

# LEGAL, REGULATORY & POLICY UPDATE

## PENSIONS AND SUPERANNUATION



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*As we enter the last few weeks of 2022, any hopes that there would be calm waters on the policy, legislative, and regulatory front for superannuation trustees appear dashed.*

*The Financial Accountability Regime and Compensation Scheme of Last Resort Bills have stalled in the Senate, while the faith-based product exceptions to the MySuper annual performance assessment have also been rolled into the broader review of the Your Future, Your Super reforms.*

*The uncontentious downsize contribution reforms have been legislated. APRA commenced consultation on important changes to the prudential framework concerning SFTs, ORFRs, and investment governance. Oh, and some important cases!*

## COMMONWEALTH PARLIAMENT



Superannuation Bills  
November 2022  
Parliamentary Business

[LINK TO DETAILS](#)

Status key  
█ House of Reps  
█ Committee  
█ Senate  
█ Royal assent

The final Commonwealth Parliament sittings for the year concluded, with several new superannuation related bills introduced:

- [Treasury Laws Amendment \(Modernising Business Communications and Other Measures\) Bill 2022](#)
- [Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#)
- [Treasury Laws Amendment \(Consumer Data Right\) Bill 2022](#)

The FAR and CSLR bills remain before the Senate following proposed amendments from the cross bench:

- [Financial Accountability Regime Bill 2022](#)
- [Financial Services Compensation Scheme of Last Resort Levy Bill 2022](#)
- [Financial Services Compensation Scheme of Last Resort Levy \(Collection\) Bill 2022](#)

The following Bills have been passed by both houses and are awaiting (or have received) Royal Assent:

- [Financial Sector Reform Bill 2022](#)
- [Treasury Laws Amendment \(2022 Measures No. 2\) Bill 2022](#)
- [Treasury Laws Amendment \(2022 Measures No. 3\) Bill 2022](#)
- [Privacy Legislation Amendment \(Enforcement/Other Measures\) Bill 2022](#)
- [Social Services and Other Legislation Amendment \(Incentivising Pensioners to Downsize\) Bill 2022](#)

The Annual Member Meeting Notice disclosure requirements under the Superannuation Industry (Supervision) Amendment (Annual Members' Meetings Notices) Regulations 2022 have come under renewed uncertainty, with two disallowance motions given by the Senate for vote in early 2023.



## Faith-Based Performance Test

28 November 2022  
*Amendment*

[🔗 LINK TO DETAILS](#)

The *Treasury Laws Amendment (2022 Measures No. 3) Bill 2022* was passed by Parliament, however a late government amendment removed **Schedule 5 Faith Based Products** before the Bill was passed.

Schedule 5 originally intended to amend the SIS Act to provide for a **supplementary annual performance test**. Where a faith-based product failed the original performance test, APRA would reassess the faith-based product against the supplementary performance test.

The Assistant Treasurer indicated that the government intends to consider the treatment of faith-based superannuation products as part of the broader [review of the Your Future, Your Super reforms](#). There were no further superannuation-related measures contained within the Bill.

*Superannuation trustees should ensure internal teams and service providers are aware of the amendment and that any relevant projects can be paused until the measure is re-reviewed in future.*



## Financial Accountability Regime Amendments

November 2022  
*Amendment proposed*

[🔗 LINK TO DETAILS](#)

The **Financial Accountability Regime's** passage through Parliament has stumbled and will be delayed following proposed amendments from the Senate cross bench.

An amendment to the *Financial Accountability Regime Bill 2022* (FAR bill) has been circulated by the Greens which proposes to impose **civil penalties** of up to \$1.1m for **individual directors** and **senior managers** of accountable entities for failure to comply with accountability obligations and extend the indemnification prohibitions on accountable entities to include accountable persons.

The FAR bill remains before the Senate. The Senate Economics Legislation Committee [report](#) made no recommendations re. the inclusion of civil penalties for **accountable persons**, noting the banning powers and deferred remuneration arrangements already in place. The Australian Greens included additional comments similar to the amendments sought.

