

# LEGAL, REGULATORY & POLICY UPDATE

## PENSIONS AND SUPERANNUATION

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### IN BRIEF

*There remains a backlog of superannuation related **Bills in Parliament** as the legislative year draws to a close. With an election not far away, there may not be many sitting days for these Bills to progress, increasing the degree of political uncertainty.*

*Importantly, the **Portfolio Holdings Disclosure** regime took shape almost a decade after originally being legislated. The significant changes to the final regulations include sensible and pragmatic format for disclosure of unlisted assets.*

*APRA also commenced consultation on **financial resilience**, while ASIC has proposed some changes to its **superannuation forecasts** (calculators and projections). We also saw the **Law Reform Commission** issue a financial services law review interim report.*

### MAJOR UPDATES



#### Commonwealth Parliament

Oct-Nov 2021  
*Parliamentary Business*

[@LINK TO DETAILS](#)

Commonwealth Parliament sat between 22-25 November, with the final sitting for the calendar year scheduled for 29 November to 2 December. The following superannuation related bill was introduced:

- [Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021](#)

The following bills passed both houses of Parliament:

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

The following superannuation related bills remain before Parliament:

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

*Superannuation trustees should remain apprised of bill status to ensure preparedness for any required change implementation, including ensuring adequate planning and resources are in place.*



## Retirement Income Covenant

25 November 2021  
*Legislation*

[LINK TO DETAILS](#)

The [Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021](#) was introduced to Parliament. Schedule 9 of the Bill requires trustees of an RSE to develop a retirement income strategy for beneficiaries who are retired or are approaching retirement. The intention is for a new covenant to be introduced to the SIS Act, the 'retirement income covenant'.

The covenant requires trustees to formulate, review regularly and give effect to a retirement income strategy for beneficiaries who are approaching or in retirement. As part of the strategy, trustees must document how they intend to assist beneficiaries to achieve and balance the following three objectives:

- maximising their expected retirement income;
- managing expected risks to the sustainability and stability of their expected retirement income; and
- having flexible access to expected funds during retirement.

Trustees must take steps to gather information to formulate their retirement income strategy and make the strategy available on the fund website from 1 July 2022. Consideration must be given to the class and sub-class of beneficiaries to which the strategy applies, along with other sources of retirement income that may be payable to the beneficiary.

Schedule 8 of the Bill contains a range of minor and technical amendments to various laws in the Treasury portfolio.

*Superannuation trustees should review the Bill and commence planning for implementation of the reforms, paying particular attention to the data collection that may be required to devise beneficiary classes. A review of the technical amendments in Schedule 8 is also warranted to ensure no unexpected impacts arise.*



## Insurance in Super

12 November 2021  
*Prudential Standard*

[LINK TO DETAILS](#)

APRA released the final *Prudential Standard SPS 250 Insurance in Superannuation* and *Prudential Practice Guide SPG 250*. The key changes to the finalised standard and guidance include:

- Heightened obligations requiring trustees to assess whether there are any conflicted provisions or business practices in relation to insurance;
- Independent certification requirement for related party insurance arrangements;
- Consideration of erosion of retirement income;
- Additional requirements for the insurance management framework, including consideration of conflicts;
- Member assistance requirements related to opting out of insurance; and
- Heightened data management requirements.

Additionally, APRA published a [Response Paper](#) detailing its response to industry submissions to the prior rounds of consultation.

*Superannuation trustees should review the finalised standard and guidance to ensure that current insurance practices will be compliant with the new standard. Consideration should be given to ensuring that any necessary adjustments are made to the trustee's Insurance Management Framework.*



## APRA Climate Change Guide

26 November 2021  
*Guidance*

[LINK TO DETAILS](#)

APRA released its final prudential practice guide on climate change financial risks following consultation on the draft *Prudential Practice Guide CPG 229 Climate Change Financial Risks* released in April. The finalised Guide takes effect immediately.

The Guide does not introduce new regulatory requirements or obligations but is intended to assist superannuation trustees (among other institutions) manage climate-related risks and opportunities within existing risk management and governance practices.

The final version of the Guide now includes additional detail in relation to setting objectives and targets (such as net zero by 2050), and additional guidance in relation to disclosing and implementing such commitments.

