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LEGAL, REGULATORY, & POLICY UPDATE

PENSIONS AND SUPERANNUATION

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IN BRIEF

There was no movement with the ***Your Future, Your Super Bill*** *which remains before the Senate Economics Committee; however, Parliament did pass the* ***Reuniting More Superannuation Act*** *– which will see the wind-up of eligible rollover funds, and the* ***second Hayne Royal Commission Response Act*** *which provides watered down limits on advice fee deductions from MySuper accounts.*

There was an unexpected end to the pandemic related relief concerning ***electronic execution of documents*** *and* ***virtual AGMs****, when the TLA No.1 Bill was referred back to a Parliamentary Committee rather than being debated by the Senate.*

The regulators were also busy, with ***enforcement*** *actions commenced against two trustees in relation to allegedly* ***misleading and deceptive representations****. There was also the usual mix of new regulations, legislative instruments, and guidance.*

MAJOR UPDATES

Commonwealth Parliament

March 2021

Parliamentary Business

LINK TO DETAILS

Commonwealth Parliament sat between 15-19 March and 20-24 March 2021. The following relevant bills were passed:

- *Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020*
- *Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020*

The following superannuation related bills remain before Parliament:

- *Treasury Laws Amendment (More Flexible Superannuation) Bill 2020*
- *Treasury Laws Amendment (2020 Measures No. 4) Bill 2020*
- *Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020*
- *Treasury Laws Amendment (Your Future, Your Super) Bill 2021*
- *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021*

Parliament is next scheduled to sit on 11 May 2021.

Superannuation trustees should ensure they are prepared for any changes required as a result of this legislation, noting the passed bills relate to financial advice in super and voluntary transfer of member accounts to the ATO, and the significant reforms proposed by the Your Future, Your Super bill.

Reuniting More Super and ERFs

16 March 2021
Bill passed & regulations made

LINK TO DETAILS

Parliament passed the *Treasury Laws Amendment (Reuniting More Superannuation) Act 2021*. Schedule 1 of the Act facilitates the closure of all **Eligible Rollover Funds** (ERF) by requiring an ERF to:

- **cease transfers** to eligible rollover funds;
- transfer member balances of **less than $6,000** to the ATO by 30 June 2021; and
- transfer **all remaining balances** by 31 January 2022.

Schedule 2, added via a Senate amendment, enables a superannuation provider to **voluntarily transfer an amount to the ATO** where it considers it to be in the best interests of the member.

These voluntary transfers will be included in the amounts that the ATO can proactively reunite with an active superannuation account or person directly as appropriate.

The ATO issued CRT Alert 003/2021 alerting trustees that an interim reporting solution would be required to facilitate trustee voluntary payments as a new category of unclaimed super money until SuperStream Rollovers version 3 transition is completed. It also issued further details on this interim solution in a super news article.

Superannuation trustees should ensure internal processes are updated to reflect the closure of ERFs. Trustees may also wish to review their business rules, processes and disclosure pertaining to transfers to ERFs and the ATO, with consideration given to the circumstances in which a Trustee chooses to voluntarily transfer amounts to the ATO in future. Trustees intending to transfer money to the ATO voluntarily should carefully review the interim solution details.

Electronic AGM and Document Execution

16 March 2021
Bill referred to Committee

LINK TO DETAILS

On 18 February, the Senate referred *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* to the **Senate Economics Legislation Committee**. The Bill seeks to extend, until 15 September 2021, the temporary relief given to companies to use technology to hold **virtual meetings**, distribute meeting related materials and validly **execute documents** while making permanent the temporary changes made to continuous disclosure laws.

The committee issued its report on 12 March recommending that the bill be passed with a dissenting report by Opposition Senators (raising concerns around disclosure to shareholders). The Senate, however, referred the Bill back for further consultation and report by 30 June 2021.

The temporary relief was originally introduced by the Government in response to the Coronavirus pandemic and expired on 21 March 2021. The government has signalled its intention to make this relief permanent beyond September as part of its **Digital Business Plan** and has consulted on draft legislation looking to make permanent changes to the *Corporations Act 2001* in relation to both virtual meetings and electronic document execution.

