

LEGAL, REGULATORY & POLICY UPDATE

PENSIONS AND SUPERANNUATION

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IN BRIEF

*In contrast to January, which was the quietest month for legislative and regulatory change for superannuation funds in a long time, February saw the traffic jam of superannuation related bills before Parliament clear up slightly with the passage of three Bills – **Retirement Income Covenant, Budget Measures and Digital Execution of Documents and Meetings**. To offset the clearance, four new Bills were also introduced, including **Financial Reporting and Auditing** and the second **Critical Infrastructure Bill**.*

*The controversial **Proxy Advice Regulations** were disallowed and Regulators, also back from the holidays, continued to issue further guidance in the form of FAQs and articles, including **How to manage compliance risk and stay out of the headlines**.*

MAJOR UPDATES



Commonwealth Parliament

February 2022
Parliamentary Business

[LINK TO DETAILS](#)

Commonwealth Parliament sat between 8-10 February and 14-17 February 2022. The 2022-23 Budget will be delivered on 29 March 2022.

The following superannuation related bills were introduced:

- [Security Legislation Amendment \(Critical Infrastructure Protection\) Bill 2022](#)
- [Treasury Laws Amendment \(Streamlining and Improving Economic Outcomes for Australians\) Bill 2022](#)
- [Treasury Laws Amendment \(Enhancing Tax Integrity and Supporting Business Investment\) Bill 2022](#)
- [Treasury Laws Amendment \(Modernising Business Communications\) Bill](#)

The following superannuation related bills received Royal Assent:

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

Superannuation trustees should remain apprised of bill status to ensure preparedness for any required change implementation.



Proxy Advice Regulations

10 February 2022
Senate disallowance

[LINK TO DETAILS](#)

The Senate disallowed the *Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021*. The Regulations, only registered on 17 December 2021, would have required RSE licensees to expand the information disclosed on the fund website relating to how voting rights attached to shares in listed companies were exercised and how proxy advice was used in any votes.

The Regulations would have also imposed additional obligations on financial services licensees who provide voting advice that is proxy advice, including a requirement to be independent of their client and to provide a copy of proxy advice to the subject of the advice on the same day the advice is given to the client.

The disallowance motion, brought forth by Senator Rex Patrick, was foreshadowed soon after the Regulations were introduced, but could not proceed until Parliament resumed for 2022. A number of the reforms had already taken effect, however the majority were not scheduled until 1 July 2022.

Superannuation trustees should note the repeal of the Regulations and immediately review any implementation activity planned for the introduction of the reforms.



Retirement Income Covenant

22 February 2022
Royal Assent

[LINK TO DETAILS](#)

The *Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021* received royal assent. Schedule 9 of the Bill amends the SIS Act to insert a new covenant that requires superannuation trustees to develop a retirement income strategy for beneficiaries who are retired or approaching retirement; take reasonable steps to gather the information necessary to inform the retirement income strategy; record the strategy; and make it publicly available.

The strategy must address how the trustee will assist beneficiaries to achieve and balance the objective to: maximise expected retirement income over the period of retirement; manage longevity, investment, inflation and any other risks to the sustainability and stability of retirement income; and have flexible access to expected funds.

Trustees have until 1 July 2022 to formulate and publish a summary of their retirement income strategy.

Superannuation trustees should review the legislation and any progress made to formulate a retirement income strategy.



Digital Execution

22 February 2022
Royal Assent

[LINK TO DETAILS](#)

The *Corporations Amendment (Meetings and Documents) Bill 2021* received Royal Assent, which makes permanent changes introduced in the [Treasury Laws Amendment \(2021 Measures No. 1\) Act 2021](#). The Bill amends the *Corporations Act* to allow companies to execute documents in a flexible and technology neutral manner and allows agents to make, vary, ratify or discharge contracts and execute documents on behalf of companies.

The Bill also makes permanent changes related to member meetings.

The Government also introduced the [Treasury Laws Amendment \(Modernising Business Communications\) Bill](#) that establishes a global communications regime for documents sent under the *Corporations Act*.

Superannuation trustees should update any relevant policies and procedures.



