

LEGAL & REGULATORY UPDATE

PENSIONS AND SUPERANNUATION

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- PMIF
- RG97 (Indirect Fees & Costs)

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Jonathan Steffanoni
Partner, QMV Legal

IN BRIEF

*Isn't it great to have an excuse to talk about **RG 97** again, with ASIC issuing a revised version of regulatory guidance on indirect fee and cost disclosure.*

*We also saw the **Your Super, Your Choice Bill** introduced to Parliament after a similar Bill failed to be passed in 2017 to extend choice of fund to employees covered by new EBAs and workplace determinations.*

*We had a new **Prudential Standard on OTC Derivatives** finalised, and changes to the **Insurance in Super Prudential Standard** proposed.*

*Consultation on the **Retirement Income Review** has commenced, and APRA provided insights into its approach to **Governance, Culture, Remuneration, and Accountability**.*

*Important guidance on **Whistleblower Policies** and **Putting Members' Interests First** reforms was issued, just in time for the changes to come into effect.*

MAJOR UPDATES



Member Outcomes Guidance

27 November 2019
Consultation

[LINK TO DETAILS](#)

APRA released a final revised Prudential Practice Guide SPG 516 Business Performance Review and a letter responding to submissions. Key points arising from both the letter and revised guidance include:

- The outcomes assessment is expected to be anchored to the publication of APRA's Annual MySuper Statistics, Annual Fund-level Superannuation Statistics and Quarterly MySuper Statistics reports for the period ending 30 June. This means that the assessment will cover the preceding July-June financial year;
- Clarification that while it is not possible for an RSE licensee to undertake the required choice product comparison under 52(10A), trustees must undertake the assessments under 52(9)(a) using factors in 52(11); and
- Drafting changes expanding the expectations in considering insurance product design issues under the cohort analysis of BPR; clarifying cohort analysis expectations for defined benefit and retirement product holding members; clarifying MySuper products comparison section; and cleaning up the insurance strategy assessment factor section.

QMV Legal recommends that superannuation trustees assess planning for transitioning to the member outcomes regime, including ensuring that planned activities are consistent with the relevant guidance from APRA.



Retirement Income Review

22 November 2019
Consultation

[LINK TO DETAILS](#)

The Treasury released a consultation paper outlining some of the issues the Retirement Income Review Panel will be considering. Submissions are not limited to the identified issues, as the Panel is interested in receiving input on any issues considered relevant to the Review. Specific areas in which the Panel seeks feedback include:

- the community's understanding of retirement system objectives;
- roles of the Government, private sector and individuals in enabling older Australians to achieve adequate retirement savings;
- the pillars of the retirement income system, their respective roles and trade-offs between them;
- the changing Australian landscape, including demographics, the labour market and home ownership trends; and
- the measure, appropriateness and balancing of adequacy, equity, sustainability and cohesion as benchmarks for assessing outcomes of the retirement system, now and in the future.

The consultation paper does not, however, address the inclusion of family home value in the Age Pension means test, the increase of the superannuation guarantee or the interplay and characteristics associated with the default system.

QMV Legal recommends that superannuation trustees consider contributing to the consultation to ensure that the scope of information being reviewed captures key aspects of the superannuation system, such as the important role of defaults in promoting outcomes for members.



Your Super Your Choice

27 November 2019
Legislation

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019* was introduced to Parliament, which seeks to amend the *Superannuation Guarantee (Administration) Act 1992* to enable employees under new workplace determinations or enterprise agreements (after 1 July 2020) to exercise choice of superannuation fund for their compulsory employer contributions.

The Bill is almost identical in substance to Schedule 1 of the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017* which did not pass into law.

The Bill carves out exceptions for some existing members of defined benefit schemes, where the member benefit would not be affected by employer contributions not being made to the fund (such as where the fund is in surplus, or a maximum benefit has been reached).

The Bill also ensures that notional contributions for an employee in relation to a defined benefit scheme will not cause an employer to have an increase in their superannuation guarantee shortfall if the employee's benefit in the scheme would not be affected by the employer making contributions to another fund.

QMV Legal recommends that trustees assess the extent of any impact, and the effect of the changes on future member flows and ensure financial modelling accounts for any such changes. Trustees may also consider ensuring that contributing employers affected are aware of the proposed changes.



