



# QMV LEGAL

## LEGAL & REGULATORY UPDATE

### PENSIONS AND SUPERANNUATION

NOVEMBER 2020

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#### IN BRIEF

*Following the branding of the Stronger Super, Better Super, MySuper, Protecting Your Super, and Your Super, Your Choice reforms – the **Your Future, Your Super** package has been released, consisting of three draft Bills which would make some significant changes to the way that default arrangements work, the best interest duty is applied, and the way that underperformance is supervised.*

*We also saw the **Hayne Royal Commission** related reforms introduced to Parliament, with the financial advice related reforms previously included in the draft legislation being quietly omitted (however there is no indication that the policy of prohibiting advice fees from MySuper accounts has changed).*

*The **Retirement Income Review Final Report** was also made public, while not making any recommendations – the Report does nudge towards some suggestions in relation to the rate of the superannuation guarantee, legislating an objective of the superannuation system, and enabling better member access to retirement planning guidance and tools. All eyes will now be on the May 2021 Commonwealth Budget to see how these findings might translate into policy!*

#### MAJOR UPDATES



Your Future,  
Your Super

26 November 2020  
Draft legislation

 [LINK TO DETAILS](#)

Treasury has released exposure draft legislation and explanatory material relating to the *Your Future, Your Super* package, announced in the 2020-21 Commonwealth Budget. The package consists of three bills:

- *Draft Treasury Laws Amendment (Best Financial Interests Duty) Bill 2020*
- *Draft Treasury Laws Amendment (Single default account) Bill 2020*
- *Draft Treasury laws Amendment (Addressing underperformance in superannuation) Bill 2020*

The consultation period is open until 24 December this year, and the draft legislation proposes a 1 July 2021 commencement date for all the reforms with the exception of the underperformance monitoring for trustee directed products, which will begin on 1 July 2022.

*These draft bills contain measures which will significantly affect superannuation trustees. We recommend that superannuation trustees consider participating in the consultation to identify any issues arising from the drafting of the bills. We also recommend completing an impact assessment for each of the bills and commencing planning for transitioning to the changes.*

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## Best Financial Interests

26 November 2020  
Draft legislation

[LINK TO DETAILS](#)

The *Draft Treasury Laws Amendment (Measures for a Later Sitting) Bill 2020: Best Financial Interests Obligation* will be introduced as part of the *Your Future, Your Super* package and will amend the SIS Act from **1 July 2021** to require superannuation trustees to perform their duties and exercise their powers in the **best financial interests of members**.

The new best financial interests duty is intended to clarify the interpretation of the existing best interest duty, codifying the well-established interpretation in case law. The explanatory memorandum also suggests the development of a best financial interests test, which projects the financial benefits of payments and investments.

The draft Bill also provides that regulations may be made to **prohibit certain investments or payments** regardless of whether the payment is considered in the best financial interests of beneficiaries.

The draft Bill also seeks to place an **evidential burden** on trustees to quantify the financial case for expenditure with third parties and imposes strict liability for certain record keeping offences.

*The Bill makes significant changes to fundamental aspects of the supervisory statute and should warrant attention of trustees. If legislated, the Bill is likely to require the development of analysis tools to support significant investment and expenditure decisions. There may also be impacts to investment procedures to manage risks of investments in prohibited investments.*



## Default Account Stapling

26 November 2020  
Draft legislation

[LINK TO DETAILS](#)

The *Draft Treasury Laws Amendment (Measures for consultation) Bill 2020: Single default account* introduced as part of the Government's *Your Future, Your Super* will amend the *Superannuation Guarantee (Administration) Act 1992* from 1 July 2021 to limit the creation of new superannuation accounts to employees who do not have an **existing stapled fund** or have exercised choice of fund when they start a new job.

The Bill would see that an employer can satisfy the choice of fund requirements by making contributions for the employee into a stapled fund which exists for an employee. Employers will be able to request that the ATO identify whether there is a stapled fund for an employee.