*Superannuation trustees should monitor the progression of the bill when debate resumes in Parliament in 2023. We expect consultation on amendments to the Bill to occur in early 2023. Engagement with directors and senior management on the possible amendments may be beneficial.*



## Downsizer and Asset Test Exemption

29 November 2022  
*Legislation passed*

[🔗 LINK TO DETAILS](#)

The [Treasury Laws Amendment \(2022 Measures No. 2\) Bill 2022](#) passed both houses of Parliament and awaits Royal Assent. The bill reduces the eligibility age of the **Downsizer regime** from **age 60 to age 55**, fulfilling an election promise by the government.

The related [Social Services and Other Legislation Amendment \(Incentivising Pensioners to Downsize\) Act 2022](#) passed Parliament and received Royal Assent. The Bill provides pensioners an **additional 12-month asset test exemption** on home sale proceeds to give more time to purchase, build, rebuild, repair or renovate a new principal home before their age pension is impacted. It also changes the deeming rate on principal home sale proceeds to purchase a new home from **2.25 to 0.25%** per annum.

Both measures are due to commence from 1 January 2023.

*Superannuation trustees should ensure internal teams and service providers are prepared for these changes to take effect, including updating fund collateral, policies, procedures and training material for staff.*



## Financial Reporting and Auditing

23 November 2022  
*Bill introduced*

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2022 Measures No. 4) Bill 2022* was introduced, with Schedule 6 carrying additional **financial reporting** and **auditing requirements**. RSE licensees would need to 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).

The RSE licensee must also **appoint an auditor** to conduct an audit of the RSE and 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**. RSE Licensees will also be required to maintain financial and accounting records for 7 years. The measures are scheduled to commence 1 July 2023.

ASIC would have stronger monitoring and enforcement trustees compliance with **accounting standards** under the Bill.

These measures were previously introduced in [\*Treasury Laws Amendment \(Streamlining and Improving Economic Outcomes for Australians\) Bill 2022\*](#) by the previous government, but lapsed with the calling of the election.

*Superannuation trustees should review the legislation and review relevant procedures and policies for impact. The additional transparency measures should be noted for future implementation and planning purposes.*



## Consumer Data Right Bill

30 November 2022  
*Bill introduced*

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Consumer Data Right Bill) 2022* was introduced and seeks to introduce measures that would expand the **Consumer Data Right (CDR)** from a data-sharing scheme to one which allows consumers to authorise, manage and facilitate transactions as well.

Under the current CDR regime, a consumer may request and consent to an **Accredited Data Recipient** accessing their data from **Data Holder** for the purposes of sharing that data with another provider.

The Bill proposes to expand this arrangement and introduce the ability for a consumer to request an **Accredited Action Initiator** to request an **Action Service Provider** to undertake a particular transaction on their behalf.

To support the measures, the bill also sets out the following:

- the participants of the CDR and their obligations, which include the obligation for Accredited Persons to act **efficiently, honestly and fairly** when initiating CDR actions and Action Service Providers to adhere to the Non-Discrimination Rule;
- provides broader Ministerial rule making powers; and
- expands CDR-specific **privacy safeguards** to the transfer of data between an accredited action initiator and action service provider.

The majority of amendments within the Bill will commence on the day after receiving Royal Assent.

*Superannuation trustees should consider the impact of the changes in the context of the opportunities that access to consumer data may present to retirement planning, member services, and business planning. Trustees should also remain attentive to the likelihood that certain superannuation data elements are likely to be subject to the regime in future.*



## Modernising Business Communications

23 November 2022  
*Bill introduced*

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022* was introduced, containing previously announced **technical measures** relevant to trustees, including:

- allowing all documents under the *Corporations Act* to be **signed and sent electronically**;
- ability for regulatory bodies to use **virtual enquiry technology** at hearings and examinations and provide discretion to the regulator to conduct hearings and examinations in person, in hybrid or virtually;
- provisions that require or **permit notices** to be published in newspapers to be replaced with technology neutral rules;
- **streamlining definitions**, removing or amending incorrect or redundant references and standardising headings;
- update the *SIS Act* to ensure that **notices of relevant decisions** are published by notifiable instrument instead by notice in the *Gazette*;
- rationalise and transfer matters contained within several **ASIC Legislative Instruments** into primary legislation; and
- clarify that the licensee of a registrable superannuation entity can use technology to hold **annual members' meetings**, allowing for meetings held physically, in hybrid form, or wholly virtual.

