



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations (Shorter PDS and Delivery of Accessible Financial Products Disclosure by Platform Operators and Superannuation Trustees) Instrument 2022/497*

This is the Explanatory Statement for *ASIC Corporations (Shorter PDS and Delivery of Accessible Financial Products Disclosure by Platform Operators and Superannuation Trustees) Instrument 2022/497 (Instrument)*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (ASIC).

#### Summary

1. The Instrument continues relief that was previously provided under ASIC Class Orders [CO 12/749] *Relief from the shorter Product Disclosure Statement regime* and [CO 13/797] *Platform operators and trustees of superannuation entities using an agent to deliver a Product Disclosure Statement*, and *ASIC Corporations (Superannuation: Investment Strategies) Instrument 2016/65 (LI 2016/65)* in a new instrument with minimal changes. The Instrument will provide, until 1 October 2027, relief relating to:
  - a. the shorter product disclosure statement (**PDS**) regime for superannuation platforms and multifunds and hedge funds;
  - b. the giving of PDSs for superannuation trustees who offer a choice of investment strategies; and
  - c. platform operators and trustees of superannuation entities delivering a PDS using an agent who is an Australian financial services licensee (**AFS licensee**) or an authorised representative of an AFS licensee.

#### Purpose of the Instrument

2. The purpose of the Instrument is to continue, with minimal changes, relief previously provided under [CO 12/749], LI 2016/65 and [CO 13/797] in a new instrument with a 1 October 2027 expiry date. ASIC considers this relief remains a necessary and useful part of the legislative framework, and is operating efficiently and effectively.

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[CO 12/749]

3. [CO 12/749] previously provided relief from application of the shorter PDS requirements in subdivisions 4.2B and 4.2C of the *Corporations Regulations 2001 (Regulations)* for superannuation platforms, multifunds and other complex products such as hedge funds. [CO 12/749] was made after a government announcement in 2011 that these products should be excluded from the regime. Regulations giving effect to the government announcement have not yet been made.

LI 2016/65

4. LI 2016/65 previously provided relief for superannuation trustees who offered a choice of investment strategies to members where, if the member instructed the trustee to follow a particular strategy, the trustee would acquire ‘accessible financial products’ (within the meaning of LI 2016/65) on behalf of the member. Section 1012IA of the *Corporations Act (Act)* would apply in this situation but LI 2016/65 modified requirements in sections 1012IA, 1013D, 1013E and 1013F to provide three alternate options for giving disclosure about accessible financial products.
5. LI 2016/65 also amended disclosure obligations where an additional investment is made in an accessible financial product that a member has instructed the trustee to follow so that a PDS does not have to be provided for each additional investment.
6. LI 2016/65 also set out requirements for a superannuation trustee to give updated disclosure to a member when a material adverse change or a significant event that adversely affected a matter occurred where the member has given the trustee instructions to follow an investment strategy that involves the acquisition of an accessible financial product.

[CO 13/797]

7. Paragraphs 1015C(3)(a) and (b) of the Act prohibit the PDS for a product being given to a person by giving it to an AFS licensee or the authorised representative of an AFS licensee acting as the person’s agent to receive a PDS.
8. [CO 13/797] previously provided relief from this prohibition and allowed superannuation trustees, investor directed portfolio service (**IDPS**) operators and responsible entities of IDPS-like schemes that are required to give PDSs about financial products available through a platform to an investor to do so through an agent who is an AFS licensee or the authorised representative of an AFS licensee.

## Consultation

9. On 15 February 2022, ASIC released CP 358 *Remaking ASIC relief on PDSs, superannuation dashboards and FSGs (CP 358)* seeking feedback on proposals to remake legislative instruments relating to specific financial services disclosure requirements. This included proposals to remake in a single

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legislative instrument, with minimal changes, the relief in [CO 12/749], LI 2016/65 and [CO 13/797].

10. The consultation period closed on 12 April 2022. We received six submissions in response to CP 358.
11. No respondent opposed our proposal to remake the relief with minimal changes in a new instrument.
12. The submissions to CP 358 are publicly available on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au).

