

# LEGAL, REGULATORY & POLICY UPDATE

## PENSIONS AND SUPERANNUATION

### INSIDE THIS EDITION

- 47<sup>th</sup> Parliament
- AFCA Activity
- ASIC and Cybersecurity
- Derivative Transaction Rules
- Enforcement Action



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### IN BRIEF

*The Federal Election dominated headlines this month, with votes still being counted and one electorate still in play. While the Parliamentary calendar is yet to be set, we expect to see some lapsed Bills reintroduced during winter.*

*AFCA have finalised the **new funding model**, releasing the **Fairness Jurisdiction Outcomes report** and introduced a new **merit assessment** for complaints handling. Meanwhile, ASIC released another round of consultation on **Derivative Transaction Rules** and published an article regarding **cybersecurity**.*

## MAJOR UPDATES



Commonwealth  
Parliament

May 2022  
*Parliamentary Business*

[LINK TO DETAILS](#)

The Federal Election was held on 21 May 2022, with the Australian Labor Party (ALP) forming a majority government and the makeup of the Senate changing. The Ministry announcement on 31 May confirmed Stephen Jones as the Assistant Treasurer and Minister for Financial Services. Although all Bills before the previous Parliament lapsed when it was prorogued, the ALP had [announced several measures relating to superannuation](#) preceding the election, including:

- Reducing the eligibility age for downsizer contributions from 60 to 55;
- Reviewing the Annual Performance Test;
- Freezing the pension deeming rate at 0.25% and maintaining the upper rate at 2.25% for two years;
- Increasing the income thresholds for access to a Commonwealth Seniors Health Card to \$90,000 per year (singles) and \$144,000 per year (couples);
- Legislating an objective test to determine whether a worker is casual;
- Legislating to make wage theft a criminal offence; and
- Legislating a right to superannuation within the National Employment Standards, allowing workers to pursue unpaid super as an entitlement.

Additionally, it is expected that a selection of key reforms previously introduced will be re-introduced when Parliament recommences, including the [Financial Accountability Regime](#) (FAR), the [Compensation Scheme of Last Resort](#) (CSLR), as well as the [Financial Sector Reform](#) Bill.

Importantly, the new Assistant Treasurer had previously indicated that stability and certainty in the superannuation system would be prioritised.



## TECHNICAL CHANGES AND UPDATES



### Excess Non-concessional Contribution Release Authorities

13 May 2022  
Announcement

[LINK TO DETAILS](#)

The ATO announced that, due to unavoidable delays caused by improvements to ATO systems, they are about to start issuing excess non-concessional contribution release authorities for clients who did not make an election on the tax treatment of their excess non-concessional contributions for prior financial years.

Accordingly, trustees may note an increase in the number of release authorities received over the coming months while the ATO work through the backlog. These will be issued across several months to minimise impact on the trustees.

*Superannuation trustees should note the announcement and ensure administration teams are aware of the potential increase in release authority requests received.*



### AFCA Funding Model

31 May 2022  
Announcement

[LINK TO DETAILS](#)

Following a period of consultation, AFCA finalised a new funding model which will take effect from 1 July 2022. The new model includes a single registration fee and a simplified complaints fee structure.

Feedback from the consultation assisted to refine and improve the model, including such changes as instalments being introduced for member payments above a threshold amount, and no fee being payable for complaints found upon initial assessment to be outside AFCA's jurisdiction. In addition, the five free complaints provided under the new model will not be included when AFCA calculates the user charge that applies to more frequent users of the service.

For superannuation funds, the superannuation levy has been abolished and super funds have been brought under the same fee structure as other scheme members – with a positive or neutral impact for most super fund trustee members expected.

The model minimises the cross-subsidisation across sectors that was occurring under the interim model put in place at AFCA's inception in 2018, by considering both the volume of complaints registered for a firm along with the time taken to resolve them.

*Superannuation trustees should note the new fee model and consider the impact the potential decrease in fees may have on budgets.*



## GUIDANCE AND POLICY



### ASIC Cybersecurity

12 May 2022

Article

[LINK TO DETAILS](#)

ASIC published an article entitled *What a Federal Court ruling on cybersecurity means for AFS licensees* on their website. The article sets out ASIC's expectations of AFS licensees in relation to managing cybersecurity risk and considers the recent court judgement in relation to RI Advice Group Pty Ltd. In this case, the licensee was found to have breached its licence obligations to, amongst other things, adequately manage its cybersecurity risks.

