Chapter 3

Schedules 3, 4 and 5 of the bill: provisions and views

Schedule 3—Collection and disclosure of information

3.1 Schedule 3 of the bill amends the *Australian Prudential Regulation Act 1998*, the *Corporations Act 2001*, the *Financial Sector (Collection of Data) Act 2001* (FSCOD Act) and the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). It expands the coverage of Australian Prudential Regulation Authority's (APRA) data collection, ensures the publication of data on MySuper products, and improves disclosure for superannuation.[1]

3.2 The Cooper Review noted in its final report that:

> Transparency and comparability are critical to the efficiency and operation of a market-based savings system, even where participation is compulsory. The Panel believes that there is presently a lack of transparency, comparability and, ultimately, accountability in the Australian superannuation system that can only be effectively improved through targeted and proportionate regulation.[2]

3.3 The Panel added:

> There is no standardised methodology for calculating and disclosing relevant fund or investment option information. Members often rely inappropriately on historical investment return data which gives no information about the risk attaching to those returns.[3]

3.4 The Explanatory Memorandum (EM) notes that MySuper products are intended to set a new benchmark for superannuation in the level of transparency and comparability of key performance information.[4]

Data collection

3.5 APRA will have an expanded role in the collection and publication of data on superannuation entities. This data will allow members, employers, the industry and other stakeholders with information to compare the performance of superannuation

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1 Explanatory Memorandum, p. 31.

2 *Review into the governance, efficiency, structure and operation of Australia's superannuation system*, 2010, p. 13 http://www.supersystemreview.gov.au/ (accessed 24 September 2012).

3 *Review into the governance, efficiency, structure and operation of Australia's superannuation system*, 2010, p. 99.

4 Explanatory Memorandum, p. 31.

products. As the EM notes, this will enhance the accountability of trustees to their members.[5]

3.6 The bill would amend APRA's secrecy obligations with the effect that the Authority's decisions on the confidentiality of a document are streamlined. Currently, under section 57 of the APRA Act, the Authority can make a determination on the non-confidentiality of a *particular* reporting document required to be given by a registered entity to APRA under the FSCOD Act. The bill would enable APRA to make a determination on a *class* of reporting document that is required to be given by a registered entity to APRA under the FSCOD Act. The EM notes that under the proposed law, APRA will be able to determine that information reported in specified line items of a particular reporting form is non-confidential.[6] APRA will thereby not be required to repeat confidentiality determinations for each particular document.

3.7 The Cooper Review panel recognised that currently, superannuation funds' information is 'to a fairly detailed level' disclosed to APRA under the FSCOD Act through the APRA annual and quarterly returns. It noted that these returns capture a fund's financial performance, financial position, derivative financial instruments, transactions with associated parties, and membership and superannuation entity profile.

3.8 However, the panel also observed that while APRA returns contain more detail than the audited financial statements:

> ...many costs are not disclosed or are disclosed only in highly aggregated form. This problem can arise because some of the costs are incurred in ‘downstream’ entities, rather than in the fund itself. This typically occurs when the trustee owns a subsidiary administrator that provides all services for the trustee as well as the fund; where the trustee is itself owned by an administrator; or where all investment services for the fund are provided by a third party, whether or not that third party is related to the trustee. Another shortcoming is that some of the data is not publicly reported by APRA for confidentiality reasons.[7]

3.9 The EM presents a diagram to illustrate this case. It shows a member's assets earning a return of 6.5 per cent from which an investment manager deducts a fee of one per cent and the managed investment scheme deducts a fee of 0.5 per cent. An investment return of 5 per cent is returned to the Registrable Superannuation Entity (RSE) licensee that provides it to members. The licensee in turn charges an explicit fee of 1 per cent to members. The member is only aware of this 1 per cent fee; the

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5 Explanatory Memorandum, p. 35.

6 Explanatory Memorandum, pp 35–36.

7 *Review into the governance, efficiency, structure and operation of Australia's superannuation system*, 2010, p. 120 http://www.supersystemreview.gov.au/ (accessed 24 September 2012).

additional 1.5 per cent fee taken by the investment manager and the managed investment scheme (MIS) is hidden.[8]

3.10 The bill seeks to provide APRA with powers to examine the 'hidden' fee component, ensuring that the full costs of investing the assets of members are provided to APRA and to members. Proposed subsection 13(4A) of the FSCOD Act gives APRA explicit power to require RSE licensees to provide investment information on their assets (or assets derived from their assets) by:

- a related body corporate of the licensee;
- a custodian holding the RSE's superannuation assets; or
- a person under a contract or arrangement with the licensee.

