

LEGAL & REGULATORY UPDATE

PENSIONS AND SUPERANNUATION

INSIDE THIS EDITION

- The Hayne Reforms
- Extending the BEAR
- Sole Purpose Test Guidance
- Consumer Data Right
- APRA Priorities

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IN BRIEF

*The Hayne reforms landed on the last day on January, with a series of exposure draft Bills released to address 22 of **Hayne's recommendations**.*

The reforms are broad ranging and will have a significant effect on superannuation trustees in areas including advice fees, disclosure, governance, promotion and marketing, and regulatory engagement and breach reporting.

*The extension on the **BEAR** isn't FAR away either, with Treasury releasing a discussion paper for consultation on an expanded **Financial Accountability Regime**.*

*The ATO importantly issued some technical guidance in relation to **TRIS taxation** and **Transfer Balance Cap** indexation, while the **Consumer Data Right** looks set for further changes as Open Banking comes online this year.*

MAJOR UPDATES



The Hayne Reforms

31 January 2020
Consultation

[@LINK TO DETAILS](#)

Treasury released for consultation exposure draft legislation to implement 22 recommendations and two additional commitments from the **Banking, Superannuation & Financial Services Royal Commission** (Hayne Royal Commission). The bills seek to implement reforms in relation to:

- Strengthening Breach Reporting
- Enforceability of certain terms of industry codes
- Superannuation Trustees holding no other role or office
- Advice fees in superannuation
- Prohibiting hawking of superannuation products
- Independence & disclosure of ongoing advice fee arrangements
- Regulator Roles and Powers

The amendments are proposed to be introduced into Parliament by mid-2020 and most to take effect on Royal Assent of 1 July 2020. The consultation is open until 28 February 2020.

We have included a summary for each of the superannuation related items covered by these bills in this update.



Financial Accountability Regime (FAR)

22 January 2020
Consultation

[LINK TO DETAILS](#)

Treasury released a discussion paper for consultation on extending the **Banking Executive Accountability Regime (BEAR)** to all APRA regulated entities, to be known as the **Financial Accountability Regime (FAR)** and administered jointly by APRA and ASIC.

Pursuant to recommendations stemming from Hayne Royal Commission, the FAR provides for both prudential and conduct regulation purposes. The proposed regime would include:

- Inclusion of holding parent entities and subsidiaries;
- Distinction between **core** and **enhanced** entity obligations;
- Identification and registration of all "**Accountable Persons**" (which include certain senior executives and all board members);
- Accountability **statements** and **mapping**;
- Imposing entity and accountable person **obligations**;
- Deferral of 40% of variable remuneration;
- **product** design, maintenance, and remediation responsibility;
- Regulatory notification obligations; and
- Penalties and related **indemnity** issues, including accountable person exposure to civil penalties.

The consultation is open until 14 February 2020. Commencement is uncertain (likely at either 1 January or 1 July 2021) but legislation will be introduced to Parliament in the Spring sitting.

Superannuation trustees should commence planning to transition to the FAR regime, including engaging with Trustee Directors and executives. Key activities to prepare early include identifying likely accountable persons and roles and preparing accountability mapping. Implementing processes and frameworks to enable "reasonable steps" to be taken by accountable persons should also be considered to best prepare for the transition.



Sole Purpose Test Guidance

4 February 2020
Parliamentary Question

[LINK TO DETAILS](#)

The Treasurer has confirmed that APRA is revising *Superannuation Circular No. III.A.4*, its guidance on the **Sole Purpose Test** under section 62 of the *Superannuation Industry (Supervision) Act*.

The current guidance details APRA's position on the **core, ancillary, and incidental benefits** which trustees may encounter or pursue in managing the fund. Changes may address:

- Impact or ethically oriented investment objectives;
- Financial planning services; and
- Trauma and ill health related benefits.

It is expected that APRA will release updated guidance in the first quarter of 2020.

Superannuation Trustees should identify any activities which may be considered as being inconsistent with revised guidance on the Sole Purpose Test and prepare to assess the impact of the revised guidance on such activities once the updated guidance is issued.



Banning MySuper Advice Fees

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020* would **prohibit** superannuation funds from **deducting financial advice fees** from MySuper products.

Under the proposed change, superannuation trustees would still be permitted to charge fees in relation to intra-fund advice as administration fees (which must be collectively charged in accordance with the applicable charging rules).

The Bill also provides new conditions for **ongoing fee arrangements** (for choice products), which would include new requirements for annual renewal, identification of services that will be provided and consent to the charging of fees.

The changes would commence from 1 July 2020 in relation to any fees payable under an arrangement entered into on or after 1 July 2020, and 1 July 2021 in relation to any other existing arrangements that were entered into before 1 July 2020.

Trustees should assess whether financial advice fees are currently deducted from any MySuper products, and where so plan for the likely transition away from such fee deductions. Trustees may also benefit from a review of existing advice fees and disclosures to ensure ongoing arrangements will remain compliant.



