

LEGAL, REGULATORY & POLICY UPDATE

PENSIONS AND SUPERANNUATION

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IN BRIEF

*There was a flurry of regulatory and legislative activity before the year finished, with significant changes to the regulation of **proxy advice** being unexpectedly made by Treasury without prior release or consultation on an exposure draft.*

*APRA focused its attention on organisational and systemic resilience, with drafts released for consultation of new cross industry prudential standards on **financial resilience** and **resolution planning**.*

December also saw several superannuation trustees rush to Court seeking judicial advice in relation to deed amendments to facilitate the remuneration of the trustee as a control on risks amplified by recent changes to section 56 and 57 of the SIS Act.

MAJOR UPDATES



Commonwealth Parliament

December 2021
Parliamentary Business

[LINK TO DETAILS](#)

Commonwealth Parliament had its final sitting for the calendar year from 29 November to 2 December and will not resume until 8 February 2022. The 2022-23 Budget will be delivered on 29 March 2022.

The following bills received Royal Assent:

- [Security Legislation Amendment \(Critical Infrastructure\) Bill 2020](#)
- [Treasury Laws Amendment \(2021 Measures No. 5\) Bill 2021](#)

The following superannuation related bills remain before Parliament:

- [Financial Accountability Regime Bill 2021](#)
- [Financial Sector Reform \(Hayne Royal Commission Response No. 3\) Bill 2021](#)
- [Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021](#)
- [Financial Services Compensation Scheme of Last Resort Levy Bill 2021](#)
- [Financial Services Compensation Scheme of Last Resort Levy \(Collection\) Bill 2021](#)
- [Treasury Laws Amendment \(Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest\) Bill 2021](#)
- [Treasury Laws Amendment \(2021 Measures No. 7\) Bill 2021](#)
- [Treasury Laws Amendment \(2020 Measures No. 4\) Bill 2020](#)
- [Corporations Amendment \(Meetings and Documents\) Bill 2021](#)
- [Superannuation Guarantee \(Administration\) Amendment Bill 2021](#)

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.



Stewardship & Proxy Advice

16 December 2021
Regulations

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021* were made, following a limited consultation on related themes (however, there was no consultation on the draft regulations).

The Regulations amend the *Corporations Regulations 2001* to:

- specify circumstances in which voting advice is proxy advice (a financial service); and
- impose obligations on financial services licensees who provide proxy advice to provide any proxy advice to the entity that is the subject of the advice on the same day it is provided to the client; and
- impose strict independence obligations of providers of proxy advice, which could restrict movement of employees between superannuation trustees and proxy advisers.

The Regulations also amend the *Superannuation Industry (Supervision) Regulations 1994* to expand the range of information that RSE licensees must make publicly available on their website to include a summary of how voting rights attached to listed company shares are exercised.

The amendments apply as early as 7 February 2022 in relation to when proxy advice is a financial service and when proxy advice must be provided to the entity subject of the proxy advice and the 1 July 2022 in relation to making information publicly available.

The amendments relating to the independence obligation for financial services licensees apply concerning proxy advice provided by a licensee on or after 1 July 2022 and under a contract executed or renewed on or after the commencement of the Regulations.

Superannuation trustees should consider engaging with proxy advice providers to make any necessary adjustments to service contracts, ideally prior to 7 February to preserve flexibility over the transition period for the independence obligation. Work should also commence to ensure the required information is available to comply with the changes to the website disclosure obligations.



Crisis Preparedness

2 December 2021
Consultation

[LINK TO DETAILS](#)

APRA released a discussion paper and two draft prudential standards (CPS 190 Financial Contingency Planning and CPS 900 Resolution Planning). CPS 190 is directed at ensuring the financial resilience of regulated entities, and CPS 900 is directed at circumstances where APRA's resolution powers would be relied on to prevent or manage the failure of a regulated entity.

The new prudential standards are expected to be implemented under a staged approach with CPS 190 coming into effect on 1 January 2025 for the superannuation industry and CPS 900 on 1 January 2024.