3.11 APRA would have power to establish a reporting standard that requires information on underlying investments and/or deductions on net returns by third parties. This could be the assets invested in a MIS, which has in turn invested the assets in financial products or property.[9] Where these assets are invested under contract or other arrangement between the RSE licensee and a person connected with the RSE licensee, the contract or arrangement must have an implied term:

- requiring the RSE licensee to notify the connected person that the assets are derived from a RSE; and
- requiring the connected person to provide the RSE licensee with the required information. If the RSE licensee invests its fund's assets in an investment life policy issued by a related life company, which in turn invests in a MIS in which another related body corporate is the responsible entity, both the life company and the responsible entity will be persons connected with the RSE licensee. APRA may, therefore, have a reporting standard requiring the RSE licensee to report on the underlying investments of the MIS and the deductions on net returns imposed by the responsible entity and life company.[10]

3.12 The EM gives the example of an RSE licensee investing in a MIS (that is not a related body corporate of the RSE) through a custodian. In this instance:

- the RSE licensee must notify the custodian the assets are its own;
- the custodian must notify the MIS that it is investing assets of the RSE licensee;
- the MIS must provide the custodian details of the costs it deducts from the investment return, and the custodian provides this information and details of

8 Explanatory Memorandum, p. 37.

9 Explanatory Memorandum, p. 38.

10 Explanatory Memorandum, paragraph 3.29, p. 38.

the costs it deducts from the investment return it received from the MIS to the RSE licensee.[11]

The product dashboard

3.13 The Cooper Review noted that in order to make meaningful choices, or even to understand their personal situation, members need to be able to make 'like with like' comparisons between competing superannuation products. With a view to providing transparency and more meaningful information, the Review argued that standard product 'dashboards' and standardised investment performance reporting would 'lift the fog that has clouded this area so far'. It added:

> [T]he new 'forward looking' investment option disclosure 'dashboard' would enable members to examine likely future performance, rather than basing investment choice on past investment performance. The Panel believes that this way of preparing and disclosing investment option data will aid members in figuring out some of the technical information that is associated with their super.[12]

3.14 The bill would require that RSE licensees publish a product dashboard for each of the fund's MySuper and choice products.[13] This information should be made available on the RSE's website such that it is accessible to the public at all times and updated as required.[14] The bill would require that the following information is provided:

- the investment return target;
- the number of times the current target has been met in the last ten financial years (or for the period the product has been offered if it has been offered for less than ten financial years);
- the level of investment risk;
- a statement about the liquidity of the product, and the average amount of fees (excluding activity fees, advice fees and insurance fees) in relation to the product; and
- other costs such as embedded investment costs in relation to the MySuper product or investment option during the last quarter, expressed as a percentage of the assets of the fund attributable to the MySuper product or investment option.[15]

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11 Explanatory Memorandum, p. 39.

12 *Review into the governance, efficiency, structure and operation of Australia's superannuation system*, 2010, p. 21 http://www.supersystemreview.gov.au/ (accessed 24 September 2012).

13 Explanatory Memorandum, p. 32.

14 Explanatory Memorandum, p. 40.

15 Explanatory Memorandum, p. 41.

3.15 It will be an offence for the trustee, who is required to publish a product dashboard, not to do so (proposed subsection 1021NA(1) of the Corporations Act). It will be a strict offence for a trustee to publish a product dashboard containing defective information (proposed subsections 1021NA(2) and (3) of the Corporations Act), fail to update the product dashboard as required and omit information from the product dashboard or fail to update as required.[16]

3.16 Proposed subsection 1021NA(5) of the Corporations Act does provide a defence where it has taken reasonable steps to ensure that the dashboard was updated as required, not misleading or deceptive, and contained no omissions.

