

LEGAL, REGULATORY & POLICY UPDATE

PENSIONS AND SUPERANNUATION

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IN BRIEF



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*The major legislative and regulatory changes keep coming for superannuation trustees. Treasury released exposure draft legislation and explanatory material which would implement the **Retirement Income Covenant** and consequential amendments related to the **Financial Accountability Regime**.*

*We saw ASIC release updates related to **Internal Dispute Resolution, Breach Reporting, Design and Distribution** and **Anti-hawking** – all significant reforms that commence in the first week of October. APRA issued an update on **SPS 250 – Insurance in Super** and a significantly revised **SPS 530 – Investment Governance** for consultation.*

*The ATO also made a myriad of updates to various superannuation related materials, including its **SFT Protocol**. Treasury also released exposure regulations and explanatory materials related to the **Better Advice Bill** before Parliament.*

MAJOR UPDATES



Commonwealth Parliament

September 2021
Parliamentary Business

[@LINK TO DETAILS](#)

Commonwealth Parliament sat for only two days on 1-2 September and will resume on 18 October 2021. The following superannuation related bill was passed:

- [Treasury Laws Amendment \(2021 Measures No. 6\) Act 2021 \(Cth\)](#)

This Act enables the Federal Court to access superannuation information from the ATO in relation to family law proceedings and makes exemptions in relation to the requirement to provide an actuarial certificate when determining exempt current pension income.

The following superannuation related bills remain before Parliament:

- [Financial Sector Reform \(Hayne Royal Commission Response - Better Advice\) Bill 2021](#)
- [Treasury Laws Amendment \(2021 Measures No. 5\) Bill 2021](#)
- [Treasury Laws Amendment \(2021 Measures No. 7\) Bill 2021](#)
- [Treasury Laws Amendment \(2020 Measures No. 4\) Bill 2020](#)
- [Security Legislation Amendment \(Critical Infrastructure\) Bill 2020](#)

Superannuation trustees should remain apprised of bill status to ensure preparedness for any required change implementation, including ensuring adequate planning and resources are in place. The 2020 Measures No. 4 Bill is unlikely to proceed, as the changes were legislated by the 2021 No. 6 Act.



Investment Governance

29 September 2021
Consultation

[LINK TO DETAILS](#)

APRA released for consultation its proposed revisions to Prudential Standard SPS 530 Investment Governance.

The proposed revisions to SPS 530 respond to findings from APRA's unlisted asset valuation thematic review and the 2018-2019 post-implementation review of the superannuation prudential framework.

The updates focus on enhancements to stress testing, valuation and liquidity management practices and include:

- Enhanced obligations related to the development and maintenance of a comprehensive investment stress testing program that is approved by the Board and at a minimum, includes appropriate adverse stress scenarios for the investment strategy of each option;
- An obligation to develop and implement an effective valuation governance framework;
- Reporting of performance of each investment and investment option to the Board and senior management must include an assessment of the sources of out-performance and under-performance relative to appropriate performance benchmarks.

This consultation will run until 16 February 2022. The prudential standard is intended to commence on 1 January 2023.

APRA also foreshadowed their intent to consult on the accompanying guidance within *Prudential Practice Guide SPG 530 Investment Governance* and *Prudential Practice Guide SPG 531 Valuation* in 2022 after the consultation for SPS 530 is completed.

Superannuation trustees should review the changes closely with their investments teams and consider submitting a response to the consultation.



Insurance in Super

21 September 2021
Letter

[LINK TO DETAILS](#)

APRA wrote to RSE licensees to provide an update on the Prudential Standard SPS 250 Insurance in Super consultation and clarify APRA's position on the independent certification requirements. APRA is finalising amendments to SPS 250 and SPG 250 and intends to issue these in the coming months with an effective date from 1 July 2022.