If an employee has a stapled fund, their employer is prevented from satisfying the choice of fund requirements for contributions made to: a **default fund** chosen by the employer, if the employee has no chosen fund; or a fund specified under a workplace determination or an enterprise agreement made before 1 January 2021.

*Superannuation trustees should consider the implications of the "stapling", particularly trustees of funds comprised of a membership largely from one industry and provide feedback as appropriate. Strategic planning might need to consider the impact on modelling related to the inflows of new members due to existing default arrangements.*



## Underperformance

26 November 2020  
Draft legislation

[LINK TO DETAILS](#)

The draft *Treasury Laws Amendment (Measures 4 for a later sitting) Bill 2020: Addressing underperformance in superannuation* to be introduced as part of the Government's *Your Future, Your Super* package will amend the SIS Act to require:

- APRA to conduct an **annual performance test** for MySuper products and other products to be specified in regulations (such as 'trustee-directed products' where the trustee has control over the design and implementation of the investment strategy);
- The SIS Act will be amended to allow the regulations to specify one or more **formulas for the ranking of superannuation products** by APRA;
- Trustees to give **notice to their beneficiaries** who hold a product that has failed the performance test; and
- Where a product has failed the performance test in two consecutive years, the trustee will be **prohibited from accepting new beneficiaries** into that product (with APRA having the ability to lift the prohibition if circumstances specified in the regulations are met).

The proposed bill also gives APRA prudential standard making powers in order to determine how RSE licensees will be managed and how other people respond to RSE licensees in respect of these provisions. This change is intended to allow APRA to ensure RSE licensees are prepared for a range of contingencies, including the possibility that the prohibition against accepting new beneficiaries into a product may lead to a material deterioration in the financial condition of the fund.

*Superannuation trustees should consider the risks associated with the proposed performance test and consider the impact of the underperformance test of investment strategy and related arrangements.*



## Remuneration

12 November 2020  
Draft Prudential Standard

[LINK TO DETAILS](#)

APRA released a Response Paper and revised draft to *Prudential Standard CPS 511 (Remuneration)* for a second round of consultation alongside its response to industry's feedback. Key changes to note on the revised standard include:

- Creation of a tiered approach to **Significant Financial Institutions (SFIs)** and non-Significant Financial Institutions (non SFIs);
- **Board oversight** requirements obligations have been streamlined to reduce operational burden on Boards;
- Clarified intent that focus for third-party providers is **assessing conflicts**;
- Replacement of the 50% cap on **financial performance measures** with material weight to non-financial measures and adjustment for adverse risk and conduct outcomes; and
- Reduced requirements of **non-SFIs** to not have to meet minimum deferral, clawback and review requirements.

Written submissions are requested by 12 February 2021. Larger and more complex entities (SFIs) will be expected to comply with the new requirements in 2023, while smaller entities (non-SFIs) will not need to comply until 2024.

*Superannuation trustees should review the revised standard and are likely to benefit from assessing whether the trustee is likely to meet the definition of an SFI as at the commencement date. Early stage planning for transition to the new requirements would also benefit trustees.*



## Retirement Income Review

20 November 2020  
*Final Report*

[LINK TO DETAILS](#)

Treasury released the **Retirement Income Review Final Report**, finding that "the Australian retirement income system is effective, sound and broadly sustainable. But it can be improved." While no policy recommendations are made, the report did suggest some policy initiatives. The key observations from the report include:

- suggesting that the objective of the system be developed around the goal "to deliver adequate standards of living in retirement in an equitable, sustainable and cohesive way."
- an appropriate adequacy objective is to balance living standards across a person's working life and retirement;
- increases in SG result in moderation of future wage growth which might affect living standards in working life, particularly for lower-income earners;
- more efficient management of retirement savings could have a bigger impact than increasing the rate of the superannuation guarantee;
- there is insufficient attention on assisting people to optimise their retirement income;
- changes would need to be made to the regulatory framework to facilitate funds providing more guidance at retirement. Automated or digital advice could be more accessible and affordable;
- the home is an important factor influencing retirement outcomes and how people feel about retirement; and
- the design of tax concessions increases inequality in the system, by providing greater benefit to people on higher incomes.