3.17 The EM notes that civil action against the trustee will be able to be taken by a person who suffers loss or damage as a result of the trustee's product dashboard not containing the required information, not being updated as required, containing misleading or deceptive information, or if there is an omission.[17]

3.18 The bill would exempt certain investment options within a choice product from publishing a product dashboard. These options are:

- a capital guaranteed life insurance policy, where the contributions and accumulated earnings may not be reduced by negative investment returns or any reduction in the value of assets in which the policy is invested;
- a life policy providing benefits based solely on the realisation of a risk, and not related to the performance of an investment; and
- an investment account contract that is held solely for the benefit of that member, and relatives and dependants of that member—to cover legacy products such as endowment and whole of life policies.[18]

3.19 The requirement of publishing a product dashboard would also not apply if the sole purpose of the investment option is the payment of a pension to members, or if the assets of the fund are only invested in another single asset, such as individual financial products offered on a platform (proposed subsection 1017BA(4) of the Corporations Act).

3.20 The product dashboard will not apply to defined benefit arrangements. To ensure that this is the case, the bill would define a choice product as a class of beneficial interest in a regulated superannuation fund, unless all the members of the fund who hold the class of beneficial interest in the fund are defined benefit members or the class of beneficial interest is a MySuper product.[19]

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16 Explanatory Memorandum, p. 42.

17 Explanatory Memorandum, p. 42.

18 Explanatory Memorandum, p. 42.

19 Proposed subsection 10(1) of the SIS Act, Explanatory Memorandum, p. 43.

Disclosure of remuneration

3.21 The bill would require an RSE licensee to disclose the remuneration details of each executive officer in cases where the licensee is a body corporate, or each trustee if the RSE licensee is a group of individual trustees. This requirement will be set out in the regulations.[20]

3.22 The Cooper Review recommended that trustees should allow a beneficiary access to any prescribed information or any prescribed documents. The EM notes that the regulations will also specify certain documents that will have to be published on the public section of the fund's website.[21] These documents include the net returns of all MySuper and investment options over the past ten years and the investment return target for all MySuper and investment options for choice products. It also includes the fund's most recent audited financial and actuarial report, product disclosure statements and annual report. ASIC will be responsible for ensuring that trustees comply with these disclosure requirements. Failure to publish up to date information on the fund's website at all times will be a strict liability offence carrying a penalty of 50 penalty units.

Consistent information

3.23 The EM states that inconsistent information provided through multiple means 'can cause significant damage to members of superannuation funds and inhibit informed decision-making'.[22] The bill would also require RSE licensees to give any person information that is calculated in the same way as required under APRA's reporting standard. Regulations may prescribe an exemption to this requirement. Notwithstanding these, failure to provide information calculated on the same basis will be a strict liability offence carrying a penalty of 50 penalty units.

Portfolio holdings

3.24 A further area of disclosure set out in Schedule 3 of the bill relates to the requirement for RSE licensees to disclose their portfolio holdings twice annually. Licensees must publish this information on the fund's website within 90 days of the reporting day (30 June or 31 December) and the information must remain on the fund's website until it is updated. The key information requirements are to disclose each financial product, the value of the RSE's investment in that product.[23] It will

20 Explanatory Memorandum, p. 42.

21 *Review into the governance, efficiency, structure and operation of Australia's superannuation system*, 2010, p. 30 http://www.supersystemreview.gov.au/ (accessed 24 September 2012).

22 Explanatory Memorandum, p. 45.

23 Explanatory Memorandum, p. 46.

include financial products in which the assets are derived from assets of the RSE, such as through multiple levels of pooled investments include MISs.[24]

3.25 The EM notes that the regulations will be able to prescribe a materiality threshold for the information that must be published on an RSE licensee's website. It notes that the government will give consideration to this threshold 'to strike a balance between the compliance costs and the benefits for members from portfolio holdings disclosure'.[25]

3.26 The bill would impose a penalty of 100 penalty units or two years' imprisonment or both for an RSE licensee that fails to publish details of its portfolio holdings on its website. It is a defence to show that the RSE licensee would have published the information, but for the fact that the trustee was not provided with the required information.[26] The penalty for RSE licensees who knowingly publish misleading or deceptive information, or information containing omissions, is 200 penalty units or imprisonment for five years, or both. The bill has a corresponding strict liability offence of 100 penalty units or imprisonment for two years or both.[27]