Putting Members' Interests First

14 November 2019
Legislation

[LINK TO DETAILS](#)

APRA issued a letter to all RSE licensees outlining new guidance for the implementation of the *Treasury Laws Amendment (Putting Members' Interest First) Act 2019* (the PMIF), as well as encouraging licensees to consider [ASIC's 30 October letter to the industry](#). With respect to the dangerous occupation exception, APRA provides an [Election Template](#) and [Withdrawal Template](#).

[APRA's Frequently Asked Questions](#) provide guidance on the reforms, including that the reforms do not capture Defined Benefit members, an election by a member to continue insurance lasts indefinitely, if a member elects for their insurance to continue under PYS they do not need to make a separate election for PMIF, and members on claim are subject to the reforms.

The Government has indicated that it will pursue amendments to the SIS Act to ensure the Government's original policy intent is achieved, including aggregation of member interests, the effect on rights under fixed term insurance and a member's opt-in under PYSP satisfying the PMIF opt-in requirement.

QMV Legal recommends that superannuation trustees ensure that arrangements are in place to administer the reforms and monitor compliance. There are a broad range of considerations which should already have been taken into account, including impact on fees and communications and servicing of members. Ongoing attention will be required to work closely with the Government and Industry Associations to ensure proposed amendments to the SIS Act address all necessary issues.



Insurance in Super. Prudential Standard

25 November 2019
Consultation

[LINK TO DETAILS](#)

APRA released proposed revisions to Prudential Standard SPS 250 Insurance in Superannuation for consultation. The revisions include:

- independent certification that arrangements are in the best interest of members and otherwise satisfy legal and regulatory requirements for RSE licensees with an insurance arrangement with a related party or one that gives a priority or privilege to an insurer (Royal Commission Recommendation 4.14);
- confirmation that any status attributed to a beneficiary in connection with the provision of insurance is fair and reasonable (Royal Commission Recommendation 4.15);
- a process that enables beneficiaries to easily opt-out of insurance cover; and
- confirmation that the level and type of insurance cover not inappropriately erode the retirement income of beneficiaries

The consultation closes 3 February 2020, after which APRA will finalise SPS 250 by mid-2020 with an effective date of 1 January 2021.

Insights from the consultation will form the basis of a revised Prudential Practice Guide SPG 250 Insurance in Superannuation, which APRA will consult on early next year.

QMV Legal recommends that superannuation trustees review revised SPS 250 and provide feedback related to compliance and costs associated with the changes.



TECHNICAL CHANGES AND UPDATES



APRA Super Data Transformation

7 November 2019
Consultation

[LINK TO DETAILS](#)

APRA has launched its ‘Superannuation Data Transformation,’ a program of work aimed at transforming superannuation data collection and publication. A key focus of the program is addressing the gaps in the existing data collection, which according to APRA does not provide the depth and breadth of data needed to adequately assess all aspects of the industry’s operations, and improving visibility of product-level and investment option-level data beyond MySuper.

The program will be divided in three phases:

1. Breadth – to address the most urgent data gaps required to support APRA, the industry and other stakeholders in assessing member outcomes and industry operations and performance;
2. Depth – to explore new and better approaches to data reporting to improve the granularity of superannuation data collection; and
3. Quality – to assess the quality and consistency of data reported in the first two phases.

APRA will release proposals for each topic for consultation separately in targeted ‘Topic Papers’ and separately hold round-table discussions and pilot collections of proposed data. The first Topic Paper covers the structure and profile of RSEs and seeks to establish the population of products, investment menus and investment options on which information is to be reported as well as determine data to be deemed non-confidential.

Phase 1 will have further releases of Topic Papers up to mid-2020.

QMV Legal recommends that superannuation trustees review APRA’s proposals and evaluate whether any impediments to providing the proposed data exist, including availability of data and implementation of data reporting mechanisms, and consider whether any data items should remain confidential. Trustees may also consider engaging with administration and custody service providers to ensure that there is adequate access to and quality in the data relied on to satisfy reporting requirements.



ASIC Relief from Financial Adviser Compliance Scheme

14 November 2019
Legislation

[LINK TO DETAILS](#)

ASIC issued *ASIC Corporations (Amendment) Instrument 2019/1145*, which provides a three-year exemption (until 31 October 2022) to all AFS licensees from section 921H; and sections 922D, 922E, 922F, 922L and 1546W of the *Corporations Act* to the extent those sections impose an obligation on a financial services licensee to lodge a notice with ASIC in relation to a compliance scheme.

This confirms that AFS licensees will not be in breach of the law if their financial advisers were not able to register with an ASIC-approved compliance scheme by 1 January 2020. The Government announced that it is accelerating the establishment of a new disciplinary system and single disciplinary body for financial advisers and will work towards establishing the new body in early 2021 with legislation to be introduced in early 2020.