ASIC has subsequently announced that it will adopt a 'no action' position in relation to AGMs held electronically following the relief.

Superannuation trustees should ensure that they revert to the approach to document execution prior to the electronic relief being provided. Where a superannuation trustee had planned to hold its AGM in electronic format, it should consider the associated risks of doing so in the absence of formal relief.

APRA Data Transformation

25 March 2021
Final reporting standards

LINK TO DETAILS

APRA completed Phase 1 (breadth) of its Superannuation Data Transformation which aims to support improved member outcomes by increasing the breadth, depth, and quality of APRA's superannuation data collection. APRA issued a response paper and **10 final reporting standards** addressing the following: Registrable Superannuation Entity (RSE) structure and profile, performance, member demographics, expense management, asset allocation, insurance arrangements, and fees and costs.

APRA has adopted a staged implementation approach in four areas and detailed the transitional arrangements for each of products, investment menus and investment options for reporting on Performance, Asset Allocation and Fees and Costs; materiality threshold for expense reporting; investments and currency exposure; and asset allocation characteristics. Aside from these items, the **first reporting period remains as the period ending 30 June 2021** with the due date for the submission being 30 September 2021.

The reporting framework has also been updated to facilitate proposed legislative amendments to be introduced under the Government's *Treasury Laws Amendment (Your Future Your Super) Bill 2021*.

Consultation on Phase 2 (Depth), which will further increase the granularity of the superannuation data collections and identify data collections that may be discontinued, is due to commence in late 2021. Once complete, APRA will commence Phase 3 (Quality), which will assess the quality and consistency of the outcomes from Phases 1 and 2 and address any implementation issues.

Superannuation trustees should ensure that its reporting team and any services providers involved are aware of the changes to the reporting standards to ensure compliance by the reporting period deadline.

Hayne Royal Commission & Financial Advice

25 March 2021
Legislative Instruments

LINK TO DETAILS

ASIC made three legislative instruments that deal with advice fee consents and independence disclosure following Royal Assent of the *Financial Sector Reform (Hayne Royal Commission Response No.2) Act 2021*.

ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2021/126 details the written consent requirements for the purposes of section 99FA(1)(d)(ii) of the SIS Act in relation to giving written consent by a member to permit the trustee to pass the cost of providing financial advice on to the member. An example written consent form is also available.

Additional information to help superannuation trustees comply with their oversight obligations will be provided and released later in 2021.

ASIC also released Report 687. As related to superannuation, the report details ASIC's response relating to its retention of the requirement that the written consent for non-ongoing fees include information about the services the member will receive; removal of the requirements for the written consent to provide a breakdown of the proportion of fees that will be deducted from each investment option, a warning that entitlement to benefits may cease or be reduced due to the deduction, and a dollar amount of the non-ongoing fees; the inclusion of a member's consent to deduct advice fees from multiple accounts into one written consent; and the inclusion of a requirement that the written consent set out the name and contact details for the superannuation fund.

Superannuation trustees should ensure that their advice teams are aware of the changes and appropriate changes are made to any advice consent templates.

Breach Reporting

10 March 2021
Consultation

LINK TO DETAILS

Treasury has issued draft regulation amendments and explanatory materials for changes to regulations that support the newly enacted breach reporting rules in Schedule 11 of the *Financial Sector Reform (Hayne Royal Commission) Response Bill 2020*, which implemented Royal Commission recommendations, and amended the breach reporting regime for AFS licensees and the breach reporting timeframe to 30 days for RSE licensees.

The new regime will apply to all breaches that occur from 1 October 2021 and those breaches that may have occurred prior to that date, but the licensee only discovers the breach following the commencement date.

The regulations amend the *Corporations Regulations 2001* and the *Corporations (Fees) Regulations 2001* to:

- prescribe civil penalty provisions that are not taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened (mostly related to issue of PDS and FSG);
- ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice; and
- make minor and technical amendments, including updating references to the Corporations Act.

Superannuation trustees should consider the impact of the revised breach reporting regime and review the draft regulations, with special attention to the civil penalty and infringement notice provisions, as the trustee and directors cannot be indemnified from trust assets for these types of breaches.

