

LEGAL, REGULATORY & POLICY UPDATE

PENSIONS AND SUPERANNUATION

INSIDE THIS EDITION

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IN BRIEF

With the start of the new financial year, we see a myriad of superannuation-related changes come into effect as of 1 July 2022.

*To finish the 2022 financial year, ASIC issued a new legislative instrument covering **superannuation calculators and retirement estimates** and information sheet on **greenwashing**, while APRA confirmed it will be releasing a refreshed **investment governance prudential standard**.*

*Following concerns from industry, the ATO updated materials related to **non-arm's length expenditure**.*

MAJOR UPDATES



Commonwealth Parliament

June 2022
Parliamentary Business

[LINK TO DETAILS](#)

Both Houses of the new Parliament will sit for 7 days between 26 July and 4 August. The Prime Minister announced the Government's [full Ministry](#), which includes the following Ministers relevant to superannuation:

- The Hon. Dr Jim Chalmers MP – Treasurer
- Stephen Jones MP – Assistant Treasurer & Minister for Financial Services
- Senator the Hon. Katy Gallagher – Minister of Finance and Minister for Women
- The Hon. Tony Burke MP – Minister for Employment and Workplace Relations
- The Hon. Chris Bowen MP – Minister for Climate Change and Energy
- Clare O'Neil MP – Minister for Cyber Security

The Assistant Treasurer will have primary responsibility for most matters that are relevant to superannuation trustees.



1 July Changes

A number of superannuation-related changes came into effect 1 July 2022:

- Eligibility age for **downsizer contributions** reduced from 65 to 60;
- **Super Guarantee rate** increased from 10% to 10.5%;
- **\$450 per month threshold** no longer applies;
- Increase to \$50,000 of amounts under **first home super saver scheme**;
- Members under 75 years old no longer have to meet the **work test** to make super contributions; and
- **Retirement income strategy** summary must be posted on website.

Superannuation trustees should ensure that systems and collateral have been updated to reflect the above.



Investment Governance

23 June 2022
Update

[LINK TO DETAILS](#)

In a speech at the Trans-Tasman Business Circle “Meet the regulators” event, APRA Executive Director of Superannuation Suzanne Smith confirmed that “[n]ext month, [APRA] will be releasing a refreshed **investment governance** prudential standard.”

“The refresh follows a review of **unlisted asset valuation practices** and transactions in the wake of COVID-inspired market volatility, which identified several areas for improvement, including how funds manage their **liquidity** and conduct **stress testing** of their investment strategy. These three areas are clearly relevant to boards and board investment committees, and it is here that the standard is being strengthened. The updated SPS 530 Investment Governance will take effect from the start of next year.

We will be releasing **new guidance on investment governance** and valuation practices towards the end of the year to assist industry implement the new standard.”

Superannuation trustees should note the update and ensure resources are allocated for implementation of the updated prudential standard.



Non-arm's Length Expenditure

10 June 2022
Guidance

[LINK TO DETAILS](#)

The ATO extended its approach to **not allocate compliance resources** in relation to APRA regulated superannuation trustees and its ruling on non-arm's length income and expenditure.

In response to concerns raised by the industry, the ATO updated:

- [Practical Compliance Guideline PCG 2020/5 Applying the non-arm's length income provisions to 'non arm's length expenditure' - ATO compliance approach for complying superannuation entities](#) to extend its transitional compliance approach of not allocating compliance resources to determine whether the non-arm's length income provisions apply to a complying super fund further through 2022-23 where the fund incurred non-arm's length expenditure of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in those respective income years.
- [Law Companion Ruling LCR 2021/2 Non-arm's length income – expenditure incurred under a non-arm's length arrangement](#) to refer to the ATO's compliance approach from 1 July 2023.

The ATO refers to “unresolved concerns raised by industry” as the reason for the update.

Superannuation trustees should ensure that tax advice concerning non-arm's length expenditure is current, and the revised guidance is considered in preparing financial and taxation reporting.