*Superannuation trustees should review the legislation in detail and consider implementation of any relevant reforms. Given the measures have all previously been released or otherwise announced, a level of familiarity should already exist across both the trustee and relevant service providers.*

## MAJOR UPDATES



### SPS114 ORFR Consultation

14 November 2022  
*Consultation*

[LINK TO DETAILS](#)

APRA released a discussion paper that proposes to replace *Prudential Standard SPS 114 Operational Risk Financial Requirement* (SPS 114) with enhanced obligations for trustees. The discussion paper proposes to move to a **Baseline+ model** which comprises of the following components.

**Baseline component** - an RSE licensee must maintain and manage financial resources to take actions to implement its business continuity plan, financial contingency plan, resolution plan or to undertake a transfer of members or a transfer of MySuper assets. Financial resources can continue to be held either in a reserve in the RSE or as trustee capital.

**Operational risk component** - an RSE licensee would use the operational risk component as the primary source of financial resources to manage the impact of operational risk, supported by appropriate controls. A new definition of 'operational risk event' is also proposed which is intended to expand the allowable uses to include **investigations, remediations and mitigation** related activities to address operational risk within the RSE.

Feedback is sought by 17 March 2023, and APRA intends to release a draft standard and guidance for consultation in mid-2023 and finalise the revised SPS 114 in early 2024 to commence on 1 January 2025.

*Superannuation trustees should consider existing ORFR holdings and the impact the proposals would have on reserve management and trustee capital requirements. Consideration should also be given to responding to the consultation questions posed by APRA.*



## Climate-Related Financial Disclosure

28 November 2022  
*Consultation*

[🔗 LINK TO DETAILS](#)

Treasury released *Exposure Draft legislation Treasury Laws Amendment (Measures 4 for Consultation) Bill 2022: sustainability standards* for consultation. The draft seeks to amend the *Australian Securities and Investment Commission Act 2001* (ASIC Act) to empower the **Australian Accounting Standards Board** (AASB) to make **sustainability standards**.

The standards will allow the AASB to establish non-binding (initially) reporting requirements for sustainability that align with significant international developments (such as the standards under development by the **International Sustainability Standards Board** (ISSB)). The **Financial Reporting Council** (FRC) will have oversight of sustainability standard-setting processes and governance of the standard-setting bodies.

The ASIC Act does not currently grant the AASB the function to develop and formulate sustainability standards. The proposed standards would provide general guidance, assisting the relevant industry to prepare systems and processes for eventual transition to **mandatory climate-related financial disclosures**, as [foreshadowed by ASIC](#) recently.

*Superannuation trustees should note this progress toward mandatory climate-related financial disclosures and ensure they keep abreast of further developments in this space. Upon reviewing the draft legislation, consideration may be given to submitting a response to the consultation.*



## Transfer Planning and SFTs

10 November 2022  
*Consultation*

[🔗 LINK TO DETAILS](#)

APRA released a discussion paper which contains a series of measures to heighten obligations in relation to **successor fund transfers** and **transfer planning**. APRA has proposed uplifting some obligations into a new prudential standard and revising existing guidance. Changes include:

- that requirements in *Prudential Standard SPS 515 Strategic Planning and Member Outcomes* (SPS 515) to ensure all RSE licensees are **appropriately prepared to transfer or receive members**, elevating what was previously guidance;
- significant new requirements relating to **the transfer of MySuper product assets** in the event of MySuper product authority cancellation;
- **updated transfer planning guidance** to replace existing *Prudential Practice Guide SPG 227 Successor Fund Transfers and Wind-ups*.

APRA set out 3 key steps and requirements to transfer planning:

- **Planning** – RSE licensees must be well-prepared ahead of time to take prompt actions, including a transfer of members, to promote the financial interests of beneficiaries;
- **Pre-positioning and decision making** – RSE licensees must act promptly to respond to triggers, and undertake an objective and thorough analysis of transfer options to determine the best outcome for members; and
- **Execution** – RSE licensees must execute transfers efficiently and with robust governance, risk and project management practices.