ASIC notes the following expectations of AFS licensees:

- be aware of the potential consumer harms that arise from cybersecurity shortcomings;
- adopt good cybersecurity risk management practices, including active management of cyber risks and continuous cybersecurity improvement, including assessment of cyber incident preparedness and review of incident response and business continuity plans;
- act quickly in the event of a cyber incident to minimise the risk of ongoing harm. All organisations should regularly re-assess their cyber risks and ensure their detection, mitigation and response measures adequately support the size and complexity of their business, and the sensitivity of the information they hold; and
- report cyber incidents to the Australian Cyber Security Centre (ACSC) and consider whether a report to ASIC is also required.

*Superannuation trustees should review the article and ensure current policies and processes regarding cybersecurity align with ASIC's expectations. Consideration should also be given to ensuring that risk management frameworks adequately consider the regulatory and enforcement aspects of information security risks.*



### AFCA Merit Assessment

9 May 2022

Media Release

[LINK TO DETAILS](#)

Following a three-month pilot program run last year, AFCA has permanently introduced an early "merit assessment" to identify unmeritorious complaints early in the complaints process.

Where a complaint is found to be without merit (where there is clearly no error or financial loss), AFCA has discretion to "exclude" the complaint under its Rule A.8.3.

The merit assessment will be applied in cases where sufficient information about a complaint is available at an early stage and it clearly shows there is no error and/or loss. Complaints that raise more complex issues, with significant documentation involved, would still require an investigation to reach a view on what has most likely occurred.

*Superannuation trustees should note the change in AFCA process and ensure administrators involved in complaints handling are aware of the change. IDR procedures may benefit from ensuring that consideration of financial loss is considered in the early stages of handling a complaint.*



## AFCA Fairness Jurisdiction Report

11 May 2022  
Report

[LINK TO DETAILS](#)

AFCA published a new report which summarises the work undertaken to ensure AFCA's Fairness jurisdiction is well understood by stakeholders, that it is applied consistently and independently, and in a way that is fair for members and complainants.

The report is the conclusion of the Fairness Jurisdiction Project – a strategic program of work to develop resources for AFCA staff, members, and complainants which communicate AFCA's jurisdiction throughout the process.

The report sets out the Fairness Jurisdiction Framework comprising of four focus areas: (1) Understanding and explaining AFCA's jurisdiction; (2) Ensuring consistency of experience; (3) Delivering a fair process; and (4) Providing a fair outcome.

A range of documents and material have been developed as part of the project and are detailed in the report, including a new Fairness Jurisdiction Tool, new decision templates, an apprehended bias policy, the AFCA engagement charter, a revised AFCA Approach library and a set of new processes to calculate and capture fair outcomes once achieved.

*Superannuation trustees should note the report and ensure that the IDR function is aware of the material that has been developed.*



## ASIC Derivative Transaction Rules

16 May 2022  
Consultation

[LINK TO DETAILS](#)

ASIC released Consultation Paper *CP361 Proposed changes to simplify the ASIC Derivative Transaction Rules (Reporting): Second consultation* which sets out the first proposals to amend the *ASIC Derivative Transaction Rules (Reporting) 2013* made under s901A of the Corporations Act.

This follows an initial consultation released in November 2020 (CP334) which proposed to update the current ASIC rules to implement a range of measures to harmonise, simplify and clarify aspects of the ASIC rules.

ASIC has considered feedback to the initial consultation and decided to split further proposals into two more rounds of consultation. ASIC are proposing specific changes to the current ASIC rules:

- relating to the long lead time elements of implementing the internationally harmonised standards of the UTI, UPI and data elements and to specify *ISO 20022 Financial Services—Universal financial industry message scheme* as the data messaging standard; and
- to simplify and remove the outdated transitional provisions and consolidate some exemptions within the current ASIC Rules.

ASIC are proposing a two-stage process to effect updates to the rules:

- 1 October 2023 - a new legislative instrument (the *ASIC Derivative Transaction Rules (Reporting) 2022*) would implement the UTI, fully implement LEI requirements and make other changes, but not add any new data elements beyond those currently reported
- 1 April 2024 - an amendment to the new *ASIC Derivative Transaction Rules (Reporting) 2022* would implement the UPI and fully implement the additional data elements.

Consultation closes 8 July 2022.

*Superannuation trustees should ensure investment teams are aware of the consultation and should consider submitting a response. In many instances, superannuation trustees may rely on substituted reporting by a counter party to comply with the reporting obligations.*



## APRA Superannuation Data Transformation

26 May 2022  
FAQs

[LINK TO DETAILS](#)

APRA updated two FAQs and published five new FAQs to support the implementation of the Superannuation Data Transformation project.