TECHNICAL CHANGES AND UPDATES

Contribution cap indexation

31 March 2021
Regulations made

LINK TO DETAILS

The Australian Taxation Office (ATO) confirmed increases to a number of superannuation key rates and thresholds. From 1 July 2021, the concessional and non-concessional contribution caps and the general transfer balance cap are set to increase due to indexation for the first time since July 2017.

- The **annual concessional contribution cap** will increase from $25,000 to $27,500.
- The **annual non-concessional contribution cap** will also increase on 1 July 2021 from $100,000 to $110,000.

These changes are in addition to the regular indexation of the Excess Concessional Contribution Charge rate and the CGT Cap amount. These indexed rates follow the recent announcement by the ATO of an indexed increase in the transfer balance cap from $1,600,000 to $1,700,000 (also from 1 July 2021).

Superannuation trustees should take action to ensure that administration systems and processes are updated to reflect the indexed cap amounts from 1 July 2021, and that and representations in member communications, the fund website, or contact centre guidance scripts are amended to reflect the revised caps.

Superannuation Data & Payment Standard

29 March 2021
Amendment instrument

LINK TO DETAILS

A legislative instrument has been made requiring self-managed superannuation funds (SMSFs) to **send and receive rollover information and payments** using SuperStream from 31 March 2021.

There is a transitional period until 1 October 2021 within which Electronic Service Addresses will transition to the new arrangement.

The *Superannuation Data and Payment Standards (Release Authorities, and SMSF Rollovers) Amendment 2021* amends the *Superannuation Data and Payment Standard 2012* by extending its application to include:

- rollovers and transfers of superannuation monies to and from SMSFs on or after 31 March 2021; and
- electronic release authorities issued on or after 31 March 2021 by the Commissioner under Div. 131 of sch 1 to the *Taxation Administration Act 1953* (excess contributions determinations, Div. 293 determinations, and first home super saver determinations).

The SMSF Standard also repeals sch 1—transitional arrangements of the *Data and Payment Standard 2012*, which provides transitional requirements entities required to meet during the historical transition-in periods.

Superannuation trustees should ensure that administrative systems and processes are updated in order to send and receive transfer requests from SMSFs via the Superannuation Transaction Network (STN).

Income Tax Regulations

15 March 2021
Regulations made

LINK TO DETAILS

The *Income Tax Assessment (1997 Act) Regulations 2021* were made to **remake and improve** the operation of the *Income Tax Assessment Regulations 1997* (the 1997 Regulations) before they 'sunset'.

The Regulations remake and improve the 1997 Regulations by repealing redundant provisions, simplifying language and restructuring provisions for ease of navigation.

These changes do not affect the substantive meaning or operation of the provisions except in limited cases. Changes to the following superannuation-related provisions have been made:

- Contributions to superannuation funds;
- Excess concessional and non-concessional contributions;
- Sustaining the superannuation contribution concession;
- Transfer balance cap;
- Taxation of superannuation entities;
- Superannuation member benefits;

The 1997 Regulations are repealed by the *Treasury Laws Amendment (Income Tax Assessment Repeal and Consequential Amendments) Regulations 2021*.

Superannuation trustees should review the amendments to ensure that any current processes are updated where appropriate.

Business Registers

12 March 2021
Consultation

LINK TO DETAILS

As part of the *2020 Budget Digital Business Plan*, Treasury announced the full implementation of the Modernising Business Registers (MBR) Program.

The MBR Program will include the introduction of a director identification number (director ID) which is a unique identifier that a director will keep forever. The director ID will help prevent the appointment of fictitious directors and facilitate traceability of their profile and relationships with companies over time.

This consultation process focused on the new data standard and disclosure framework which support the commencement of the director ID regime.

Superannuation trustees should remain apprised of the status of this legislation as the intention is to consolidate the Australian Business Register and 31 business registers administered by ASIC into a single platform that will be administered by the Commonwealth Registrar.

ASIC Cost Recovery

4 March 2021
Statement

LINK TO DETAILS

ASIC published the final 2019-20 Cost Recovery Implementation Statement (CRIS) that provides details of ASIC's forecast regulatory costs and activities by industry and subsector.