AFCA also announced its [assessment approach](#) to adviser conduct obligations under the new Financial Adviser Code of Ethics effective 1 January 2020.

QMV Legal recommends that superannuation trustees confirm appropriate policies and procedures are in place to ensure financial advisers licensed under the trustee’s AFSL comply with the Financial Planners and Advisers Code of Ethics.



Single Touch Payroll – Small Employers

19 November 2019
Media Release

[LINK TO DETAILS](#)

Small employers with 19 employees or fewer are also now required to start reporting through Single Touch Payroll. The ATO has confirmed, however, that no penalties will be applied in the 2019-20 financial year for those small employers that make a genuine attempt to transition or for missed or late reports.

The ATO confirmed that there are three possible pathways for small employers:

- start reporting through an STP-enabled solution;
- consider if they are eligible for a quarterly reporting concession, or
- apply for a deferral if additional time is needed.

The ATO will continue to work with small employers to understand any barriers they may be facing and provide support through the transition.

While no action is required from superannuation trustees, QMV Legal recommends that superannuation trustees draw attention to any employers and employer service teams.



Small Business Super Clearing House

19 November 2019
Media Release

[LINK TO DETAILS](#)

The ATO issued PCG 2019/D8 *Superannuation contributions made to the Small Business Super Clearing House – compliance approach to timing of income tax deductions* for consultation.

The draft Guideline describes circumstances in which the Commissioner will not apply compliance resources to determine which income year an employer is entitled to claim income tax deductions for superannuation contributions made through the Small Business Superannuation Clearing House (SBSCH) to a super fund or retirement savings account.

The Guideline does not apply to contributions made through a commercial clearing house, which typically will set out in their contract the terms and conditions of the agreements, including service standards for processing payments.

QMV Legal recommends that superannuation trustees assess the impact of the approach to any SG compliance assurance performance by the fund. Trustees may also communicate the changes to employer service teams and any affected contributing employers.



Significant Global Entity Taxation

13 November 2019
Consultation

[LINK TO DETAILS](#)

The Treasury opened for consultation draft legislation extending the definition of a Significant Global Entity (SGE) beyond groups headed by listed companies and by private companies required to prepare general purpose financial statements to include members of large business groups headed by trusts and investment entities.

The concept behind SGE is to define a group of entities, interrelated by a control relationship that could enable non-arm's length dealings and therefore be of special interest to tax authorities.

The SGE definition is now also used to determine application of the OECD Country-by-Country reporting, Multinational Anti-Avoidance Law, the Diverted Profits Tax and penalties applying to false or misleading statements, late lodgement or tax schemes.

QMV Legal recommends that trustees ensure that financial reporting aligns with the relevant obligations where the RSE or trustee is now covered by the definition.



Family Law Splits

27 November 2019
Legislation

[LINK TO DETAILS](#)

Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019 was introduced into Parliament. The Bill gives effect to a referral power from Western Australia to the Commonwealth in respect of superannuation matters in family law proceedings for separating de facto couples in Western Australia.

It will allow de facto couples in Western Australia to split their superannuation interests as part of their property settlements. All other property splitting for separated Western Australian de facto couples will continue to be dealt with under Western Australian law.

QMV Legal recommends that superannuation trustees remain apprised of the Bill's status to ensure any processes and procedures associated with family splits are amended to reflect the change in law.



Grandfatered Commissions

28 November 2019
Legislation

[LINK TO DETAILS](#)

The Government has introduced *Treasury Laws Amendment (Ending Grandfatered Conflicted Remuneration) Regulations 2019*, supporting the recent legislation removing grandfatered arrangements for conflicted remuneration and other banned remuneration from 1 January 2021.

The Regulations:

- amend the *Corporations Regulations 2001* to provide for a scheme by which conflicted remuneration in relation to financial product advice that remains payable on or after 1 January 2021 will be rebated to affected retail customers by means of payments or other monetary benefits;
- place record-keeping requirements on Australian financial services licensees who are required to rebate conflicted remuneration; and
- repeal provisions that grandfather conflicted remuneration that are contained in the *Corporations Regulations 2001*.

QMV Legal recommends that superannuation trustees review operational and commercial arrangements in line with the proposed regulations to ensure they can comply with the regulations once in force.