The new FAQs cover:

- How an RSE licensee should report historical insurance policies under SRF251.2 (FAQ 1.11);
- When an RSE licensee should report tax rebates in relation to insurance premium amounts in SRF251.3 (FAQ 251.3h);
- How an RSE licensee should classify an expense when considering APRA's look through requirements (FAQ 332.0r);
- When an RSE licensee should report a benchmark allocation to the 'Currency Exposure' strategic sector or a currency hedging ratio to internationally domiciled strategic sectors (FAQ 550.0q); and
- How an RSE licensee should report 'Investment Horizon Years Number' in SRF 705.1 when the investment time horizon in the relevant return objective is not specified (FAQ 705.1f).

Additionally, APRA has updated two FAQs to provide further guidance to RSE licensees on the reporting standards, specifically in relation to the staged implementation and best endeavours approach to reporting under Reporting Standards SRS 550.0 Asset Allocation and SRS 332.0 Expenses.

*Superannuation trustees should review the new and updated FAQs and determine whether any changes are required. The FAQs are becoming a rich source of information in relation to this project and should be prominent in any project planning.*



## Retirement Income Covenant FAQs

1 June 2022  
FAQs

[LINK TO DETAILS](#)

APRA released a set of five FAQs to assist RSE licensees in the implementation of the retirement income covenant from 1 July 2022. The FAQs follow a [joint letter](#) issued in March which outlined the regulators' expectations in relation to the implementation of the covenant.

The FAQs set out the following expectations of APRA and ASIC:

- Implementation of the retirement income strategy should be subject to a continuous improvement process, with a summary of the current strategy remaining publicly available at all time (even when under review);
- APRA will not be providing feedback on draft retirement income strategies, but does intend to review RSE licensees' implementation of the new requirements in the 22/23 financial year;
- A reminder that guidance already exists in relation to reviewing the outcomes of retirement incomes products, including SPS 515 Strategic and Business Planning (and associated guidance), as well as [RG274 Product design and distribution obligations](#);
- Confirmation that a retirement income strategy can include provision of financial product advice, providing the RSE licensee or entity providing the advice is appropriately licensed; and
- A reminder that the joint letter includes a number of implementation steps that RSE licensees should consider when developing their retirement income strategy.

*Superannuation trustees should review the FAQs and the joint letter to ensure the retirement income strategy being devised meets the regulator's expectations. No further guidance is expected before the reforms take effect.*



## CASE LAW AND ENFORCEMENT ACTIVITY



### RI Advice

5 May 2022  
*Federal Court*

[LINK TO DETAILS](#)

The Federal Court found Australian Financial Services licensee, RI Advice, breached its license obligations to act efficiently and fairly when it failed to have adequate risk management systems to manage its cybersecurity risks.

The finding comes after a significant number of cyber incidents occurred at authorised representatives of RI Advice between June 2014 and May 2020. In one of the incidents, an unknown malicious agent obtained, through a brute force attack, unauthorised access to an authorised representative's file server from December 2017 to April 2018 before being detected, resulting in the potential compromise of confidential and sensitive personal information of several thousand clients and other persons.

RI Advice has taken steps to address cybersecurity risk across its authorised representative network. In addition to the declaration of contravention, the Court ordered RI Advice to engage a cybersecurity expert to identify and implement what, if any, further measures are necessary to adequately manage cybersecurity risks across RI Advice's authorised representative network.



### NESS Super

13 May 2022  
*APRA Direction*

[LINK TO DETAILS](#)

APRA issued directions to NESS Super Pty Ltd (NESS) designed to improve its governance and ensure the board's structure, skills and experience promote a strong risk culture and better position NESS to deliver improved outcomes to members.

APRA's directions will ensure that NESS makes the necessary amendments to its constitution so that it can appoint a second independent director, which will achieve an equal composition of employee, employer and independent directors on a six-person board.

APRA gave the direction following an APRA governance review and an independent review conducted by NESS that identified skills gaps and deficiencies on the NESS Board.

Although the trustee agreed with appointing a second independent director, it has not yet been able to effect the constitutional change required for the appointment. APRA considers the direction necessary to ensure NESS and its members have the benefit of the additional skills and capabilities that the independent director would bring to the board.



## ABOUT QMV LEGAL

QMV Legal is committed to assisting superannuation trustees and their members achieve the best retirement outcomes through good governance, timely regulatory compliance, and pragmatic legal advice.

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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## CONTACT US

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



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In the spirit of reconciliation QMV Legal acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.