With respect to independent certification requirements, APRA intends:

- In addition to maintaining the requirement for independent certification for related party insurance arrangements, to include a provision in SPS 250 for APRA to require an RSE licensee to obtain an independent certification;
- To require that RSE licensees' insurance management frameworks include consideration of any contractual terms and business practices that may indicate conflicts and/or 'priority and privilege'; and
- To require consideration of whether any 'priority and privilege' provisions are affecting insurance outcomes for member as part of the Business Performance Review (BPR) and outcomes assessment.

Superannuation trustees should review its current insurance management, BPR and outcomes assessment processes to ensure that it is prepared for these changes.



Retirement Income Covenant

27 September 2021
Exposure Draft

[LINK TO DETAILS](#)

Treasury released exposure draft legislation and explanatory material which would implement the retirement income covenant. The exposure draft of *Treasury Laws Amendment (Retirement income covenant) Bill 2021* (Cth) would:

- Introduce a new covenant to section 52 requiring trustees to formulate, review regularly and give effect to a retirement income strategy that meets the requirements in a new section 52AA;
- Require trustees to take reasonable steps to gather the information necessary to inform the strategy; and
- Place documentation and disclosure requirements on trustees in relation to the strategy.

The new section 52AA would prescribe specific requirements in relation to the strategy, including that the strategy is for the benefit of the class of members that the trustee determines to be approaching retirement or retired.

In determining this class of members, the trustee may exclude beneficiaries who only hold a defined benefit interest which cannot be commuted.

Superannuation trustees should consider planning for the development and implementation of a retirement income strategy, which will be required to be in place by 1 July 2022.



Financial Accountability Regime

2 September 2021
Draft Legislation

[LINK TO DETAILS](#)

The Government has released for consultation the draft *Financial Accountability Regime (Consequential Amendments and Transitional Provisions) Bill 2021*.

The Bill follows the consultation on the draft [Financial Accountability Regime Bill 2021](#) and makes consequential amendments to various Commonwealth laws to establish the FAR, including amendments to the SIS Act to:

- ensure that the Regulator considers FAR in granting and imposing conditions on RSE licenses;
- expand the obligations of auditors and actuaries to provide superannuation entities or the Regulator information when there is likely to have been a breach of the law, to situations in which there have been breaches of the FAR;
- expand the ability for a court to disqualify an individual from being a superannuation trustee for breaching certain legislation to include breaches of the FAR;
- expand the ability for a court to order the disqualification of an individual from being an auditor or actuary for a superannuation entity for breaches of certain legislation, to include breaches of the FAR;
- expand the ability of APRA to direct the removal of an auditor or actuary for a superannuation entity, or direct a matter to an auditor or actuary's professional organisation for breaches of certain legislation to include breaches of the FAR; and
- expand the ability of a court to stop the payment of money to protect certain creditors for certain breaches of legislation to include breaches of the FAR.

Consultation closed on 17 September 2021.

Superannuation trustees should note the draft legislation, and closely monitor the passage of the two FAR related bills in Parliament.



TECHNICAL CHANGE AND UPDATES



Internal Dispute Resolution

2 – 28 September 2021
Updated Guidance

[LINK TO DETAILS](#)

ASIC published an updated Regulatory Guide RG 271 *Internal Dispute Resolution* and [ASIC Corporations, Credit and Superannuation \(Amendment\) Instrument 2021/753](#) that includes several technical and clarifying amendments arising from feedback from stakeholders. [A summary of changes to RG 271 was also published.](#)

Changes affecting superannuation trustees include:

- Paragraph 75 has been amended to correct a minor departure from the wording of s101 of the SIS Act. A note has also been added to provide some guidance on ASIC's interpretation of when complaints are likely to involve a decision of a trustee (or failure by a trustee to make a decision) relating to the complaint. This is relevant when considering whether written reasons are required (per s101(1)(d) of the SIS Act) for complaints resolved within 5 days of receipt.
- The words 'amend or' have been removed from paragraph 83(b), which deals with objections to death benefit distributions, to align the paragraph with the operation of s1056 of the Corporations Act.