## **Operation of the instrument**

### **Part 1 – Preliminary**

13. Section 1 provides the name of the Instrument.
14. Section 2 provides that the Instrument commences at the same time that the *ASIC Corporations (Repeal) Instrument 2022/499* commences.
15. Section 3 provides that the Instrument is made under paragraph 1020F(1)(c) of the Act.
16. Section 4 provides definitions for the purposes of the Instrument.

### **Part 2 – Declaration**

#### *Relief from the shorter PDS regime*

#### Superannuation platforms

17. Subsection 5(1) modifies regulation 7.9.11K of the Regulations so that Subdivision 4.2B does not apply to a 'superannuation platform'. This is so long as a PDS covering the product is not prepared or purports to be prepared in accordance with Part 7.9 of the Act as affected by the Subdivision.
18. That is, the issuer of a superannuation platform may choose to opt in to the shorter PDS regime and, if they adopt this approach, that regime will apply.
19. 'Superannuation platform' refers to superannuation products in which:
  - a. two or more investment strategies are available from which a member, or a class of members, may choose; and
  - b. each of the investment strategies enables a regulated acquisition (within the meaning of section 1012IA of the Act) of a financial product to be made.
20. A superannuation product that has a default option or which provides pre-mixed investment strategies remains subject to the shorter PDS regime, even if it also allows a member to choose from a range of accessible investments.

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21. For the purpose of determining whether a superannuation product is a superannuation platform, a facility (e.g. a cash account) where members' contributions are temporarily placed when they fail to make a choice of investment or makes an error in their choice of investment is to be disregarded.

### Multifunds

22. Subsection 5(2) modifies regulation 7.9.11S to insert notional subregulation 7.9.11S(5) that excludes 'multifunds' from the shorter PDS regime.
23. Consistent with application of the relief to issuers of superannuation platforms, issuers of multifunds may choose to opt into the shorter PDS regime. If an issuer of a multifund decides to opt into the shorter PDS regime, it must comply with the regime as it appears in the Act. For example, this means that a shorter PDS covering multiple simple managed investment schemes will not be permitted. A separate shorter PDS will be required for each simple managed investment scheme.
24. A 'multifund' is a simple managed investment scheme (within the meaning of regulation 1.0.02 of the Regulations) for which a shorter PDS is required to be prepared under regulation 7.9.11S that is offered as part of a collection of registered schemes (irrespective of whether the schemes are also simple managed investment schemes). A full PDS is required to be prepared for this collection of registered schemes where they are grouped together for the purposes of product distribution and marketing in one document setting out one or more PDSs.
25. Where the multifund involves a combination of simple managed investment schemes, the instrument excludes the issuer(s) from the shorter PDS regime so that a full PDS may be prepared. If the multifund involves the combination of simple managed investment schemes and other registered schemes that are not simple managed investment schemes, the instrument also excludes the issuer(s) from the shorter PDS regime so that a full PDS may be prepared.
26. There may be some situations where a simple managed investment scheme is offered with another type of financial product (i.e. a non - managed investment scheme product). The instrument does not allow the issuer(s) to opt out of the shorter PDS regime for the simple managed investment scheme by preparing a full PDS covering the simple managed investment scheme and the other non-managed investment scheme products.

### Hedge funds

27. Subsection 5(2) modifies regulation 7.9.11S to insert notional subregulation 7.9.11S(6) that excludes a 'hedge fund' from the shorter PDS regime.
28. 'Hedge fund' is defined in notional subregulation 7.9.11S(7) and means a registered scheme which:

