

Chapter 3

Infringement notices

3.1 This chapter examines the provisions of the bill that would allow APRA to issue infringement notices for certain alleged contraventions of the SIS Act.

Overview of the proposed infringement notice regime

3.2 An infringement notice regime gives an agency the power to issue a notice alleging that a particular contravention has occurred and providing the recipient with the option to pay a fine rather than having the matter dealt with by a court. Payment of the fine discharges any liability of the person for the particular contravention but is not an admission of guilt. Infringement notices are intended to be a mechanism for dealing with relatively minor offences 'where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective'.¹ APRA currently has the power under Division 3 of the *Financial Sector (Collection of Data) Act 2001* (FSCOD Act) to issue infringement notices for certain offences.² APRA, along with the Australian Taxation Office (ATO), also has the power to issue a contravention notice under section 252B of the SIS Act if it has reason to believe that the trustees of a fund have not informed it of its status as being either a self-managed superannuation fund (SMSF) or a registrable superannuation entity (RSE).³

3.3 The bill proposes to introduce a new part of the SIS Act (part 22) that would enable APRA to issue infringement notices for a range of 'minor and straight-forward' breaches of the SIS Act.⁴ This follows recommendation 10.4 of the Cooper Review.

Provisions subject to an infringement notice

3.4 Under the proposed amendments, 26 provisions would initially be subject to an infringement notice. The explanatory memorandum provides the following examples of conduct that would be subject to a notice:

... not putting contributions into a MySuper product (in cases where the member has not given the trustee a direction in writing that the contribution is to be invested under one or more specified investment options); not notifying as soon as practicable each beneficiary about an acting trustee's appointment; not having rules in place for the appointment of member or

1 Attorney-General's Department, *Guide to framing Commonwealth offences, infringement notices and enforcement powers*, September 2011, p. 50.

2 Explanatory memorandum, p. 10.

3 If the bill is passed, the contravention notice regime will be incorporated into the infringement notice regime.

4 Explanatory memorandum, paragraph 2.5.

independent representatives where required to do so; and not meeting APRA's deadline for receipt of a report relating to an investigation.⁵

3.5 The bill also proposes to allow the regulations to provide that further offences against a provision of the SIS Act or the regulations, or civil penalty provisions in the SIS Act or the regulations may be made subject to an infringement notice.

3.6 Generally, an infringement notice will need to relate to a single contravention of a single provision. However, if multiple contraventions of a single offence occur, an infringement notice that covers these alleged contraventions can be issued if the following four conditions are satisfied:

- the provision requires the person to do a thing within a particular period or before a particular time;
- the person fails or refuses to do that thing within that period or before that time;
- the failure or refusal occurs on more than one day; and
- each contravention is constituted by the failure or refusal on one of those days.⁶

Penalties

3.7 The proposed fine is an amount equal to one-fifth of the maximum penalty that a court could impose on the person for the contravention.⁷ The Attorney-General's Department's *Guide to framing Commonwealth offences, infringement notices and enforcement powers* recommends that, for offences, infringement notice provisions should generally ensure that the amount payable is one-fifth of the maximum penalty that a court could impose, but not more than 12 penalty units for a natural person and 60 penalty units for a body corporate.⁸ The provisions proposed to be subject to an infringement notice are subject to maximum court-imposed penalties ranging from 30 to 100 penalty units.⁹ Therefore, the fine included in an infringement notice would range from six to 20 penalty units depending on which provision was alleged to have been contravened.

5 Explanatory memorandum, paragraph 2.8.

6 Schedule 1, item 112, proposed subsection 224(4). The bill and explanatory memorandum note that multiple offences of this kind may arise as a result of the application of section 4K of the *Crimes Act 1914*.

7 Schedule 1, item 112, proposed subsection 224A(2).

8 Attorney-General's Department, *Guide to framing Commonwealth offences, infringement notices and enforcement powers*, September 2011, p. 59.

9 With the exception of offences against subsection 242M(1), which is discussed at the end of this chapter titled 'Drafting issues'.