Financial Reporting & Auditing

17 February 2022
Bill introduced

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022* was introduced into Parliament.

Schedule 2 introduces financial reporting and auditing requirements for RSEs consistent with the requirements for public companies and registered schemes.

Under the financial reporting requirements an RSE licensee must: prepare and lodge financial reports for each financial year with ASIC and make certain reports and information publicly available (similar to the existing requirements under the SIS Act).

Additionally, under the auditing requirements an RSE licensee must appoint an individual auditor, firm or company to conduct an audit of the RSE and for the auditor to: prepare an audit report of the RSE's financial report; report contraventions of the *Corporations Act* to ASIC; meet auditor independence and rotation requirements and lodge and publish auditor transparency reports, where required.

The Bill also requires that RSE Licensees keep financial and accounting records for 7 years rather than the currently required 5 years.

The reforms commence for the income year beginning on or after 1 July 2023.

Superannuation trustees should review the new legislation and make any changes to policies or procedures to align with the new requirements.



Budget Measures

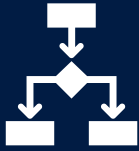
22 February 2022
Royal Assent

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Bill 2021* received Royal Assent. The Bill legislates the following reforms announced in the Budget:

- removal of the monthly minimum threshold for salary and wages to count towards the superannuation guarantee;
- first home super saver scheme maximum releasable amount increase from \$30,000 to \$50,000;
- reduced eligibility age for downsizer contributions to 60 and above;
- repeal of the work test for superannuation contributions for those under 75, except when claiming a deduction for personal contributions;
- segregation of current pension assets; and
- extension of temporary full expensing of depreciating assets.

Superannuation trustees should commence updating member disclosure documents and administration systems and processes to reflect the changes.



Member Outcomes

24 February 2022
FAQ

[LINK TO DETAILS](#)

APRA updated its FAQs and published new FAQs 6.1-6.2 related to the outcomes assessment under section 52(9) of the SIS Act.

FAQ 6.1 clarifies that an RSE licensee should align their outcomes assessment and business performance review cycles so that the RSE licensee is using up-to-date assessment when undertaking the business performance review and considers that a gap of more than six months risks not enabling an up-to-date business performance review and optimisation of the value of the process.

FAQ 6.2 clarifies that an entity must undertake a business performance review within 12 months of the previous review, but in practice an RSE licensee may bring the review forward to align with its business planning cycle.

Superannuation trustees should review the updated FAQs and determine whether any updates to its processes are required.



Critical Infrastructure Bill

10 February 2022
Bill introduced

[LINK TO DETAILS](#)

The *Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022* was introduced into Parliament which seeks to introduce an obligation for responsible entities with critical infrastructure assets to have a risk management program and to create enhanced cyber security obligations.

Under the enhanced cyber security obligations, the Secretary of Home Affairs may require the responsible entity for a system of national significance to undertake one or more cyber security activities, including the development of cyber security incident response plans, cyber security exercises to build cyber preparedness, vulnerability assessments to identify vulnerabilities for remediation, and the provision of system information to build Australia's situational awareness. The Minister will be able to declare a critical infrastructure asset to be a system of national significance.

The Bill also amends the definition of critical superannuation assets to clarify such assets are owned or operated by an RSE licensee rather than an RSE.

Superannuation trustees should remain apprised of the Bill's status, its impact and overlap with CPS 234 requirements and any decision by the Minister of Home Affairs to exempt trustees from certain requirements as a result of the existing CPS 234 regime.



APRA Data Publications

18 February 2022
Consultation

[LINK TO DETAILS](#)

After the finalisation of Phase 1 of the APRA Data Transformation Project which saw the implementation of 10 new reporting standards, APRA is consulting on plans to expand the breadth and granularity of superannuation data it publishes.

The consultation paper outlines APRA's proposals to, starting in June 2022:

- publish new aggregate industry, fund-level and product-level statistics, including improved data on insurance arrangements, expenses, member demographics and asset allocation classifications;
- deem most of the data collected in Phase 1 as non-confidential;
- introduce two types of datasets for users to access published statistics – key metrics datasets without formatting; and granular datasets for sophisticated users.