Obligations on other parties on ensure disclosure of portfolio holdings

3.27 The bill's requirement for disclosure of portfolio holdings is accompanied by obligations on parties that acquire a financial product using the assets of an RSE. The EM describes a situation where a person (the first party) enters into a contract with another person (the second party) to acquire a financial product using the assets (or assets derived from the assets) of an RSE. It notes that:

> If a financial product is acquired under the contract or arrangement, the second party will have an obligation to provide the RSE licensee with information sufficient to identify the financial product acquired and any financial products or other property that the second party knows, or reasonably ought to know, will be acquired using the assets, or assets derived from the assets, of the RSE.[28]

3.28 The EM gives the example of an RSE investing its funds through a custodian in assets in a financial product provided by MIS 1. This MIS—a fund of funds—purchases units in a financial product offered by MIS 2. In this case, the custodian must notify MIS 1 that the assets invested are those of the RSE. Then:

- MIS 1 will have an obligation to provide information to the RSE that is sufficient to identify:

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24 Paragraphs 1017BB(1)(a) and (b)

25 Explanatory Memorandum, p. 46.

26 Subsections 1021NB(1) and (5)

27 Explanatory Memorandum, p. 51.

28 Explanatory Memorandum, p. 48.

  - its financial product;
  - the financial products it acquires with the assets that it acquires with the assets; and
  - the value of the RSE's investments.
- MIS 1 must then notify MIS 2 that it is investing assets derived from the assets of the RSE.
- MIS 2 will subsequently have an obligation to provide information directly to the RSE to identify:
  - its financial product;
  - the financial products it acquires with the assets that it acquires with the assets; and
  - the value of the RSE's investments.[29]

3.29 Parties who do not notify another party that a contract or arrangement invests assets of an RSE, or assets derived from the assets of an RSE, or who fail to notify other parties of the details of the RSE licensee commit an offence. This offence carries a penalty of 100 penalty units or imprisonment for 2 years, or both.

3.30 Parties commit an offence when they knowingly omit, or knowingly provide misleading or deceptive, information when:

- notifying another party that a contract or arrangement invests assets of an RSE;
- notifying another party of the details of the trustee; or
- notifying and not providing the relevant information to the RSE licensee.

3.31 This offence carries a penalty of 200 penalty units or imprisonment for 5 years, or both. There is a corresponding strict liability offence of 100 penalty units or imprisonment for two years or both.

3.32 It is a defence to the charge of not providing relevant information to show that the person took reasonable steps to ensure there would not be an omission in providing the information. Alternatively, it is a defence to show that the information was omitted because it would have been misleading or deceptive, and that the person took reasonable steps to obtain information that would not have been misleading or deceptive.[30]

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29 Explanatory Memorandum, p. 49.

30 Explanatory Memorandum, p. 52.

Views on Schedule 3

The product dashboard

3.33 The majority of submitters' comments relating to Schedule 3 of the bill concerned the product dashboard and in particular, the limitations of its design and practical difficulties in interpreting the information.

3.34 The Law Council of Australia (LCA) told the committee that it would be difficult to provide and calculate some of the product dashboard information. It also expressed concern at the 'mismatch' between other published information, particularly in product disclosure statements and the material that is on the dashboard.[31]

3.35 The LCA argued that the information in the Product Disclosure Statement (PDS) should 'in most instances be the most accurate estimate of what the annual fees and charges are likely to be'. For instance, it noted that the PDS already includes a historical figure reflecting total management costs, in percentage terms, for the most recently completed financial year.[32]

3.36 Indeed, the LCA argued that the new information which would be required to be included in the product dashboard could be significantly different from the published data in the PDS including other fee information in the PDS. This could cause confusion among members. It also observed that the new requirements 'seem to focus on fees and charges incurred in a quarter', which could create confusion given that percentage-based fees are usually expressed on a per annum basis.[33]

3.37 The LCA also expressed concern with the bill's obligations in terms of 'platform wraps' or 'superannuation wraps'. These are arrangements whereby a member can have a large range of investment options (that are financial products in their own right) that are typically provided by third party fund managers. The LCA noted that it is likely that trustees will be 'heavily reliant' upon those third parties to provide the dashboard data or actually to prepare the dashboard.[34] Given this, it argued that:

> [T[he defences which protect trustees who take reasonable steps to ensure that their dashboards are up-to-date and not misleading or deceptive should be broadened so as to clarify that those defences will be available in cases where trustees reasonably rely upon third parties in connection with the preparation of dashboards. For example, beyond making due diligence enquiries, a trustee is entirely dependent upon a third party fund manager to

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31 Ms Michelle Levy, Law Council of Australia, *Proof Committee Hansard*, 5 October 2012, p. 16.