ASIC Greenwashing Information Sheet

14 June 2022
ASIC Guidance

[LINK TO DETAILS](#)

ASIC released Information Sheet (INFO 271) *How to avoid greenwashing when offering or promoting sustainability-related products*. The Information Sheet outlines:

- what **greenwashing** is and why it is a concern;
- the current regulatory setting for **communications about sustainability-related products**; and
- question to consider when **offering or promoting** sustainability-related products.

'Greenwashing' is the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical.

ASIC recognises that greenwashing "distorts relevant information that a current or prospective investor might require in order to make informed decisions," and is contrary to the prohibitions against **misleading and deceptive statements and conduct**.

ASIC confirmed that this will remain a priority area of focus and it will continue to monitor the market and look for misleading claims about ESG and sustainability.

Superannuation trustees should review the information sheet and consider whether any amendments are required to its member disclosures. Attention should be focused on ensuring that disclosures adequately distinguish between the consideration of ESG factors as financial risk indicators from ethical or ESG objectives or representations about the impact of investments.



Audit and Related Matters

9 June 2022
Prudential Standard

[LINK TO DETAILS](#)

APRA wrote to all RSE licensees and RSE auditors in response to submissions to its consultation on proposed amendments to *Prudential Standard SPS 310 Audit and Related Matters* to reflect changes to the superannuation reporting framework.

In response to feedback, APRA will **delay the commencement** of the proposed amendments, with no change for the 2022 financial year. APRA will finalise SPS 310 later in 2022 and the new requirements will apply to audits from the financial year ending **30 June 2023**.

APRA's letter warns that the deferral should not be viewed as suggesting a tolerance for the submission of inaccurate data before the amended requirements apply.

APRA expects RSE licensees to take reasonable steps to ensure that they have robust processes and systems, supported by appropriate governance and oversight, to report accurate data under the new reporting standards.

The letter also clarified matters related to the transitional arrangements for new data forms; approach to sampling; auditing forms completed on a best endeavours basis; and attestation requirements.

Superannuation trustees should note the deferral and ensure that accurate information is provided to APRA. Planning for adopting the changes should also be adjusted to align with the revised commencement date.



Legal Professional Privilege & the ATO

22 June 2022
ATO Protocol

[LINK TO DETAILS](#)

The ATO published its recommended approach to respond to formal notices requiring production of documents; specifically, for identifying communications covered by Legal Professional Privilege (LPP) and making LPP claims where the taxpayer does not wish to provide those communications to the ATO.

The protocol had been developed to address ATO concerns where LPP claims were inappropriately asserted, either deliberately or through taking short cuts, with the result that key materials, facts, and evidence were inappropriately withheld from the ATO.

Superannuation trustees should consider the ATO protocol in any situation where it seeks to claim legal privilege in relation to any information or documents requested by the ATO. The protocol provides insight as to the ATO's expectations, however, trustees should consider obtaining legal advice where it intends to claim legal privilege over documents requested for production to the ATO.



Super Calculators & Estimates

29 June 2022
Legislative Instrument

[LINK TO DETAILS](#)

ASIC made *ASIC Corporations (Superannuation Calculators and Retirement Estimates) Instrument 2022/603*, which continues relief for retirement estimates and superannuation calculators (superannuation forecasts) in a single instrument.

Previously, relief was provided through two separate instruments - *ASIC Class Order [CO 11/1227] Relief for providers of retirement estimates* (was due to sunset on 1 April but its effect extended until 31 December) and *ASIC Corporations (Generic Calculators) Instrument 2016/207* (relief for superannuation and retirement calculators in this instrument [will cease from 1 January 2023](#)).

The Instrument provides **conditional relief** from the AFS licensing requirements of the *Corporations Act 2001* for superannuation trustees who prepare **retirement estimates** for their members, and for providers of **superannuation calculators**. Where a trustee or other provider already holds an AFS licence, the Instrument provides relief from the requirements relating to advice in Divisions 2, 3 and 4 of Part 7.7 of the Act.