*Superannuation trustees should review the report and flag the likelihood of policy measures related to the findings being announced at the 2021-21 Commonwealth Budget in May 2021.*



## Affordable Financial Advice

17 November 2020  
*Consultation*

[LINK TO DETAILS](#)

ASIC released Consultation Paper 332 *Promoting access to affordable advice for consumers*. The paper seeks input from industry to help ASIC understand: The issues and impediments relating to the supply of good quality affordable personal advice; and the practical steps that can be taken by ASIC and industry to improve consumer access to good quality affordable advice.

A particular focus of this paper is on promoting access to quality 'limited advice', with feedback sought on the impediments to providing affordable and limited advice that ASIC and industry are able to address. Feedback on industry's experience in providing limited, digital and strategic advice is of particular interest.

ASIC is also seeking input on what can be done to make the example statements of advice in RG 244 and RG 90 more helpful. The consultation period ends on 18 January 2021.

*Superannuation trustees should consider providing a response, particularly around limited advice and perceived regulatory constraints.*



## The Hayne Reforms

12 November 2020  
*Bill introduced to the House*

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* and the *Corporate (Fees) Amendment (Hayne Royal Commission Response) Bill 2020* were introduced to Parliament. The bills seek to implement reforms concerning:

- Enforceability of certain terms of industry codes
- Prohibiting hawking of financial products
- Superannuation Trustees holding no other duty
- Adjustment of APRA and ASIC's roles in superannuation
- Breach reporting and remediation
- Broadening prohibitions on indemnification from trust assets
- Statutory obligation to cooperate

While reforms related to **advice fees in superannuation** and **ongoing fee disclosure and lack of independence arrangements** were part of the exposure draft legislation that was released for consultation earlier this year, **they are not included in these bills**. While most of the changes commence 1 July 2021, certain measures are likely to have an earlier commencement date.

*Superannuation trustees should prioritise completing an impact assessment as soon as possible, as there is likely to be a short transition period before many of the measures commence. We have included a summary for each of the superannuation related items covered by these bills in this update.*



## Industry Code Enforceability

12 November 2020  
*Bill*

[LINK TO DETAILS](#)

Schedule 1 of the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* seeks to amend the *Corporations Act* and the *Credit Act* to strengthen the existing voluntary code of conduct framework to allow **ASIC to designate enforceable code provisions in approved codes of conduct**. A breach of an enforceable code provision may attract civil penalties (including pecuniary penalties of up to 300 penalty units) and/or other administrative enforcement action from ASIC.

The Bill also seeks to establish a **mandatory code of conduct** framework for the financial services industry through regulations, with the ability to add designated civil penalty provisions. A breach of a mandatory code of conduct provision may attract civil penalties and/or administrative enforcement action from ASIC.

The new powers would commence on the later of the day after Royal Assent and 1 January 2021.

*Superannuation trustees should consider the likelihood of any existing voluntary codes that they are signatories to (such as the Insurance in Superannuation Voluntary Code) having enforceable provisions.*



## No Hawking

12 November 2020  
Bill

[LINK TO DETAILS](#)

Schedule 5 of the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* seeks to amend the *Corporations Act* to **ban the hawking** of financial products. It includes a new general prohibition of offers to sell or issue financial products made in the course of, or because of, **unsolicited contact**.

Unsolicited contact is any contact in relation to a financial product to which the consumer did not consent that is made by telephone, in face-to-face meetings or any other real-time interaction which is in the nature of a discussion or conversation.

Contact is not unsolicited if the consumer consented to the contact in relation to the financial product. For a consumer to consent to contact, they must make a positive, voluntary and clear request to be contacted about the financial product before the contact is initiated.

The Bill also gives consumers the power to specify how they can be contacted and withdraw or vary a request at any time

The reforms to commence on the later of the day after Royal Asset and 05 October 2021.

*Superannuation trustees should review their promotional, business development, and distribution activities to identify whether such activities may be considered to be hawking under the proposed new laws. Such strategies may need to be revisited when relied on by trustees.*



## No Other Duty

12 November 2020  
Bill

[LINK TO DETAILS](#)

Schedule 8 of the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* seeks to amend the *SIS Act* to impose a new condition on licences held by a body corporate trustee of a registrable superannuation entity.

