

# LEGAL, REGULATORY & POLICY UPDATE

## PENSIONS AND SUPERANNUATION

### INSIDE THIS EDITION

- Bills lapse
- Investment switching
- Whistleblower policies
- Financial advice relief
- Unpaid super guarantee



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### IN BRIEF

*With the calling of the election, the House of Representatives was prorogued and all bills before it lapsed, including the bills relating to the **Financial Accountability Regime**, the **Compensation Scheme of Last Resort** and the uplift of **financial reporting and auditing requirements** commensurate with those of public companies. Depending on the outcome of the election we may see these bills reintroduced to the 48<sup>th</sup> Parliament.*

*APRA sent a letter to all regulated entities outlining risk management expectations relating to **crypto assets** and ASIC issued a warning to regulated entities that their whistleblower policy may not comply with the latest updates to the **whistleblower regime**.*

## MAJOR UPDATES



Commonwealth  
Parliament

April 2022  
Parliamentary Business

[LINK TO DETAILS](#)

The election was called on 11 April 2022, meaning that parliament was prorogued and the House of Representatives dissolved. As a result, the following superannuation-related Bills before parliament have lapsed and must be reintroduced in order to be passed.

- [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](#)
- [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](#)
- [Superannuation Guarantee \(Administration\) Amendment Bill 2021](#)

The following superannuation related bills remain before the Senate (and consideration may be resumed provided such a message is received from the House of Representatives):

- [Treasury Laws Amendment \(2021 Measures No. 7\) Bill 2021](#)
- [Treasury Laws Amendment \(2020 Measures No. 4\) Bill 2020](#)



## Investment Switching

6 April 2022  
Media Release

[LINK TO DETAILS](#)

After releasing results from its surveillance of conflicts management arrangements related to investment switching, where ASIC found a lack of oversight and control measures, ASIC has written to 23 trustees who were reviewed, outlining its concerns and requesting that they take steps to improve existing policies and procedures.

In response to ASIC's concerns, trustees have committed to implementing a range of changes to improve arrangements for managing conflicts, including updating policies and practices, increasing board-level engagement, staff awareness and undertaking an independent review of the trustee's broader conflicts management frameworks.

Based on the evidence obtained during our surveillance, ASIC is satisfied no further action is warranted against any individuals in relation to the identified transactions.

ASIC will continue to work with APRA on ensuring trustees have appropriate policies and procedures in place to manage possible conflicts of interest.

*Superannuation trustees should consider reviewing their conflicts management frameworks to ensure that investment switching activities are sufficiently covered.*



## Super Guarantee

29 April 2022  
Report

[LINK TO DETAILS](#)

The Australian National Audit Office issued *Addressing Superannuation Guarantee Non-Compliance* – a report that details the findings from the independent performance audit of the ATO, providing assurance about the effectiveness of ATO activities aimed at fostering participation in the superannuation system.

The report found that the ATO's:

- Activities in addressing Superannuation Guarantee non-compliance are partly effective;
- Risk-based Superannuation Guarantee framework is partly effective in that the risk rating for unpaid SG is lower than the ATO risk framework would indicate if consideration of risk to revenue was applied;
- Compliance activities are partly effective in achieving greater employer compliance with SG obligations. They have had a small influence on reducing the Superannuation Guarantee gap (an estimate of non-compliance) over time;
- Compliance activities continue to be mainly corrective and reactive.

Three recommendations were made of which two were wholly agreed by the ATO and the third agreed with qualification: (1) implement the proposed preventative approach to SG compliance (agreed); (2) assess performance measures against Public Governance, Performance and Accountability Rule 2014 and enhance public SG performance information by setting targets for measures and including explanation for performance results (agreed with qualification); (3) maximise the benefit to employees' superannuation funds through more use of enforcement and debt recovery powers, amongst other things (agreed).

*Superannuation trustees should note the report.*



## TECHNICAL CHANGES AND UPDATES



### Caps and Thresholds

11 April 2022  
*Regulations*

[LINK TO DETAILS](#)

While the concessional and non-concessional contributions caps and the transfer balance cap have not been indexed, the ATO has published the indexed caps and thresholds for 2022-23:

- Low rate cap amount, which is the limit set on the amount of taxable components of a super lump sum that can receive a lower (or nil) rate of tax increased from \$225,000 to \$230,000;
- Maximum super contribution base increases from \$58,920 to \$60,220;
- Government co-contribution income thresholds increased from \$41,112 to \$42,016 for the lower income threshold and \$56,112 to \$57,016 for the higher income threshold; and
- CGT cap amount from \$1.615 million to \$1.65 million.