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- a. is promoted by the responsible entity using the expression and as being a ‘hedge fund’; or
  - b. satisfies two or more of the following limbs:
    - i. use of investment strategies intended to generate returns with low correlation to prescribed published indexes (complexity of investment strategy limb) or use of complex investment structures (complexity of investment structure limb);
    - ii. use of debt for the dominant purpose of making a financial investment (leverage limb);
    - iii. use of derivatives (subject to limited carve-outs) (derivatives limb);
    - iv. use of short selling (short selling limb); and
    - v. rights to charge a performance fee (performance fee limb)
29. Where a scheme’s use of derivatives means it could be characterised as satisfying either the leverage or short selling limbs, it should not be double counted. That is, only the derivatives limb is satisfied unless the scheme is covered by the leverage or short selling limbs for some other reason.
30. Notional subregulation 7.9.11S(7) defines ‘prescribed published index’ for the complexity of investment strategy limb. The subregulation also defines ‘interposed entity’ for the complexity of investment structure limb. ‘Derivative’, ‘notional derivatives exposure’ and ‘net asset value’ are defined for the derivatives limb and the ‘securities lending arrangement’ definition is relevant to the short selling limb.
31. Subsection 5(3) inserts notional Schedule 10F into the Regulations that lists foreign regulatory authorities for the purposes of the definition of ‘prescribed foreign regulatory authority’ in notional subregulation 7.9.11S(7). This definition is relevant to the definition of ‘interposed entity’.

#### Fund of hedge funds

32. Subsection 5(2) modifies regulation 7.9.11S to insert notional subregulation 7.9.11S(6) that excludes a ‘fund of hedge funds’ from the shorter PDS regime.
33. ‘Fund of hedge funds’ is defined in notional subregulation 7.9.11S(7) as a registered scheme that:
- a. is promoted by the responsible entity using the expression and as being a ‘fund of hedge funds’; or
  - b. invests at least 35% of scheme property in a way that gives rise to economic interests in one or more of:
    - i. a hedge fund; or
    - ii. a managed investment scheme or body, whether operating or carrying on business in or outside this jurisdiction that, would be a hedge fund if it were a registered scheme. (This covers

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unregistered managed investment schemes or bodies operating or carrying on a business outside this jurisdiction that would be hedge funds if they were offered to retail clients in this jurisdiction); or

- c. is promoted by the responsible entity on the basis that scheme property will be invested in the way set out in paragraph (b).
34. The definitions of ‘hedge fund’ and ‘fund of hedge funds’ in notional subregulation 7.9.11S(7) use the expression ‘promoted by’. Promotion by a responsible entity includes any promotion caused or authorised by the responsible entity in accordance with section 52 of the Act. Therefore, if a responsible entity (or anyone authorised by the responsible entity) uses the terms ‘hedge fund’ or ‘fund of hedge funds’ in any promotional material, including disclosure documentation, the scheme is a hedge fund or a fund of hedge funds as applicable under the definitions.

#### *Superannuation Investment Strategies*

35. Section 6 preserves, with minimal changes, relief that was previously provided by LI 2016/65. This relief applies to superannuation trustees who offer a choice of investment strategies to members where, if the member instructs the trustee to follow a particular strategy, the trustee will acquire accessible financial products on behalf of the member. If the relief did not apply, section 1012IA of the Act would apply.
36. Key difficulties previously identified from the operation of section 1012IA were:
- a. the duplication of disclosure obligations. Under section 1012IA, a superannuation trustee needs to provide information about financial products (**accessible financial products**) that may be acquired through a superannuation entity to members twice — in the PDS the superannuation entity prepares (the **superannuation entity PDS**) and in the PDS for the accessible financial product, which the issuer of the product prepares (**the accessible product PDS**);
  - b. the Act does not allow the superannuation trustee to prepare the accessible product PDS (it must be prepared by the product issuer). However, prior to this relief being first granted many superannuation trustees indicated a strong preference to prepare the information that must be provided to members about accessible financial products; and
  - c. superannuation trustees must give a member a PDS each time an accessible financial product is acquired by the trustee on behalf of the member. Each additional investment of money by the member will be an additional acquisition, with the result that the member will generally be repeatedly given the same accessible product PDS.