The new licence condition **prohibits** these trustees from **having a duty to act in the interests of another person, except in the course of**: Performing their duties and exercising their powers as superannuation trustee; or providing personal advice.

Examples of situations or relationships which give rise to a duty to act in another person's interest include:

- Being the responsible entity of a registered managed investment scheme;
- Being a trustee of an unregistered managed investment scheme;
- Acting as an agent of another person;
- Being a trustee of a traditional trust; and
- Providing personal advice to a person as a retail client.

The reforms to commence on the later of the day after Royal Asset and 1 July 2021.

*Superannuation trustees should review any licences held and relationships apparent to the trustee entity which may give rise to prohibited duties. Particular attention should be paid to any related investment vehicles and corporate structures, which may need to be appropriately adapted.*



## ASIC Breach Reporting

12 November 2020  
Bill

[LINK TO DETAILS](#)

Schedule 11 of the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* clarifies and strengthens the breach reporting regime for AFS licensees, introducing a comparable breach reporting regime for Australian credit licensees, and requiring licensees to report serious compliance concerns about financial advisers; and imposing a new obligation to investigate misconduct and promptly remediate affected clients.

Key features of the proposed amendments expand the situations that need to be reported to ASIC, to include:

- Investigations into whether a significant breach has occurred or will occur if the investigation continues for more than 30 days, and the outcomes of those investigations;
- conduct constituting gross negligence or serious fraud;
- conduct that amounts to misleading or deceptive conduct under financial services law; and
- where there are reasonable grounds to suspect that a reportable situation has arisen in relation to a financial adviser operating under another licence.

The Bill would also require AFS licensees to report to ASIC within **30 calendar days** after the licensee first knows that or is reckless with respect to whether there are reasonable grounds to believe, a reportable situation has arisen. The Bill also introduces two separate tests for when a breach is significant – the first deems specified breaches to be significant and the second determines whether a breach is significant based on several listed factors.

*Trustees need to consider how these requirements will impact current breach notification processes and whether any changes will be required to comply with the amendments.*



## Regulator Roles & Powers

12 November 2020  
Bill

[LINK TO DETAILS](#)

Schedule 9 of the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* makes adjustments to the SIS Act relating to the roles and responsibilities of superannuation industry regulators. Specifically, it extends ASIC's role in superannuation regulation to cover consumer protection and market integrity regulation.

The Bill also extends the AFS licensing regime under the *Corporations Act* and the consumer protection provisions under the ASIC Act to cover a broader range of activities undertaken by APRA-regulated superannuation trustees. The Bill also creates a new financial service – providing a superannuation trustee service.

In the context of the extension of the Australian financial services licensing regime's coverage over superannuation, Part 2 amends the SIS Act's existing indemnification rules to prevent superannuation trustees and their directors from using trust assets to pay criminal, civil or administrative penalties incurred in relation to a contravention of any Commonwealth law.

The reforms to commence on the later of the day after Royal Asset and 1 January 2021.

*Superannuation trustees should ensure that their representatives involved in regulatory engagement are aware of the broader role that ASIC will play in regulating the SIS Act and ensure that any regulatory engagements are with the appropriate regulator.*



## Member Outcomes

11 November 2020  
FAQ

[LINK TO DETAILS](#)

APRA published a new FAQ to support trustees to undertake the **outcomes assessment** by the end of February 2021. The FAQs address common areas of weakness identified from APRA's targeted review of trial outcomes assessments, and include:

- Trustees should not place on hold work underway to complete the assessment based on potential changes to reflect proposed budget measures;
- The 2019-20 financial year is likely to be the appropriate first period for the majority of trustees, however, trustees have discretion as to which 12-month period they utilise (whether calendar year, financial year or income year);
- Trustees must complete an assessment for each choice product and, in the absence of prescribed 'comparable choice products' in the SIS Regulations, the approach taken for choice products is largely at the discretion of the RSE licensee;
- Trustees may draw upon analysis undertaken in complying with section 52(6) of the SIS Act and SPS 530 requirements when assessing, for the purpose of s. 52(11)(b);
- An RSE licensee is required to undertake the comparison against all MySuper products (i.e. both single strategy and lifecycle products); and
- Reference to the data that should be used to complete the assessment.

