

LEGAL & REGULATORY UPDATE

PENSIONS AND SUPERANNUATION

INSIDE THIS EDITION

- Eligible Rollover Fund phase-out
- Extending the BEAR
- Compensation Scheme of Last Resort
- Transfer Balance Cap
- APRA Data Collection

[SUBSCRIBE](#)


Jonathan Steffanoni
Partner, QMV Legal

IN BRIEF

Parliament commenced its Summer recess in early December; however, it was hardly an idle month for legal and regulatory change for superannuation funds.

The expected announcement that Eligible Rollover Funds are to be phased out was made, and there were important refinements made via legislative instrument to the Protecting Your Super, Putting Members' Interests First, and Design and Distribution Obligations.

Data related themes were again prominent, with the ACCC consulting on extending the Consumer Data Right to intermediaries, and providing a revised timeline for Open Banking confirmed and changes to APRA's data collection regime and approach.

We are expecting a large number of superannuation related exposure draft bills and consultation papers to be released in January 2020, particularly in relation to the Hayne Royal Commission recommendations which are yet to be implemented.

MAJOR UPDATES



Eligible Rollover Funds

13 December 2019
Consultation

[LINK TO DETAILS](#)

The Treasurer announced that the government will introduce legislation early in 2020 to allow trustees of Eligible rollover funds (ERFs) to voluntarily transfer amounts to the ATO.

The measure is intended to facilitate the eventual exit of ERFs from the industry by 30 June 2021, as was recommended by the Productivity Commission.

It will add to current requirements, as part of the Protecting Your Super reforms, that ERFs transfer inactive low balance accounts to the ATO so it can reunite members with their lost super.

Under the measure, ERFs will also be required to transfer to the ATO all accounts below \$6,000 by 30 June 2020 and to transfer any remaining accounts still residing in an ERF to the ATO by 30 June 2021.

Superannuation trustees should commence planning to review the appropriateness (or existence) of their ERF Policy and related references to transfer to an ERF in product disclosure documents, periodic reporting statements, and fund websites.



Protecting Your Super & Putting Members' Interests First

5 December 2019
Consultation

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2019 Measures No. 3) Bill 2019* was introduced to Parliament on 5 December 2019 and proposes a range of technical amendments, including in relation to the *Protecting Your Superannuation Package* and *Putting Members Interests' First* reforms:

- expanding the application of the fee cap in s 99G(1)(b) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to include when a member ceases holding the product part way through the fund's income year and at that time the balance of the product is less than \$6,000;
- amending sections 16, 20QB and 24C of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to remove the requirement for lost member reporting to the ATO of information about money that ceases to be unclaimed or accounts that cease to be in-active low balance or lost member accounts during the period;
- amendment of the definition of 'inactive low balance account' so that an account is not an 'inactive low balance account' if the member has elected to maintain insurance on that account by making an election under subsection 68AAA(2) of the SIS Act on or after 30 June 2019; and
- providing that a member election that the account is not an inactive lost account is to be made to the trustee rather than the Commissioner. The exception is amended so that the member makes this election directly to the superannuation provider rather than the ATO.

Superannuation trustees are unlikely to be required to make many substantive changes arising from these technical changes. These changes do however provide greater certainty of the operation of PYSP and PMIF, and could be relevant in revising risk related regulatory risk assessments.



Design & Distribution Obligations

12 December 2019
Legislative instrument

[LINK TO DETAILS](#)

ASIC has made the *Corporations Amendment (Design and Distribution Obligations) Regulations 2019*, amending the *Corporations Regulations 2001* to enhance the Design and Distribution Obligations (DDO) regime. The regulations alter the products and persons to which the regime applies and extend the regime.

Importantly for superannuation trustees, the regulations exclude the following products from the DDO regime:

- interests in eligible rollover funds;
- defined benefit interests; and
- an employer complying with certain superannuation guarantee obligations from the DDO regime (issuing an interest in a default fund and providing the PDS and contributing).