The proposed CPS 190 would ensure that RSE licensees are better placed to provide for the best financial interest of members by requiring RSE licensees to prepare for scenarios that threaten their viability.

The proposed CPS 900 requires entities to take steps, where appropriate, to ensure they can be resolved by APRA in an orderly manner. It will be targeted at larger and more complex entities and those that provide functions that are critical to the economy.

Superannuation trustees should consider the draft standards, paying particular attention to risks associated with restrictions on a trustee's right to indemnify itself from trust assets being amplified by recent changes to section 56-57 of the SIS Act and any controls relied on to ensure financial resilience.



Audit and Related Matters

10 December 2021
Consultation

[LINK TO DETAILS](#)

APRA released for consultation its proposed amendments to Prudential Standard SPS 310 Audit and Related Matters (SPS 310) to align with changes to APRA's reporting standards for superannuation.

This comes after a relatively high number of data resubmissions leading into the initial Your Future, Your Super performance test. APRA stated in its letter to RSE licensees and RSE auditors that "[i]t is crucial that RSE licensees develop and maintain systems, procedures and internal controls to ensure a robust approach to data management and reliable reporting to APRA." APRA intends to update SPS 310 to:

- remove the requirement to review seven reporting standards because the data collected will (after a short period of parallel reporting) be superseded by new reporting standards;
- leave the requirements applying to six existing reporting standards unchanged; and
- require assurance over six new reporting standards. Of these, the review must cover specified data items within three reporting standards.

APRA will consult on these amendments for three months, with submissions due by 11 March 2022.

Superannuation trustees should review APRA's letter and consider submitting feedback directly to APRA or through one of the industry associations.



Cyber Security

8 December 2021
Rules

[LINK TO DETAILS](#)

The Minister for Home Affairs made the *Security of Critical Infrastructure (Definitions) Rules (LIN 21/039) 2021* under section 61 of the *Security of Critical Infrastructure Act 2018*. The Act provides the framework for managing risks relating to critical infrastructure assets, as recently amended by the *Security Legislation Amendment (Critical Infrastructure) Act 2021*.

Section 12J of the Act defines "critical superannuation asset" and provides that the rules may prescribe requirements for an RSE to be critical to the security and reliability of the financial services and markets sector. Section 14 of the Rules prescribes that an RSE is critical if the RSE holds assets over \$20 billion. Therefore, an asset is a *critical superannuation asset* if: it is owned or operated by a registrable superannuation entity that holds assets over \$20 billion; and it is used in connection with the operation of a superannuation fund.

The Department of Home Affairs is also consulting on the [Security Legislation Amendment \(Critical Infrastructure Protection\) Bill 2022](#) which proposes a framework for risk management programs, declarations of systems of national significance and enhanced cyber security obligations.

Superannuation trustees should review the rules in conjunction with the Act to determine any potential impact on current cyber and information security practices, as those RSEs that meet the critical superannuation asset definition may have additional reporting obligations. Additionally, trustees should review the consultation and consider submitting a response either individually or through an industry organisation, as the proposed bill will impact trustees of RSEs that are critical superannuation assets and may impose overlapping obligations to those under CPS 234 currently.



TECHNICAL CHANGES AND UPDATES



SFT Planning

10 December 2021
ATO News

[LINK TO DETAILS](#)

The ATO published detail related to superannuation trustees who are planning a successor fund transfer. The ATO has called out that it has "seen an increase in SFTs recently and incorrect reporting may result in downstream impacts for: individuals' superannuation and taxation position; and the ATO's ability to effectively administer superannuation products, caps, and taxes.

To improve the integrity of member reporting and ultimately provide a better client experience, the ATO have published the SFT protocol document and checklist to assist funds planning or undertaking an SFT.

Funds are encouraged to contact the ATO client relationship team for help and support prior to an SFT by lodging an enquiry using the Super Enquiry Service.

Superannuation trustees should review the ATO's publication and consider engaging with the ATO earlier rather than later if planning an SFT.



Transfer balance caps and DB income streams

12 December 2021
Exposure Draft

[LINK TO DETAILS](#)

Treasury released an exposure draft Bill, Regulations and Rules along with corresponding explanatory materials for consultation. The material covers minor and technical changes to the Treasury portfolio laws with the intent of addressing unintended consequences.