ASIC also published [a summary of the results](#) from its voluntary survey of superannuation trustee preparedness for RG 271 identifying areas of concern: Governance (29% of trustees had not briefed their boards on their obligations under RG 271; Integration of objections to death benefit distributions into the Fund's IDR processes, data collection and complaints reporting; Response timeframes and barriers or risks across the business or in outsourcing arrangements; Systemic issue identification, ownership and reporting; and Data capture.

Superannuation trustees should review the changes to RG 271 and determine whether there are any impacts or any uplift of IDR processes and note ASIC's preparedness findings.



APRA Data Project

20 September 2021
Data Standards

[LINK TO DETAILS](#)

APRA has determined ten reporting standards developed under the first phase of its multi-year Superannuation Data Transformation. This includes expanding the collection to include all products and investment options, improved data on performance, fees and costs, asset allocation classifications, insurance arrangements, expenses and member demographics.

The reporting standards include minor amendments to the versions of the reporting standards APRA released as part of the response to consultation in March 2021. These minor amendments incorporate clarifications issued publicly as Frequently Asked Questions (FAQs).

APRA also published [additional FAQs](#) to provide guidance to RSE licensees on the reporting standards.

Superannuation Trustees should review the standards and additional FAQs.



Design and Distribution Obligations

15 September 2021
Treasury Update

[LINK TO DETAILS](#)

Leading up to the October 2021 commencement of the Design and Distribution Obligations (DDO) regime, Treasury received feedback from industry stakeholders and, consequently, intends to make a number of amendments to achieve its intended operation of these reforms. For many of these amendments, ASIC will provide temporary relief that gives effect to the Government's policy intention in the interim period before the legislative changes are made.

The updated proposed amendments include:

- Removing the requirement for distributors to report nil complaints or nil information;
- Clarify that where a PDS is given in the course of providing personal advice as required by law, this conduct is within the scope of excluded conduct; and
- Expand the employer exemption to ensure that employers are not regulated as distributors when providing a PDS for their default fund product to employees.

Superannuation trustees should note the changes and await a legislative instrument from ASIC giving temporary relief related to the issues above.



ATO Update

22 September 2021
Guidance

[LINK TO DETAILS](#)

The ATO issued a reminder to superannuation funds not to attach password protected documents within communications to the ATO.

The ATO is required by law to contact APRA funds who have sent unclaimed super money (USM) to the ATO for a client who is now deceased. This is to determine if there was a binding death nomination (BDN) on the account.

The ATO is contacting funds about this enquiry by email and have identified an issue where funds are replying to the request and including a password protected document. Any emails sent to the ATO containing a password protected document do not make it through as they get blocked by email servers for security reasons.

Superannuation trustees and external administrators should note the request from the ATO consider whether internal security protocols require review.



COVID Recontribution

3 September 2021
Guidance

[LINK TO DETAILS](#)

The ATO released further information regarding the re-contribution of funds withdrawn under the COVID-19 Early Release Scheme. This follows the release of guidance, FAQs and the approved form for use in August 2021.

The ATO previously announced that the re-contribution information will be provided via the Bulk Data Exchange. The ATO is still working through the requirements of the data file, however have confirmed that the following will be required for each data file lodged with the ATO:

- Super Fund ABN;
- Super Fund Name; and
- The file format will be CSV.

The data file name convention/format has yet to be confirmed.

The ATO intends to provide a detailed guide to assist funds to lodge the CSV file once they have confirmed specific data requirements.

Superannuation trustees should note the guidance and ensure that administrators are keeping up to date on any additional updates the ATO may issue.



Securities Lending

29 September 2021
Legislative Instrument

[LINK TO DETAILS](#)

ASIC released *ASIC Corporations (Securities Lending Arrangements) Instrument 2021/821* to provide relief to persons engaged in securities lending in relation to the substantial holdings provisions within Chapter 6C of the Corporations Act 2001. This relief is granted on substantially similar terms to *ASIC Class Order [CO 11/272]*, which was due to sunset on 1 October 2021 and has been repealed.