The regulations commence on the commencement date of the DDO regime: 5 April 2021. ASIC also released [Consultation Paper 325](#) seeking feedback by 11 March 2020 on a draft **Regulatory Guide on Product Design & Distribution Obligations**.

Superannuation trustees should ensure that any planning in relation to compliance with the design & distribution obligations considers the exclusions. The regime will primarily relate to the design and distribution of choice and retirement phase products, and will require that target market determinations are made in relation to such products.



Compensation Scheme of Last Resort

20 December 2019
Consultation

[LINK TO DETAILS](#)

Treasury has released a discussion paper on establishing a *Compensation Scheme of Last Resort* (CSLR) that would compensate consumers and small businesses where a financial service provider is found to have engaged in misconduct and the provider is unable to pay. The Hayne Royal Commission recommended that a CSLR be established and that the three principle recommendations made in the Supplementary Final Report of the Review of the financial system external dispute resolution and complaints framework (Ramsay Review) should be carried into effect.

The discussion paper seeks feedback on establishing a CSLR that is industry-funded, operated by the *Australian Financial Complaints Authority* (AFCA), and extends beyond personal advice failures. The discussion paper seeks views on four aspects of the CSLR:

- coverage, beyond personal advice;
- funding arrangements;
- compensation to be paid; and
- managing scheme evolution.

The consultation is open until 7 February 2020, and Exposure Draft legislation is expected to be released for consultation in mid-2020 to establish the CSLR by December 2020.

While unpaid determinations involving superannuation trustees are rare, trustees should consider the consultation process in relation to funding arrangements and coverage.



Extending the BEAR (SEAR)

13 December 2019
Update

[LINK TO DETAILS](#)

APRA has provided an update on the timing of making amendments to the Banking Executive Accountability Regime (BEAR).

APRA had previously released for consultation a letter outlining APRA's approach to adding a product responsibility to the BEAR in accordance with recommendation 1.17 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission).

The consultation letter set out APRA's intention to release a draft schedule for consultation in October 2019, and the final requirements in December 2019.

APRA provided an update that consultation on amending the BEAR to include product responsibilities will now not occur until 2020 in order to align with the timing and content of the Government's proposed extension of the BEAR to RSE Licensees (Hayne recommendation 3.9).

QMV Legal expects the timing of finalisation of the product responsibility changes will align with a discussion paper on extending the BEAR to become the Senior Executive Accountability Regime (SEAR). The consultation paper will be released in January and exposure draft legislation before 30 June. Trustees should expect to participate in the consultation in early 2020.



APRA Super Data Transformation

19 December 2019
Consultation

[LINK TO DETAILS](#)

The Australian Prudential Regulation Authority (APRA) has released a second consultation package on its Superannuation Data Transformation project.

The package contains topic papers on **Performance** and **Member Accounts**, in addition to the following draft reporting standards:

- SRS611.0 Member Accounts;
- SRS705.0 Components of Net Return; and
- SRS705.1 Investment Performance and Objectives.

The project is intended to make it easier to scrutinise and reliably compare fund and product performance, especially in the choice segment of the market. Submissions in response to the consultation on these proposals will close on 14 February 2020.

QMV Legal recommends that superannuation trustees consider the operational impacts of complying with the changes to the reporting standards. An increase in the comparability of choice product performance may also be worth considering as part of strategic planning activities.



Consumer Data Right

23 December 2019
Legislative instrument

[LINK TO DETAILS](#)

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.

Intermediaries have been identified as being important for the uptake of the CDR to allow, in some circumstances, the disclosure by data recipients of CDR data to non-accredited persons such as financial advisers and accountants.

Submissions in response to the consultation paper are due by 3 February 2020, and will inform the development of version 2 of the CDR rules on which the ACCC expects to consult in March 2020.