The exposure draft Regulations outline amendments to the *Superannuation Industry (Supervision) Regulations 1994*, *Retirement Savings Account Regulations 1997* and *Income Tax Assessment (1997 Act) Regulations 2021* in relation to commutation rules in order to resolve excess transfer balance amounts.

The Regulations would address unintended outcomes arising from the inability of recipients of certain non-capped defined benefit income streams (that were commenced on or after 1 July 2017) to address excess transfer balance amounts.

Superannuation trustees should note the proposed changes and liaise with the administration function or service provider to ensure that consideration is given to any changes to transfer balance cap related reporting.



Misc. Regulations

16 December 2021
Regulations

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Miscellaneous and Technical Amendments No. 2) Regulations 2021* were made. The Regulations:

- Exclude certain products from the periodic statement content requirements in the Regulation 7.9.20AA of the *Corporations Regulations 2001*;
- Extend to approved deposit funds and pooled superannuation trusts the allowance to provide fund information to interest holders in the entity by publishing it on the entity's website; and
- Amend the *Superannuation (Unclaimed Money and Lost Members) Regulations 2019* to ensure the recovery of overpayments operates properly and is consistent with the other recovery of overpayment provisions.

Superannuation trustees should review the regulations and consider whether there is any impact on current practices.



APRA Data Project

3 December 2021
FAQs

[LINK TO DETAILS](#)

APRA continues to publish new and updated FAQs related to its Superannuation Data Transformation Project. This month, APRA released:

- New Historical Data FAQs: 1.0, 1.1 and 1.2 relating to the data that is required for the historical data collection, due dates and allocations in APRA Connect.
- General FAQs: 1.19 and 1.20 relating to reporting ad-hoc submissions and the process for resubmitting a reporting form in APRA Connect.
- FAQ 550.0 relating to the way in which foreign exchange derivatives held for the purpose of gaining exposure to underlying assets should be reported.

Superannuation trustees should review the additional FAQs, and continue to work with APRA as the data project progresses into the second and third phases.



Better Advice Regulations

16 December 2021
Regulations

[LINK TO DETAILS](#)

The *Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021* were made to support the amendments in the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (the Better Advice Act), which received Royal Assent on 28 October 2021.

The regulations amend the *Australian Securities and Investments Commission Regulations 2001*, the *Corporations Regulations 2001* and the *Tax Agent Services Regulations 2009* to:

- prescribe criteria for when ASIC must convene a Financial Services and Credit Panel (FSCP);
- set allowances for witnesses summoned to appear at a hearing of an FSCP;
- provide that specified civil penalty provisions are not taken to be significant (and therefore may not be reportable) under the breach reporting regime;
- prescribe sanctions that must be included on the Register of Relevant Providers;
- provide for the Minister to be able to delegate the functions and powers to approve foreign qualifications to officers in the Department of Treasury;
- extend the deadline for certain existing providers to pass the financial adviser exam;
- set requirements (including eligibility criteria, fees and transitional provisions) for non-relevant providers (individuals, companies and partnerships) who provide tax (financial) advice services to be registered as tax agents; and
- make consequential amendments to the *Tax Agent Services Regulations 2009* to remove references to tax (financial) advisers and recognised tax (financial) adviser associations.

Superannuation trustees should ensure that all their financial advice teams are aware of, and ensure processes and procedures are in place to facilitate compliance with the new regulations.



Foreign Financial Service Providers

20 December 2021
Draft Legislation

[LINK TO DETAILS](#)

The Government is seeking stakeholder views on the first tranche of exposure draft legislation to provide regulatory relief for Foreign Financial Service Providers (FFSPs).

The Exposure Draft legislation seeks to introduce:

- the comparable regulator exemption, which exempts FFSPs authorised to provide financial services in a comparable regime from the requirement to be licensed when dealing with wholesale clients;
- the professional investor exemption, which exempts FFSPs that provide financial services from outside Australia to professional investors from the requirement to be licensed in Australia; and
- an exemption from the fit and proper person assessment to fast track the licensing process for FFSPs authorised to provide financial services in a comparable regulatory regime.

