

LEGAL, REGULATORY & POLICY UPDATE

PENSIONS AND SUPERANNUATION

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- Investment Governance
- Internal Dispute Resolution
- Breach Reporting
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- Design and Distribution Obligations

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IN BRIEF

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.

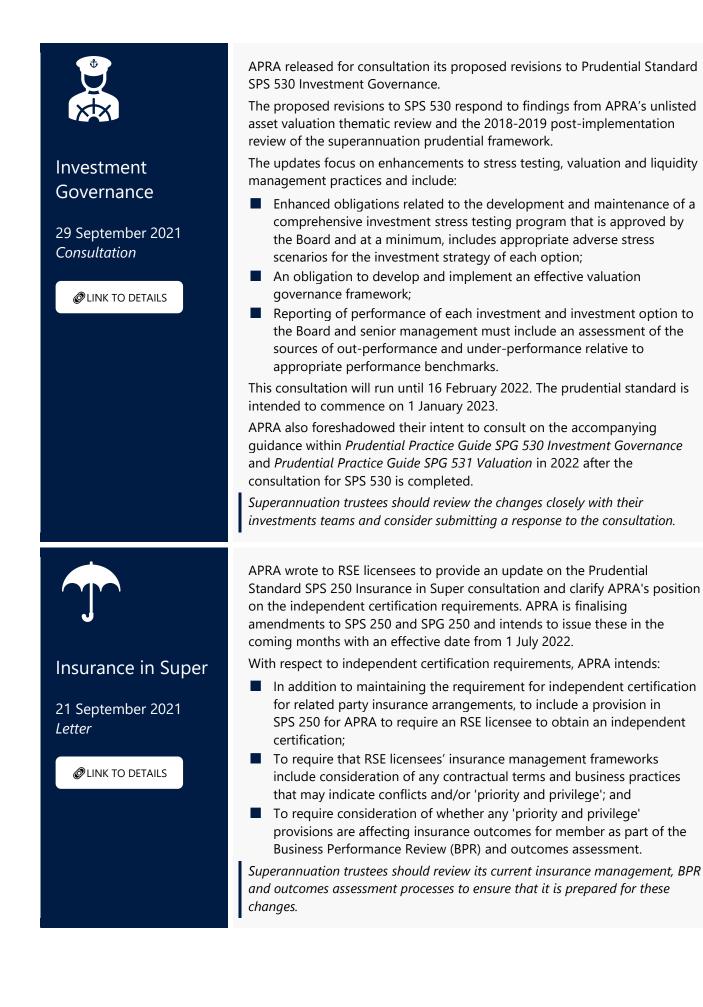
The following superannuation related bills remain before Parliament:

- 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

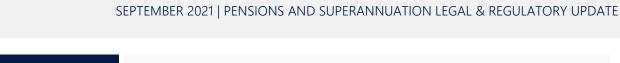
Superannuation trustees should remain apprised of bill status to ensure preparedness for any required change implementation, including ensuring adequate planning and resources are in place. The 2020 Measures No. 4 Bill is unlikely to proceed, as the changes were legislated by the 2021 No. 6 Act.