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### Relief for providing PDSs for accessible financial products

37. Paragraph 6(e) of the Instrument inserts notional section 1013FB into the Act that allows trustees of superannuation entities to choose between different methods of giving PDSs for accessible financial products (within the meaning of notional section 1013FB) to address difficulties with the operation of section 1012IA.
38. The methods available are to give a:
- a. superannuation entity PDS and accessible product PDS (both prepared by the trustee) (**Option 1**);
  - b. an ‘integrated PDS’ that includes product disclosure information about the accessible financial product in the superannuation entity PDS (**Option 2**);  
or
  - c. superannuation entity PDS (prepared by the trustee) and accessible product PDS (prepared by the product issuer) (**Option 3**).
39. A trustee may also elect to not rely on the relief under the Instrument. If this occurs, section 1012IA will apply. This means that the trustee is required to give a member a PDS in relation to the superannuation fund and, on each occasion an interest is acquired in a financial product through the superannuation fund, a PDS for the relevant financial product.
40. If a trustee relies upon the methods in Option 1 or Option 3, notional paragraph 1013FB(3)(a) provides that the PDS requirements that apply to the superannuation product under Division 2 of Part 7.9 of the Act continue to apply. In many cases, this will translate as the shorter PDS requirements under Schedule 10D of the Regulations: see regulation 7.9.11O of the Regulations.
41. Notional paragraph 1013FB(3)(b) provides that, in addition to the information regarding the superannuation product, particular information about each accessible financial product must be given in the superannuation entity PDS under Options 1 and 3. Specifically, the superannuation entity PDS must contain information that a person would reasonably require as a retail client to:
- a. identify the accessible financial product;
  - b. understand the investment strategy under which the product may be acquired; and
  - c. work out whether to ask for further information about the product.
42. Notional paragraph 1013FB(3)(c) requires the superannuation entity PDS to contain a statement that informs people of their right to obtain from the trustee on request the accessible product PDS. This obligation applies irrespective of

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whether the trustee has prepared the accessible product PDS (Option 1) or if the product issuer has prepared the accessible product PDS (Option 3),

43. As the accessible product PDS must satisfy the requirements of Division 2 of Part 7.9 of the Act, the shorter PDS requirements will apply for some types of accessible financial products. For example, an accessible financial product may be a simple managed investment scheme, to which the shorter PDS requirements would apply: see Schedule 10E and regulation 7.9.11W of the Regulations.
44. For Options 1 and 3, notional paragraph 1013FB(4)(a) relieves the trustee from the obligation to include in the superannuation entity PDS any other information about the accessible financial product that would be required by sections 1013C, 1013D, 1013DA, 1013E or 1013F of the Act. The exemption in relation to the PDS content requirements under s1013C includes absolving the trustee from any requirement that would otherwise arise to comply with the shorter PDS requirements for an accessible financial product.
45. Notional paragraph 1013FB(4)(b) requires the trustee to give the accessible product PDS to any person who asks for it. This obligation applies irrespective of whether the trustee has prepared the accessible product PDS (Option 1) or if the product issuer has prepared the accessible product PDS (Option 3),
46. If a trustee relies on the method in Option 2, notional subsection 1013FB(5) provides that the integrated PDS may be a single document or 2 or more separate documents that are given at the same time. If the integrated PDS comprises 2 or more separate documents, further requirements in section 1013L of the Act apply.
47. Notional paragraph 1013FB(6)(a) requires the integrated PDS to contain information about the superannuation product and information about each accessible financial product that is required by the PDS requirements under Division 2 of Part 7.9 of the Act. This may include the shorter PDS requirements to the extent that those requirements apply. In addition, notional paragraph 1013FB(6)(b) provides that the integrated PDS must contain information that a person would reasonably require as a retail client to understand the investment strategy under which the accessible financial product may be acquired.