The ACCC has also updated the timeline for the implementation and launch of the CDR in the banking sector (Open Banking), deferring the launch of certain aspects from February to July 2020.

Consumers will now be able to direct major banks to share their credit and debit card, deposit account and transaction account data with accredited service providers from 1 July 2020. Mortgage and personal loan data will be able to be shared after 1 November 2020.

Superannuation trustees that have or intend to register as authorised data recipients should note the revised commencement dates for Open Banking. Consideration should also be given to potential opportunities for associated financial planning services offered or associated with superannuation funds and how they can benefit from the matters under consultation without needing accreditation as a data recipient.



TECHNICAL CHANGES AND UPDATES



Transfer Balance Cap & Defined Benefit Income

13 December 2019
Legislation

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2019 Measures No. 3) Bill 2019* was introduced to Parliament on 5 December 2019. This Bill proposes technical amendments, including amendments relating to the treatment of capped defined benefit income streams under the transfer balance cap.

There are issues where a relevant capped defined benefit income stream is fully commuted or is partially commuted, which may result in members incurring tax in a manner not intended by the policy.

The Bill would make amendments to ensure that upon a full commutation of a capped defined benefit income stream, the transfer balance debit is the debit value of the superannuation interest that supported the superannuation income stream just before the commutation takes place.

Treasury has also made *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019*, which amends the *Income Tax Assessment Regulations 1997* to prescribe additional circumstances in which a transfer balance debit arises in an individual's transfer balance account and the amount of the debit.

The changes address drafting issues to ensure that the value of the transfer balance account debit that arises when a deferred superannuation income stream ceases to be in the retirement phase is simply the amount that the individual would be entitled to if they voluntarily ceased to hold the interest.

These amendments apply to reductions in value that occur on or after 1 July 2017.

Superannuation trustees should liaise with administration functions or service providers to understand the current administration of any such arrangements and ensure that any necessary changes are planned or made to administration systems and related ATO reporting via MAAS and MATS.



Building Insurance & Terrorism Cover

12 December 2019
Legislative Instrument

[LINK TO DETAILS](#)

Treasury determined the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019* on 12 December 2019.

The regulations make amendments to the *Terrorism Insurance Regulations 2003* to ensure that contracts of insurance that cover two or more buildings are subject to the reinsurance cover provided by the *Terrorism Insurance Act 2003* where the total sum-insured value of the buildings is \$50 million or more.

The *Terrorism Insurance Act* operates to override terrorism exclusions in eligible insurance contracts. The amendments apply in relation to contracts of insurance made before, at or after the time those items commence.

QMV Legal recommends that any superannuation trustees holding any direct investments in relevant real property review any insurance contracts to ensure that coverage remains adequate to manage financial risks associated with terrorist acts. Related risks and controls identified as part of the risk management framework should also be reviewed.



Successor Fund Transfers & DB Income Streams

12 December 2019
Legislative Instrument

[LINK TO DETAILS](#)

Treasury determined the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019* on 12 December 2019.

The regulations amend the *Income Tax Assessment Regulations 1997* (ITAR) to prescribe a superannuation income stream to be a capped defined benefit income stream under the *Income Tax Assessment Act 1997* (ITAA) where:

- ▶ it would be a capped defined benefit income stream if it had started on or before 1 July 2017; and
- ▶ it arises as a direct result of the payment of an involuntary roll-over superannuation fund to a successor fund.

The changes ensure that a superannuation income stream paid to the member by the successor fund (after an SFT) will be treated as a capped defined benefit income stream for the purposes of the transfer balance cap, avoiding unintended adverse consequences under the transfer balance cap.

These amendments apply to successor fund transfers that occur on or after 1 July 2017.

QMV Legal recommends that superannuation trustees review administration arrangements and information systems to ensure that any transferred members are treated appropriately. Any trustee involved in a successor fund transfer should consider the impact of the change on any assessments of equivalency and best interests associated with the transfer.