The purpose of the instrument is to make substantial holding disclosure by those parties involved in securities lending more practical and meaningful to the market.

ASIC approached several industry groups in July 2021 seeking feedback on a proposal to remake the relief.

Superannuation trustees involved in securities lending should ensure their internal investment teams and custodial service providers are aware of the change.



Compassionate release of super

16 September 2021
Guidance

[LINK TO DETAILS](#)

The ATO published an update to its originally published (on 23 August) Super news article *Compassionate release of super approval notification update*, where it advised it will be deploying an update to the Compassionate release of super (CRS) approval notifications sent to superfunds and administrators via the Online services for business portal.

This update was deployed on 23 September 2021 and will see the USI of the nominated superfund included in the PDF file name.

All PDFs issued by the ATO from 24 September 2021 should display the file as below, depending on the availability of USIs in ATO systems:

- USI available – CRS_[betid]_[usi].pdf
- USI not available - CRS_[betid]_[0].pdf

The ATO will be working with superfunds and administrators to ensure there are no issues with the deployment and encourages superfunds and administrators to check the update has occurred correctly on or after 24 September 2021.

Superannuation trustees should ensure that administrators are aware of this update and confirm that no issues have arisen since the 23 September deployment.



Super Enquiry Service

17 September 2021
Update

[LINK TO DETAILS](#)

The ATO released a further request for funds and administrators to voluntarily transition to the Super Enquiry Service (SES) by 1 October 2021. Although the ATO will continue to monitor the CRT mailbox, its preference is for funds and administrators seeking assistance to use SES, with the CRT mailbox used by entities who are unable to access the service or as a backup channel in case of a system outage.

If emails are still being sent to the Super CRT inbox from 1 October, the ATO may contact the fund or administrator to arrange onboarding to the SES.

In the near future, the ATO intends to use SES for ATO-initiated communications, add content to the knowledge base in SES for searching and an announcement banner will be added for the ATO to relay information to all SES users simultaneously.

Superannuation trustees should ensure their administrators are aware of this transition and have updated any relevant policies, procedures and processes.



GUIDANCE AND POLICY



Better Advice

29 September 2021
Consultation

[LINK TO DETAILS](#)

Treasury released for consultation exposure draft regulations and a legislative instrument underpinning the *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2021* that passed the House of Representatives in August and is currently before the Senate. The Bill is scheduled to commence on 1 January 2022.

The Government seeks feedback on:

- setting the criteria for when ASIC must refer matters to the single disciplinary body;
- specifying the administrative sanctions made against a financial adviser that must be included on the Financial Advisers Register;
- extending the deadline to complete the financial adviser exam to 30 September 2022 for financial advisers who have attempted the exam twice before 31 December 2021;
- proposing new fees for the financial adviser exam and registration of financial advisers from 1 January 2022; and
- outlining the registration, education and training requirements for financial advisers providing tax (financial) advice services.

Consultation closes on 15 October 2021.

Superannuation trustees should review the draft legislation and socialise with their advice teams to consider whether a submission to treasury is warranted.



Occupational Exclusions

2 September 2021
Consultation

[LINK TO DETAILS](#)

The Government is undertaking a review into determining the appropriateness of occupational exclusions in default insurance in MySuper products.

The objective of the consultation is to canvass views from interested parties on the extent of the problem arising from occupational exclusions for new members and for members changing jobs and what options, if any, may be required for changes to the current regulatory framework.

Stakeholder views are being sought on the following options:

- no change;
- strengthen disclosure of occupational exclusions;
- members retain their insurance coverage when they change occupations; and
- ban occupational exclusions.

The consultation also poses questions related to the prevalence of occupational exclusions, the level of occupational data available to trustees, the scope for standardising disclosure, benefits of occupational exclusions, implications on pricing, benefit design and claims.