ASIC Enforcement Review

28 November 2019
Legislation

[LINK TO DETAILS](#)

The Government introduced the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019*, which implements recommendations from the ASIC Enforcement Review Taskforce Report, including recommendations to:

- harmonise and enhance ASIC's search warrant powers, including the power for ASIC to apply for a search warrant in circumstances where the contravention can be an indictable offence under the ASIC Act, the SIS Act and the *Corporations Act*;
- strengthen ASIC's licensing powers; and
- extend ASIC's banning powers.

QMV Legal recommends that superannuation trustees review the Bill and consider the impact of the changes to the trustee's compliance and regulatory risk profile.



OTC Derivatives Prudential Standard

22 November 2019
Legislation

[@LINK TO DETAILS](#)

APRA has finalised *Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives*.

The key requirements of this Prudential Standard are that an APRA covered entity must:

- exchange variation margin and post and collect initial margin in transactions with a covered counterparty subject to certain criteria and the implementation timetables;
- use a zero threshold in the exchange of variation margin;
- post and collect initial margin on a gross basis calculated by either the standardised schedule or an approved model approach;
- ensure that initial margin is held in a manner that provides legal certainty to both counterparties in the event of insolvency or bankruptcy; and
- collect eligible collateral to satisfy margin requirements and apply appropriate risk-sensitive haircuts to collateral collected.

The changes may affect superannuation trustees, which utilise OTC derivatives to manage investment related risks. QMV Legal recommends that superannuation trustees review the revised CPS 226 and consider APRA's expectation to monitor exposure and ensure that documentation, custodial arrangements and operational processes are in place sufficiently in advance of exceeding the threshold.



GUIDANCE AND POLICY



RG 97 Indirect Fees & Costs Disclosure

29 November 2019
Guidance

[LINK TO DETAILS](#)

ASIC released updated Regulatory Guide 97 *Disclosing Fees and Costs in PDSs and Periodic Statements*, intended to provide greater clarity on disclosure obligations for issuers of superannuation and managed investment products. *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070* (including a consolidated version of Schedule 10 of the *Corporations Regulations 2001*) and *ASIC Corporations (Amendment) Instrument 2019/1071* (amending ASIC Class Order 14/1252) modify relevant legislation.

Key revisions to the prior version of RG 97 include:

- re-grouping of values in the re-named fees and costs summary to more clearly show fees and costs that are ongoing and those that are member-activity based;
- categorisation of ongoing fees and costs into three groups: Administrative, Investment and Transaction;
- single "Cost of Product" figure in a PDS; and
- simplification of fees and costs presentation in periodic statements.

The new requirements apply to all PDSs issued on or after 30 September 2020 and periodic and exit statements with reporting periods commencing from 1 July 2021. ASIC also released: [Response to submissions on CP 308 Review of Regulatory Guide 97 \(REP 637\)](#) and [Consumer testing of the fees and costs tools for superannuation and managed investment schemes \(REP 638\)](#).

QMV Legal recommends that superannuation trustees review the updated RG 97 and review periodic reporting and product disclosure templates to ensure compliance with the relevant obligations.



Whistleblower Policies

13 November 2019
Guidance

[LINK TO DETAILS](#)

ASIC published RG 270, providing guidance to entities, including trustees, required to have a whistleblower policy in force by 1 January 2020 pursuant to the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, which amended the whistleblower protections in the *Corporations Act*. Key information includes:

- the matters that must be addressed in a whistleblower policy;
- if a discloser seeks compensation and other remedies through courts, including because an employer failed to prevent the detriment from occurring, the court may consider the extent to which the employer gave effect to its policy;
- examples of content for a whistleblower policy;
- good practice tips, including those on implementing and maintaining a whistleblower policy, including fostering a whistleblowing culture and monitoring and reporting on the effectiveness of the policy.

ASIC plans to survey the whistleblower policies of a sample of companies next year to review compliance with the legal requirements.

QMV Legal recommends that superannuation trustees ensure that a Whistleblower Policy is in place by 1 January 2020, and review RG 270 to assist in ensuring compliance with legal obligations.



APRA MySuper Heatmap

15 November 2019
Announcement

[LINK TO DETAILS](#)

As part of its commitment to improving transparency in the superannuation industry, APRA released details of its superannuation heatmap (set to be published in December 2019), intended to provide insights into the outcomes being delivered by every MySuper product.

The Heatmap provides information on investments, fees and sustainability (measures APRA considers central to member outcomes), based primarily on APRA reported data from RSE licensees. The concise view displays eight key metrics, including 5-year net investment return, administration and total fees on \$10,000 and \$50,000 representative balances, adjusted total accounts growth rate and net cash flow ratio. The expanded view shows 21 metrics, displaying broader investment performance metrics and fee impacts for different member account balances.