Regulatory costs to be recovered by industry levies for the investment management, superannuation and related services sector are: $48.928m cost recovery and $15.432m statutory levies for a total of $64.360m. All superannuation trustees will pay a minimum levy of $18,000.

Where the total value of assets in all registrable superannuation entities operated by the trustee exceeds $250 million, that trustee will have to pay a graduated levy amount. The graduated levy amount is equal to the value of assets in all registrable superannuation entities operated by the trustee as a proportion of the total value of assets in all entities in the subsector above the $250 million threshold.

APRA will continue to recover costs of the SCT through the Financial Institutions Levies until 30 June 2023.

ASIC has also published a summary of its actual regulatory costs and actual levies.

Levies will be issued shortly and will consider waivers due to the impact of COVID-19 on a case-by-case basis.

Superannuation trustees should ensure that the relevant finance teams are aware of the projected levies.

GUIDANCE AND POLICY

Insurance Data in Superannuation

12 March 2021
Article

LINK TO DETAILS

As insurance in super remains a focus for ASIC, the regulator discussed its recent work on insurance in super and identified how trustees can use data to improve the insurance they provide to members.

ASIC suggests that trustees must "have the right data, as well as the systems and analysis, that enable them to track what is happening to their members" in order to provide affordable default insurance cover and properly review insurance arrangements.

The following steps were identified for trustees to take to better collect and analyse data to monitor and review member outcomes:

- segmenting their membership by whether or not members have default cover and by demographic characteristics (e.g. age, gender, occupation category and work status)
- monitoring the insurance outcomes for these members (e.g. level of premiums, claims ratios, claim incident rates) to understand what outcomes each cohort of their membership is receiving and why these outcomes may differ across cohorts
- engaging with members and employers to gather better occupation data about individuals and cohorts
- strengthening their data collection and analysis to support product design that meets member needs with minimal account erosion, and to track their members' claims and complaints in a way identifies any systemic issues.

Superannuation trustees should consider ASIC's recommendations in relation to managing insurance related data.

APRA Connect

25 March 2021
Guidance

LINK TO DETAILS

APRA released draft technical information and supporting material relating to superannuation taxonomies to help superannuation entities prepare data for submission on APRA Connect. Final versions of these documents will be available before the external test environment is released to entities in June 2021.

The artefacts include explanatory notes on data dictionary, reporting taxonomy, validation file and XSD files.

This follows the release of the response paper and 10 final reporting standards for the first phase of APRA's Superannuation Data Transformation – all reporting to be done through APRA Connect.

The draft taxonomy artefacts are based on the current version of APRA Connect, which does not reflect the full final version of the reporting standards – differences (material change to expenses collection and cosmetic changes to all collections) will be reflected in the next version of the artefacts. APRA anticipates that entities may decide to manually account for these differences when progressing the build of data collections.

Trustees should ensure that the team responsible for reporting understands the changes and is prepared for the new reporting requirements.

ASIC Responsible Manager Relief

March 2021

Website updates

LINK TO DETAILS

ASIC has updated its website with information about its temporary arrangements for trustees notifying ASIC of **new responsible managers** for the provision of a **superannuation trustee service**.

This follows the extension of the Australian Financial Services licensing regime to cover provision of a **superannuation trustee service** under the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*.

In response to feedback from the industry, as a temporary measure, ASIC will not require trustees notifying ASIC of the appointment of new responsible manager(s), for the provision of a superannuation trustee service, to provide the following proof documents that would usually be required at the time of notification:

- qualification certificates; and
- two business references.

The temporary arrangements apply to new responsible manager notifications only, in circumstances where the trustee does not request a separate variation to the conditions of their AFS licence.

ASIC also confirmed that this relief will also extend to non-public offer trustees applying for a new AFS licence or to vary their existing AFS licence for authorisations to provide a superannuation trustee service and to deal in superannuation.

QMV Legal recommends that superannuation trustees currently considering the appointment of new responsible managers as a result of the superannuation trustee service licensing change note the relief when engaging with ASIC.