3.8 The bill also proposes to make void any governing rule of a superannuation entity that allows the assets of a fund to be used to indemnify a trustee or a director who has been issued with an infringement notice under the SIS Act (or the FSCOD Act).¹⁰ The explanatory memorandum notes that:

One of the reasons the [Cooper] Review recommended providing APRA with the ability to issue infringement notices is to deter uncompliant behaviour. This objective would be undermined if trustees and directors were able to use fund money to pay for the infringement notice.¹¹

Infringement officer

3.9 The bill allows the chair of APRA to determine, by legislative instrument, a class of APRA staff members to be 'infringement officers' who, therefore, may issue infringement notices if they have reasonable grounds to believe that a person has contravened an infringement notice provision.¹² However, the APRA chair is required to be satisfied that the class of APRA staff members have 'suitable training or experience to properly exercise the powers of an infringement officer'.¹³

Views of stakeholders on the overall proposal

3.10 Overall, stakeholders supported the proposed infringement notice arrangements. The following observations made by the CEO of the Association of Superannuation Funds of Australia (ASFA) provide a useful insight into the sector's view on infringement notices as a concept:

Court cases are costly for all parties and not necessarily the best outcome. Fining powers have been used and are a normal part of regulators' toolboxes across the world. There is enough transparency around the application of fines to ensure that misuse is not made of those. So, from a toolbox point of view, I think it is appropriate to have the ability to fine behaviour that is not necessarily reckless but is behaviour where there has been a level of noncompliance, where a more reasonable approach should be applied. I think a fining power is appropriate. APRA as a regulator has a very good reputation, and that is globally. I think it is very important that we make

10 Schedule 1, item 70, proposed subsections 56(2) and 57(2) and item 71, proposed paragraphs 56(2)(b) and 57(2)(b).

11 Explanatory memorandum, paragraph 2.27.

12 Schedule 1, item 112, proposed subsection 223C(1).

13 Schedule 1, item 112, proposed subsection 223C(2). This appears to comply with the *Guide to framing Commonwealth offences*, which observes that an infringement notice provision drafted to allow 'a person' or 'an APS employee' to issue a notice is 'likely to be inappropriate'. It suggests that '[a] common approach is to require that the person issuing the notice possess special attributes, qualifications or qualities ... Further, if the power to issue a notice can be delegated, the delegation should be restricted to persons of suitable seniority and expertise'. Attorney-General's Department, *Guide to framing Commonwealth offences, infringement notices and enforcement powers*, September 2011, p. 60.

sure that the history of the regulator and its ability to regulate and make appropriate decisions be taken into account.¹⁴

3.11 A representative of the Industry Super Network also noted that a benefit of an infringement notice regime would be its cost-effectiveness which, in the superannuation context, 'leaves more in the pockets of beneficiaries'.¹⁵ The AIST noted that the ATO and ASIC already have the power to issue infringement notices, and, similarly to the Industry Super Network, it argued that giving APRA the 'same nuanced ability' to encourage compliance would be preferable compared to the alternative of court action, as infringement notices would not 'impose significant additional costs on the fund and, by implication, the members of that fund'.¹⁶

3.12 However, a number of specific issues were raised about how certain provisions of the bill have been drafted. These issues are discussed in the following paragraphs.

Level of detail to be included in the notice

3.13 Along with other identifying material, the bill proposes to require that notices 'give brief details of the alleged contravention, including':

- (i) the provision that was allegedly contravened; and
- (ii) the maximum penalty that a court could impose if the provision were contravened; and
- (iii) the time (if known) and day of, and the place of, the alleged contravention;¹⁷

3.14 Both the Law Council and the Corporate Super Association suggested that further details regarding the 'reasonable grounds' for the officer's belief and further details about the circumstances of the alleged breach should be required to be included in the infringement notice. Without such information, the Corporate Super Association argued that the 'ability of the trustee or other affected person to challenge the notice may be impaired'.¹⁸

3.15 Infringement notices are already used by a number of regulators and there is accepted guidance on how statutory provisions giving an infringement notice power to a regulator should be framed. Accordingly, before progressing further with the

14 Ms Pauline Vamos, Chief Executive Officer, Association of Superannuation Funds of Australia, *Proof Committee Hansard*, 22 January 2013, p. 7.

15 Mr Richard Watts, External Relations Manager and Legal Counsel, Industry Super Network, *Proof Committee Hansard*, 22 January 2013, p. 21.

16 Mr David Haynes, Project Director, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 22 January 2012, p. 27.

17 Schedule 1, item 112, proposed paragraph 224(1)(e).

18 Corporate Super Association, *Submission 1*, p. 2.

arguments put forward by stakeholders on this issue, it is useful to examine other infringement notice regimes that have been legislated. Table 3.1 below compares the bill's proposed paragraph 224(1)(e) of the SIS Act (the provision outlined above) with the principles contained in the *Guide to framing Commonwealth offences* and selected existing infringement notice regimes.