32 Law Council of Australia, *Submission 10*, p. 9.

33 Law Council of Australia, *Submission 10*, p. 9.

34 Law Council of Australia, *Submission 10*, p. 9.

> have correctly calculated their historical performance and therefore in ascertaining how many times the performance objective has been achieved.[35]

3.38 The Australian Institute of Superannuation Trustees (AIST) told the committee that while disclosure is 'critically important', 'it must not be misleading and it must be designed to provide members with a real, accurate and useful understanding of a super product and assist comparisons with other super products'.[36] On this basis, it argued that there are problems with both the framework for the product dashboard in the bill and the more detailed structure released by APRA in a recent discussion paper. Accordingly, AIST recommended that:

> ...the product dashboard provisions should be excised from this tranche of the legislation, subject to further consultation with the super industry, and be reintroduced in a clearer, more consumer-friendly version in the fourth tranche of the MySuper legislation.[37]

3.39 The Industry Super Network (ISN) also expressed concerns. Based on the early indications from APRA consultations on the measures which began on 19 September 2012, it foresaw a 'serious risk of outcomes that could lead to members being misled about products and trustees being encouraged to make sub-optimal investment decisions'.[38] Specifically, the ISN identified the following weaknesses:

- the investment return target (proposed subsection 1017BA(2)(a)) does not require that the target is net of all fees (investment and administration) and as a consequence will overstate the level of returns to which a member would actually be entitled;
- the risk measure (proposed subsection 1017BA(2)(c)) specifies the likelihood of a negative return (exclusive of some costs) but provides no guidance as to the quantum of such a negative return;
- the liquidity measure (proposed subsection 1017BA(2)(d)) is not clearly defined and is likely to overstate the proportion of illiquid assets in a product. The ISN suggested that this requirement be omitted from the bill and considered in the subsequent tranche of reforms;
- a number of carve outs from the product dashboard (proposed subsection 1017BA(4)) are 'inappropriate'. The ISN criticised the exemption of pension products and fund of fund investment options delivered through a platform claiming consumers. It argued that consumers would benefit from their inclusion;

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35 Law Council of Australia, *Submission 10*, p. 9.

36 Mr David Haynes, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 5 October 2012, p. 28.

37 Mr David Haynes, *Proof Committee Hansard*, 5 October 2012, p. 28.

38 Industry Super Network, *Submission 20*, pp 2–3.

- the product dashboard measures will differ from those contained in the new short PDS regime. The ISN shared the Law Council's concerns that consumers could receive contradictory information and be misled depending on which disclosure they rely on.

3.40 ISN thereby recommended that proposed amendments to sections 1017BA–1017BE of the Corporations Act be omitted from the bill.[39]

Committee view on the product dashboard

3.41 The committee believes that the case for introducing a product dashboard for each of a fund's MySuper products is compelling. The Cooper Review found there is a lack of transparency, comparability and accountability in the superannuation system. Further, portfolio disclosure in Australia does not meet global best practice. A product dashboard would introduce a standardised methodology for calculating and disclosing relevant fund or investment option information. It would rightly provide information on the investment return target, the investment risk, the liquidity of the investment and the average amount of fees and costs in relation to the MySuper product in the last quarter.

3.42 Schedule 3 of the bill would establish this basic framework in legislation. The committee supports its passage through Parliament and believes the carve-outs in proposed section 1017BA(4) of the Corporations Act are justified.

3.43 However, it is true that the real benefit from this dashboard to both trustees and members will depend on how the details are put in place. The committee notes that the negotiations with APRA that began in September 2012 appear to have uncovered several areas of potential difficulty and confusion. It urges APRA in further consultations with stakeholders to examine these issues carefully. The prime consideration must be the usefulness of the information to members and to ensure that any confusion that may arise from information through other sources is minimised.