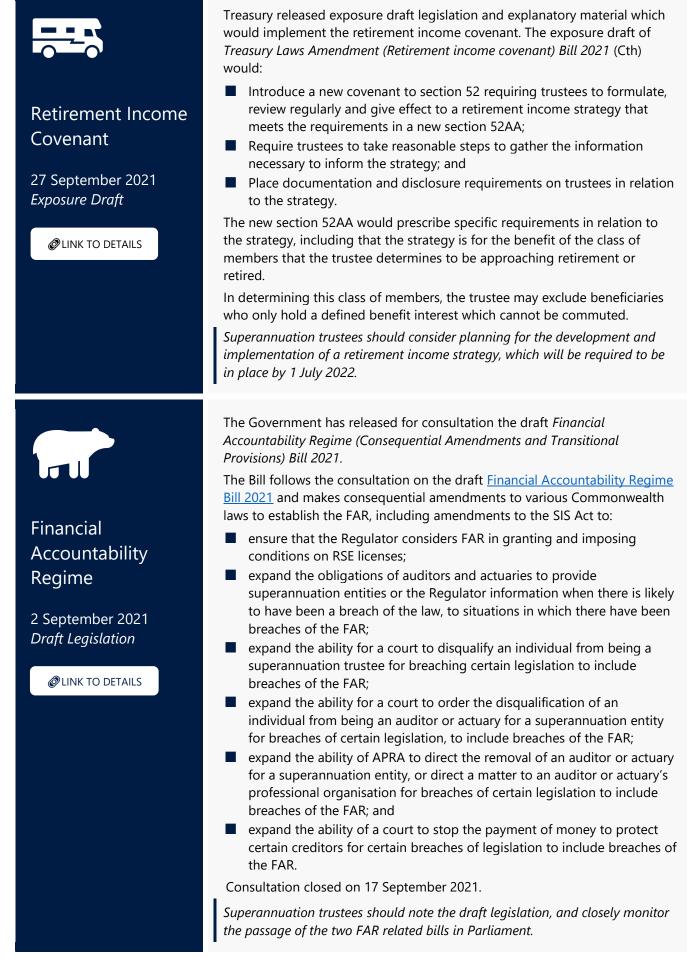


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TECHNICAL CHANGE AND UPDATES



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 <u>a summary of the results</u> 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 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 <u>additional FAQs</u> to provide guidance to RSE licensees on the reporting standards.

Superannuation Trustees should review the standards and additional FAQs.



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Design and Distribution Obligations

15 September 2021 Treasury Update

CLINK 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*

CINK TO DETAILS



COVID Recontribution

3 September 2021 *Guidance*

DINK 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.

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.



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Securities Lending

29 September 2021 Legislative Instrument

WLINK TO DETAILS



Compassionate release of super

16 September 2021 Guidance

LINK TO DETAILS



Super Enquiry Service

17 September 2021 *Update*

CINK 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.

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.

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.

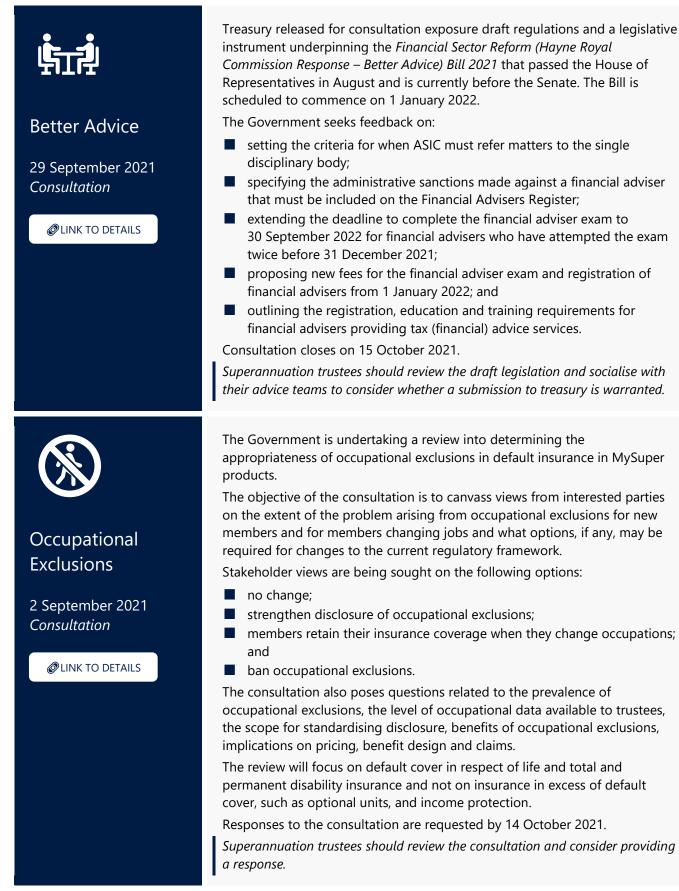
In the near future, the ATO intends to use SES for ATO-initiated communications, add content to the knowledge base in SES for searching and an announcement banner will be added for the ATO to relay information to all SES users simultaneously.

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



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GUIDANCE AND POLICY





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Anti-Hawking

23 September 2021 *Regulatory Guide*

WLINK TO DETAILS



Breach Reporting

7 September 2021 *Guidance*

WLINK 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 <u>Report REP 701</u> 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.

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 <u>Financial Sector</u> <u>Reform (Hayne Royal Commission Response—Breach Reporting and</u> <u>Remediation) Regulations 2021;</u>
- 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.