*Superannuation trustees should note the changes and ensure that administration functions are also aware.*



### Super Splitting

1 April 2022  
*Announcement*

[LINK TO DETAILS](#)

The Government announced that parties to family law property proceedings can apply to family law court registries to request their former partner's superannuation information, held by the Australian Taxation Office (ATO). Information about how to make an application is available on the websites of the [Federal Circuit and Family Court of Australia](#), the [Family Court of Western Australia](#), and the [Australian Taxation Office](#).

Additionally, the Western Australian Government has introduced the [Family Court Amendment Bill 2022](#) which makes the necessary amendments for super splitting by Western Australia de facto couples.

*Superannuation trustees should monitor these developments to ensure that any changes required in administration processes are made in a timely manner.*



### COVID-19 Advice Relief

7 April 2022  
*Media Release*

[LINK TO DETAILS](#)

ASIC confirmed that it will allow the temporary relief in [ASIC Corporations \(COVID-19—Advice-related Relief\) Instrument 2021/268](#) to be automatically repealed on 15 April 2022.

The instrument extended the relief initially introduced in April 2020, allowing financial advisers to provide a record of advice, rather than a statement of advice, to existing clients requiring financial advice due to the impacts of the COVID-19 pandemic. The relief also provided financial advisers with additional time to give their clients a time-critical statement of advice.

ASIC undertook consultation to understand the effects of the relief and does not consider that the current response to COVID-19 requires that the relief be extended.

*Superannuation trustees should make sure that advice teams are aware of the cessation of the Covid-19 related relief.*



## Income Stream Commutations

29 March 2022  
*Regulations*

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Allowing Commutation of Certain Income Streams) Regulations 2022* were made.

The Regulations add exceptions to the commutation rules in the SIS Regulations and the RSA Regulations that enable individuals who were previously recipients of a capped defined benefit income stream (including a person who was previously a recipient of a lifetime annuity or lifetime pension) and commuted a lump sum to directly purchase an affected product on or after 1 July 2017 to commute up to the amount that they are in excess of the transfer balance cap from the commenced income stream. Previously, the exceptions did not allow such commutations to occur.

*Superannuation trustees should note the change and consider whether there is any impact on members and administration processes.*



## Margining and Derivatives

8 April 2022  
*Prudential Standard*

[LINK TO DETAILS](#)

APRA made Banking, Insurance, Life Insurance and Superannuation (prudential standard) determination No. 1 of 2022 (the instrument), which revokes *Prudential Standard CPS 226 Margining and Risk Mitigation for Non-Centrally Cleared Derivatives* made under Banking, Insurance, Life Insurance and Superannuation (prudential standard) determination No. 1 of 2020, and determines a new *Prudential Standard CPS 226 Margining and Risk Mitigation for Non-Centrally Cleared Derivatives (CPS 226)*.

In the new version of CPS 226, the list of foreign bodies contained in Attachment D has been updated to include the Prudential Regulation Authority and the Financial Conduct Authority, both in the United Kingdom. This change is in response to new regulatory jurisdictions resulting from the United Kingdom's withdrawal from the European Union.

The new version of CPS 226 also makes a minor change to update an out-of-date reference.

*Superannuation trustees should note the change.*



## Balance after SFT

19 April 2022  
*Reminder*

[LINK TO DETAILS](#)

The ATO has issued a reminder to APRA-regulated funds to report account balances after a successor fund transfer. As the last 30 June date is used for the ATO's other calculations like total super balance, the ATO has advised trustees to not reuse that date, but rather any other date.

If the account balance is not reported promptly after an SFT, it may be 12 months before members can see the balance in their successor fund, the ATO warns.

The ATO also reminds trustees of the following reporting obligations: (1) report a 30 June annual balance on or before 31 October following the end of the relevant financial year for any account that was open as of this date; and (2) report member account information through the member account attribute service (MAAS) and the Australian business number (ABN) and ensure that the unique superannuation identifier (USI) and member account identifier reported in the MATS is identical to those reported through MAAS for the member account.