Superannuation trustees should note the draft legislation.



Western Australia de facto splitting regulations

16 December 2021
Legislative instrument

[LINK TO DETAILS](#)

The *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020* (Cth) was recently passed, which gives effect to a referral of power from Western Australia to the Commonwealth in respect of superannuation matters in family law proceedings for separating de facto couples in Western Australia.

The *Superannuation Legislation Amendment (Western Australia De Facto Superannuation Splitting) Regulations 2021* (Cth) (the instrument) amends eight Commonwealth regulations to ensure consistency with the 21 amended Acts.

The instrument ensures that any provisions in regulations which deal with superannuation splitting under the *Family Law Act* (FLA) also apply to superannuation splits made by de facto couples in Western Australia in accordance with Part VIIIIC of the FLA.

Superannuation trustees should ensure that any member guidance material in relation to family law and superannuation is aligned with the changes and ensure that member service functions or service providers are aware of the changes.



Pension loan scheme

15 December 2021
Announcement

[LINK TO DETAILS](#)

Services Australia has announced changes to the Pension Loan Scheme, which will be renamed to become the Home Equity Access Scheme. The introduction of the *Social Services and Other Legislation Amendment (Pension Loans Scheme Enhancements) Bill* seeks to give effect to these changes.

The scheme supports the retirement income of eligible retirees by providing access to a voluntary non-taxable fortnightly loan from the State, using Australian real estate as security for the loan.

It also announced a reduction to the interest rate from 4.50 per cent to 3.95 per cent per annum, which will take effect from 1 January 2022.

Superannuation trustees should ensure that any financial advice function or provider is aware of the changes, and that any member guidance of information which refers to the scheme is updated to refer to the scheme under its new name.



Co-contribution regulations

20 December 2021
Draft regulations

[LINK TO DETAILS](#)

The *Minister for Superannuation, Financial Services and Digital Economy* released for consultation the draft *Superannuation (Government Co-contribution for Low Income Earners) Regulations 2022*.

The draft regulations remake the existing *Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004* which are due to sunset on 1 April 2022. The draft regulations improve the 2004 Regulations by omitting redundant provisions, simplifying language and restructuring provisions for ease of navigation.

The only substantive changes in the draft regulations are:

- amending the definition of an eligible account to receive super co-contribution payments so that it excludes those which only provide terminal medical condition benefits in addition to the existing exclusion on accounts which provide only death or incapacity benefits; and
- clarifying the operation of section 7 relating to where a Government co-contribution is to be directed in specific circumstances. The draft regulations ensure that only one item will apply in the event of multiple circumstances being applicable.

The consultation period ends on 14 January 2022.

Superannuation trustees should assess the impact of the substantive changes on administrative practices and systems, particularly in relation to eligibility of "insurance only" type accounts.



Modern slavery

29 November 2021
Legislation amended

[LINK TO DETAILS](#)

The NSW Parliament passed amendments to the *Modern Slavery Act 2018 (NSW)* (NSW Act). The amendments address concerns that the NSW Act was inconsistent with, or duplicates, the obligations in the Commonwealth *Modern Slavery Act*, as well as clarifying the role of the Anti-slavery Commissioner and strengthening slavery offences. The amended NSW Act will now commence on 1 January 2022.

The substantive changes included:

- removing reporting requirements in the NSW Act which duplicate and overlap with the Commonwealth scheme;
- removing provisions regarding modern slavery risk orders, which would have allowed courts wide discretion to prohibit modern slavery offenders from contacting their victims or taking other actions;
- inserting a provision for reviewing the Act twelve months after its commencement; and
- amending other legislation relating to defamation, victims' rights and support, child abuse material and child forced marriage.

Superannuation trustees should consider making minor changes to their Modern Slavery policies to reflect the operation of the NSW Act in addition to the Commonwealth Act. Importantly, there is no new reporting obligation.