For a period of **approximately six (6) months following commencement** of this Instrument, trustees and other providers can **provide superannuation forecasts under previous relief arrangements**, while they transition to the new framework.

*Superannuation trustees should review the new instrument with particular attention to the defined terms: **superannuation calculator**; **retirement estimate** and **interactive retirement estimate**. It may also be prudent for superannuation trustees to complete a technical compliance review of any superannuation calculators or retirement income estimates it makes available to members.*



TECHNICAL CHANGES AND UPDATES



Insurance in Super

27 May 2022
Prudential Standard

[LINK TO DETAILS](#)

After two rounds of consultation, APRA made *Superannuation (prudential standard) determination No. 1 of 2022*, Prudential Standard SPS 250 **Insurance in Superannuation**.

The instrument **commences on 1 July 2022**. The key changes to the prudential standard are:

- **Conflicted arrangements:** heightened obligations to assess whether there are any conflicted provisions or business practices with respect to insurance arrangements, and whether they are appropriate and in the best interests of beneficiaries.
- **Independent certification:** requirement to obtain an independent certification for related party insurance arrangements, before entering into, or materially altering, an insurance arrangement, and on a triennial basis.
- **Insurance strategy:** Updated provisions reinforcing APRA's expectation that rigorous analysis is undertaken to ensure that the kind and/or level of insurance offered does not inappropriately erode retirement income.
- **Insurance management framework:** consideration to potentially conflicting arrangements and ensuring that insurance outcomes are in the best financial interests of members.
- **Member matters:** amendments to improve protections for members regarding their insurance arrangements.
- **Data management:** strengthened expectations to improve cohort analysis.

Superannuation trustees should note the update and ensure they are prepared to comply with the new standard from 1 July 2022.



Financial Reporting

3 June 2022
Announcement

[LINK TO DETAILS](#)

ASIC announced new **financial reporting** requirements for AFS licensees, following changes to the **accounting standards**.

From financial years commencing 1 July 2021 (with a deferral option for one year), for-profit companies, registered schemes and disclosing entities that prepare financial reports under Chapter 2M of the *Corporations Act 2001* (the Act), and which are not reporting entities, **can no longer prepare special purpose financial reports** that do not contain all disclosures required in the full accounting standards.

The disclosure requirements of the full standards will apply to all licensees that are also regulated by APRA. All licensees will be required to prepare a cash flow statement, and in addition to single entity financial statements, **consolidated financial statements** must be presented where the licensee has controlled entities.

The changes will be given legal effect through the certification section of the prescribed ASIC Form FS 70 *Australian financial services licensee profit and loss statement and balance sheet*. The revised form will be available in late June 2022.

Superannuation trustees should confirm whether its current financial reporting is compliant with the new requirements.



Family Law Interest

24 May 2022
Legislative Determination

[LINK TO DETAILS](#)

The Australian Government Actuary made determinations that relate to the adjustment of superannuation entitlements of separated and divorced spouses, and of separated de facto couples (except in Western Australia, pending commencement of the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*).

The interest rate for the adjustment period, being the financial year beginning on **1 July 2022**, is **0.047**. The Instrument also contains the calculation methodology for an adjustment period that is less than 12 months within a financial year, 12 months not within a financial year and less than 12 months not within a financial year.

Superannuation trustees should note the change and also ensure that administrators are aware and have updated operational processes and systems.



Super Splitting

22 June 2022
Legislation

[LINK TO DETAILS](#)

The [Family Court Amendment Bill 2022](#) which makes the necessary amendments for **super splitting by Western Australia de facto couples** has progressed through the Parliament of Western Australia with consideration in detail and a third reading.

Presently, in family law proceedings between de facto couples the Family Court of Western Australia has no power to distribute superannuation interests to reflect the relative contributions of the partners of the relationship. This is because superannuation is a matter governed by commonwealth legislation.

The Bill is now awaiting consideration by the WA Legislative Council.

