest to be provided electronically and make consequential amendments.

The amendments in Schedule 1 to the Regulations were released for public consultation for four weeks, from 31 January 2020 to 28 February 2020 alongside the draft changes in Schedule 1 to the Act. None of the submissions raised issues in relation to the amendments in Schedule 1 to Regulations. Direct consultation with ASIC and APRA was undertaken at the same time.

Consistent with the requirements of the *Legislation Act 2003*, the amendments in Schedule 2 to the Regulations have been informed by consultation with the government agencies that have policy responsibility for the legislation specified in the Regulations. The amendments in Schedule 2 to the Regulations have also been

informed by feedback received from industry during consultations on the related changes to the primary law. These changes are wholly beneficial to industry as they provide greater flexibility in obtaining consents.

Details of the Regulations are set out in Attachment A.

The *Corporations Act 2001* and the *Electronic Transactions Act 1999* 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*.

Schedule 1 to the Regulations commenced on the later of 1 July 2021 or the day after registration and Schedule 2 to the Regulations commenced on 1 July 2021.

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.html>

A statement of Compatibility with Human Rights is at Attachment B.

Details of the *Financial Sector Reform (Hayne Royal Commission Response – Advice Fees) Regulations 2021*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Financial Sector Reform (Hayne Royal Commission Response – Advice Fees) Regulations 2021* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commenced on the later of the day after registration and 1 July 2021 (being the time that Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* commenced).

Schedule 2 to the Regulations commenced on 1 July 2021.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* and the *Electronic Transactions Act 1999*.

Section 4 – Schedules

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 – ongoing fee arrangements

Items 1 and 3 – consequential amendments

Items 1 and 3 of the Regulations amend the references in subregulation 7.7A.11(2) and paragraph 9.4AB.02(2)(f) of the *Corporations Regulations 2001* to reflect the updated ongoing fee arrangement rules.

Item 2 – compliance records required to be kept by fee recipients

Item 2 inserts regulation 7.7A.11AA in the *Corporations Regulations 2001*, which sets out the compliance records that fee recipients are required to keep for the purposes of meeting the new record keeping requirement in section 962X of the *Corporations Act 2001*.

Subsection 962X(1) requires financial service providers that receive fees ('fee recipients') to keep records sufficient to ascertain their compliance with the new requirements in relation to ongoing fee arrangements. A failure to keep the required records attracts a maximum penalty of up to 5 years' imprisonment and/or a fine of up to 600 penalty units for an individual and 6,000 penalty units for a corporation

(calculated in accordance with the existing rules regarding penalties in sections 1311B and 1311C of the *Corporations Act 2001*). Provision is also made for the regulations to specify the records which fee recipients must keep to fulfil these obligations.

These new requirements for ongoing fee arrangements implement recommendation 2.1 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Recommendation 2.1 addressed significant problems that were identified with clients being charged for services that were not provided (particularly in relation to ongoing fee arrangements). To address these issues, amendments enacted through Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* impose a range of obligations on fee recipients – including in relation to the information provided to a client about the services provided under an ongoing fee arrangement and the frequency with which clients must opt-in to such arrangements.

The new obligation to keep sufficient compliance records is integral to the legal framework to address the problems identified with ongoing fee arrangements. Keeping sufficient compliance records ensures there is a minimum level of information available to the Australian Securities and Investments Commission when undertaking compliance and enforcement work. A contravention of this obligation is the only contravention in the new law regulating ongoing fee arrangements that gives rise to a potential criminal offence, highlighting its importance to the overall integrity of the regime.

Additionally, this penalty is in line with penalties for breaching other record keeping provisions, including the requirement to keep financial records in subsection 988A(1) of the *Corporations Act 2001*.

The Regulations provide that the fee recipient must keep a record of any fee disclosure statements that they give to clients under an ongoing fee arrangement as well as documents relating to the receipt, variation or withdrawal of consent to make or arrange a deduction of an amount for an ongoing fee from a client account.