CCIV Regulations

21 December 2021
Draft Legislation

[LINK TO DETAILS](#)

Treasury released draft *Corporate Collective Investment Vehicle (CCIV) regime regulations and rules* for public consultation. The draft regulations follow the passage of the *Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021* (the Bill) on 25 November 2021. The Bill would establish a new corporate structure for funds management in Australia, to be available from 1 July 2022.

The draft regulations and rules support the framework established by the Bill by introducing details such as:

- financial product disclosure particulars;
- requirements for financial reporting, record-keeping and custody of CCIV assets; and
- arrangements for cross-investment within CCIVs (including voting processes and restrictions on circular investment) and other rules for managing a CCIV's share capital.

Importantly, the regulations and rules don't address the Retirement Income Covenant, which would also be legislated by the Bill. The consultation period closes on 21 January 2022.

Superannuation trustees should ensure that the investment committee and function are aware of the introduction of CCIVs as an alternative legal structure which may be used directly or indirectly by trustees to invest.



Audit finding communication

2 December 2021
Consultation

[LINK TO DETAILS](#)

ASIC is seeking feedback on its proposals to change its approach to the communication of audit quality findings identified from ASIC's review of audit files to the directors of the entities audited.

Consultation Paper 352 Communicating audit findings to directors, audit committees or senior managers (CP 352) outlines ASIC's proposal to communicate the findings directly to directors on a routine basis rather than communicating findings on the current exception basis and the circumstances in which that would apply.

ASIC's current guidance is contained in Regulatory Guide RG 260 *Communicating findings from audit files to directors, audit committees and senior managers* (RG 260).

Superannuation trustees should note the proposed changes and may wish to communicate these changes to trustee directors on commencement.



GUIDANCE AND POLICY



Default Income Protection

10 December 2021
Communication

[LINK TO DETAILS](#)

ASIC issued a media release in relation to its review of the practices of the trustees of five large funds that provided default income protection insurance on an opt-out basis to their members, which together provided IP insurance to approximately 2 million MySuper member accounts as of June 2021.

According to ASIC, its review "highlighted that trustees need to examine outcomes for their members and proactively consider whether they are delivering value for money through their insurance in superannuation offering." Key findings include:

- Variation in the types of income that were offset against IP benefits: Trustees offset different combinations of alternate income;
- Disclosures about offset clauses were incomplete and difficult to understand: trustees were not proactively giving their members clear explanations about when insurance benefits would or would not be paid as a result of offsets;
- No evidence that the trustees had rigorously analysed how their offset clauses affected members: offset clauses observed by ASIC have raised questions about whether trustees should be doing more to identify if there are groups of members who may be getting low value from default IP insurance;

ASIC's concern is not that offset clauses exist, but the potential for insurance premiums to inappropriately erode member super balances if the clauses mean that members get very little value for their default insurance. To address the identified issues, ASIC recommended that trustees: obtain and analyse data to assess how offsets affect their members; improve the extent and quality of disclosures to members; and clearly explain to members how offset clauses work.

Next year, ASIC will undertake a surveillance on the progress made by industry more broadly in insurance in superannuation.

Superannuation trustees should review ASIC's findings and their IP insurance terms, and consider undertaking the activities recommended by ASIC as related to IP Offset Clauses.



Breach Reporting

6 December 2021
Guidance

[LINK TO DETAILS](#)

ASIC has updated its website with further guidance for trustees in relation to the new breach reporting regime that commenced on 1 October 2021.

Key points include that effective 1 October 2021, superannuation trustees that hold an AFS licence should lodge reports about reportable situations to ASIC using the prescribed form in the ASIC Regulatory Portal. Alternatively, for matters that need to be reported to both APRA and ASIC, superannuation trustees may satisfy their obligations by lodging the one report containing all the required information to APRA under the dual reporting framework.

The page includes a summary of the breach reporting changes and information relating to: reporting to APRA and ASIC; completing the prescribed reportable situations form; and reporting of investigations

Superannuation trustees should review ASIC's website to ensure compliance with the new breach reporting regime.