Age Pension Life Tables

23 December 2019
Legislative Instrument

[LINK TO DETAILS](#)

The Department of Social Services has made *Social Security (Value of Asset-tested Income Streams (Lifetime)) Amendment Determination 2019 (No. 2)*, which amends *Social Security (Value of Asset-tested Income Streams (Lifetime)) Amendment Determination 2019* to:

- ▶ ensure that the latest Australian Life Tables published by the Australian Government Actuary are used when determining the surrender value and death benefit value of a person's asset-tested income stream (lifetime); and
- ▶ repeals the *Social Security (Value of Asset-tested Income Streams (Lifetime)) Amendment Determination 2019*, which contained an error.

This instrument is in the same terms as the earlier amending instrument, with the drafting error corrected, and does not affect calculations undertaken prior to 1 January 2020.

Superannuation trustees should ensure that member services involved in providing personal financial advice or any age pension calculators apply the correct calculation methodology in determining age pension eligibility and tapering.



Unclaimed Money & Lost Members

16 December 2019
Legislative Instrument

[LINK TO DETAILS](#)

Treasury has determined the *Superannuation (Unclaimed Money and Lost Members) Regulations 2019* (SUMLMR), which remake and improve the operation of the *Superannuation (Unclaimed Money and Lost Members) Regulations 1999* before they sunset.

The SUMLMR repeals redundant provisions, simplifies language and restructures provisions for ease of navigation. These changes do not affect the substantive meaning or operation of the provisions.

Treasury also determined the *Superannuation (Unclaimed Money and Lost Members) and Other Laws (Repeal and Consequential Amendments) Regulations 2019*. These regulations repeal the *Superannuation (Unclaimed Money and Lost Members) Regulations 1999* and make minor consequential amendments related to the repeal of these regulations.

QMV Legal recommends that trustees note the new legislative instruments, and references to the regulations in documentation and regulatory compliance and assurance frameworks.



Life Expectancy & Leap Years

12 December 2019
Legislative Instrument

[LINK TO DETAILS](#)

Treasury determined the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019* on 12 December 2019.

The regulation amends the definition of life expectancy in the *Superannuation Industry (Supervision) Regulations 1994* to ensure that the life expectancy period calculation of the maximum commutation amount for the purposes of the development of innovative superannuation income streams correctly accounts for leap years by converting the years to the actual number of days remaining to the end of the period.

These amendments in relation to life expectancy period and leap years apply to working out an individual's maximum commutation amount on or after 1 July 2017.

QMV Legal recommends that trustees liaise with product development teams involved in the planning of product development (CIPRs in particular) are aware of these minor and technical changes.



AML-CTF Rules

13 December 2019
Legislative Instrument

[LINK TO DETAILS](#)

The Australian Transaction Reports and Analysis Centre (AUSTRAC) has made *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2019 (No. 3)*, which makes several minor and technical revisions to the current drafting, including:

- The reporting period in paragraph 11.2 is now specified to be "each successive period of 12 months beginning on 1 January and ending on 31 December", and the lodgement period is specified in paragraph 11.3 to be "the period of 3 months beginning at the end of each successive reporting period"; and
- The drafting of paragraph 11.4 has been simplified, including by removing references to the 2018 and 2019 calendar years, to ensure that annual amendments to the Chapter are no longer required.

These amendments are not intended to change the substantive effect of the provisions but are intended to simplify the drafting.

QMV Legal recommends that trustees note the amendments, however there is unlikely to be any material impact on superannuation trustees.



Financial Regulator Reform

24 December 2019
Consultation

[LINK TO DETAILS](#)

Treasury released exposure draft *Financial Regulator Reform (No. 2) Bill 2019* for consultation which will oblige the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) to:

- ▶ co-operate with one another;
- ▶ share information to the maximum extent practicable; and
- ▶ notify the other whenever it forms the belief that a breach of the law for which the other regulator has enforcement responsibility has occurred.