APRA also released a [Response Paper](#) summarising the feedback received from industry and other stakeholders during the consultation process.

*Superannuation trustees should review the finalised guidance and ensure existing risk management and governance practices adhere to the APRA Guide. Where trustees have made public commitments, specific attention should be paid to how APRA expects such commitments to be managed.*



## Remediation Guidance

17 November 2021  
*Consultation*

[LINK TO DETAILS](#)

ASIC released an updated and expanded draft regulatory guide for consultation regarding consumer remediation.

According to ASIC, the draft guidance is comprehensive and makes allowance for licensees to tailor it to the circumstances of their particular remediation activity. It has been informed by ASIC's operational experience and benefitted from extensive earlier consultation.

The release follows ASIC's earlier consultation through [Consultation Paper 335 Consumer remediation: Update to RG 256 \(CP 335\)](#) which was published on 3 December 2020. ASIC also released [REP 707](#) to respond to submissions to the earlier consultation.

Comments close on 11 February 2022.

*Superannuation trustees should review the guidance and consider providing feedback, before the guidance is finalised.*



## Kiwisaver

26 November 2021  
*Regulations*

[LINK TO DETAILS](#)

The Government released [Treasury Laws Amendment \(Kiwisaver Scheme\) Regulations 2021](#) to support the transfer of Unclaimed Monies to Kiwisaver Schemes.

Schedule 2 to the [Treasury Laws Amendment \(2020 Measures No. 5\) Act 2020](#) enabled superannuation balances held by the Commissioner of Taxation to be transferred to a New Zealand Kiwisaver Scheme in the same manner as payment to a superannuation fund.

The Regulations support this change by prohibiting entry and exit taxes between the Australian and New Zealand schemes, and both clarify and introduce a range of definitions that apply.

*Superannuation trustees should note the Regulations and ensure that appropriate administration arrangements and member service material is in place concerning trans-Tasman portability.*



## Portfolio Holdings Disclosure

22 November 2021  
*Regulations*

[LINK TO DETAILS](#)

After consulting on two draft versions, Treasury made the [Corporations Amendment \(Portfolio Holdings Disclosure\) Regulations 2021](#).

The following significant changes were made from the previous exposure drafts:

- New Regulation whereby the asset item description is not required for certain types of investment items;
- Introduction of different disclosure requirements for assets managed internally versus externally. For example, unlisted assets only require an aggregated valuation by investment kind (where managed internally) or aggregated by investment manager (where managed externally);
- Improved alignment with APRA reporting; and
- Amended derivative disclosure allowing some aggregation.

The Treasurer and Minister also announced that [the use of derivatives will be examined by the Council for Financial Regulators](#).

*Superannuation trustees should review the changes and ensure that preparation for the first disclosure is aligned with the revised requirements. Importantly, the significant changes to the way in which unlisted assets are required to be aggregated and distinctions made between internally and externally managed assets should be considered.*



## Technology Neutrality

19 November 2021  
*Consultation*

[LINK TO DETAILS](#)

Treasury released exposure draft legislation to modernise business communications by improving the technology neutrality of Treasury portfolio laws.

Building on the proposed reforms in the [Corporations Amendment \(Meetings and Documents\) Bill 2021](#) introduced into Parliament in October, the *Treasury Laws Amendment (Modernising Business Communications) Bill* is intended to provide greater flexibility for businesses, individuals and regulators when communicating with each other. The draft bill and regulations would:

- Remove redundant and spent regulations from the *Superannuation Industry (Supervision) Regulations 1994*;
- All documents under the *Corporations Act* will be permitted to be signed electronically; and
- Newspaper publication requirements would be permitted to be published in other comparable formats.

While the Bill proposes minor changes to superannuation legislation, other changes would have a minor impact on superannuation trustees as a result of changes to the *Corporations Act*.

Feedback to the consultation is sought by 10 December 2021.