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



Disclosure Instruments

14 June 2022
Legislative Instruments

[LINK TO DETAILS](#)

ASIC has remade and combined seven legislative instruments relating to specific financial services disclosure requirements, which were due to **automatically repeal or cease** in the next two years if not remade.

- [ASIC Corporations \(In-use Notices for Employer-sponsored Superannuation and Superannuation Dashboards\) Instrument 2022/496](#), which provides relief in relation to Product Disclosure Statement (PDS) in-use notices for employer-sponsored superannuation and choice product dashboard disclosure;
- [ASIC Corporations \(Shorter PDS and Delivery of Accessible Financial Products Disclosure by Platform Operators and Superannuation Trustees\) Instrument 2022/497](#), which provides relief in relation to shorter PDSs and PDS obligations for superannuation trustees, IDPS operators and responsible entities of IDPS-like schemes;
- [ASIC Corporations \(Financial Services Guide Given in a Time Critical Situation\) Instrument 2022/498](#), which provides relief in relation to the giving of Financial Services Guides in time critical situations.

Superannuation trustees should note the updates and the fact that no substantive changes have been made.



APRA Data Project

23 June 2022
FAQs

[LINK TO DETAILS](#)

APRA published **12 additional FAQs** to provide further guidance to RSE licensees on the reporting standards for Phase 1 of the Superannuation Data Transformation project:

- **revised timeframes** for the consultation on Phase 2 in APRA's response paper that is expected to be released in early August 2022;
- modified duration information for **fixed income** characteristics, including that APRA intends to revise the instructions for reporting modified duration effective from the 30 June 2022 period;
- reporting **derivatives** with synthetic exposure and **currency** exposure;
- defining '**Strategic Subsector**' as the segment of a 'strategic sector' asset class to which an asset allocation target is approved by the board, committee or individual with investment delegations under the investment governance framework of the fund;
- an expectation that RSE licensees are able to report on investment **strategy of externally managed options** even where the RSE licensee adopts the investment strategy of the external investment manager (as reported by the external investment manager);
- an intention to **revise the instructions** when SRS 550.0 is re-determined;
- for any **investment options not underlying a MySuper or trustee-directed product**, information must be reported under each table of SRF 550.0 for each reporting period ending on or after 30 June 2022;
- **Net Investment Return** is calculated as investment earnings as a proportion of the members' balance attributed to an investment option, consistent with how that return is disclosed to members;
- the 30 June 2022 submission of **SRF 705.1** is due by 28 July 2022; and
- reporting **salaries of internal investment teams**.

APRA also updated Historical Data FAQ 1.0 to reflect a three-month extension to the due date for some types of investment options.

Superannuation trustees should ensure that teams responsible for APRA reporting review the new FAQs to consider whether there is any impact on the data preparation required.



GUIDANCE AND POLICY



Your Future, Your Super

15 June 2022
FAQs

[LINK TO DETAILS](#)

APRA published a new set of FAQs to provide further guidance on the administration of the Your Future, Your Super performance test.

The new FAQs confirm:

- APRA will not include any **updated data** received after **15 August** other than in exceptional circumstances.
- APRA will provide **provisional results** to RSE licensees ahead of publication where a product appears likely to fail the test.
- RSE licensees are expected to have administrative processes in place to ensure they comply with their legislative obligation to **prevent new beneficiaries** from holding the product on and from the day the second fail notification is received. Any **contributions received** from or on behalf of persons who were not holding the product before that day **will need to be returned**.
- APRA will combine performance history for MySuper products that have been authorised under a material goodwill authorisation.

Superannuation trustees should note the FAQs, specifically the point that updated data received after 15 August will not be included.



Underperformance Communications

24 June 2022
Report

[LINK TO DETAILS](#)

ASIC released Report 729 *Review of trustee communications about the MySuper performance test* (REP 729), which contains findings from its review of superannuation trustees' (12 trustees of the 13 products that failed the test in 2021) **communications with their members** following the first **annual performance test** for MySuper products.