Superannuation trustees should review the consultation paper, particularly the data APRA has proposed to deem as non-confidential and consider providing a response to the consultation.



TECHNICAL CHANGES AND UPDATES



Disclosure

18 February 2022
Consultation

[LINK TO DETAILS](#)

ASIC released Consultation Paper 358 *Remaking ASIC relief on PDSs, superannuation dashboards and FSGs*, outlining ASIC's proposal to consolidate the relief contained in seven legislative instruments into three new instruments without major substantive change.

ASIC is seeking feedback on its proposals to remake:

- in a single new instrument, relief in class orders relating to Product Disclosure Statement (PDS) in-use notices for employer sponsored superannuation and product dashboard disclosure;
- in a single new instrument, relief in instruments that relate to shorter PDSs and PDS obligations of superannuation trustees, IDPS operators and responsible entities of IDPS-like schemes; and
- as a new instrument, a class order relating to Financial Services Guides (FSGs) in time critical situations.

Superannuation trustees should review the consultation and consider whether they have any feedback to submit to ASIC (individually or as part of an industry association submission).



APRA Data Project

21 February 2022
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: 1.6-1.10 relating to reporting historical asset allocation where the structure of the MySuper product has changed; reporting for a historical period should be submitted for each period in the relevant return; investment options not meeting the definition of trustee directed product the entire time; two reporting dates and provision of dummy data.
- New FAQ: SRS 605 u relating to the code of the exchange on which any exchange-traded assets are listed to be reported and not the ticker for the individual security.

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



ATO Instrument

22 February 2022
Draft instrument

[LINK TO DETAILS](#)

The ATO issued draft legislative instrument LI 2022/D6 *Taxation Administration - Payment Summary Deferral: Employment Termination and Departing Australia Superannuation Payments Deferral 2022* which commences 1 April 2022. It replaces *Taxation Administration Act 1953 - Pay As You Go (PAYG) Withholding - Payment summary deferral - Employment termination and departing Australia superannuation payments (F2012L00584)*, registered on 2 March 2012 which is due to sunset.

The instrument sets the date that a payment summary must be given to the ATO to 14 August following the financial year in which the payment was made.

Superannuation trustees should note the change.



Co-contribution Regulations

17 February 2022
Regulations Made

[LINK TO DETAILS](#)

After consultation, the *Superannuation (Government Co-contribution for Low Income Earners) Regulations 2022* were made.

The 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 regulations ensure that only one item will apply in the event of multiple circumstances being applicable.

Superannuation trustees should note the changes.



Misc Amendments

9 February 2022
Bill introduced

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022* was introduced into Parliament. The superannuation related amendments include:

- clarification that the requirement to make product dashboards available publicly does not apply to SMSFs;
- exemption of certain commutations of market-linked and life expectancy income streams.

Superannuation trustees should note the changes.



GUIDANCE AND POLICY



Consumer Data Right

14 February 2022
Review

[LINK TO DETAILS](#)

Following the release of its [report on outcomes from the Consumer Data Right \(CDR\) Strategic Assessment](#), which identified 'Open Finance' (which includes superannuation) as the next priority area to expand the CDR, the Government announced the commencement of a statutory review on the operation of the CDR.

The Review will explore the extent to which implementation of the CDR statutory framework supports the core policy objectives of driving value for consumers, increasing competition within designated sectors, and driving innovation across the data services sector.

The review will focus on implementation of Open Banking and take into account other relevant CDR developments, such as the Digital Economy Strategy, the Government response to the final report of the Inquiry into Future Directions for the Consumer Data Right, the Consumer Data Right Strategic Assessment, and international developments.

The review will be completed in July 2022.

Superannuation trustees should note the Review.



Compliance Risk

17 February 2022
Insight

[LINK TO DETAILS](#)

APRA published *How to manage compliance risk and stay out of the headlines*. The article covers, amongst other things, APRA's:

- view that compliance risk relates to an organisation's ability to comply with the laws, rules, regulations and standards (both external and internal) which govern its operations – including voluntary industry standards and codes of conduct that an organisation elects to comply with – and the consequences that may flow if it fails to do so;
- approach to compliance risk, specifically that it is essential that compliance risk management remains a priority for senior management and boards;
- consideration that an entity's compliance risk management processes to understand how the entity captures and maintains its obligations, and ensures adherence to those obligations;
- key observations to date that entities need to have a clearly defined approach to managing compliance risk, established processes to support the compliance risk management practices and clear accountability for managing compliance risk;
- continued focus on better practice for compliance risk management.