*Superannuation trustees should review the draft legislation and consider submitting a response.*



## TECHNICAL CHANGE AND UPDATES



### APRA Data Project

4 November 2021  
FAQs

[LINK TO DETAILS](#)

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

- General FAQs 1.17 and 1.18 related to submitting reporting forms where there is no data to report on the form related to that RSE and where an RSE licensee can access information on the interpretation of trustee-directed products.
- FAQ 550.0 n and FAQ 605.0 s related to what needs to be reported where an investment option with multiple asset classes does not have any strategic asset allocation benchmarks and what inception date should be used when an investment option is determined to be a trustee-directed product on the reporting date, however it would not have been classified as such at inception.
- Clarification to General FAQs 1.02 (due dates) and 1.12 (reporting requirements for Pooled Superannuation Trusts).

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



### AFCA Review

24 November 2021  
Findings and Response

[LINK TO DETAILS](#)

The Government tabled the Review of AFCA in Parliament, welcoming the overall finding of the Review that AFCA is performing well and providing an effective dispute resolution service for consumers and small businesses.

The 2021 Review of AFCA was undertaken in response to a statutory requirement and was conducted between February and August 2021. The Review made 14 recommendations (none of which were specific to superannuation) with which the government agreed. The recommendations focus on improving guidance; the decision-making process; and improved transparency.

*Superannuation trustees should review the recommendations and response.*



### ASIC Levies

November 2021  
Statement

[LINK TO DETAILS](#)

ASIC published its *Cost Recovery Implementation Statement (CRIS) 2020-21*, which provides information on how ASIC will implement the industry funding model and recover the costs of its regulatory activities from each industry subsector and its user-initiated and transaction-based regulatory costs via fees for service in 2020-21.

The CRIS outlines ASIC's focus areas in the superannuation trustees subsector with the total levy to recover costs of \$23.084m (cost recovery levy) and \$6.129m (statutory levy).

It also confirms the relief announced by the Minister to provide temporary and targeted relief for financial advisers through a graduated component of the levy for the subsector restored to its 2018-19 level for two years.

ASIC also registered [ASIC \(Supervisory Cost Recovery Levy—Annual Determination\) Instrument 2021/0936](#) and [ASIC \(Supervisory Cost Recovery Levy—Regulatory Costs\) Instrument 2021/0938](#).

*Superannuation trustees should note the CRIS and review the legislative instruments to anticipate the invoice it will receive from ASIC in January 2022.*



## Dispute Resolution Benchmarking

19 November 2021  
*Launch*

[LINK TO DETAILS](#)

AFCA launched a new digital platform to help financial firms better manage disputes that reach the ombudsman service.

The new AFCA Member Benchmarking Dashboard is an interactive platform for financial firms that provides near real-time complaints data – updated daily – and gives individual firms a greater understanding of their complaints, including how quickly they are being resolved. It also enables firms to compare their performance against an anonymised set of similar financial firms.

The new tool is only available to member firms, however AFCA will continue to provide insights into complaints through its public AFCA Datacube, which is updated twice per year.

AFCA also published three new response guides for super: [Distribution of a superannuation death benefit](#); [Superannuation declined insurance claims](#) and [Superannuation insurance claim delays](#).

*Superannuation trustees should familiarise itself with the tool and the new response guides. The tool may provide relevant benchmarking data for strategic business planning.*



## Limited Advice

1 December 2021  
*Guidance*

[LINK TO DETAILS](#)

ASIC released an information sheet on limited advice and an example statement of advice (SOA) to assist financial advisers and advice licensees comply with their obligations when providing limited personal advice to retail clients.

[INFO 267 Tips for giving limited advice](#) includes information on what advice providers can do to meet their obligations under the law, including the best interest duty and related obligations as well as the FASEA Code of Ethics.

This new guidance follows the recent release of ASIC's [INFO 266 Records of Advice](#) that can be used when providing advice under the temporary relief *ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2021/268* until 15 April 2022.

*Superannuation trustees should note the information sheet and ensure and associated financial advisors are aware of the obligations.*



## ASIC Capability Review

29 November 2021  
*Consultation*

[LINK TO DETAILS](#)

The Financial Regulator Assessment Authority (FRAA) released the scope of its first ASIC assessment into the effectiveness and capability of ASIC. This consultation is intended to ensure ASIC is operating effectively and consistently with the Government's Statement of Expectations.

The FRAA's statutory mandate requires it to assess and report on the effectiveness and capability of ASIC and APRA on a biennial basis, with reports to be delivered to the Minister and subsequently tabled in Parliament.