While most trustees complied with the legal obligations to notify their members, the Report identifies communication strategies of concern including:

- publishing the MySuper product's failure of the test on a **webpage less likely to be visited** by persons interested in the product;
- highlighting other performance measures that were more favourable, such as **recent positive past performance** figures; or
- **criticising aspects of the test** to suggest it was not relevant to the particular product.

ASIC warned that it expects that "[f]or the 2022 performance test, we expect trustee communications to reflect our expectations for prominence, balance and clarity set out in REP 729, including where products fail for a second time. Where we see a need to, ASIC will take appropriate action to protect consumers."

Superannuation trustees who may be at risk of failing the APRA performance test should closely review ASIC's report. Others should note the update for awareness of ASIC's expectations in relation to member communications.



Cyber Security

10 June 2022
Article

[LINK TO DETAILS](#)

ASIC released an article titled *Cyber safety a company culture matter*, which encourages regulated entities to:

- **re-assess their cyber risks** and ensure their detection, mitigation and response measures adequately address their risk appetite; and
- assess their preparedness to respond to cyber security incidents, and to review **incident response** and business continuity plans.

Although ASIC is not seeking to prescribe technical standards or to provide expert guidance on cyber security, where it considers a firm has not met its risk management obligation, ASIC may consider enforcement action to drive changes in behaviour.

Further [guidance and resources](#) are available on the topic from ASIC.

Superannuation trustees should review the article and the ASIC resources and assess whether current measures are fit for purpose and address the trustee's risk appetite appropriately.



Choice of Fund – Defined Benefit

29 June 2022
Consultation

[LINK TO DETAILS](#)

APRA is seeking input into its review of the impact of **choice of fund amendments on defined benefit schemes' operations**, profitability, funding and viability.

The *Superannuation Guarantee (Administration) Act 1992* was amended on 4 September 2020 by the *Treasury Laws Amendment (Your Superannuation, Your Choice) Act 2020 (Your Superannuation, Your Choice Act)*.

The amendments provide that employers who make contributions for employees under workplace determinations or enterprise agreements made on or after 1 January 2021 need to provide those employees with choice of fund.

The *Your Superannuation, Your Choice Act* requires APRA to conduct a review to identify any unintended consequences of the amendments on the operation of defined benefit schemes.

Superannuation trustees of defined benefit schemes should review the questions posed by APRA and consider providing a response. Analysis of the extent to which defined benefit members are exercising choice of fund would be a valuable contribution where the information is available to trustees.



Employer Contributions during SFT

20 June 2022
Guidance

[LINK TO DETAILS](#)

The ATO issued a news release for APRA-regulated funds, ensuring that employers are able to keep making contributions to all funds for their employees through a successor fund transfer (SFT).

The ATO recommends that trustees:

- notify the ATO well in advance of processing employer contributions during an SFT, which will allow the ATO to provide guidance and support to reduce impacts for the fund and members, and the broader super system;
- engage with their Gateway provider to discuss ways they can assist the trustee and communicate broadly with employers; and
- consider how messages and payments will be actioned and how response messaging and error management will be dealt with past the SFT date.

Superannuation trustees considering or currently in the planning phase of an SFT should consider the ATO's guidance.



Warnings and Reprimands to Financial Advisers

9 June 2022
Information Sheet

[LINK TO DETAILS](#)

ASIC released INFO 270 *Warnings and Reprimands* in accordance with **the requirement for ASIC to give warnings and reprimands** to financial advisers in specified circumstances which was introduced in the *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021*.

The information sheet explains that a warning or reprimand is a letter sent by ASIC to a financial adviser to warn or reprimand them where ASIC reasonably believes that [warning or reprimand circumstances](#) exist. Not every concern brought to ASIC's attention will lead to ASIC giving a warning or reprimand, however, the information sheet **provides a list of circumstances** where ASIC must give a warning or reprimand.

ASIC will decide on a case-by-case basis whether a financial adviser is entitled to procedural fairness. Decisions are reviewable by the Administrative Appeals Tribunal.