Recommendation 1

3.44 The committee recommends that the Australian Prudential Regulation Authority continue its consultation with stakeholders on the product dashboard with a view to considering:

- **a requirement that the investment return target be net of investment and administration fees in proposed subsection 1017BA(2)(a) of the *Corporations Act 2001*;**
- **how best to quantify the likelihood of a negative return as part of the risk measure in proposed subsection 1017BA(2)(c) of the *Corporations Act 2001*;**

39 Industry Super Network, *Submission 20*, p. 3.

- **a clear definition of the liquidity measure in proposed subsection 1017BA (2)(d) of the *Corporations Act 2001*; and**
- **the options to minimise discrepancies between the information in the product dashboard and the information contained in the new short product disclosure statement regime.**

Views on publishing information about underlying holdings

3.45 Proposed section 1017BB of the Corporations Act would require the publication of investment information. The LCA observed that a trustee may not have all of the information and may not be in a position to comply fully because it is reliant on action from other entities.[40] It stated in its submission:

> The provision is extremely unclear and potentially very onerous. Just as an example, it requires trustees to identify:
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> > …each of the financial products or other property in which assets, or assets derived from assets, of the entity are invested…
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> It is intended to create some kind of flow-through into underlying investments, but the language is very unclear. It also raises the problem of double counting, which could arise if you had to delve through many layers of investments. A small but important point is that this information is required to be disclosed on a whole-of-fund basis, whereas members' interests are usually calculated by reference to their investment options. We query why you would not want this kind of information on a per-investment-option basis.[41]

Views on the strict liability provisions

3.46 The LCA was also critical of the strict liability provisions for trustees in relation to the failure to provide the requisite information on the product dashboard. It argued that a better option would be to have an offence where the trustee has failed to use best endeavours to comply with provisions. It viewed this provision as preferable to forcing a trustee into a position where they are in breach 'and then have to defend what may well be completely reasonable'.[42]

3.47 The Association of Superannuation Funds of Australia (ASFA) also expressed concern with the strict liability provisions in Schedule 3 of the bill. It also proposed amending the strict liability offences to 'at fault' provisions. ASFA noted that this amendment would recognise the need for there to be an offence with respect to

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40 Ms Michelle Levy, Law Council of Australia, *Proof Committee Hansard*, 5 October 2012, p. 20.

41 Ms Michelle Levy, Law Council of Australia, *Proof Committee Hansard*, 5 October 2012, p. 16 and p. 20.

42 Ms Michelle Levy, Law Council of Australia, *Proof Committee Hansard*, 5 October 2012, p. 16.

deliberate or systemic failures, but also that liability will be a function of undesirable behaviour or conduct as opposed to inadvertent administrative or operational errors or omissions. If 'at fault' provisions are not legislated, ASFA argued that consideration should be given to introducing explicit reasonable steps, or safe harbour defences.[43]

Committee view on strict liability offences

3.48 The committee emphasises that the strict liability provisions in relation to the product dashboard reflect the benefit of these disclosures for consumers and the importance that trustees maintain a level of vigilance to ensure that the information is provided in an accurate and timely manner. It also notes that the strict liability offence is the same as similar offences that apply to other disclosures such as a product disclosure statement.

3.49 The committee also highlights that a trustee will have a defence where it has taken reasonable steps to ensure that the dashboard was updated as required, was not misleading or deceptive, and contained no omissions. Again, this is consistent with defences for other disclosure offences.

Schedule 4—Modern awards and enterprise agreements

3.50 Currently, most modern awards specify a particular fund or funds to which employers must make compulsory superannuation contributions for the benefit of employees covered by the award who have not chosen a fund. Employers who fail to make contributions for employees to a 'default fund' listed in the award are in contravention of the award, and liable to penalties under the *Fair Work Act 2009* (FW Act).[44]

3.51 The bill proposes that from 1 January 2014, only a fund that offers a MySuper product may be nominated in a modern Award or enterprise agreement. As the Minister explained in the Second Reading Speech:

> [T]his will ensure that employees that have their contributions directed to a fund nominated in a modern award or an enterprise agreement will benefit from having their contributions placed in a MySuper product if they do not wish to choose another superannuation product.[45]

3.52 An 'exempt public sector superannuation scheme', within the meaning given by the SIS Act, will also be permitted to be included as a default fund in a modern