Member support during COVID

22 March 2021

ASIC findings

LINK TO DETAILS

ASIC released an article on its review of how superannuation trustees supported their members during COVID-19. The findings included:

- Most websites had dedicated a COVID-19 webpage that was prominent and easy to access from the homepage.
- Many websites lacked detail about how members' insurance through super might be affected if they chose to access super early or if employment status changed.
- Several websites had inaccurate or incomplete insurance eligibility information if an early release payment resulted in a low balance.
- Projection tools were found that discouraged early release.

Overall, funds' communications approach and information on the early release, drawdown and investments did not raise concerns, with a greater risk in relation to information on projection tools and insurance in super.

ASIC reiterated its previous guidance on how trustees can provide good communications published in Report 655 *Review of member communications: Protecting Your Superannuation Package (PYSP) reforms*.

Superannuation trustees should review the article and ensure that appropriate information about insurance arrangements is displayed prominently on website and similarly review any projection tools.

Sustainability of insurance in super

9 March 2021
Letter

LINK TO DETAILS

APRA wrote to RSE licensees and Group Life Insurance CEOs expressing its concern that certain practices, if continued, are likely to lead to poor member outcomes and adversely impact the availability and sustainability of life insurance through superannuation.

APRA's key observations include:

- insurance premiums per insured member have been escalating during 2020 which has contributed to RSE licensees tendering insurance arrangements more frequently;
- insurers are continuing to face challenges in accessing high quality and timely superannuation fund and membership data relevant to designing and pricing insurance; and
- increasing incidences of undesirable tender practices, including abbreviated timeframes for the tender process, or to respond to revisions in insurance design or other parameters as part of that process, being imposed; life insurers being unduly restricted by RSE licensees seeking to have a major role in determining the reinsurers that must be used; and the data provided being inadequate, out of date and/or not made available to all tender participants.

APRA expects that RSE licensees should maintain clear insurance strategies that reflect a scheme design for default insurance which reflects members' needs; maintain and make available to insurers high quality and sufficiently granular data to support a thorough understanding of fund membership and sound insurance benefit design; and tender practices that allow enough time to consult on scheme designs and appropriately price risks and benefits.

> *Superannuation trustees should review APRA's letter and ensure that product teams understand APRA's concerns and expectations and address any issues. APRA has signalled that it will engage closely with trustees and insurers to ensure that appropriate actions are taken.*

ENFORCEMENT & CASE LAW

ASIC v Statewide Super

4 March 2021
Civil penalty proceeding

LINK TO DETAILS

ASIC commenced civil penalty proceedings in the Federal Court against the trustee of *Statewide Superannuation Trust* for false and misleading representations made about the insurance cover held by members of the fund and deducting insurance premiums from member accounts at times when members did not have insurance. The claim relates to the trustee's action in the period from May 2017 to June 2020.

The background of the action relates to Statewide's transition to a new administration system in 2017, during which data migration of insurance data and coding of insurance rules into the new administration system was not completed correctly.

ASIC alleges that the trustee did not conduct structured, successful testing of insurance data and end of month processes by which insurance statuses were updated and premiums deducted. This caused the insurance status of members on system to differ from those provided by the trustee's group policies.

During the relevant period, insurance cover for approximately 12,500 members ceased due to operation of inactive low balance rules which was not reflected on the trustee's administration system. As a result, premiums continued to be deducted and communications issued to members confirming the provision of insurance cover.

The claim also alleges that Statewide failed to comply with breach reporting requirements despite awareness of its leadership team of a significant breach.

ASIC v REST

2 March 2021
Civil penalty proceeding

LINK TO DETAILS

ASIC commenced civil penalty proceedings in the Federal Court against the trustee of REST for false and misleading representations made to members about their ability to transfer their superannuation out of REST. The claim relates to the trustee's actions between 2009 and 2018.

ASIC alleges that the trustee made representations to member who sought to transfer the whole of their balance that:

- if they remained employed by a REST employer and the REST employer would continue to make contributions to the fund, then the member could only partially transfer their super balance out;
- if they continued to be employed by a REST employer, then they were required to maintain a minimum balance of $5,000 in their account; and
- they were required to first obtain a declaration from their employer that they had "choice of fund rights and of the date upon which the employer ceased making contributions to REST; and
- they were first required to obtain a separation certificate from their employer or provide a date of termination.

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CONTACT US

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