Superannuation trustees should note the information and consider communicating it to associated advice teams.



Climate and Sustainability Disclosure

29 June 2022
Guidance

[LINK TO DETAILS](#)

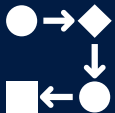
The International Sustainability Standards Board (ISSB) published two draft standards for consultation and ASIC is encouraging all relevant stakeholders to make a submission.

Responses can be submitted by participating in a survey or submitting a comment letter by 29 July 2022.

ASIC is engaging with the ISSB Exposure Drafts through its membership of the [Council of Financial Regulators Climate Working Group](#), participation in stakeholder roundtables being conducted by the AASB and engagement with industry stakeholders. As [announced](#) on 23 June 2022, CFR agencies will provide a joint submission to the ISSB on the Exposure Drafts.

ASIC's Deputy Chair Karen Chester said, "[s]hould the Exposure Drafts be adopted internationally, they will inevitably impact Australia's capital markets and participants, as investors continue to demand comparable sustainability and climate-related corporate disclosures."

Superannuation trustees, as key stakeholders in Australian capital markets, should consider reviewing the standards and submitting a response.



Corporate Collective Investment Vehicles

23 June 2022
Guidance

[LINK TO DETAILS](#)

ASIC released a range of documents to support the **licensing and other requirements** for corporate collective investment vehicles (CCIVs).

A CCIV is a new type of company that can be registered from 1 July 2022. The CCIV framework was introduced by the *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022*, including adding a new Chapter 8B to the *Corporations Act 2001*.

Report 728: *Response to submissions on CP 360 Corporate collective investment vehicles: Preparing for the commencement of the new regime* highlights the key issues from, and ASIC's response to, submissions to ASIC's consultation on the new regime's licensing.

ASIC has also published Information Sheet 272 *How to register a corporate collective investment vehicle and sub-fund* and made updates to existing guidance to support the implementation of the CCIV regime.

Superannuation trustee investment teams should note the guidance, which may be relevant should any new investment vehicles be structured as a CCIV.



CASE LAW AND ENFORCEMENT ACTIVITY



Sharma v H.E.S.T. Australia Ltd [2022] FCA 536

13 May 2022
Judgment

[LINK TO DETAILS](#)

The Federal Court of Australia handed down its decision in *Sharma v H.E.S.T. Australia*, a case which addresses a successor insurer's ability to deny a claim based on misrepresentations made to a prior insurer.

In November 2009, the Trustee entered into a group life insurance policy with ING Life Limited, which later changed its name to OnePath. OnePath remained the insurer until 30 November 2011.

On 1 December 2011, CommInsure entered into a contract of group life insurance with the Trustee and contracted with the Trustee to provide indemnity upon the terms of the OnePath policy. In April 2021 the life insurance business of CommInsure was transferred to AIA.

While OnePath was the insurer, the relevant member became a member of the Fund and received default cover under the insurance policy without any form of underwriting. In March 2011, the member made an application for additional death, TPD and income protection cover pursuant to the Fund rules. The member made certain misrepresentations in the application.

In March 2017, the member lodged a terminal illness claim and subsequently died of heart failure in April 2017.

The Court analysed various provisions of the *Insurance Contracts Act 1984* (Cth) and relevantly found on the facts that "[h]aving correctly concluded that CommInsure could not avoid the contract pursuant to s 29, AFCA ought to have confined its subsequent consideration of other principles to those that may arise by operation of the ICA and not by speculating about other common law or equitable principles that are not provided for in the Act":

- the focus of the duty of disclosure and the effect of the making of a misrepresentation is upon an identifiable insurer at an identifiable point in time, and not a subsequent insurer which assumes the risk at a later point in time and therefore s 29 does not provide an avenue for avoidance of the insurance contract;
- the ICA operates as an exclusive code so as to displace the operation of common law and equitable principles of misrepresentation or failure to disclose a material fact;
- s 32, as applied by s 27A, is only applicable to a failure to comply with the duty of disclosure or a misrepresentation "made, to the insurer under a blanket superannuation contract in respect of a proposed member" for the straightforward reason that when the member made his application for additional cover, he was a member of the Fund and did not have the status of a proposed member; and
- AFCA failed to consider whether AIA and CommInsure before it had any other remedies under the ICA, such as section 13 which implies into contracts of insurance a duty of utmost good faith which requires "each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith."