Feedback is requested by 10 March 2023. APRA expects to release the **draft transfer planning enhancements** in the first half of 2023, following further consultation in relation to SPS 515 in early 2023.

*Superannuation trustees should review the consultation and consider submitting a response to the questions posed by APRA. Trustees who have participated in a merger should consider drawing upon previous merger experiences in the response.*



## Improving Super Transparency

23 November 2022  
*Media Release*

[LINK TO DETAILS](#)

The Government announced several measures in relation to **improving the transparency of the superannuation system**. Three separate measures were announced:

- Introduction of legislation to align financial reporting obligations of superannuation funds with those of a publicly-listed company (as noted above);
- Launch a new annual **Super Transparency Report** which will comprise a single source of information for members to compare fund performance expenditure; and
- **Reform existing reporting rules** so each reporting stream serves a distinct purpose, thereby eliminating duplication.

Further detail pertaining to the Super Transparency Report has not been released, however Greens Senator Nick McKim has indicated the Report will require superannuation trustees to publicly **report any dividends paid**.

*Superannuation trustees should be cognizant of the announcement and the intent to further expand existing reporting requirements in relation to expenditure and dividends. There is little detail in relation to the second and third measure at this stage.*



## Climate Vulnerability Assessment

30 November 2022  
*Information Paper*

[LINK TO DETAILS](#)

APRA has released an Information Paper on the aggregated findings of its **Climate Vulnerability Assessment** (CVA) of Australia's five largest banks. Two different future climate scenarios, aligned to the internationally recognised scenarios developed by the Network for Greening the Financial System (NGFS), were used in the CVA:

- a **Delayed Transition Scenario**: which explores a future with delayed policy action on climate change, followed by a rapid reduction in global emissions after 2030; and
- a **Current Policies Scenario**: which explores a future with continued increase in global emissions beyond 2050.

Whilst specific to banking, the Information Paper speaks to the use of climate scenario analysis by international regulators, as well as related domestic activities and the **interconnectedness of climate financial risks** across industries which can be used to provide broader insights into the systemic impacts of climate change on the financial system.

APRA, together with the CFR agencies, will consider how the experience gained from the CVA may be applied to similar activities in other sectors, including insurance and superannuation, as well as the broader banking sector in future.

APRA has urged **all APRA-regulated entities** to "examine the CVA findings to see how they can leverage the insights to enhance their own climate risk analysis and management."

*Superannuation trustees should review the CVA in conjunction with APRA's recommendations in relation to the recent climate risk self-assessment survey. Climate-related risk management and disclosure practices are a focus area for regulators, so superannuation trustees should remain abreast of any developments in this space.*



## Beneficial Ownership Register

7 November 2022  
*Consultation*

[🔗 LINK TO DETAILS](#)

Treasury released a consultation paper *Multinational tax integrity: Public Beneficial Ownership Register* concerning a **public register of beneficial ownership**, a record of ultimate ownership, control, and beneficial interest in companies or legal vehicles operating in Australia.

Phase 1 would focus on entities regulated under the *Corporations Act* ('regulated entities') which include Australian **proprietary companies**, unlisted Australian **public companies**, unlisted Australian registered MISs, and unlisted **Corporate Collective Investment Vehicles** (CCIVs), and Regulated Superannuation Entities (RSEs). It is proposed that a regulated entity's beneficial ownership register would include details of:

- all **natural persons** who satisfy at least one of the threshold requirements; and
- all **companies, registered MISs, CCIVs, or trusts** that would satisfy at least one of the threshold requirements if they were a natural person.

The threshold requirements would mirror the UK approach, being to:

- hold, directly or indirectly, **20 per cent of the shares**, units or voting rights in the regulated entity;
- hold the right, directly or indirectly, to **appoint or remove a majority of the board of directors**, responsible entity or corporate director; and
- have the right to exercise, or actually exercise, **significant influence or control** over the regulated entity.

The intent of the register is to increase transparency and discourage the use of complex structures that obscure tax liabilities. Feedback is sought by 16 December 2022.