The review will focus on default cover in respect of life and total and permanent disability insurance and not on insurance in excess of default cover, such as optional units, and income protection.

Responses to the consultation are requested by 14 October 2021.

Superannuation trustees should review the consultation and consider providing a response.



Anti-Hawking

23 September 2021
Regulatory Guide

[LINK TO DETAILS](#)

ASIC published an updated Regulatory Guide 38 *The Hawking Prohibition*, which reflects the reforms to the anti-hawking regime under the [Financial Sector Reform \(Hayne Royal Commission Response\) Act 2020](#) that commences on 5 October 2021. ASIC also published [Report REP 701](#) in response to submissions to its consultation on the updated regulatory guide.

Relevant to superannuation trustees, ASIC has clarified that "offerors, including superannuation trustees, are able to discuss products with consumers, and are able to provide information," including discussion about possible retirement options. Trustees are still prohibited from making unsolicited offers, requests or invitations in relation to financial products. However, "when superannuation trustees have a statutory obligation that requires them to make an offer, request or invitation to a consumer that they may do so without breaching the hawking prohibition."

Superannuation trustees should ensure that its member services team is aware of the updated guidance.



Breach Reporting

7 September 2021
Guidance

[LINK TO DETAILS](#)

ASIC issued a revised Regulatory Guide RG 78 *Breach reporting by AFS licensees and credit licensees*. Key changes to RG 78 include:

- Further information on what ASIC considers to be an "investigation";
- Addition of new examples about investigations, reportable situations about other licensees, and determining whether a breach may or may not be a "significant" breach of a core obligation;
- Superseded RG 78 will continue to provide guidance for AFS licensees on the transitional provisions in s1671A and 1671B of the Corporations Act;
- A detailed summary of core obligations;
- Changes to guidance and to both existing and new examples to reflect the changes to the law following the release of the [Financial Sector Reform \(Hayne Royal Commission Response—Breach Reporting and Remediation\) Regulations 2021](#);
- Guidance on when a breach of the IDR requirements may need to be reported to ASIC;
- New example on gross negligence; and
- Additional information on reporting to ASIC.

ASIC also published [INFO 259 Complying with the notify, investigate and remediate obligations](#), which sets out actions that must be taken by licensees to notify affected customers of a breach of the law, investigate the breach and remediate impacted customers.

ASIC has stated that it "will take a reasonable approach in the initial stages of these new obligations provided industry participants are using their best efforts to comply."

Superannuation trustees should review the revised RG 78 and ensure readiness for the new Breach Reporting regime.



Critical Infrastructure

29 September 2021
Committee Report

[LINK TO DETAILS](#)

The Parliamentary Joint Committee on Intelligence and Security has made 14 recommendations in relation to the *Security Legislation Amendment (Critical Infrastructure) Bill 2020* and Statutory Review of the Security of Critical Infrastructure Act 2018. The Committee has recommended that emergency powers be swiftly legislated in a standalone bill, with a second, separate bill to be introduced following further consultation.

Amongst its recommendations the Committee has proposed a split in the current proposed framework into two amended Bills:

- Bill One for rapid passage – to expand the critical infrastructure sectors covered by the Act, introduce government assistance measures to be used as a last resort in crisis scenarios as well as mandatory reporting obligations; and
- Bill Two for further consultation – including declarations of systems of national significance, enhanced cyber-security obligations and positive security obligations which are to be defined in delegated legislation.

Superannuation trustees should note this development and continue to monitor the status of this Bill as it has the potential to augment cyber security obligations currently imposed.



APRA Priorities

24 September 2021
Letter

[LINK TO DETAILS](#)

APRA wrote to industry to provide an interim update on its policy priorities after having reprioritised its policy agenda for the remainder of the year.