Table 3.1: Comparison of the detail required under different infringement notice regimes

Source	Description
Attorney-General's Department's <i>Guide to framing Commonwealth offences, infringement notices and enforcement powers</i> , September 2011 (p. 62)	The <i>Guide</i> suggests that a notice should 'identify the alleged offence (including the offence provision) and the time, nature and place of its alleged commission'.
ACCC (relating to consumer law): <i>Competition and Consumer Act 2010</i> , s. 134B	The relevant section in the Competition and Consumer Act (CCA) is drafted similarly to the bill with the exception that the phrase 'give details' is used in the CCA whereas the bill uses 'give brief details'.
ASIC (relating to market integrity rules): Corporations Regulations 2001, regulations 7.2A.05 and 7.2A.06	ASIC 'must specify details of each alleged contravention' rather than 'give brief details' (as proposed in the bill). Details are also required about 'the <i>conduct</i> that made up each alleged contravention (including, to the extent known, the date on which it occurred and the place at which it occurred)' (emphasis added). ASIC must also give a written statement that sets out ASIC's reasons for believing that the recipient has contravened subsection 798H(1) of the Corporations Act.
ASIC (credit infringement notices): National Consumer Credit Protection Regulations 2010, part 6-2	The details that ASIC includes in a notice reflect those expressed by the <i>Guide to framing Commonwealth offences</i> noted above. ASIC also states on its website that it will issue a covering letter stating why the infringement notice has been issued.

3.16 As Table 3.1 illustrates, there are some minor differences in the level of detail contained in the infringement notices that would be issued under the bill's proposed framework compared to other infringement notice regimes.

3.17 The Law Council contended that for infringement notices that relate to the superannuation sector, the nature of that sector necessitates further information about the details of the alleged contravention being included. It argued that requiring only brief details about the alleged contravention may be suitable for some offences outside the superannuation sector, but it could be insufficient for 'the often complex web of compliance obligations applying to large superannuation funds'.¹⁹ In the Law Council's view, further details would allow a trustee to 'obtain proper advice about

¹⁹ Law Council of Australia, *Submission 2*, p. 5.

whether to pay the infringement notice or let the matter proceed to court'.²⁰ The Law Council also suggested that not requiring in the notice detail about the 'reasonable grounds' for an infringement officer's belief that a contravention has occurred may result in it being 'too easy' for an infringement officer to issue a notice.²¹

3.18 Other witnesses considered that further detail in the notice would also assist the recipient understand the nature of the problem and would help avoid future problems of a similar nature from occurring.²²

3.19 The committee raised this issue with Treasury at the public hearing. Unsurprisingly, Treasury's evidence implicitly acknowledges that the superannuation sector is different from others, however, Treasury focused on this from the perspective of the supervision arrangements that apply to the superannuation sector. Treasury noted the close supervisory relationship that APRA has with superannuation funds, including a framework where particular supervisors are connected with specific funds. A Treasury officer observed that:

You would expect that a fund would not first become aware of this when they open the letter with the infringement notice and that there would have been some conversation between supervisors and the fund in the lead up to issuing an infringement notice.

3.20 The Treasury officer also commented that the straightforward nature of the offences that would be subject to an infringement notice would limit uncertainty about exactly what conduct was of concern:

... because infringement notices are limited to cases where it is more or less a black-and-white issue about whether or not there has been compliance, by reference to the provision that has been infringed it becomes pretty clear what the nature of the infringement was.²³

3.21 However, it was acknowledged that, in principle, the issue could be considered further.²⁴

Committee view

3.22 The committee does not consider that additional details regarding the reasonable grounds for an APRA officer's belief that a contravention has occurred

20 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 15.

21 Law Council of Australia, *Submission 2*, p. 5.

22 See Mr Richard Watts, External Relations Manager and Legal Counsel, Industry Super Network, *Proof Committee Hansard*, 22 January 2013, p. 21.

23 Mr Jonathan Rollings, Principal Adviser, Financial System Division, Treasury, *Proof Committee Hansard*, 22 January 2013, p. 32.