These new provisions are intended to enable the regulators to support each other in discharging their regulatory functions effectively and ensure that there are no unnecessary barriers to their sharing information.

These obligations are supplemented by the release of the updated Memorandum of Understanding between APRA and ASIC, which would implement Recommendation 6.10 of the Hayne Royal Commission.

Consultation is open until 24 January 2020.

Superannuation trustees should liaise with administration functions or service providers to understand the current administration of any such arrangements and ensure that any necessary changes are planned or made to administration systems and related ATO reporting via MAAS and MATS.



APRA New SRI

19 December 2019
Announcement

[LINK TO DETAILS](#)

The Australian Prudential Regulation Authority (APRA) has announced that it is replacing its risk assessment and supervisory intensity models, PAIRS (the Probability and Impact Rating System) and SOARS (Supervisory Oversight and Response System), with a more contemporary model to be known as the Supervision Risk and Intensity Model (SRI).

The SRI is grounded on three core attributes of APRA's philosophy: risk-based, forward-looking and outcomes-focused, and provides a common platform on which all regulated entities can be assessed. The APRA-regulated entity population will be divided into 'tiers' based on size, complexity, substitutability, inter-connectedness and resolvability. New risk categories will also be introduced to more explicitly address matters such as cyber risk; resolvability; governance, culture, remuneration and accountability; and member outcomes. The SRI scoring will be overlaid with a common consideration of external environment factors impacting the industry.

The SRI is in final pilot testing until the end of January 2020 and is planned for roll-out during 2020/21.

Superannuation trustees should monitor the development of the new SRI and analyse any impact it may have on current operations. While APRA recognises that some entities will see no change, others may see their risk score and level of supervisory intensity go up or down.



GUIDANCE AND POLICY



Transfer Balance Cap

19 December 2019
Tax Ruling

[LINK TO DETAILS](#)

The ATO has issued an addendum to *Law Companion Ruling LCR 2016/12 Superannuation reform: total superannuation balance*.

The addendum amends the ruling from 1 July 2018, to refer to certain circumstances where the outstanding balance of a limited recourse borrowing arrangement is included when working out an individual members' total superannuation balance as set out in s 307-230(1)(d) and 307-231 of ITAA 1997. These amendments were introduced by *Treasury Laws Amendment (2018 Superannuation Measures No 1) Act 2019*.

It also amends LCR 2016/12 from 1 April 2019 to reflect changes in the rules that determine when a transition to retirement income stream (TRIS) is in retirement phase introduced by *Treasury Laws Amendment (2018 Measures No 4) Act 2019*.

The aspects of the ruling related to LRBA's and the Total Superannuation Balance calculation are unlikely to affect trustees of superannuation funds that are not SMSFs. The amendments to the treatment of TRIS in relation to the Total Superannuation Balance are likely to affect superannuation funds and information technology and administration providers.



Financial Advice provided by Superannuation Funds

3 December 2019
Report

[LINK TO DETAILS](#)

ASIC released *Report 639 Financial advice by superannuation funds* on 3 December 2019. This report examines the ways in which superannuation funds help members obtain financial advice and the quality of personal advice obtained through the funds. The findings were based on a review of 11 retail, 10 industry, two corporate and two public sector funds.

ASIC found that overall, the quality of personal advice provided to members was generally appropriate.

According to responses provided by trustees of the superannuation funds:

- the most popular advice topics sought by members were member investment choice, contributions and retirement planning;
- general advice made up 75 per cent of advice accessed;
- four of the 25 funds surveyed did not offer personal advice to members;
- across all the funds that offer advice services to members, the most common delivery channels for providing advice to members were in-house call centres and advice providers employed by a related party;
- across all funds, the key conflicts of interest identified by trustees were vertical integration, relationships with third-party advice providers, and bonuses paid to advice providers; and
- most superannuation funds intend to increase their use of digital tools in the coming year.

The report also includes several practical tips for trustees, advice licensees and advice providers.