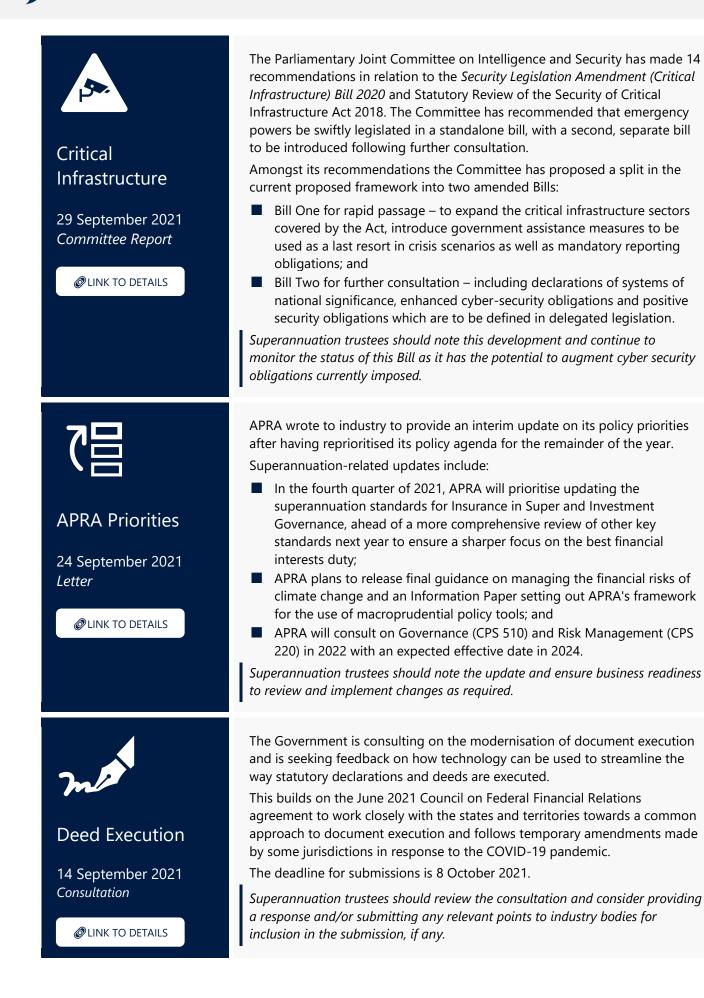
ASIC also published <u>INFO 259 Complying with the notify, investigate and</u> <u>remediate obligations</u>, which sets out actions that must be taken by licensees to notify affected customers of a breach of the law, investigate the breach and remediate impacted customers.

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."

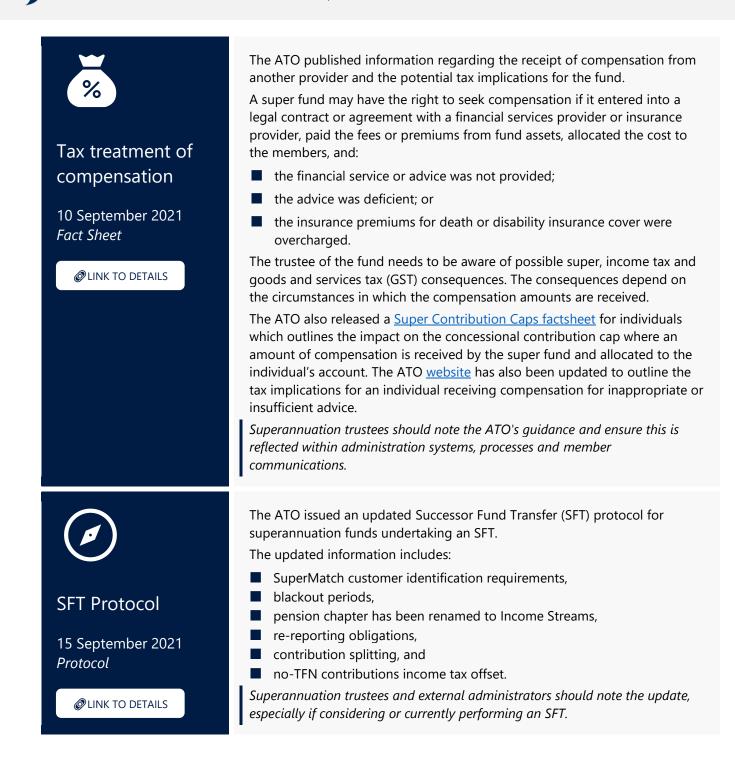
Superannuation trustees should review the revised RG 78 and ensure readiness for the new Breach Reporting regime.



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ENFORCEMENT AND CASE LAW



ASIC v Colonial First State

7 September 2021 *Court Order*

WLINK 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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