24 Mr Jonathan Rollings, Principal Adviser, Financial System Division, Treasury, *Proof Committee Hansard*, 22 January 2013, p. 32.

should be required by legislation to be included in an infringement notice. Such an approach is uncommon and the offences that are proposed to be made subject to an infringement notice are offences that are straightforward. The information that the bill requires to be included is factual in nature and recipients would be able to assess whether it was accurate or not and, as a consequence, whether they may have contravened the relevant provision. The close engagement that APRA has with the superannuation funds should also alleviate concern in this area, as noted by Treasury. The recipient of a notice can also seek to have it withdrawn and the bill does require that the notice informs the recipient that they may choose not to pay. In any case, for the effectiveness of the infringement notice regime to be maximised APRA may be inclined to provide further detail, where it appropriate to do so, to encourage payment. To ensure the integrity of the regime, it is also likely that APRA would only issue a notice where it was prepared to take further action in the event of non-payment. In the committee's view these features of an infringement notice regime dismiss arguments that it would be 'too easy' for an APRA infringement officer to issue an infringement notice, even if one accepted the proposition that an infringement officer would be casual with their statutory responsibilities.

3.23 Nonetheless, without adding a particularly prescriptive requirement, it may be beneficial for further details about the circumstances of the alleged breach to be provided to the recipient. To guide APRA on this, the word 'brief' in the requirement that APRA 'give brief details of the alleged contravention...' should be omitted. This drafting appears to differ from existing infringement notice provisions contained in other legislation and does not appear helpful. Additionally, in the event that it is considered beneficial for additional information to be included in a notice, perhaps when further offences are made subject to an infringement notice by the regulations, the bill should require APRA to include any additional information as required by the regulations. This would provide a relatively simple mechanism for further information requirements to be stipulated.

Recommendation 3

3.24 That:

- **proposed paragraph 224A(1)(e) be amended to omit 'brief'; and**
- **proposed section 224A be amended to require that an infringement notice must contain any other information specified by the regulations.**

Prohibiting indemnification from the assets of the fund

3.25 As noted at paragraph 3.8, the bill proposes to make void any governing rule of a superannuation entity that allows the fund's assets to be used to indemnify a trustee or a director who has been issued with an infringement notice. In its submission, the Law Council expressed some concern about this proposal. First, the Law Council suggested that many trustees, such as those of industry funds, will have

corporate assets available to pay the infringement notices.²⁵ Second, the Law Council argued that not allowing indemnification from the assets of the fund may raise a conflict of interest between the trustee's interests and the interests of fund members. It was reasoned that, because the trustee would not be able to be indemnified from the fund's assets for the infringement notice, they could elect not to pay the notice and essentially challenge APRA to take the matter to court, where for strict liability offences such as those included as infringement notice provisions 'under their broad rights of the indemnity they would be able to claim reimbursement from the fund'. The Law Council concluded that the restriction on indemnification could make infringement notices as an enforcement tool 'practically useless'.²⁶

3.26 The committee raised these concerns with Treasury. Treasury's response focused on how the proposed infringement notice regime complements the earlier tranches of the MySuper reforms:

This goes to the issue of new obligations for directors of trustee boards, as opposed to obligations that apply to the corporate trustee as a collective. The new obligations have been crafted quite carefully, recognising that the general administration and running of a superannuation fund is a matter for the collective trustee board, and those obligations are appropriately applied to the corporate trustee as a collective. The new obligations, though, that attach to individual directors are really behavioural ones. They do not go to decision making of the fund per se, but they go to behaviours like acting honestly and managing your conflicts of interest—they are more behavioural, and they really are within the control of individual directors. So, that is the demarcation there between obligations of the corporate trustee and obligations of individual directors. Again, the government's and the Cooper review's objective here was to raise standards and accountability of individual directors to not leave the impression—and this was Cooper's concern—that the corporate structure shielded them from all responsibility and accountability for their behaviour, but in fact they did have some personal behaviours that they needed to adhere to as part of their role of being a director on a trustee board.²⁷

Committee view

3.27 The committee notes the arguments put forward by the Law Council regarding the possible consequences of not allowing a fund's assets to be used to indemnify a trustee or a director who has been issued with an infringement notice. At this time, the committee has decided against recommending amendments in this area. The government's approach is based on a clear principle and this principle

25 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 15.

26 Ms Pamela McAlister, Deputy Chair, Superannuation Committee, Legal Practice Section, Law Council of Australia, *Proof Committee Hansard*, 22 January 2013, p. 15.