Superannuation-related updates include:

- In the fourth quarter of 2021, APRA will prioritise updating the superannuation standards for Insurance in Super and Investment Governance, ahead of a more comprehensive review of other key standards next year to ensure a sharper focus on the best financial interests duty;
- APRA plans to release final guidance on managing the financial risks of climate change and an Information Paper setting out APRA's framework for the use of macroprudential policy tools; and
- APRA will consult on Governance (CPS 510) and Risk Management (CPS 220) in 2022 with an expected effective date in 2024.

Superannuation trustees should note the update and ensure business readiness to review and implement changes as required.



Deed Execution

14 September 2021
Consultation

[LINK TO DETAILS](#)

The Government is consulting on the modernisation of document execution and is seeking feedback on how technology can be used to streamline the way statutory declarations and deeds are executed.

This builds on the June 2021 Council on Federal Financial Relations agreement to work closely with the states and territories towards a common approach to document execution and follows temporary amendments made by some jurisdictions in response to the COVID-19 pandemic.

The deadline for submissions is 8 October 2021.

Superannuation trustees should review the consultation and consider providing a response and/or submitting any relevant points to industry bodies for inclusion in the submission, if any.



Tax treatment of compensation

10 September 2021
Fact Sheet

[LINK TO DETAILS](#)

The ATO published information regarding the receipt of compensation from another provider and the potential tax implications for the fund.

A super fund may have the right to seek compensation if it entered into a legal contract or agreement with a financial services provider or insurance provider, paid the fees or premiums from fund assets, allocated the cost to the members, and:

- the financial service or advice was not provided;
- the advice was deficient; or
- the insurance premiums for death or disability insurance cover were overcharged.

The trustee of the fund needs to be aware of possible super, income tax and goods and services tax (GST) consequences. The consequences depend on the circumstances in which the compensation amounts are received.

The ATO also released a [Super Contribution Caps factsheet](#) for individuals which outlines the impact on the concessional contribution cap where an amount of compensation is received by the super fund and allocated to the individual's account. The ATO [website](#) has also been updated to outline the tax implications for an individual receiving compensation for inappropriate or insufficient advice.

Superannuation trustees should note the ATO's guidance and ensure this is reflected within administration systems, processes and member communications.



SFT Protocol

15 September 2021
Protocol

[LINK TO DETAILS](#)

The ATO issued an updated Successor Fund Transfer (SFT) protocol for superannuation funds undertaking an SFT.

The updated information includes:

- SuperMatch customer identification requirements,
- blackout periods,
- pension chapter has been renamed to Income Streams,
- re-reporting obligations,
- contribution splitting, and
- no-TFN contributions income tax offset.

Superannuation trustees and external administrators should note the update, especially if considering or currently performing an SFT.



ENFORCEMENT AND CASE LAW



ASIC v Colonial First State

7 September 2021
Court Order

[LINK TO DETAILS](#)

The Federal Court found that Colonial First State Investments Limited (Colonial), as trustee for the Colonial First State FirstChoice Superannuation Trust (FirstChoice Fund), made false or misleading representations and engaged in misleading and deceptive conduct when communicating with members. The conduct relates to communications made to members regarding the MySuper product within the FirstChoice Fund.

This included telling members that recent legislative changes required Colonial to contact them and obtain an investment direction to stay in the FirstChoice Fund. Colonial also failed to tell members that if Colonial did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.

The Court declared that between 18 March 2014 and 21 July 2016, Colonial:

- engaged in misleading and deceptive conduct by sending 12,911 letters to members containing misleading representations about investment directions;
- made false or misleading representations and engaged in misleading and deceptive conduct in 70 calls to members about investment directions;
- failed to provide a 'general advice warning,' as required by the Corporations Act, in 17 calls to members; and
- failed to do all things necessary to ensure the financial services covered by its financial services licence were provided efficiently, honestly and fairly.

The Court declared the misleading representations may have encouraged members to stay with the FirstChoice Fund rather than move to the MySuper product.



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