*Superannuation trustees should note the reminder and ensure that SFT project and administration teams are aware of the requirements.*



## GUIDANCE AND POLICY



### Whistleblower Policies

1 April 2022  
Article

[LINK TO DETAILS](#)

ASIC published *Blowing the whistle*, an article warning regulated entities that their whistleblower policy may not comply with the latest updates to the whistleblower regime.

After allowing a period of time for companies to adapt to the 2019 reforms, ASIC conducted a review of 102 whistleblower policies throughout 2020 to assess the extent of any gaps between the legal requirements and how policies are responding to them. Most fell short, with the most prevalent and concerning deficiencies identified as incomplete or inaccurate information and obsolete, out-of-date policies.

ASIC continues to monitor compliance with the whistleblower policy requirements and the handling of whistleblower disclosures. The article confirms that where ASIC identifies non-compliance, it will consider using the full range of regulatory tools available to it, including enforcement action.

*Superannuation trustees should ensure that whistleblower policies and oversight systems are up to date. ASIC has confirmed that it will review whistleblower programs from a sample of companies this year.*



### Work Test

24 March 2022  
Guidance

[LINK TO DETAILS](#)

The ATO has issued guidance on what the repeal of the work test for voluntary super contributions affects members and funds.

From 1 July 2022, members under 75 years old you can make or receive personal superannuation contributions and salary sacrificed contributions (within your existing contribution cap limits) without needing to meet the work test.

Trustees will no longer have to apply the work test at the time they accept the contribution from their members, nor validate the work test has been met when receiving a [Notice of intent to claim or vary a personal super contribution deduction](#) as the ATO will be administering the work test obligations when the individual lodges their income tax return. However, Funds will still need to administer the Notice of Intent to claim or vary a deduction and acknowledge receipt of the Notice if the member is eligible.

*Superannuation trustees should note the change and ensure that appropriate changes to administration processes and procedures are made.*



### Unclaimed super and lost member

19 April 2022  
Guidance

[LINK TO DETAILS](#)

The ATO has added a page to its website on unclaimed super and lost member reporting obligations. The page also covers the requirements associated with section 20C notices related to former temporary residents.

Funds must complete all fields in the data standard correctly to ensure successful processing. According to the ATO, funds should review each unclaimed money outcome response (USMOR) to confirm the data message was successful. An unsuccessful USMOR provides details of the reason for the rejection so funds can correct the data message and re-lodge. Non-responses should be followed up through the Super Enquiry Service.

The page confirms that if funds are unable to meet their obligations, they can request a deferral using Super Enquiry Service.

*Superannuation trustees should make sure that administration services teams are aware of the ATO's note and understand the reporting obligations.*



## ASIC Quarterly Update

28 April 2022  
Update

[LINK TO DETAILS](#)

ASIC issued its quarterly update, which provides an update on ASIC's work undertaken between 1 January and 31 March 2022.

The following superannuation-related work was undertaken:

- ASIC and APRA issued a joint letter on the implementation of the retirement income covenant;
- Issued a warning to remind superannuation fund members to seek advice from a licensed financial adviser before agreeing to transfer their superannuation out of a regulated fund into an SMSF;
- Released *Consultation Paper 360 Corporate collective investment vehicles: Preparing for the commencement of the new regime* (CP 360); and
- Focused enforcement action on areas of greatest harm, including fees for no service and breach reporting failures.

*Superannuation trustees should note the update.*



## Crypto assets

21 April 2022  
Guidance

[LINK TO DETAILS](#)

APRA sent a letter setting out its initial risk management expectations for all regulated entities that engage in activities associated with crypto assets and a policy roadmap for the period ahead.

APRA expects that regulated entities will:

- Conduct appropriate due diligence and a comprehensive risk assessment before engaging in activities associated with crypto assets, and understand and have actions in place to mitigate risks;
- Consider *SPS 231 Outsourcing* when relying on a third party; and
- Apply robust risk management controls (with a high-level summary of potential prudential risks to be considered for specific activities, including investments in crypto assets, provided by APRA).

In terms of its roadmap, APRA plans to, amongst other things, progress new and revised requirements for operational risk management, covering control effectiveness, business continuity and service provider management with a draft prudential standard released for consultation in mid-2022.