27 Mr Jonathan Rollings, Principal Adviser, Financial System Division, Treasury, *Proof Committee Hansard*, 22 January 2013, p. 33.

should not, at this stage, be deviated from as a result of assumptions regarding the behaviour of notice recipients. Regardless of indemnification, recipients of notices may not be willing to expend the time and effort necessary to respond to court action. Moreover, once the provisions are in effect, the committee expects that APRA will advise the government if it is established that this aspect of the legislation has negative consequences for the effectiveness of the infringement notice regime.

Scope of future infringement notice provisions

3.28 Both the Law Council and the Corporate Super Association expressed concern about the ability for further offences under the SIS Act or SIS Regulations to be made subject to an infringement notice. The Corporate Super Association stated:

We are concerned that a regime which is intended to provide APRA with the power to issue infringement notices for minor and straight-forward breaches of the Act may end up providing APRA with power to issue notices in relation to more complex matters and that this may be undesirable in view of the ease of issue and the summary treatment of alleged offenders.²⁸

3.29 The Law Council suggested that some limitation on the scope of possible provisions be introduced, such as excluding civil penalty provisions.²⁹ The *Guide to framing Commonwealth offences* suggests that infringement notice schemes can apply to civil penalty provisions, although offences should be limited to matters where 'an enforcement officer can easily make an assessment of guilt or innocence', such as strict or absolute liability offences.³⁰

Committee view

3.30 The committee notes that infringement notice provisions contained in other legislation provide for regulations to specify other provisions that will be subject to an infringement notice. The drafting of the bill is, therefore, not unusual in this regard, and the committee does not object to this approach being used in the SIS Act. The committee also notes that regulations which include further offences may be disallowed by either the Senate or the House of Representatives.

3.31 However, the committee does consider that further consideration should be given to the penalties that would apply in the event that civil penalty provisions are included in the infringement notice scheme in the future. For contraventions of civil penalty provisions, the court may order a penalty that does not exceed 2,000 penalty units.³¹ While an infringement notice fine of an amount equal to one-fifth of the

28 Corporate Super Association, *Submission 1*, p. 2.

29 Law Council of Australia, *Submission 2*, p. 5.

30 Attorney-General's Department, *Guide to framing Commonwealth offences, infringement notices and enforcement powers*, September 2011, pp. 57, 58.

31 *Superannuation Industry (Supervision) Act 1993*, s. 196(3).

maximum penalty that a court could impose for the contravention is appropriate for strict liability offences, it is unlikely to be for civil penalties. Other legislation that allow for infringement notices for civil penalty provisions contain different methods for calculating the fine associated with those provisions. For example, the *National Consumer Credit Protection Act 2009*, in which civil penalties equal 2,000 penalty units, provides that the penalty that the regulations could impose must not exceed one-fortieth of the maximum penalty that a court could impose.³²

Recommendation 4

3.32 That schedule 1, item 112, proposed subsection 224A(2) be amended to provide that:

- **for offences, the amount to be stated in the notice for the alleged contravention of the provision must be equal to one-fifth of the maximum penalty that a court could impose on the person for that contravention; and**
- **for civil penalty provisions, the amount to be stated in the notice for the alleged contravention of the provision must be equal to one-fortieth of the maximum penalty that a court could impose on the person for that contravention.**

Is APRA the appropriate regulator?

3.33 As noted earlier in this chapter, stakeholders support the idea of infringement notices being issued for straightforward contraventions. Stakeholders also expressed support for APRA having the responsibility for infringement notices:

Whenever you have a regulatory power, you must be able to assess the behaviour. [APRA's] job and its mandate is to know each and every entity across the superannuation industry. That enables it to make a more appropriate decision in terms of the attitude and the culture of an organisation. It is not the role of the ATO to understand the nature, the culture, of the organisation. Therefore they are more likely to have a black-and-white pure breach of legislation. With a lot of the legislation, particularly around pooled funds, particularly if there is a noncompliance, it is not a black-and-white matter. As such, we believe APRA is the more appropriate body.³³

3.34 In its submission, however, the Australian Chamber of Commerce and Industry (ACCI) noted the inclusion of subsection 64(3A) in the list of offences that will be subject to an infringement notice unless the offence relates to an SMSF.³⁴ Section 64 of the SIS Act requires superannuation contributions that are deducted

32 *National Consumer Credit Protection Act 2009*, s. 331(2).

33 Ms Pauline Vamos, Chief Executive Officer, Association of Superannuation Funds of Australia, *Proof Committee Hansard*, 22 January 2013, p. 7.