*Superannuation trustees should carefully review APRA's FAQ and review their progress on the outcomes assessment design and implementation, taking into consideration APRA's guidance.*

## TECHNICAL CHANGES AND UPDATES



## KiwiSaver

11 November 2020  
Bill

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2020 Measures No. 5) Bill 2020* was introduced into Parliament. The Bill seeks to amend the *Superannuation (Unclaimed Money and Lost Members) (SUMLM) Act 1999* and the *ITAA 1997* to facilitate the payment of money held by the ATO directly to New Zealand KiwiSaver schemes.

The Australian and the New Zealand Governments signed the Arrangement between the *Government of Australia and the Government of New Zealand on Trans-Tasman Retirement Savings Portability* (the Arrangement) in 2009.

Currently, under the Arrangement and associated legislation, retirement savings can only be transferred between Australian complying superannuation funds and New Zealand KiwiSaver schemes, which require New Zealand residents to first transfer their superannuation from the ATO to an Australian superfund and then request that the fund transfer their superannuation to KiwiSaver.

*Superannuation trustees may wish to ensure that member service functions are aware of the changes, and that any online or published information about the fund refers to trans-Tasman consolidation where appropriate.*





## SuperStream

9 November 2020  
ATO Update

[LINK TO DETAILS](#)

The ATO has made available several onboarding and implementation documents related to the SuperStream Rollover. The resources below are provided to assist:

- APRA-regulated funds and digital service providers (DSPs) in the transition to SuperStream Rollover v3; and
- SMSF DSPs to implement SuperStream Rollover v3.

From 31 March 2021, the SuperStream Rollover message will be extended to include self-managed superannuation funds (SMSFs) and digital release authorities.

The transition period for implementation and onboarding to SuperStream Rollover v3 is from 31 March 2021 to 30 September 2021.

*Superannuation trustees should review the website and tools available.*

## POLICY & GUIDANCE



## Information Security (CPS234)

26 November 2020  
Speech

[LINK TO DETAILS](#)

In a speech to the Financial Services Assurance Forum, APRA Executive Board Member Geoff Summerhayes warned that APRA will step up its "scrutiny of cyber oversight practices" and "take a much more targeted approach to ensuring CPS 234 is being fully complied with and holding boards and management accountable where it is not."

Mr Summerhayes announced that APRA will shortly request one-off tripartite independent cyber security reviews across all regulated entities.

Starting next year, APRA will be asking boards to engage an external audit firm to conduct a thorough review of their CPS 234 compliance and report back to both APRA and the board. APRA has not made a final determination on which entities this will apply to, but all entities should prepare accordingly.

As part of its new Cyber Strategy, APRA will formulate enhanced cyber guidance for board members, internal auditors and risk management professionals.

*Superannuation trustees should review their implementation of CPS 234 and specifically the robustness of their Information Security Frameworks alongside any information security events that have occurred in the past year to ensure compliance and preparedness for an APRA requested audit.*



## Financial Advice Relief

19 November 2020  
Consultation

[LINK TO DETAILS](#)

The Government accepted the Royal Commission recommendations on reference checking and introduced in the [Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) a requirement for AFS licensees to comply with an ASIC reference checking and information sharing protocol.

In response, ASIC released a consultation paper seeking feedback on a new reference checking and information sharing protocol for financial advisers and mortgage brokers.

Currently, Section 912A of the *Corporations Act 2001* requires AFS licensees to implement adequate monitoring and supervision processes, to provide financial services efficiently, honestly and fairly, and to ensure that their representatives provide financial services that comply with the financial services laws.

The proposed law will require licensees to check references and share information about individuals to whom the ASIC protocol applies – either by requesting or providing information about the individual (who is a prospective representative). Under the Bill, licensees who contravene the obligation to comply with the ASIC protocol will be subject to a civil penalty.