*Superannuation trustees should consider the possible impact of the disclosure obligations on any legal or beneficial interests held in investment vehicles or corporate entities.*



## Investment Governance (SPS 530) Prudential Guidance

17 November 2022  
*Consultation*

[🔗 LINK TO DETAILS](#)

APRA released **draft Prudential Practice Guide SPG 530 Investment Governance (SPG 530)** which sets out principles and examples of better practice to assist RSE licensees in meeting their requirements under the recently updated *Prudential Standard SPS 530 Investment Governance* (SPS 530), which commences from 1 January 2023.

Draft SPG 530 **replaces existing APRA guidance**, *Prudential Practice Guide SPG 530 Investment Governance* and *Prudential Practice Guide SPG 531 Valuations* (SPG 531). Within the Draft SPG 530, APRA has:

- provided additional guidance to support new focus areas of draft SPS 530, including **liquidity management, stress testing, and valuations**;
- integrated SPG 531 guidance that was not elevated to SPS 530;
- outlined how APRA expects RSE licensees will consider material **environmental, social and governance** (ESG) risk factors as part of their overall investment risk management framework;
- sought to maintain key relevant aspects of existing guidance.

APRA requested feedback by 17 March 2023. Following the finalisation of SPG 530, APRA will be engaging with RSE licensees on their approach to implementing SPS 530 in the second half of 2023.

*Superannuation trustees should assess the impact that the draft guidance may have on the implementation of changes to their investment governance framework as required by changes to SPS 530 from 1 January 2023.*



## GUIDANCE AND POLICY



### APRA Effectiveness and Capability Review

3 November 2022  
*Consultation*

[LINK TO DETAILS](#)

The **Financial Regulator Assessment Authority (FRAA)** has released the first review of APRA in accordance with the FRAA's statutory mandate to report on the effectiveness and capability of Australia's regulators.

The first review of APRA will be a **targeted assessment** of the effectiveness and capability of APRA's supervision and resolution functions, focusing on superannuation:

- **Supervision:** the review will consider the effectiveness and capability of APRA's frontline supervision, and the specialist and risk functions relevant to superannuation.
- **Resolution:** the review will also include APRA's use of data, data analytics, and the supporting technology used in its supervisory and resolution activities.

Consultation closes on 15 December 2022.

*Superannuation trustees should note the consultation and consider whether a submission is warranted.*



### AUSTRAC Guidance

3 November 2022  
*Consultation*

[LINK TO DETAILS](#)

AUSTRAC released two draft updated guidance documents for consultation on **enhanced customer due diligence (ECDD)** practices by reporting entities and **employee due diligence and training**. The guidance is relevant to all reporting entities regulated by AUSTRAC.

The **Proposed updated guidance on Enhanced customer due diligence (ECDD) program** sets out AUSTRAC's expectations in relation to when and how ECDD should be performed, what must be included within the ECDD program, when additional verification should be undertaken and record keeping and reporting obligations.

The **Proposed updated guidance on Employee due diligence and Employee AML/CTF risk awareness training** guidance provides detail of how employees should be screened to ensure they do not pose a money laundering or terrorism financing risk. Consultation closes 15 December.

*Superannuation trustees should review the draft guidance and consider how current practice aligns with the proposed guidance. Administrators and other services providers should be engaged to ensure preparedness for any change.*



### Legislating the Objective of Super

8 November 2022  
*Media Release*

[LINK TO DETAILS](#)

The Government announced their **intention legislate the objective of superannuation** within a recent speech by the Assistant Treasurer and Minister for Financial Services.

The announcement comes in the context of a series of proposals and initiatives relating to utilising superannuation for novel purposes, including housing, paying off university debt, estate planning and the pandemic early release scheme.

By legislating a clear objective, the Government expects any proposed initiatives, such as reviewing the current concessional taxation arrangements and capping superannuation balances, to be assessed for opportunities "where the **national interest** and **member interests align**".

*Superannuation trustees should note the likelihood of significant policy debate on this in 2023. Even if not a legal constraint on Parliament, an objective may provide greater political stability to policy settings.*



## TECHNICAL AMENDMENTS



### National Housing Infrastructure Direction

23 November 2022  
*Legislative Instrument*

[LINK TO DETAILS](#)

The Minister for Housing made the *National Housing Finance and Investment Corporation Investment Mandate Amendment (Social and Affordable Housing) Direction 2022* (Direction). The Direction amends the *National Housing Finance and Investment Corporation Investment Mandate Direction 2018* (Investment Mandate) to **broaden the remit of the National Housing Infrastructure Facility** (NHIF) to allow it to be used to directly finance social or affordable housing projects in addition to financing housing-enabling infrastructure.