34 Schedule 1, item 112, proposed subsection 223A(2).

from salary or wages to be remitted promptly. As ACCI notes, the section refers to regulated superannuation funds which include SMSFs. ACCI suggested that:

It seems arguable that where an authorised deduction from salary or wages for a non-concessional contribution into a SMSF is not paid within the required time, the contravention is one which relates to a SMSF. If so, the operation of s 223A(2)(c) seems to exclude contraventions under s 64(3A) where the deducted contribution is to be made into a SMSF from the infringement notice regime. This does not appear to be an intended result.³⁵

3.35 Continuing with this line of reasoning, ACCI questioned whether APRA is the appropriate regulator for issuing infringement notices related to section 64. ACCI argued that:

Late payment or non-payment of superannuation guarantee contributions (attracting a superannuation guarantee charge) is overseen by the ATO and the ATO is significantly involved in implementing SuperStream. Most employers do not have any dealings with APRA, and vice versa, and many employers would not know what APRA is ... From the perspective of a complainant there seems little sense or logic in distinguishing between regulators for perceived late or non-payment of contributions because one contribution is concessional and the other is non-concessional.³⁶

Committee comment

3.36 The committee notes the arguments made by ACCI. Regarding the possibility that APRA be permitted to issue infringement notices to SMSFs for alleged breaches of section 64 of the SIS Act, the committee notes that the ATO is the regulator of SMSFs and, within this framework, it may not be ideal for APRA to be involved in one aspect of regulation that relates to SMSFs (albeit an aspect of the SIS Act that is focused on employers) and not others. It is apparent that ACCI's arguments touch on issues beyond those contained in the bill such as the division in responsibility between APRA and the ATO. Accordingly the committee has not focused on this issue; however, it has included this discussion in the report for consideration by policymakers.

APRA's approach to issuing infringement notices

3.37 ACCI expressed some concern about the commencement of the infringement notice provisions; not because ACCI considers the planned commencement is inappropriate,³⁷ but for the reason that the commencement will coincide with the

35 Australian Chamber of Commerce and Industry, *Submission 3*, p. 5.

36 Australian Chamber of Commerce and Industry, *Submission 3*, p. 5.

37 To the contrary, ACCI acknowledged that applying infringement notices to contraventions from 1 July 2013 'is appropriate' given that the MySuper obligations commence from that date. Australian Chamber of Commerce and Industry, *Submission 3*, p. 2.

implementation of SuperStream.³⁸ ACCI noted that during this period it 'is a[t] least possible that there will be system errors which give rise to late payments', and called for APRA to be sensitive to these type of SuperStream-related complications when considering the issuance of an infringement notice or instituting court proceedings.³⁹

3.38 When the approach that APRA would take to infringement notices was discussed with Treasury, a Treasury officer noted that a contravention of a strict liability offence does not require the regulator to automatically take action:

The regulator always has the discretion whether or not to enforce a penalty. And that allows a regulator to take a reasonable and pragmatic approach to things that either are inadvertent or there is a reasonable excuse for why they have occurred. I guess though the reason that strict liability provisions exist is because they provide a general deterrent for funds not to breach the provisions.⁴⁰

3.39 ACCI also suggested that publicly available enforcement policy guidelines regarding the use of infringement notices be published by APRA.⁴¹ The general desirability of publicly available guidance was also noted by ASFA:

... one of the key messages which we have been delivering for quite some time now is that we urge all the regulators—APRA, ASIC and the ATO—to issue statements in terms of the way in which they will enforce and apply the legislation and the type of pragmatic approach they are intending. So we can work through it.⁴²

3.40 The development and publication of guidelines regarding a regulator's strategy for infringement notices appears to be a best practice approach. In its 2003 report *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, the Australian Law Reform Commission recommended that regulators that have the ability to issue infringement notices should develop and publish guidelines on how they will exercise their discretion to issue, withdraw and correct those notices.⁴³

38 The SuperStream measures are designed to enhance the 'back office' of superannuation and result in the processing of everyday transactions being easier, cheaper and faster. See <http://strongersuper.treasury.gov.au/>.

39 Australian Chamber of Commerce and Industry, *Submission 3*, pp. 2–3.

40 Mr Jonathan Rollings, Principal Adviser, Financial System Division, Treasury, *Proof Committee Hansard*, 22 January 2013, p. 32.