Industry and other interested stakeholders have until 29 January 2021 to provide feedback on CP 333.

*Superannuation trustees should consider reviewing financial advice activities, and current business rules around checking references and sharing information alongside ASIC's proposed protocol. Trustees should consider providing any feedback to ASIC.*



## Insurance in Super

20 November 2020  
Report

[LINK TO DETAILS](#)

ASIC released Report 673 *Consumer engagement in insurance in super* presenting findings from research exploring the experiences of members who were not using a financial adviser and directly contacted their fund to inquire about or make changes to their insurance. Key findings include:

- Around half of over 20 million superannuation accounts have life insurance attached with most members holding default cover offered by the fund.
- Members find the process for engaging on insurance challenging and aren't always able to achieve what they set to do.
- Members expect that insurance fact-finding or knowledge about level of cover should be a self-service process, but it is often not.
- After interacting with their fund, about a third of the participants spontaneously reported that they felt confused, overwhelmed or uncertain. They found insurance complex and difficult.

ASIC is encouraging trustees to consider the issues raised in the report and how they might improve the experience of their member when they seek to engage about insurance.

*Superannuation trustees should review the report against current disclosures and avenues for members to obtain insurance information, or make changes to their insurance, and look to optimise the disclosure, documentation and member experience.*



## Insurance Claims Handling

27 November 2020  
*Information Sheet*

[LINK TO DETAILS](#)

Following the introduction of the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* into Parliament earlier in the month, ASIC released a draft information sheet for insurance claims handling, which the bill will make a financial service requiring an AFS licence.

Superannuation trustees are exempted from the requirement to hold a license; however, ASIC's information sheet suggests that the substantive obligations of an AFS licensee with a claims handling authorisation are relevant to understanding an RSE licensee's obligations in providing a trustee service when assisting members and their beneficiaries with making insurance claims. Example 6 provides a scenario of an insurance claim through superannuation.

RSE licensees will need to hold an AFS licence with an authorisation to provide a "superannuation trustee service" a core aspect of which is assisting members and their beneficiaries with insurance claims.

*Superannuation trustees should review the information sheet and consider the impact that the creation of claims handling as a financial service is likely to have on their existing operating model, supply chain, and licensing arrangements.*



## FinTech & RegTech

9 November 2020  
*Issues Paper*

[LINK TO DETAILS](#)

The Senate Select Committee on Financial Technology and Regulatory Technology published an issues paper outlining the committee's intended direction for the remainder of its inquiry and some specific areas of interests before delivering its final report with additional recommendations in April 2021.

Having recommended the rollout of the CDR into superannuation, the committee seeks input on options in the area. Noting that the superannuation measures proposed in the 2020-21 Budget include a new online YourSuper comparison tool, the committee is interested in whether the CDR could still assist and facilitate choice in the superannuation sector.

The committee welcomes written submissions addressing these issues by 11 December 2020.

*Superannuation trustees should review the issues paper and provide feedback specifically with respect to how the CDR regime could work in the industry.*

## ABOUT QMV LEGAL

QMV Legal is focused on providing pragmatic and expert legal advice which considers both the **nuance of superannuation law** and the commercial and operational objectives of superannuation trustees and providers.

Being **closer to the business** operations and technology of running a superannuation fund provides QMV Legal with a unique insight into the legal issues faced by superannuation funds.

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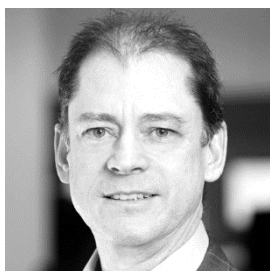
MANAGED INVESTMENTS & ESG

## LEGAL EXPERTS ON SUBSCRIPTION

QMV Legal provides an innovative legal and regulatory **subscription service for superannuation trustees** which includes pro-active, efficient, and client specific legal and regulatory change advice.

## CONTACT US

If you have any questions or need assistance, you can contact us directly via the details below:



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