CEO Roundtable

14 December 2021
Notes

[LINK TO DETAILS](#)

APRA and ASIC hosted the second Superannuation CEO Roundtable with a focus on financial resilience in superannuation and data.

APRA's recent discussion paper *Strengthening Financial Resilience in Superannuation* and the recent court applications in relation to charging fees for remuneration were the initial focus for the meeting. The regulators stressed that trustees who are seeking court input must plan for contingency scenarios should a court decision not be favourable. In response, CEOs outlined strategies to ensure they have access to adequate financial resources to fund their business operations, and to pay for penalties should they arise.

APRA and ASIC also outlined the need for high quality data to support a well-functioning superannuation system in Australia and the need for trustees to focus on, and improve, data governance evidenced by unacceptable recent regulatory data resubmissions by a range of trustees.

Superannuation trustees should review the notes and consider what they are doing in terms of ensuring financial resilience ahead of the indemnity prohibitions coming into effect in January 2022 and similarly in terms of data uplift.



APRA/ASIC Engagement

December 2021
Update

[LINK TO DETAILS](#)

APRA and ASIC published their annual update on their engagement.

The update recognised that both agencies have worked together to deliver long-term benefits through a number of significant law reforms, with the Financial Accountability Regime being of particular focus.

As related to superannuation, APRA and ASIC worked together with respect to the implementation of the Member Outcomes obligations and Design and Distribution obligations to ensure that trustees understood the interaction between the two sets of obligations and to also undertake strategic work to strengthen cooperation on enforcement matters.

The update also pointed out that information sharing continues to be central to engagement between the two regulators, and over the next 12 months, APRA and ASIC will continue to collaborate.

No further action is required from superannuation trustees.



AML/CTF

13 December 2021
Guidance

[LINK TO DETAILS](#)

AUSTRAC released insights and tips from the compliance report with a focus on the three top tips to help reporting entities meet their AML/CTF obligations: (1) ensure ML/TF risk assessment and staff training are up to date; (2) strengthen how the business identifies and manages high risk customers; and (3) use a strong transaction monitoring program to detect suspicious activity. A preview of the questions in the 2021 compliance report has also been published to help entities prepare for the report which opens on 1 January 2022 and must be submitted by 31 March 2022.

AUSTRAC also published [new financial crime guides](#) that will help entities to identify and stop criminal activity: Financial Crime Guide – Preventing the exploitation of emergency and disaster support payments and Financial Crime Guide – Preventing misuse and criminal communication through payment test fields.

Superannuation trustees should review the material published by AUSTRAC.



Heatmaps

December 2021
Update

[LINK TO DETAILS](#)

APRA published the Choice and MySuper Heatmaps along with an Insights Paper which illustrates the key insights from the data in the heatmaps, including the improvement of outcomes delivered to members and highlighting areas of poor performance.

MySuper Heatmap: Further improvement in investment outcomes to members is required. 31 products out of 69 with a 7-year history or 45% of MySuper products have performed below APRA's heatmap benchmarks. Fees are trending down, converging to the median, however fees of the most expensive products can reduce further.

Choice Heatmap: More than 60% of investment options had returns less than APRA's heatmap benchmarks, with 25% of options delivering significantly poorer returns and performance of choice products varying considerably more than MySuper products. Fees and costs are also considerably higher than MySuper products, without an obvious benefit to members.

Superannuation trustees should review the heatmaps and the insights paper and consider whether product improvements are required to uplift the delivery of member outcomes.



Financial Advice

16 December 2021
Consultations &
Guidance

[LINK TO DETAILS](#)

Treasury released draft terms of reference for an "Advice Review" that will consider whether: measures that have been implemented by the government, regulators and financial services entities have improved the quality of financial advice; further reforms or other changes are needed; and any measures or obligations are redundant or can be streamlined.

On the same day, Treasury also released a [Policy Paper](#) seeking feedback on the education standards and whether they remain fit for purpose including by ensuring that they adequately recognise on-the-job experience of advisers. Unless the standards made by FASEA are amended or replaced, the existing standards continue to set the requirements for financial advisers.