The letter states that regulated entities should engage with their responsible supervisor if they are undertaking activities associated with crypto assets.

*Superannuation trustees that invest or plan to invest in crypto assets should consider whether appropriate risk management plans are in place.*



## Data Security

06 April 2022  
Consultation

[LINK TO DETAILS](#)

Just prior to the termination of Parliament, the Government released a discussion paper on data security as part of its ongoing development of Australia's National Data Security Action Plan.

The paper provides an update on the Government's data security initiatives and seeks to, amongst other things, explore with industry on how the government and business can position itself to meet data security expectations, now and into the future; consider how data security responsibilities are best assigned to keep data safe; and an open discussion on how Government, businesses and individuals can share responsibility for data security in the future.

*Superannuation trustees should review the paper, considering their data risk assessment and strategies.*





## Ransomware

06 April 2022  
*Guidance*

[LINK TO DETAILS](#)

AUSTRAC released *Detecting and stopping ransomware financial crime guide*. According to the Australian Cyber Security Centre (ACSC), 500 ransomware attacks were reported in the 2020-21 financial year, an increase of nearly 15 per cent from the previous year.

The guide contains practical information and indicators to help businesses identify and report if a payment could be related to ransomware attacks.

According to AUSTRAC, "financial services businesses should use the information in these guides, and their own monitoring systems, to help them spot potential illicit use and report suspicious activity to AUSTRAC."

[Preventing the criminal abuse of digital currencies financial crime guide](#) was also released.

*Superannuation trustees should ensure that IT teams are aware of the guide.*

## CASE LAW AND ENFORCEMENT ACTIVITY



### Maritime Super

27 April 2022  
*Infringement Notice*

[LINK TO DETAILS](#)

ASIC issued two infringement notices to Maritime Super Pty Ltd for which the trustee has paid \$26,640. According to ASIC's media release, the infringement notices arose from ASIC's concerns that statements in a Significant Event Notice and newsletter issued by Maritime and sent to members between March and June 2021 stating that Maritime's investment partnership with Hostplus would result in reduced overall investment management fees for members was misleading.

ASIC Deputy Chair Sarah Court said: "The superannuation industry is going through a period of consolidation and change. As such, it is crucial that consumers and fund members are provided accurate information so that they can make informed decisions about their super. In this case, we were concerned that Maritime members may have been misled by the communications about fees."



### Asgard

8 April 2022  
*Decision*

[LINK TO DETAILS](#)

The Federal Court ordered Westpac subsidiary and superannuation trustee, BT Funds Management Limited (BT Funds), to pay a \$20 million penalty for incorrectly charging commission payments to members of one of its superannuation funds.

The Court found BT Funds had charged superannuation members insurance premiums that included commission payments, despite the banning of these commissions under the Future of Financial Advice reforms in 2013. BT Funds continued to charge the commissions until 2020. Asgard Independence Plan Division Two (Asgard Fund) members were also charged commissions via their premiums that were paid to financial advisers, even though the members had elected to have the financial adviser component removed from their account.

In total the Federal Court has ordered Westpac to pay [\\$113 million](#) in penalties for compliance failures across its banking, superannuation, wealth management and insurance brands.



## WAN v BT Funds Management

30 March 2022  
*Decision*

[LINK TO DETAILS](#)

The Federal Court dismissed an appeal from a determination made by AFCA affirming the decision of BT Funds Management Limited (the Trustee) to distribute a death benefit payable to one of its members, to his estate rather than the applicant, who claimed to be a de-facto spouse and dependant.

The Court summarised the legislative scheme and AFCA's remit, concluding that "the only occasion the Court may substitute its decision is when the facts as found by the Tribunal admit, upon the application of the law as laid down by the Court, of only one result."

"If the facts known to a trustee at the time of the decision objectively support a conclusion on the part of AFCA that the decision was fair and reasonable, having regard also to the interests of the complainant and to such representations concerning the effect of the trustee's decision upon the complainant's interests as may be made, that may be a sufficient basis for AFCA to discharge its statutory function."

In some instances, where there is a "dispute between the complainant and other interested persons affected by the trustee's decision concerning facts relevant to AFCA's *ex post facto* assessment of fairness and reasonableness," "AFCA may need to make its own findings concerning such disputed facts."





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## CONTACT US

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



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