#### Relief for additional acquisitions

48. Subparagraph 6(b)(i) of the Instrument inserts a notional ‘additional acquisition’ definition into subsection 1012IA(1) of the Act. This definition provides that an additional acquisition exists if as part of a regulated acquisition (within the meaning of subsection 1012IA(1)) a superannuation trustee acquires an accessible financial product of the same kind as an accessible financial product that the member already holds as a result of an instruction that they gave.
49. Subparagraph 6(b)(ii) inserts notional subsection 1012IA(2A) which exempts superannuation trustees from the obligation to give a member a PDS in



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accordance with subsection 1012IA(2) each time they make an additional acquisition. This is on condition that the member has given the trustee written acknowledgement that they understand that they may not have:

- a. received the current PDS for the accessible financial product; and
  - b. been notified about material adverse changes or significant events that adversely affect a matter required to be in a PDS for the accessible financial product immediately before the change or event occurs.
50. Notional subsection 1012IA(2B) provides that written acknowledgement does not need to be obtained from members that acquired the superannuation product immediately before 1 July 2007 that have held the product at all times since that date.
51. If a trustee or other person with whom the trustee has an arrangement holds as accessible financial product as a result of a member's direction and it is affected by a material adverse change or a significant event that adversely affects a matter required to be in a PDS for the accessible financial product, the trustee must take action.
52. Notional subsection 1017CA(2), which paragraph 1013FB(6)(f) of the Instrument inserts, requires the trustee, as soon as practicable after the change or event occurs, to notify the member of the change or event. The format for notification accords with that for significant event notices under section 1017B of the Act. This includes in writing, electronically or in a way specified in the Regulations.
53. Pursuant to notional subsection 1017CA(4), the notice must give the member the information reasonably necessary for them to understand the nature and effect of the change or event. Notional paragraph 1017CA(2)(b) provides the notice must also state that:
- a. the member may direct the trustee to follow an investment strategy that does not involve regulated acquisitions of the accessible financial product, in relation to either or both of the following:
    - i. the holding in the product that the trustee or other person with whom the trustee has an arrangement has acquired as a result of following the affected investment strategy; and
    - ii. any future contribution by or on behalf of the client to the superannuation entity to the extent to which it would otherwise have been subject to the affected investment strategy;
  - b. if the member does not give the trustee directions – the trustee will continue to follow the affected investment strategy.
54. Pursuant to notional subsection 1017CA(5), trustees must also provide members with a PDS for the accessible financial product at the same time as notifying them of a change of event.

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55. Notional paragraph 1017CA(5)(a) permits a trustee to give the member information that they consider the member reasonably requires for the purpose of making a decision whether to select a different investment strategy in place of the accessible product PDS. This is permitted if the only regulated acquisitions of the accessible financial product that the trustee is making or proposes to make are additional acquisitions (within the meaning of notional subsection 1012IA(1)).
  56. A trustee does not have to provide information or a PDS in accordance with notional subsection 1017CA(5) if they believe on reasonable grounds that the member has already received or has access to the necessary information in a PDS, information provided to the member under section 1017B of the Act or through continuous disclosure under Chapter 6CA of the Act: see notional subsection 1017CA(6)-(7).
  57. Paragraph 6(a) of the Instrument inserts a notional section 1011BA into the Act. This section defines ‘accessible financial product’, ‘additional acquisition’, ‘equivalent direct acquisition’ and ‘regulated acquisition’ for the purposes of Division 1 of Part 7.9 and notional section 1017CA. Paragraphs 6(b)(iii) - (iv), (c), (d) and (g) also make consequential amendments to the Act in recognition of the insertion of notional sections 1013FB and 1017CA.
  58. Notional subsection 1017CA(8) also defines ‘investment strategy’ for the purposes of that notional section.

*Platform operators and trustees of superannuation entities using an agent to deliver a PDS*

59. Section 7 of the Instrument modifies Part 7.9 of the Act as it applies to superannuation trustees, operators of an investor directed portfolio service (**IDPS**) and responsible entities of an IDPS-like scheme by inserting notional subsections 1015C(3A)-(3C).
60. Notional subsection 1015C(3A) permits trustees, IDPS operators and responsible entities to give PDSs for financial products held through their entity or scheme to a person through their agent who is acting in the capacity of an AFS licensee or authorised representative of an AFS licensee. Ordinarily, this would be prohibited by subsection 1015C(3).
61. The condition is that the trustee, operator or responsible entity must have received evidence of a written agreement between the agent and the individual that has appointed the agent before the PDS is given or sent. There is also an obligation in notional subsection 1015C(3B) on the AFS licensee or authorised representative that receives a PDS as a person’s agent to promptly give or send it to the person.
62. The Instrument applies to PDSs for financial products that can be acquired through platforms and superannuation entities. It does not apply to the giving or sending of IDPS Guides, PDSs for IDPS-like schemes or superannuation entities, or annual client statements and reports from auditors.