ASIC also launched its [Financial Advice Hub](#) for advice licensees and advisers, which is a centralised financial advice webpage for ASIC guidance, regulatory content and updates.

Superannuation trustees should review the Advice Review Terms of Reference and the Policy Paper to consider whether a comment is warranted in terms of the impact each may have on advice in superannuation.



Climate-related Disclosure

14 December 2021
Media Release

[LINK TO DETAILS](#)

In November the International Financial Reporting Standards (IFRS) Foundation Trustees announced the establishment of the International Sustainability Standards Board (ISSB) which will develop global baseline climate and sustainability disclosure standards.

ASIC welcomed the establishment of the ISSB and encourages listed companies to use the TCFD recommendations as the primary framework for voluntary climate change-related disclosures.

The International Organisation of Securities Commission (IOSCO) Sustainable Finance Taskforce (of which ASIC is a member) recently examined corporate sustainability disclosure practices globally and found that investor demand for transparent, comparable sustainability related information is often not currently being met.

Superannuation trustees should note this development.



ENFORCEMENT ACTIVITY



ASIC v OnePath

15 December 2021
Civil Penalty Proceedings

[LINK TO DETAILS](#)

ASIC commenced civil penalty proceedings in the Federal Court against superannuation trustee OnePath Custodians Pty Ltd (OnePath) for allegedly charging fees for no service and making false and misleading representations to fund members.

ASIC alleges that OnePath incorrectly charged over \$4 million in fees to more than 18,000 fund members when it was not entitled to do so. Specifically, ASIC alleges that OnePath charged financial advice fees to members who have been de-linked from their employer-sponsored super plans; sent these members letters and annual statement until about May 2020 which failed to inform them of their rights regarding adviser service fees, including their right to terminate the fees; and incorrectly charged financial adviser fees and sent statement representing to members that it was entitled to deduct the fees from member accounts.

ASIC claims that OnePath made false and misleading representations about its right to continue charging fees to these members, engaged in misleading or deceptive conduct and breached its obligations as a financial services licensee to provide services efficiently, honestly and fairly.



ASIC v Avanteos Investments

08 December 2021
Criminal Charges

[LINK TO DETAILS](#)

ASIC has brought criminal charges against Avanteos Investments (which was a subsidiary of the Commonwealth Bank of Australia) for charging deceased superannuation members. Avanteos has pleaded guilty to 18 criminal charges relating to failures to update defective disclosure statements and continuing to charge fees to deceased superannuation members.

According to the ASIC media release, in early 2016, Avanteos received legal advice that it did not have authority to deduct fees from superannuation members after their death; Avanteos did not update its disclosure statements and continued deducting these fees until May 2018; and during the period 6 January 2016 to 1 May 2018, disclosure statements for 18 superannuation products issued by Avanteos were defective, as they failed to tell superannuation fund members they would be charged adviser service fees after their death.

This is the first criminal prosecution under section 1021J(1) for failure to take reasonable steps to ensure that defective disclosure documents are not distributed or are not accompanied by information that corrects the deficiency.

The matter is being prosecuted by the CDPP after an investigation and referral by ASIC.



CASE LAW



Re QSuper Board [2021] QSC 276

27 October 2021
Judicial advice

[LINK TO DETAILS](#)

The QSuper Board sought judicial advice from the Supreme Court of Queensland in relation to a proposed amendment to the trust deed that would grant the trustee the power to charge, and retain for its own benefit, remuneration which it determines to be reasonable and to deduct such remuneration from the assets of the fund.

Amending the trust deed in this manner was considered a conflict between the trustee's duties owed to members and its own interest in deducting fees. In such circumstances, the trustee can seek judicial advice to endorse the proposed course of action and provide the amendment with legal protection.

The amendments were necessitated by progressive broadening of the long-held limitations on a trustee's right to indemnify itself from trust assets in the law of equity, which prohibit a trustee from indemnifying itself from trust assets to meet a liability that has arisen because of a breach of trust.