43 Association of Superannuation Funds of Australia, *Submission 17*, p. 6.

44 Explanatory Memorandum, p. 55.

45 The Hon. Bill Shorten MP, Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012, Second Reading Speech, *House of Representatives Hansard*, pp 12683–12684.

award. Exempt public sector superannuation schemes are not regulated by APRA and therefore cannot be authorised to offer a MySuper product.[46]

3.53 A term of a modern Award will be invalid if it does not nominate a fund that offers a MySuper product as a default fund. Fair Work Australia (FWA) will be required to conduct a 'one-off' process to ensure that on 1 January 2014 modern awards do not purport to nominate default funds that are not authorised by APRA as a MySuper product.[47] The object of this process is to avoid confusion for employees and employers.

3.54 The EM also notes that there will also be an ongoing obligation on FWA to remove any invalid references to non-compliant funds in modern awards 'as soon as practicable' after receiving a written notification from APRA that a fund has ceased to offer any MySuper product (or ceased to be an exempt public sector superannuation scheme and does not offer a MySuper product).[48] The onus will be on APRA to notify FWA if a fund is no longer authorised to offer a MySuper product.

3.55 The EM clarifies that if the authorisation of a fund to offer a MySuper product is cancelled, a term in a modern award will be invalid to the extent that it nominates that fund as a default fund from the time of the cancellation. The EM clarifies that this will ensure that employers are not obligated to make contributions to a fund under the terms of a modern award when they would be subject to penalties under the SG Act for doing so.[49]

3.56 The bill would require FWA to include a new term in modern awards that permits employers to make contributions to a fund for an employee who is a defined benefit member of that fund. This will allow contributions to defined benefit schemes even if the fund is not specified in the modern award and does not offer a MySuper product.[50]

3.57 The bill would amend the FW Act such that an enterprise agreement approved by FWA on or after 1 January 2014 will only be able to nominate a default fund (or scheme) that is either:

46 Explanatory Memorandum, pgs 56 and 60.

47 Explanatory Memorandum, p. 57.

48 Explanatory Memorandum, p. 55.

49 Explanatory Memorandum, p. 61.

50 Explanatory Memorandum, p. 57.

- a fund that offers a MySuper product;
- a fund that only receives contributions in respect of employees of the relevant employer who have not chosen a fund if such employees are defined benefit members; or
- an exempt public sector superannuation scheme.[51]

Schedule 5—Defined benefit members

3.58 A defined benefit fund is a superannuation fund that pays a final benefit based on a formula that takes into account an employee's final salary and the number of years worked. The bill would allow for defined benefit arrangements to be used by an employer as a default fund, regardless of whether the fund offers a MySuper product. In terms of defined benefit members, there will also be an exemption to the trustee's obligation to pay contributions into a MySuper product for members that have not given the trustee an election in writing that their contributions are to be paid into a specified choice product.[52]

3.59 Under the MySuper Core Provisions Bill, employers are required to make contributions for employees that do not have a chosen fund to a fund that offers a MySuper product. Schedule 5 of the Further MySuper bill allows for employers to make contributions to a fund for employees that do not have a chosen fund but are a defined benefit member of that fund, regardless of whether it offers a MySuper product. Accordingly, trustees will not be limited to which product they pay contributions to for defined benefit members.[53]

3.60 However, the bill would also provide that defined benefit members are not able to be counted for purposes of determining whether an employer is a 'large employer' to gain authorisation of a MySuper product under section 29TB of the MySuper Core Provisions Bill. The EM states that defined benefit members will 'generally not have any contributions held within a MySuper product, and therefore, should not be counted for the purposes of working out whether an employer can be offered a separate MySuper product'.[54]

3.61 The EM notes that regulations may be made to prescribe whether a member of a superannuation fund is, or is not a defined benefit member for the purpose of certain

51 Explanatory Memorandum, p. 57.

52 Explanatory Memorandum, p. 68.

53 Explanatory Memorandum, p. 68.

54 Explanatory Memorandum, p. 70.

provisions of the *Superannuation Guarantee Act* and the *Superannuation Industry (Supervision) Act 1993*.[55]

3.62 Schedules 4 and 5 of the Further MySuper Bill received little comment in this inquiry. The committee supports both the principles underlying these amendments and the drafting of the provisions.

55 Explanatory Memorandum, p. 70.