Consistent with the requirements of SPS 515, APRA expects RSE licensees to look beyond the Heatmap to also consider broader ranges of metrics, qualitative factors, such as governance and risk, and outcomes achieved for members with particular characteristics or needs.

APRA will periodically refresh the Heatmap to incorporate new data and develop metrics for insurance and overtime choice products.

QMV Legal recommends that trustees consider completing high-level analysis on potential heat indicators attributed to the fund (if not already provided by APRA). Where there is a possibility of adverse reputational risk events, messaging could be developed in advance. Consideration should also be given to assessing any heat spots attributed once the map is released.



Governance, Culture, Remuneration, & Accountability

19 November 2019
Information Paper

[LINK TO DETAILS](#)

APRA published an information paper setting out an enhanced approach to significantly lift standards of governance, culture, remuneration and accountability (GCRA) across all industries it regulates. It reflects APRA's strategic decision to take a more intensive regulatory approach to GCRA.

The key elements of APRA's new approach to GCRA are:

- strengthening the prudential framework in areas such as remuneration and risk management, incorporating the wider use of risk governance declarations and self-assessments;
- sharpening APRA's supervisory focus by increasing internal resourcing and capabilities for GCRA supervision; and
- better inform industries and the public through sharing APRA's insights, thus promoting better GCRA practices and compliance.

The intended outcome of this intensified approach to GCRA is to drive genuine change across the industry, with success measured by: stronger governance frameworks and processes; organisations that understand and enable a risk culture that supports effective risk management practices and delivers sound prudential outcomes; remuneration arrangements that reflect a holistic assessment of performance and risk management, and reduce the incentive for misconduct; and clear accountability (individually and collectively) for outcomes achieved.

While this information paper does not contain any substantive changes, trustees should ensure that there are adequate resources available over the short term to adapt to the change in regulatory approach, planned changes to the law, and changes in the supervision approach indicated by APRA.



ASIC & APRA MOU

29 November 2019
Policy

[LINK TO DETAILS](#)

ASIC and APRA published an updated Memorandum of Understanding (MOU), which follows the recommendations of the Royal Commission. The regulators have indicated that strengthening engagement is a key priority of the ASIC Commissioners and APRA members. Key items include:

- A formal engagement structure to further support the objectives of the MOU, including support from working groups and routine informal and ad hoc meetings and information sharing between ASIC and APRA;
- Key areas for engagement to be policy, monitoring and supervision, and investigations and enforcement; and
- Agreement to engage on industry data collection and seek to minimise duplication in statistical reporting by industry

The regulators will publicly report on their engagement activities annually and will review the effectiveness of the MOI biennially.

QMV Legal recommends that superannuation trustees remain aware of the regulators' plan and ensure readiness to comply with upcoming changes to the regulatory framework.



Consumer Advocacy Body for Super

2 December 2019
Policy

[LINK TO DETAILS](#)

The Government issued an expression of interest for a Consumer Advocacy Body for Superannuation, which is the first step in the process of implementing Recommendation 28 of the Productivity Commission's report on Competition & Efficiency for an independent, adequately resourced superannuation members' advocacy body.

The advocacy body will become the voice of consumers in policy discussion and to support access to information to educate and assist consumers, including vulnerable consumers, to navigate the superannuation system.

The Treasury invites all interested parties to respond, addressing the following topics by 13 January 2020:

- *Functions and outcomes:* What core functions and outcomes do you consider could be delivered by the advocacy body? What additional functions and outcomes could also be considered? What functions would the advocacy body provide that are not currently available?
- *Ongoing costs:* What would be the indicative ongoing costs of delivering these functions? What would be the indicative costs of delivering any additional functions?
- *Establishment:* What would be the likely set-up costs for the advocacy body and approximately how long would it take to establish such a body?
- *Governance and accountability:* What governance and accountability models (including assessment of impact and performance) do you consider to be most appropriate for the advocacy body?

QMV Legal encourages superannuation trustees to respond to the Treasury's expression of interest process, considering any issues particular to its members.

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.

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



David Reckenberg LLB (Hons), B.Ec
Managing Partner
0411 265 284
dreckenberg@qmv-solutions.com



Jonathan Steffanoni JD, Dip.FS, FASFA
Partner
0434 835 966
jsteffanoni@qmv-solutions.com



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