Superannuation trustees should compare its approach to compliance risk management to that suggested by APRA and determine whether any changes are required.



ASIC Update

3 February 2022
Update

[LINK TO DETAILS](#)

ASIC issued its quarterly update for October to December 2021. Superannuation related activity included:

- writing to trustees of registrable superannuation entities urging them to review their whistleblower policies to ensure they comply with the law;
- releasing updated information for employers and trustees on changes affecting the distribution of super products as a result of the DDO reforms (in 2021-22 ASIC will conduct a thematic review on how trustees use employers to distribute products);
- reminding trustees to examine outcomes for members (in 2022 ASIC will conduct surveillance on the progress made by industry more broadly in insurance in super).

No further action is required.



Productivity Commission

7 February 2022
Review

[LINK TO DETAILS](#)

The Government tasked the Productivity Commission to perform its second five-yearly review of Australia's productivity performance, as a follow up to its Shifting the Dial report in 2017. The report is due by 7 February 2023.

The scope of the enquiry is broad, but includes:

- Analyse Australia's productivity performance in both the market and non-market sectors, including an assessment of the settings for productive investment in human and physical capital and how they can be improved to lift productivity.
- Identify forces shaping Australia's productivity challenge as a result of the COVID-19 pandemic and policy response.
- Consider the opportunities created for improvements in productivity as a result of Australia's COVID-19 experience, especially through changes in Australia's labour markets, delivery of services (including retail, health and education) and digital adoption.
- Identify priority sectors for reform (including but not limited to data and digital innovation and workforce skills) and benchmark Australian priority sectors against international comparators to quantify the required improvement.
- Examine the factors that may have affected productivity growth, including domestic and global factors and an assessment of the impact of major policy changes, if relevant.
- Prioritise and quantify the benefit of potential policy changes to improve Australian economic performance and the wellbeing of Australians by supporting greater productivity growth to set out a roadmap for reform.
- Revisit key recommendations and themes from the previous five yearly review in light of the above, where relevant.

Superannuation trustees should note the report and consider engaging in public consultations as they arise.



CASE LAW AND ENFORCEMENT ACTIVITY



AFCA Authority

27 January 2022

[LINK TO DETAILS](#)

The Federal Court issued its decision in *MetLife Insurance Limited v Australian Financial Complaints Authority* [2022] FCA 23.

The case related to complaints made to AFCA, which AFCA determined against the insurer. MetLife argued that AFCA had no authority to determine the complaints because they were not "complaints relating to superannuation."

In reviewing the arguments put forward by MetLife and AFCA as related to section 1053 detailing when complaints relating to superannuation can be made under the AFCA scheme, the Court held that AFCA had jurisdiction or authority to make a determination in respect of the complaints under relevant statutory provisions and the AFCA Rules. The Court held that "[t]he phrase 'a complaint relating to superannuation under the AFCA Scheme' means a complaint that relates to superannuation in the sense that it seeks to invoke the particular statutory authority conferred by [the *Corporations Act*]."



RI Advice Group

17 January 2022

Civil Penalty Proceedings

[LINK TO DETAILS](#)

The Federal Court ordered RI Advice Group Pty Ltd to pay a \$6 million penalty for failing to take reasonable steps to ensure that its authorised representative provided appropriate financial advice, acted in his clients' best interests and put clients' interests ahead of his own.

The Court found that RI Advice had failed to comply with its obligations as a financial services licensee.

Justice Moshinsky of the Federal Court found that RI Advice, did not have adequate processes to identify when advisers were avoiding internal advice quality checks or were recommending non-approved financial products. Although RI Advice's conduct was not deliberate and it had paid compensation to the clients of its authorised representative, the Court said its breaches of the law were serious and sustained and the monitoring flaws should have been apparent to RI Advice.



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

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