This follows an announcement within the Commonwealth Budget of a **housing accord** designed to promote investment in affordable housing by investors including superannuation trustees.

Accordingly, widening the remit of the NHIF in this way will provide **additional flexibility for that financing** to be used to attract more private capital into the social and affordable housing sector to further help improve the returns available, including from superannuation funds and other institutional investors.

*Superannuation trustees should note the Direction and ensure internal investment teams are aware of the change.*



### ASIC Cost Recovery Levy Instruments

10 November 2022  
*Legislative Instrument*

[LINK TO DETAILS](#)

ASIC released two legislative instruments in relation to the **2021-22 Cost Recovery Levy**. The [ASIC \(Supervisory Cost Recovery Levy—Regulatory Costs\) Instrument 2022/889](#) determines **ASIC's regulatory costs** and attribution to each industry sub-sector for the 2021-22 financial year so as to facilitate the collection of industry levies to recover those regulatory costs. The costs attributed to the superannuation sector were

The [ASIC \(Supervisory Cost Recovery Levy—Annual Determination\) Instrument 2022/890](#) specifies certain matters about size and composition of ASIC's regulated population and of the metrics that apply to each industry sub-sector within that regulated population for the 2021-22 financial year. ASIC will use the figures in these instruments in preparing the invoices for the levies which will be sent out to the industry in January 2023.

*Superannuation trustees should note the announcement and ensure internal finance teams are aware of the impending invoice.*



### Financial Adviser Registration

3 November 2022  
*Media Release*

[LINK TO DETAILS](#)

ASIC has announced that it will **delay the financial adviser registration requirement until 1 July 2023**. The *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021* provided that all financial advisers who provide personal advice to retail clients be registered by 1 January 2023, which was proposed to occur through a two-stage process: registration with ASIC using the Financial Advisers Register and a second stage to begin when the Register transitions to the ATO as part of the Australian Business Registry Services.

Through engagement with industry, ASIC has identified ways to improve the operation of the stage one registration process with benefits for licensees. The delay will allow for implementation of the identified improvements.

*Superannuation trustees should note the announcement.*



## APRA Reporting Standards Amendments

7 November 2022  
Consultation

[LINK TO DETAILS](#)

APRA released a discussion paper which contains a range of minor proposed amendments to the reporting standards introduced within Phase 1 of the **Superannuation Data Transformation (SDT) Project**. The amendments include:

- minor amendments to **classifications, definitions and instructions** under five reporting standards introduced under Phase 1 to remove the need for best endeavours reporting;
- allowing **additional time** for reporting on investment objective performance under *Reporting Standard 705.1 Investment Objectives and Performance* (SRS 705.1); reporting on investments under *Reporting Standard 550.0 Asset Allocation* (SRS 550.0), and reporting for some types of investment options on *Reporting Standard 705.0 Components of Net Return* (SRS 705.0);
- **reducing the frequency of ad-hoc submissions** on *Reporting Standard SRS 251.0 Insurance* (SRS 251.0), *Reporting Standard SRS 706.0 Fees and Costs* (SRS 706.0) and *Reporting Standard SRS 605.0 RSE Structure* (SRS 605.0); and
- **consequential amendments** to *Reporting Standard SRS 101.0 Definitions for Superannuation Data Collections* (SRS 101.0).

Feedback is requested by 2 December 2022.

*Superannuation trustees should review and ensure project teams working on the SDT project are aware of the proposed changes and are prepared for implementation.*



## Notifiable Data Breaches Report

10 November 2022  
Report

[LINK TO DETAILS](#)

The Office of the Australian Information Commissioner (OAIC) released the **Notifiable data breaches report** which identified a consistent trend in the number of data breaches notified to the OAIC through the **Notifiable Data Breaches (NDB) scheme** between 1 January and 30 June 2022. Key findings include:

- 41% of all data breaches resulted from **cyber security incidents**, primarily through **Ransomware** and **phishing** activities;
- Contact information, identity information and financial details are the most common types of **personal information** involved in breaches;
- **Human error** accounted for 33% of the reported breaches, with email of personal information to the incorrect recipient the top cause (38%);
- Health is the highest reporting sector (20%), followed by finance (including superannuation) reporting 13% of all data breaches.