The *Member Outcomes Act* and *Strengthening Corporate and Financial Sector Penalties Act* of 2019 saw existing limitations extended to civil penalties under the SIS Act. The *Hayne Royal Commission Response Act* of 2020 amended section 56 and 57 of the SIS Act to extend the prohibition on indemnification to liabilities arising from pecuniary penalty imposed on the trustee under any law of the Commonwealth (however, it should be noted that the Hayne Royal Commission made no such recommendation).

Importantly, the amendment did not seek to give the trustee the right to charge and retain for its own benefit such a fee. While the exercise of a power attracts and is subject to duties under the section 52 SIS covenants and general law, the exercise of a right is not subject to these duties (including the recently amended best financial interests duty).

This means that QSuper's determination and deduction of remuneration for its own benefit would be an exercise of a power that is subject to these duties and protections.

The importance of this aspect of QSuper's application is evident in Kelly J's judgement which emphasises the concern that such a provision "might be described as a "blank cheque" indemnification and exemption".

Kelly J ruled that the fact that the remuneration power would apply to the possibility of future liabilities, rather than in response to an existing liability, and the possibility that the amount of fees would not correlate to liabilities was determinative in justifying such remuneration to have the effect of extinguishing the liability of the trustee.

Therefore, the Court did not find that the remuneration power was in effect an indemnity and therefore contrary to the law. APRA supported this proposition in its submission.

The court left open the question of how the powers might be exercised in future, and as an exercise of a power, the charging and deduction of such remuneration would be subject to the trustee's trustees at the point at which it is exercised.

The court also found that the power would also be subject to the doctrine of powers and must be exercised for the purpose which it was given. The purpose of the remuneration power is ostensibly one of maintaining financial resilience in the trustee, something the court also held to be "clearly in the best financial interests of members".



APRA provided written submissions, which seemed to suggest that documented arrangement governing the future exercise of such a remuneration power would be desirable. APRA expressed a concern that the broad discretion in the remuneration power and absence of any documented policy in relation to its future exercise of the power might not satisfy the duty of prudence and best financial interests of member covenant.

In advising that the proposed amendments were justifiable and reasonable, the court ruled that the absence of such documented policy should not prevent the amendment from being made.

The decision was also significant in that Kelly J observed in obiter that changes to the best financial interests duty did more than clarify the existing operation of the law.



Other section 56 related judicial advice hearings

December 2021
Judicial advice

[LINK TO DETAILS](#)

There were several other applications by superannuation trustees for judicial advice related to measures addressing the risks presented by the changes to section 56-57 which commenced on 1 January 2022.

- [Care Super Pty Ltd](#) sought judicial advice in the Supreme Court of Victoria concerning the exercise of an existing power to charge fees for services, to deduct a fee to be used to create a reserve of the trustee's personal balance sheet to manage the risks associated with prohibitions on indemnification. The advice sought was not provided, largely due to the narrow purposes considered by the board in determining the fee not being within the ambit of the power. However, a [subsequent application](#) saw the advice sought being provided. The decision is also notable in that it addresses the construction of the trust instrument where the executed versions of amendments cannot be located.
- The trustee of [NGS Super](#) sought judicial advice in the Supreme Court of NSW on the amendment of the existing remuneration power under its deed. The Court advised that the trustee was justified in amending the deed to clarify and broaden the purposes of the remuneration power.
- The trustee of [HESTA sought judicial advice](#) in the Supreme Court of Victoria in relation to proposed amendments to the trust deed which provide the power to deduct a limited fee from the fund, on the condition of making certain public disclosures in relation to such fees. The Court provided the advice sought, providing the necessary protection for the proposed amendment.
- Similar advice was provided to the trustees of [Spirit Super](#) and [Maritime Super](#), that proposed amendments to the respective trust deeds were justified and reasonable.



Re. HESTA

08 December 2021
Criminal Charges

[LINK TO DETAILS](#)

ASIC has brought criminal charges against Avanteos Investments (which was a subsidiary of the Commonwealth Bank of Australia) for charging deceased superannuation members. Avanteos has pleaded guilty to 18 criminal charges relating to failures to update defective disclosure statements and continuing to charge fees to deceased superannuation 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.

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

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CONTACT US

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