The consultation poses a series of questions relating to the effectiveness and capability of ASIC's strategic prioritisation, planning and decision making; surveillance function; and licensing function.

Submissions close 28 January 2022.

*Superannuation trustees should review the consultation and consider whether to provide a response.*



## GUIDANCE AND POLICY



### Financial Resilience

19 November 2021  
*Consultation*

[LINK TO DETAILS](#)

APRA released a discussion paper seeking feedback from superannuation trustees and other industry stakeholders on the current and emerging approaches for RSE licensees to maintain the financial resilience needed to protect members' best financial interests.

APRA is seeking to better understand current approaches to the management of financial resources, the role and use of the operational risk financial requirement (ORFR), reserving practices, and protections afforded to RSE licensees via insurance, and how these practices might need to adapt over time.

In particular, APRA is seeking to gain further insight into current and emerging approaches to:

- the adequacy, purpose and management of financial resources;
- the financial resources available to RSE licensees;
- financial projections in business planning processes; and
- RSE licensees' provision for contingencies.

The consultation is open until 11 March 2022.

*Superannuation trustees should review the paper and consider contributing to the consultation response. The scope of the review includes important issues related to a trustee's ability to manage liabilities – including those which it may not be able to indemnify from trust assets.*



### Climate Change

4 November 2021  
*Note*

[LINK TO DETAILS](#)

APRA and the RBA published a combined statement on the actions they are taking to ensure financial institutions and the Australian financial system are prepared to respond to the financial risks of climate change. Key points from the statement include:

- APRA considers that effective decision-making by financial institutions needs to include a full consideration of risk, including the potential impacts of physical, transition and liability climate risks.
- The RBA will conduct analysis to monitor the implications of climate change and related mitigation policies for the economy and the transmission of monetary policy through financial markets and the banking system to households and businesses.
- APRA and the RBA will continue to draw attention to the financial stability and macroeconomic consequences of climate change and share knowledge based on their experience.
- APRA and the RBA are committed to minimising the impact of their activities on the environment.

According to APRA's media release: APRA and the RBA are among more than 50 international members of the Network for Greening the Financial System (NGFS) that have made public statements on the important role of central banks and financial regulators in mitigating the physical, transition and liability risks of climate change in the finance sector.

*Superannuation trustees should note the statement.*



## Privacy Act

25 October 2021  
*Consultation*

[LINK TO DETAILS](#)

The Attorney-General released a Discussion Paper seeking feedback on proposed reforms to the *Privacy Act 1988* ('the Act'). This forms part of a broader review of the Act, announced in March 2019, which will examine whether the scope and enforcement mechanisms within the Act remain fit for purpose and potential options for reform.

The Paper outlines feedback received through submissions to the [Issues Paper](#) that was released in October 2020 and puts forward possible proposals for reforms to address issues identified with the current operation of the Act. Responses to these proposals will inform the Review's final report.

Although the proposals are extremely broad in nature, the Paper specifically references superannuation and financial services given the high level of personal data captured by the sector.

The consultation closes on 10 January 2022.

*Superannuation trustees should review the paper and consider providing a submission or contributing to a submission of one of the industry groups. The changes will impact superannuation trustees as collectors and holders of personal information.*



## YFYS MySuper Performance Test

10 November 2021  
*Media Release*

[LINK TO DETAILS](#)

APRA issued a media release urging members – especially those whose MySuper products failed the recent performance test – to more actively engage with their superannuation to maximise their retirement futures.

The media release states that "[t]he call comes as APRA data shows only a small proportion of members of the products that failed the test have moved their savings elsewhere despite receiving letters notifying them that their product was officially underperforming."

APRA advises that the best place for members to start is the ATO's YourSuper Comparison tool and ASIC's MoneySmart website and foreshadows the release of its first choice heatmap.

Separately, APRA also published [two new FAQs](#) confirming that it intends to publish the performance test values for the MySuper products as part of the MySuper heatmap and the benchmark representative administration fees and expenses used for the 2020-21 performance test was 0.3286%.

*Superannuation trustees should note the media release and FAQs.*



## ALRC Review

30 November 2021  
*Interim Report*

[LINK TO DETAILS](#)

The Australian Law Reform Commission (ALRC) released the first of three scheduled Interim Reports as part of a three-year review into the complexity within Commonwealth legislation regulating corporations and financial services. Further interim reports are due in September 2022 and August 2023, with the final report due by 25 November 2023.