The OAIC urged all organisations to "review their personal information handling practices and areas of ongoing risk identified in our report. **Only collect necessary personal information and delete it when it is no longer required**" and to "ensure they have a robust data breach response plan, so in the event of a data breach, they can rapidly notify affected individuals to minimise the risk of harm".

*Superannuation trustees should review the report and consider the findings of the OAIC in relation to key risk areas. Consideration should be given to the collection, management and retention of member data, ensuring appropriate protections are in place.*



## Prudential Standards Determined

16 November 2022  
*Legislative Instruments*

[LINK TO DETAILS](#)

APRA made the following determinations in relation to **two previously announced** superannuation-related prudential standards:

- [Superannuation \(prudential standard\) determination No. 3 of 2022](#), revokes *Prudential Standard SPS 510 Governance* (current SPS 510) and determines a new **Prudential Standard SPS 510 Governance** (SPS 510). SPS 510 has been made to cater for the introduction of *Prudential Standard CPS 511 Remuneration* (CPS 511) which is due to take effect 1 January 2023 which will make several provisions contained within the current SPS 510 relating to remuneration redundant.
- [Superannuation \(prudential standard\) determination No. 2 of 2022](#) (the Instrument) revokes *Prudential Standard SPS 530 Investment Governance* (existing SPS 530) and determines a new **Prudential Standard SPS 530 Investment Governance** (SPS 530). SPS 530 was finalised by APRA in July 2022 and will take effect from 1 January 2023. Supporting draft *Prudential Practice Guide SPG 530 Investment Governance* was recently released for consultation as noted above.

Both instruments will take effect 1 January 2023.

**| Superannuation trustees should note the amended instruments.**

## ENFORCEMENT ACTIVITY



### ASIC Enforcement Priorities

3 November 2022  
*Announcement*

[LINK TO DETAILS](#)

ASIC announced their enforcement priorities for 2023. Relevant to superannuation are:

- Enforcement action targeting **poor design, pricing and distribution** of financial products;
- Misleading conduct in relation to sustainable finance including **greenwashing**;
- Combating and disrupting **investment scams**;
- **Misleading** conduct in relation to investment practices and poor governance practices within the superannuation sector;
- Governance and **director's duties** failures.

ASIC notes that while these specific target areas may change each year, the five enduring priorities will remain in place.

**| Superannuation trustees should note the announcement.**



### ASIC v CBA [2022] FCA 1422.

29 November 2022  
*Judgement*

[LINK TO DETAILS](#)

The Federal Court dismissed proceedings brought by ASIC alleging CBA engaged in **misleading or deceptive conduct, made false or misleading representations** and contravened its obligations as an AFS licensee by incorrectly charging monthly access fees to customers.

ASIC alleged that between 1 June 2010 and 11 September 2019, CBA incorrectly charged monthly access fees to customers who were entitled to fee waivers because they met certain criteria under their contracts with the bank.

**| Superannuation trustees should note the decision, as it adds to existing body of law interpreting the obligation of AFS licensees to provide financial services efficiently, honestly, and fairly. The decision clarifies that the obligation is not one that requires any and all errors be avoided, and that customers have some responsibility to check fees applied to accounts.**

## CASE LAW



MetLife v AFCA [2022]  
FCAFC 173.

8 November 2022  
*Judgement*

[🔗 LINK TO DETAILS](#)

The full bench of the Federal Court issued its judgement on the appeal to a ruling that held AFCA has authority to determine a “**complaint relating to superannuation**” that falls outside the ambit of AFCA’s jurisdiction to hear superannuation complaints under section 1053(1) of the *Corporations Act 2001* (Cth).

The case stems from a decision in relation to a TPD benefit which the insured member challenged by way of a complaint with AFCA. The complaint was not made within the prescribed timeframes for a superannuation complaint.