FSGs & Lack of Independence in Financial Advice

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020* would require a financial services licensee or authorised representative to give a **written disclosure of lack of independence** (in a form prescribed by ASIC) where they are authorised to provide personal advice to a retail client.

This new obligation would add to the existing Financial Services Guide disclosure obligations under Division 2 of Part 7.7 of the *Corporations Act*. The lack of independence statement is to be included in the list of statements and information to be included in a **Financial Services Guide**.

The amendments would apply in relation to personal advice provided on or after 1 July 2020, meaning that Financial Services Guides provided to new clients on or after 1 July 2020 must include the lack of independence disclosure statement (if required).

Superannuation trustees may wish to assess whether any financial advice provided under their AFSL or by an authorised representative would be considered to lack independent (and therefore require disclosure in Financial Services Guides).



No Hawking

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020* (and related regulations) would **ban** the **hawking** of financial products.

The *Corporations Act* would be amended to provide a new general prohibition of offers to sell or issue all or any financial products which are made via **unsolicited contact**.

Unsolicited contact provided as any contact which is not in response to a consumer request and which is made by telephone, in face-to-face meetings or by any other form which creates an expectation of an immediate response.

Contact is not unsolicited contact if it is response to a positive, clear and informed consumer request and it relates to a financial product which the consumer has specifically requested or which a reasonable person would consider to be reasonably within the scope of the request.

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

Superannuation trustees should review their promotional, business development, and distribution activities to identify that 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 Role or Office Obligation

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020* would impose an additional condition on RSE licences held by a corporate trustee.

The new condition would **prohibit** RSE licensees from having a **duty to act** in the interests of **another person**, subject to exceptions that enable trustees to undertake their ordinary functions as RSE licensees. Relationships which may give rise to other duties arising include:

- being a responsible entity of a registered managed investment scheme or an investor direct portfolio services-like scheme;
- being a trustee of an unregistered managed investment scheme, as this would give rise to a fiduciary duty to act in the interests of the members; and
- acting as an agent of another person, as this would give rise to a fiduciary duty to act in the interests of the principal.

APRA will however have powers to grant exemptions on a case by case basis. The changes would commence on 1 July 2020 and apply in relation to any duty that is had before, on or after commencement.

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 adapted appropriately.



ASIC Breach Reporting

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020* would amend the *Corporations Act* to clarify and strengthen **breach reporting** for AFS licensees to introduce comparable breach reporting.

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

- investigations about whether a specified breach or likely breach has occurred or will occur, and outcomes of those investigations;
- conduct constituting gross negligence or serious fraud (to the extent this conduct was not previously considered a breach of the 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 has reasonable grounds to believe a reportable situation has arisen, although outcomes of investigations will need to be reported within **10 calendar days**.

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



Industry Code Enforceability

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020* would amend the *Corporations Act* to strengthen the existing **code of conduct** framework to allow ASIC to designate enforceable code provisions which, if breached, may attract civil penalties.

The Bill would also 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.

The Bill also provides the factors which ASIC would be required to consider in authorising industry codes and identifying relevant provisions for enforcement.

The new powers would commence on 1 July 2020.

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. Consideration may also be given to whether the superannuation industry creates a broader code, rather than having a mandatory code imposed.



Regulator Roles & Powers

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2020 Measures)) Bill 2020* would **expand ASIC's role** in the regulation of superannuation trustees.

The Bill would expand ASIC's role under the SIS Act to include promoting consumer protection and market integrity. The distribution of responsibilities will be governed by a new chart.

The Bill would also extend the AFSL regime to cover a broader range of activities undertaken by APRA-regulated superannuation trustees. It does this by creating a new financial service – providing a superannuation trustee service.

The Bill also provides ASIC with an alternative to enforcement via powers to give **directions** to financial services licensees where it has reason to suspect a contravention of financial services law.

The *Financial Regulator Assessment Authority Bill 2020* was also released in draft, which would establish an independent assessment authority to review effectiveness of APRA and ASIC.

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 ensures that any regulatory engagements are with the appropriate regulator.



Penalties & Trust Asset Indemnities

31 January 2020
Consultation

[LINK TO DETAILS](#)

The *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2020 Measures)) Bill 2020* also seeks to extend the existing trust asset **indemnification** restrictions.

The Bill would:

- extend the existing prohibition on indemnification from trust assets for a criminal, civil or administrative penalty imposed under the SIS Act to the Corporations Act (or any Commonwealth Act); and
- provide that a superannuation trustee or trustee director cannot use trust assets to pay a liability for breach of trust if the trustee fails to act honestly in a matter concerning the entity, or intentionally or recklessly fails to exercise, in relation to a matter affecting the entity, the required degree of care and diligence.

Importantly, the Bill also contains amendments to clarify that the impact on penalties on beneficiaries (where non-trust assets are not available) are considered when imposing penalties.

Superannuation trustees should consider the risks and impact associated with the expansion on any existing indemnities provided by trust assets and the impact the changes have under trustee or trustee director insurance or similar arrangements.