Interim Report A focuses on the appropriate use of definitions in the Corporations Act and contains 13 recommendations for reform.

The ALRC is seeking feedback on 16 proposals and 8 questions. Submissions are due by Friday 25 February 2022.

*Superannuation trustees should note the report and consider submitting a response.*





## Calculators and Projections

18 November 2021  
*Consultation*

[LINK TO DETAILS](#)

ASIC released Consultation Paper 351 *Superannuation forecasts: Update to relief and guidance* seeking feedback on proposed updates to relief and guidance for superannuation forecasting tools, including calculators and retirement projections.

The Paper outlines ASIC's proposals to:

- continue providing its longstanding relief from personal financial advice requirements for persons who provide superannuation calculators and for superannuation trustees who provide retirement estimates to their members;
- adopt a single framework for how calculators and retirement estimates may be provided under ASIC's relief, which will require trustees to have greater consistency between the assumptions used across their retirement estimates and superannuation calculators;
- set standard assumptions for retirement ages and inflation rates that must be used as the defaults, to foster consistency across the industry;
- give greater flexibility to trustees to tailor forecasts based on their members' investment strategies.

Consultation closes on 28 January 2022.

*Superannuation trustees should note the consultation and consider whether a response is warranted. Particular attention should be paid to the distinction between calculators and retirement estimates, and exclusions of defined benefit interests from parts of the relief.*



## Records of Advice

5 November 2021  
*Information Sheet*

[LINK TO DETAILS](#)

ASIC released an information sheet on records of advice (ROA) and three ROA examples to provide clarity to financial advisers and advice licensees on their obligations when using ROAs to provide personal advice to retail clients.

[INFO 266 FAQs: Records of Advice](#) answers frequently asked questions about using ROAs; preparing ROAs; keeping ROAs; the meaning of 'significantly different'; and other matters.

The information sheet also includes Example ROAs that are annotated to help advisers understand the relevant requirements under the *Corporations Act*.

This follows the release of an [Example ROA: COVID-19 relief measure](#) that can be used when providing advice under the temporary relief [ASIC Corporations \(COVID-19—Advice-related Relief\) Instrument 2021/268](#) until 15 April 2022.

*Superannuation trustees should note the release and consider circulating to advisers.*



## ENFORCEMENT ACTIVITY



### ASIC v Westpac

30 November 2021  
*Civil Penalty  
Proceedings*

[LINK TO DETAILS](#)

ASIC commenced civil penalty proceedings against Westpac in the Federal Court, alleging widespread compliance failures across multiple Westpac businesses. Six separate proceedings, each the result of individual investigations, are alleged against a range of Westpac's businesses including superannuation, banking, wealth management and the former general insurance business.

The six matters filed by ASIC allege:

- **fees for no service:** over 11,000 deceased customers were charged over \$10m in fees within a 10 year period for services not provided due to their death
- **general insurance:** 7,000 customers were issued duplicate insurance policies for the same property and were deducted commensurate premiums. Additionally, 329 members were issued insurance policies but not consented to do so.
- **Insurance in super:** Westpac subsidiary BT Funds Management charged commission fees in contravention of the Future of Financial Advice (FOFA) reforms which banned these fees. Commissions were also paid to advisors after the member had elected to remove the advisor component from their account.
- **Inadequate fee disclosure:** Westpac licensees BT Financial Advice, Securitor and Magnitude (all no longer operating) charged ongoing contribution fees for financial advice to at least 25,000 customers without proper disclosure, whereby the fees disclosed were less than those charged, or not disclosed at all.
- **Deregistered company accounts:** approximately 21,000 deregistered companies continued to hold an account, with fees and transactions continuing, as appropriate processes were not in place to manage accounts held by deregistered companies.
- **Debt on-sale:** consumer credit card and flexi-loan debt were sold to debt purchasers at a higher interest rate than allowed. This resulted in more than 16,000 consumers being overcharged interest.

ASIC further alleges that in all matters, excluding Debt on-sale and Insurance in super, Westpac failed to ensure that its financial services were provided efficiently, honestly and fairly.



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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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