*Application by SCS
Super Pty Limited atf
Australian Catholic
Superannuation and
Retirement Fund
[2022] NSWSC*

27 May 2022
Judicial Advice Application

[LINK TO DETAILS](#)

The Trustee of the Australia Catholic Superannuation and Retirement Fund sought judicial advice from the Supreme Court of New South Wales that it would be justified in amending the trust deed to insert a trustee remuneration clause, which would grant the trustee a right to fees that must be an amount that the Trustee determines is fair and reasonable.

The Court determined that the Trustee's proposed course of action seeking to amend and make the amendment to the trust deed was proper and lawful; the exercise of power will not be improper; and the proposed amendment did not contravene the amendments to sections 56(2) and 57(2) of the SIS Act.

As with other similar cases, the Court determined that the Trustee has a duty to act in the best financial interests of the members of the Fund and there did not appear to be any suggestion that one class of members would be unfairly advantaged to the prejudice of another class.



*The Queen v Avanteos
Investments Ltd
[2022] VCC 869*

15 June 2022
Judgment

[LINK TO DETAILS](#)

The Country Court of Victoria handed down its sentence in the case involving Avanteos Investments Ltd. The former subsidiary of the Commonwealth Bank has been convicted for 18 criminal offences after a guilty plea and penalised a total of \$1.71 million for failing to update defective disclosure statements.

The defective disclosure related to the charging of a total amount of almost \$700,000 in fees to 499 superannuation members after their death, when it was known that Avanteos, which traded as Colonial First State Custom Solutions, did not have lawful authority to do so.

The Court noted that had it not been for Avanteos' early guilty plea, a penalty of \$2.7 million would have been handed down.

The Court described the circumstances as "a very serious failure of corporate governance and an example of a financial corporation putting its own interests above those of its investors," with reference to management's knowledge of the defect, confirmed by formal legal advice, and the failure to cure the defects for 28 months following.



*Host-Plus Pty Ltd v
Blackwell [2022] SASC
59*

17 June 2022
Judgment

[LINK TO DETAILS](#)

The Trustee of the Hostplus Pooled Superannuation Trust and the Hostplus Superannuation Fund sought orders under section 59C of the *Trustee Act 1936* (SA) to vary the respective trust deeds to insert a new clause empowering the trustee to charge what is referred to as a "Risk Charge."

The application was opposed by a member of the Fund, as a representative of all actual and potential beneficiaries of the Fund and of the Trust, and as with all other cases of similar nature, APRA made submissions without taking a position in relation to the application.

The Court granted the Trustee's application with certain quantum limitations on the Trustee's power to charge following argument by the opposing member that the proposed annual cap was too high.

In approving the subsequently proposed cap, the Court noted that the analysis was "virtually entirely theoretical because the lack of previous imposition of penalties . . . means that there is virtually no empirical data."



*ASIC v Mercer
Financial Advice
(Australia) Pty Ltd*

29 June 2022
Action filed

[LINK TO DETAILS](#)

ASIC has commenced civil penalty proceedings in the Federal Court against Mercer Financial Advice (Australia) Pty Ltd (Mercer) for allegedly making false or misleading representations to its customers about ongoing fees charged and services that were not provided, and for failing to provide fee disclosure statements.

ASIC also alleges that Mercer Financial Advice contravened its obligation as provided in s912A(1)(c) to comply with the financial services laws and 912A(1)(a) to provide the financial services efficiently, honestly and fairly by, amongst other things, failing to have systems, practices and or policies capable of preventing the contraventions.

The total loss and damage suffered according to ASIC is approximately \$19.6 million (prior to remediation).



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