Yet, in determining in favour of the member complainant, AFCA referred to its **Operational Guidelines** that state where a fund member does not meet the AFCA time limits for a Superannuation complaint, AFCA “may be able to accept a complaint against the insurer under our **general jurisdiction**.”

The Court applied the principles of statutory interpretation to section 1053(1) of the *Corporations Act 2001*, considering the statutory **text, purpose and context** of the legislative provisions in issue.

The decision reasoned that “the grammatical and ordinary sense of the words in the chapeau to s 1053(1)(a) is that a complaint that relates to superannuation can only be made under the AFCA Scheme if it falls within the ten types of complaints specified in sub-ss 1053(1)(a)-(j).”

The ruling places significant weight on the words, “**only if**” as having an exclusionary effect to the scope of the jurisdiction of AFCA to hear superannuation complaints. Consideration was also given to the fact that section 1053(1) would be deprived of meaning if it was not of **exclusionary operation**.

The decision concludes that “any construction of s 1053(1) that had the consequence that a complaint relating to superannuation could be made in the non-superannuation jurisdiction of AFCA would be antithetical to the explanations in the extrinsic materials that the particular characteristics of superannuation complaints required different procedures to non-superannuation complaints.”

The Court ruled that AFCA does not have the authority to determine a “**complaint relating to superannuation**” that falls outside the ambit of AFCA’s jurisdiction to hear superannuation complaints as specified under sub-ss 1053(1)(a)-(j) of the *Corporations Act 2001*.

*Superannuation trustees should consider the significance of the decision on any AFCA complaints that may purport to be heard under its general jurisdiction. This may be particularly relevant to complaints related to insured benefits, in circumstances similar to that in this case.*



Application of MLC  
Investment Limited  
[2022] NSWSC 1541.

27 October 2022  
*Judgement*

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The Supreme Court of New South Wales published a judgement relevant to the issue of whether superannuation trustees are at risk of committing offences under the *Crimes Act 1901 (NSW)* where it receives benefits in the course of changing trustee or giving effect to a **successor fund transfer**.

The decision by Stevenson J concerns the change in trustee of several managed investment schemes and interprets section 249E of the *Crimes Act* which makes it a criminal offence for a trustee to give, solicit, receive a benefit without the consent of all beneficiaries or the Supreme Court as an **inducement or reward** for the appointment of any person as trustee.

The case follows the ruling of Ball J in *BT Funds Management Limited as trustee for Retirement Wrap Superannuation Fund* [2022] NSWSC 401, where the Court held that section 249E may have been enlivened by the **indemnities** that formed part of the successor fund transfer and provided consent, protecting the trustee from possible **criminal responsibility**.

In interpreting section 249E, Stevenson J reasoned that "a corrupt purpose is not an element of the statutory offence." In reaching this conclusion, Stevenson J considered that "the legislature had chosen not to use the word "corruptly" in section 249E" and had included the caveat that **consent of the Attorney General** was required in order to prosecute. Stevenson J held that this "suggests that section 249E was intended to operate broadly and capture conduct which might not necessarily merit prosecution." In other words, the statutory offence under section 249E could apply in NSW even where there is **no improper or corrupt intention**.

Accordingly, the Court proceeded to consider whether consent should be given. In doing so, Stevenson J followed the decision of *BT Funds Management* in applying the test of whether "the appointment of the new trustee was in the best interests of beneficiaries" or that the proposed conduct "did not provide an **inducement** to the transfer to act other than in the **best interests of the beneficiaries**." In concluding that consent should be given, weight was placed on the reasonableness of the extent of the indemnities provided, so as not to be a reward that creates any inducement or **interest that conflicts** with the interests of beneficiaries.

Some caution is required in applying the reasoning to a successor fund transfer, as the facts clearly involve the **appointment of a new trustee** to the existing funds. This can be distinguished from many successor fund transfers, which involve the transfer of trust assets and beneficial interests to another trust. No consideration is given to the issue of whether such a transfer would correctly be characterised an appointment of a new trustee.

*Superannuation trustees should remain cautious in relation to any conduct that may constitute the appointment of a new trustee as part of successor fund transfer negotiations, particularly where there is a connection to NSW or Queensland. In some scenarios, application to the Court for consent and orders protecting from criminal prosecution may be prudent.*



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



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