QMV Legal recommends that superannuation trustees review the findings and recommendations against their existing financial advice related activities and plans to identify opportunities for improvement.



Insurance in Superannuation

13 December 2019
Report

[LINK TO DETAILS](#)

ASIC released *Report 646 Insurance in superannuation: Industry implementation of the Voluntary Code of Practice* on the superannuation industry's progress in improving consumer outcomes in relation to life insurance provided through superannuation and on the industry's implementation of the Insurance in Superannuation Voluntary Code of Practice.

In the report, ASIC observes that some improvements in practices are being introduced as a result of adoption of the Code by a significant number of trustees. However, further work needs to be done to achieve the high industry standards consumers expect.

The report identifies several inconsistencies in the implementation of the Code, some relating to fundamental aspects such as which members are covered by the Code including:

- the controls around balance erosion;
- calculation of timeframes for claims processes; and
- the need to have better defined policies and processes for vulnerable members with unique needs.

QMV Legal recommends that signatory superannuation trustees review the Report and identify any opportunities to uplift the measures in place to manage balance erosion, handle claims, and deal with vulnerable members.



APRA D2A & Extranet

13 December 2019
Announcement

[LINK TO DETAILS](#)

APRA has released information about changes that will be made to D2A and the APRA Extranet in 2020 to replace AUSkey with myGovID and Relationship Authorisation Manager (RAM).

AUSkey will be decommissioned at the end of March 2020, and superannuation trustees will be required to take steps in February/March 2020 to ensure continued access to APRA systems.

Trustees will need to ensure that users set up a new digital identity in myGovID and that their business is linked and administrators authorised in RAM now. Entities may also create machine credentials ready for 2020 but should store them in a different file to the current D2A credential. Please visit the ATO website which contains full information about myGovID, RAM and M2M credentials.

Entities will also need to complete a minor update to D2A in February/March 2020. More information will be provided by APRA in early 2020.

QMV Legal recommends that superannuation trustees ensure that the relevant business functions are proactive in updating access arrangements to APRA portals in accordance with APRA's instructions. Consideration should also be given to any service providers that might access such systems on the trustee's behalf.



Regtech Initiatives

20 December 2019
report

[LINK TO DETAILS](#)

The Australian Securities & Investments Commission (ASIC) released *Report 653 ASIC's Regtech Initiatives 2019-19* on its observations and findings from four initiatives, which focused on the potential use of technology to help businesses deal with conduct of business compliance issues. The initiatives related to: financial promotions monitoring; financial advice file compliance reviews; voice analytics and voice-to-text; and technology-assisted guidance related to credit and financial services licensing regulatory frameworks.

Observations of participants and attendees of ASIC's regtech initiatives include:

- exponential growth in data volume means the financial services industry must consider implementing regtech as it enables analysis of large, high data volumes at speed and in real time;
- a need for improved standards on data capture and storage as data quality is critical; and
- implementation is not easy and regtech poses further cyber security and privacy risks.

ASIC intends to implement further regtech initiatives during the remainder of FY 2019-20, including on digital record-keeping of financial services, looking at current and potential future practices.

QMV Legal recommends that superannuation trustees review the Report and review current compliance and risk management tools used to determine whether implementation of regtech initiatives is appropriate and will result in a more streamlined risk management and compliance operation.

ABOUT QMV LEGAL

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

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

 [LEARN MORE ABOUT QMV LEGAL](#)

 [SUBSCRIBE TO QMV LEGAL & REGULATORY UPDATES](#)



SUPERANNUATION & FINANCIAL SERVICES LAW



PRIVACY & DATA REGULATION



INFORMATION TECHNOLOGY & ADMINISTRATION SERVICES



REGULATORY CHANGE & POLICY



SUCCESSOR FUND TRANSFERS



MANAGED INVESTMENTS & ESG

LEGAL EXPERTS ON SUBSCRIPTION

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

CONTACT US

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



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