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63. Section 8 of the Instrument provides for its repeal on 1 October 2027.

### **Legislative instrument and legislative authority**

63. The Instrument provides certainty for providers of superannuation platforms, multifunds and other complex products such as hedge funds that the shorter PDS regime does not apply, consistently with a previous Government commitment to enact regulations to this effect. The Instrument also facilitates practical arrangements to provide for the delivery of PDS information to clients of financial advisers and members of superannuation trustees that offer a choice of investment strategies.
64. The Instrument utilises powers given by Parliament to ASIC that allow ASIC to modify or affect the operation of the Act to provide a tailored and flexible regulatory environment that is fit for purpose for certain financial products. The matters contained in the Instrument are specific amendments designed to ensure that application of the Act remains flexible and applies in a way consistent with the intended policy and the enabling provisions in the Act.
65. The Instrument is made under paragraph 1020F(1)(c) of the Act. Paragraph 1020F(1)(c) provides that ASIC may declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
66. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make any instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend any such instrument.
67. The Instrument is a disallowable legislative instrument.
68. It will be a matter for the Government and for Parliament as to whether the Act or Regulations may be amended in future to include the relief in the Instrument.

### **Appropriate duration of the Instrument**

69. The effect of the Instrument is that, with minimal changes, the relief in [CO 12/749], LI 2016/65 and [CO 13/797] will be extended to 1 October 2027.
70. ASIC considers that a five year duration for the Instrument is appropriate due to the business costs, reduced flexibility and harm to consumers that would result if there was a shorter period. The relief is longstanding and if the relief ceased or changed, affected stakeholders would need to invest in systems and amend operational practices to comply with the Act. Consumers of more complex products would also likely receive less meaningful disclosure about their product because of limitations associated with the shorter PDS regime.

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71. ASIC considered a shorter duration for the Instrument but determined this would impose unnecessary uncertainty on those affected by the relief. Relevant to this determination was the scale of systems and operational changes that would be necessary if the relief is not continued and the fact that, for example, [CO 12/749] was originally made in order to provide certainty to industry in the implementation of the shorter PDS requirements. The relief in [CO 13/797] and LI 2016/65 were made to provide flexibility for superannuation trustees and platform providers, and remove administrative costs associated with meeting particular requirements in the Act.
72. If the Act or Regulations are amended to include the relief, ASIC will repeal the Instrument.

### **Statement of Compatibility with Human Rights**

73. A Statement of Compatibility with Human Rights consistent with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is in the Attachment.

## Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***ASIC Corporations (Shorter PDS and Delivery of Accessible Financial Products Disclosure by Platform Operators and Superannuation Trustees) Instrument 2022/497***

#### Overview

1. The *ASIC Corporations (Shorter PDS and Delivery of Accessible Financial Products Disclosure by Platform Operators and Superannuation Trustees) Instrument 2022/497* continues, with limited changes, relief previously provided in ASIC Class Orders [CO 12/749] and [CO 13/797], and *ASIC Corporations (Superannuation: Investment Strategies) Instrument 2016/65*, in a new instrument until 1 October 2027.
2. This means that ASIC will continue to provide conditional relief relating to:
  - a. the shorter product disclosure statement (**PDS**) regime for superannuation platforms, multifunds, hedge funds and fund of hedge funds;
  - b. the giving of PDSs for superannuation trustees who offer a choice of investment strategies; and
  - c. trustees of superannuation entities, operators of investor directed portfolio services (**IDPSs**) and responsible entities of IDPS-like schemes delivering a PDS using an agent who is an Australian financial services licensee (**AFS licensee**) or an authorised representative of an AFS licensee.

#### Assessment of human rights implications

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

#### Conclusion

4. This 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*.