Specifically, subregulation 7.7A.11AA(2) provides that a fee recipient must keep records of:

- each fee disclosure statement that they provide to a client as well as a record of the date on which the documents were provided to the client and the manner in which they were given;
- any notification that a client wishes to renew, terminate, or not renew an ongoing fee arrangement, as well as the date that the notification was given; and
- if an ongoing fee arrangement is terminated, the date on which it was terminated and the basis on which it was terminated.

Subregulation 7.7A.11AA(3) further provides that the fee recipient must keep a record of:

- each consent for the deduction of fees from a client's account that a fee recipient receives under sections 962R and 962S of the *Corporations Act 2001*, and the date on which the consent was given to the fee recipient;

- each notice from a client in relation to the variation or withdrawal of a consent in accordance with section 962U of the *Corporations Act 2001*, and the date that the client provided the notice to the fee recipient;
- each confirmation of receipt of a notice to withdraw or vary consent and the date that the fee recipient provided the confirmation;
- a copy of any communication with a third party account provider in relation to the client's consent for the deduction of fees, including the cessation of consent, and the date of the communication; and
- the details of any arrangement with a third party account provider in relation to the deduction of an amount for the payment of fees under an ongoing fee arrangement.

Schedule 2 – Electronic Transactions

Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* amended the *Superannuation Industry (Supervision) Act 1993* to provide greater protection for superannuation members against paying fees for no services. Section 99FA(1) of the *Superannuation Industry (Supervision) Act 1993* provides that 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 of that member.

The *Electronic Transactions Act 1999* applies to all Commonwealth laws unless, pursuant to section 7A of that Act, they are specifically exempted by regulations, or another exemption applies. Schedule 1 to the *Electronic Transactions Regulations 2020* contains a list of Commonwealth laws that are exempt from the application of the *Electronic Transactions Act 1999*. Exemptions are necessary to account for circumstances where it is not appropriate to provide information, documents or signatures electronically.

Item 89 of the table in Section 1 of Schedule 1 to the *Electronic Transactions Regulations 2020* exempts the whole of the *Superannuation Industry (Supervision) Act 1993* from certain provisions of the *Electronic Transactions Act 1999*, except for certain provisions that are listed in that item.

The amendments in Schedule 2 to the Regulations apply the *Electronic Transactions Act 1999* to section 99FA(1) of the *Superannuation Industry (Supervision) Act 1993* so that consents in relation to financial product advice fees can be provided electronically.

The Regulations also omit provisions of the *Superannuation Industry (Supervision) Act 1993* from items 89 and item 90 in the table that were repealed by the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*.

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 – Advice Fees) Regulations 2021

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

Schedule 1 to the Regulations supports the amendments in Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021*, which implemented recommendation 2.1 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) in relation to ongoing fee arrangements.

Section 962X of the *Corporations Act 2001* provides that a fee recipient must keep records which demonstrate their compliance with the ongoing fee arrangement rules. The Regulations specify the records which fee recipients must keep in order to fulfil their record keeping obligation under section 962X of the *Corporations Act 2001*. Specifically, the regulations provide that the fee recipient must keep a record of any fee disclosure statements that they give to clients under an ongoing fee arrangement as well as documents relating to the receipt, variation or withdrawal of consent to make or arrange a deduction of an amount for an ongoing fee from a client account.

The new obligation to keep sufficient compliance records is integral to the legal framework in addressing the problems identified with ongoing fee arrangements. Keeping sufficient compliance records ensures there is a minimum level of information available to the Australian Securities and Investments Commission when undertaking compliance and enforcement work.

Schedule 2 to the Regulations enables written consents in relation to financial product advice fees paid out of a superannuation interest to be provided electronically. This Schedule supports the amendments in Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021*, which implemented the Government's response to recommendations 3.2 and 3.3 of the Financial Services Royal Commission Final report.

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.