Consumer Data Right Inquiry

22 January 2020
Consultation

[LINK TO DETAILS](#)

Treasury has announced that it was undertaking an inquiry to examine further ways in which the Consumer Data Right (CDR) can further support **innovation** and **competition**.

The Inquiry will examine matters that include how the CDR can be:

- Expanded beyond its current “read” access to include “write” access to enable customers to apply for and manage products (including, for Open Banking, by initiating payments);
- Leveraged with other frameworks to enhance security, efficiency and the consumer experience including the New Payments Platform;
- Further used to overcome behavioural and regulatory barriers to allow consumers to conveniently and efficiently switch between products and providers; and
- Enhanced by considering global developments with respect to similar reforms.

The review will be led by Mr Scott Farrell who undertook the formative review which gave rise to the newly legislated Consumer Data Right regime. The review will report by September 2020. An Issues Paper will be made available in early 2020 for interested parties to provide input and feedback.

In December, the Australian Competition and Consumer Commission (ACCC) has released a consultation paper seeking views on how best to **permit the use of intermediaries** and the disclosure of Consumer Data Right (CDR) data to non-accredited third parties, and appropriate controls having regard to the importance of privacy and security of CDR data.

Superannuation trustees should continue to consider the application of the CDR to superannuation and the potential opportunities from the matters under consultation.



TECHNICAL CHANGES AND UPDATES



Transition to Retirement Taxation

22 January 2020
Guideline

[LINK TO DETAILS](#)

The ATO updated PCG 2017/2 on the implementation of the changes to the **taxation of transition to retirement income streams (TRIS)** to reflect amendments by Schedule 1 to the *Treasury Laws Amendment (2017 Measures No. 2) Act 2017* and Schedule 8 to the *Treasury Laws Amendment (2018 Measures No. 4) Act 2019*.

The guideline clarifies that a TRIS will not be in the retirement phase unless a superannuation income stream benefit is currently payable from it and the recipient:

- is 65 years old or older;
- has met a relevant condition of release with a nil cashing restriction (retirement, terminal medical condition and permanent incapacity) and they have notified the superannuation provider for the TRIS of that fact; or
- is in receipt of the TRIS as a reversionary beneficiary.

The Guideline applies for the 2017/18 income year only and to Funds that:

- hold assets in segregated current pension asset pools or segregated exempt asset pools ('segregated asset pools') before the 2017-18 income year and those assets include assets supporting the payment of TRIS that is not in the retirement phase; and
- have deployed a full system solution by the end of 30 June 2018.

Superannuation trustees should review the ATO guideline and ensure that financial planners are aware of the changes. Consideration should also be given to whether system updates are required to ensure correct tax is being paid in relation to TRIS.



Transfer Balance Cap

31 January 2020
Guideline

[LINK TO DETAILS](#)

The ATO confirmed that indexation of the **general balance cap** will not occur on 1 July 2020. The CPI figure for December 2019 quarter was 116.2 and indexation would have occurred only if the CPI was 116.9 or higher. The general transfer balance cap therefore remains at \$1.6 million and all individuals have a personal transfer balance cap of \$1.6 according to the ATO.

The ATO expects that the cap will be indexed on 1 July 2021. When the general transfer balance cap is indexed to \$1.7 million there will be no single cap that applies to all individuals. Every individual will have their own personal transfer balance cap. If the member starts a retirement phase income stream for the first time after indexation occurs, the member will have a personal transfer balance cap of \$1.7 million. Whereas if the member had a transfer balance account before indexation, the personal balance cap will be:

- \$1.6 million if, at any time between 1 July 2017 and indexation occurring, the balance of that account was \$1.6 million or more
- between \$1.6 and \$1.7 million in all other cases, based on the highest ever balance of your transfer balance account.

Superannuation trustees should remain apprised of any changes in indexation and ensure that financial planners are aware potential impacts to members.



GUIDANCE AND POLICY



APRA Policy and Supervision Priorities

30 January 2020
Guidance

[LINK TO DETAILS](#)

APRA set out its **policy and supervision priorities** for the next 12 to 18 months, giving the industry a forward view of its planned changes to the prudential framework. Superannuation policy priorities include:

- The release of a discussion paper covering the **governance** related prudential standards, in the first half of 2020;
- Enhancements to the **risk management, outsourcing and business continuity** management prudential standard in the first half of 2020;
- Updated guidance on the **sole purpose test**;
- Continued support to the Government in implementation of Royal Commission recommendations, including expansion of ASIC's role in super, prohibition of dual regulated entity structures, prohibition of advice fee deductions from super accounts, and establishment of compensation scheme of last resort; and
- Continued work to ensure that the policy intent of the insurance reforms is achieved.

Superannuation supervision focus includes:

- trustees' oversight of **fees and other charges** being deducted from members' superannuation accounts for payment to third parties such as financial advisers;
- **Conflicts of interest**;
- Lifting the bar for trustee boards;
- Data and insights; and
- Additional public information on trustee operations and outcomes they deliver.

While no action is currently required from superannuation trustees, they will benefit from keeping apprised of APRA's agenda.

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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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