41 Australian Chamber of Commerce and Industry, *Submission 3*, p. 3.

42 Ms Pauline Vamos, Chief Executive Officer, Association of Superannuation Funds of Australia, *Proof Committee Hansard*, 22 January 2013, p. 8.

43 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, report no. 95, March 2003, p. 34 [recommendation 12-8].

Recommendation 5

3.41 That prior to the commencement of the provisions in the bill that will establish an infringement notice regime, the Australian Prudential Regulation Authority publishes guidance on the approach it will take to exercising its discretion to issue, withdraw and correct those notices.

Committee view

3.42 Enabling APRA to issue infringement notices for minor and straightforward contraventions of the SIS Act and regulations is a welcome enhancement of the options currently available for enforcing superannuation law. An infringement notice regime will provide a low-cost alternative to court proceedings for both the recipient of the notice and the regulator. It will add to the options available in the regulator's enforcement toolbox for ensuring the desired regulatory outcome is achieved and will increase the likelihood that the enforcement response is appropriate and proportional to the offence.

3.43 The proposed regime is generally supported by the superannuation sector, and the committee notes that infringement notice regimes have operated successfully in several other regulatory areas. Stakeholders did raise some consequential and technical issues. Fundamentally, many of these issues relate to the approach that APRA will take to its new power. The committee expects that APRA will take a sensible and considered approach to issuing infringement notices. To ensure the integrity of the infringement notice regime is maintained, the committee anticipates that APRA would only issue an infringement notice where it will proceed with court proceedings if the recipient of the notice elects not to pay. To further promote compliance with infringement notices, the committee expects that APRA will be willing to engage with recipients to discuss the conduct that is of concern. These principles, and the recommendations that the committee has made, should alleviate concern and help improve the operation of the provisions.

Drafting issues

3.44 The committee has identified some drafting issues in item 112 of the bill. Included in the bill is one proposed infringement notice provision that appears outside the scope of 'minor and straight-forward' breaches. Offences against subsection 242M(1) are proposed to be subject to an infringement notice.⁴⁴ Subsection 242M(1) is inserted into the SIS Act by the Further MySuper Act that was passed in November 2012. It provides for civil and criminal consequences for contraventions of sections 242K and 242L—provisions that require trustees of eligible rollover funds to promote the financial interests of the beneficiaries of the fund and directors of those funds to exercise a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out the obligations.

44 Schedule 1, item 112, proposed subparagraph 223A(1)(i).

3.45 It appears likely that the provision intended to be subject to an infringement notice is actually section 242P, which is also inserted by the Further MySuper Bill. Section 242P makes it a strict liability offence if a person represents that they offer an eligible rollover fund when they are not authorised by APRA.

3.46 Two observations support this conclusion. As the Further MySuper Bill progressed from the exposure draft stage to the bill that was introduced into the Parliament (which ultimately became the Further MySuper Act), the numbering of the sections changed. In the exposure draft, subsection 242M(1) was a strict liability offence if a person represents that they offer an eligible rollover fund when they are not authorised by APRA. However, this provision became subsection 242P(1) in the Further MySuper Bill as introduced to the Parliament, as well as in the Further MySuper Act.

3.47 In addition to the changes to section numbering, it has been identified that the notation in chapter 7 of the original and revised explanatory memorandums for the Further MySuper Bill differ; that is, paragraph 7.40 of the revised explanatory memorandum discusses the matters addressed by section 242P; however, section 242M is stated in the notation that follows the paragraph.

Recommendation 6

3.48 That proposed subparagraph 223A(1)(i) contained in schedule 1, item 112 of the bill be amended by omitting 'subsection 242M(1)' and substituting 'subsection 242P(1)'.

3.49 The committee has also observed that items 70 and 71 of the bill both propose the same amendment, namely the introduction of paragraphs 56(2)(c) and 57(2)(c).⁴⁵ However, as shown below, the use of ';' or 'differ:

70 At the end of subsections 56(2) and 57(2)

Add:

; or (c) the payment of any amount payable under an infringement notice.

71 After paragraphs 56(2)(b) and 57(2)(b)

Insert:

(c) the payment of any amount payable under an infringement notice; or

3.50 Item 70 appears to be drafted so that the ';' or ' is placed in the correct position for relating the proposed paragraph with the existing series (i.e. paragraphs (a) and (b)). Accordingly, item 71 should not be proceeded with.

45 This was also identified by the Law Council: *Submission 2*, p. 6.

Recommendation 7

3.51 That the bill be amended to omit schedule 1, item 71.