



RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS IN SUPERANNUATION 20 MAY 2019 – 14 JUNE 2019

1. APRA AND ASIC UPDATES

1.1 ***APRA Information Paper: Self-assessments of governance, accountability and culture (22 May 2019)***

Background

In May 2018, APRA released the Final Report of its Prudential Inquiry (**Final Report**) into the Commonwealth Bank of Australia (**CBA**). The Final Report's major finding was that CBA's continued financial success had dulled the institution's senses, especially with regard to the management of non-financial risks.

When the Final Report was released, APRA called on all APRA-regulated institutions to reflect on the findings and consider whether similar issues might exist in their own organisations. In addition, APRA wrote to the boards of 9 authorised deposit-taking institutions, 16 insurers and 11 superannuation fund trustees asking them to conduct a self-assessment against the findings, and provide that assessment to APRA. APRA has since examined these self-assessments.

Information Paper

APRA's Information Paper discusses the outcomes of the self-assessments, key findings and common themes, and some of the solutions being implemented by institutions.

A number of common themes have emerged from the self-assessments, including:

- a) non-financial risk management requires improvement;
- b) accountabilities are not always clear, cascaded and effectively enforced;
- c) acknowledged weaknesses are well-known and some have been long-standing; and
- d) risk culture is not well understood, and therefore may not be reinforcing the desired behaviours.

Key findings

A number of common themes have emerged from the self-assessments, including:

- a) non-financial risk management requires improvement;
- b) accountabilities are not always clear, cascaded and effectively enforced;

- c) acknowledged weaknesses are well-known and some have been long-standing; and
- d) risk culture is not well understood, and therefore may not be reinforcing the desired behaviours.

Emerging themes

While the self-assessments exhibited considerable variation in the number and severity of findings, four themes emerged across all industries:

- a) *non-financial risk management requires improvement.* This was evidenced through a range of issues including resource gaps (particularly in the compliance function), blurred roles and responsibilities for risk, and insufficient monitoring and oversight. Institutions acknowledged that historical underinvestment in risk management systems and tools also contributed to ineffective controls and processes;
- b) *accountabilities are not always clear, cascaded, and effectively enforced.* Institutions noted that there is less clarity or common understanding of responsibilities below the senior executive levels, and points of handover where risks, controls and processes cut across divisions. This is further undermined by weaknesses in remuneration frameworks and inconsistent application of consequence management;
- c) *acknowledged weaknesses are well known and some have been long-standing.* Nevertheless, some issues have been allowed to persist over time, with competing priorities, resource and funding constraints typically cited as the basis for acceptance of slower progress. It was observed that these issues are often only prioritised when there is regulatory scrutiny or after adverse events; and
- d) *risk culture is not well understood, and therefore may not be reinforcing the desired behaviours.* Institutions are putting considerable effort into assessing risk culture, but many continue to face difficulties in measuring, analysing, and understanding culture (and sub-cultures) across the institution. It is therefore unclear if these institutions can accurately determine whether their culture is effectively reinforcing desired behaviours (or identify how it would need to be changed to do so).

1.2 **Protecting your super package - frequently asked questions (4 June 2019)**

APRA amended its frequently asked questions (**FAQs**) in respect of the *Parliament of Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* (Cth).

APRA has added the following FAQs:

Fees charged to superannuation members

1.6B How do fee refunds operate for members leaving part way through the year?

APRA considers that the policy intent of the legislation is that the fee cap would apply on exit during the year (including the refunding element) where an

account was below \$6000. However, the legislation provides that a trustee is taken to have complied with the fee cap requirements under the law if it provides a refund to the member within 3 months from the end of the year.

In respect to members leaving a fund part way through the year, APRA expects that a trustee acting in the best interests of members would endeavour to provide the refund for fees in excess of the fee cap to any exited members no later than 3 months after those members have left the fund. APRA's view is that such action is not contrary to s 99G(6) and is consistent with the policy intent outlined in the Explanatory Memorandum (see Example 2.3 and paras. 2.24 and 2.25). Refunding any excess fees to a member as soon as practicable (and within 3 months) could mitigate any administrative difficulties or operational risks that may arise at a later date, for example issues that may arise where a trustee was not able to locate a member who had exited the fund earlier in the year.

Circumstances may result in some trustees not being able to refund exiting members until the end of the year. However, APRA expects trustees to put in place appropriate systems and processes that limit circumstances where they are not able to apply the fee cap at/close to the time of exit.

1.8 Are funds compelled to rebate very small amounts to members and rebate fees where the cost to administer and process the rebates, coupled with the member experience impact, will be problematic?

The legislation provides that trustees are required to refund members any excess fees above 3 per cent for products with balances below \$6,000, no matter how small the amount.

APRA would expect that trustees would minimise costs associated with the refund by directly crediting the products of their existing members. In respect to exiting members, APRA expects that trustees would establish whether an amount was required to be refunded at the time of exit or as soon as practicable after that time.

Refunding any excess fees to a member as soon as practicable (and within 3 months) could mitigate any excessive costs that may arise at a later date, for example issues that may arise where a trustee was not able to locate a member who had exited the fund earlier in the year.

Insurance for inactive accounts to be provided on an opt-in basis only

2.6 Does an election made by a member for their insurance to continue in respect of their inactive account last indefinitely?

Yes. APRA considers that once a member makes an election in relation to the member's insurance under a particular product, that election continues indefinitely until the member advises the trustee otherwise. Trustees are required, at regular intervals, to notify members that have made an election how they can subsequently cease their insurance.

2.7 Can a trustee receive elections to maintain insurance in respect to products that are inactive electronically?

Section 68AAA provides members with the ability to elect 'in writing' to maintain insurance provided under a product that has been inactive for a period of 16 months or more. APRA notes that the policy intent of this section, as outlined in the Explanatory Memorandum, was to permit electronic

communications. When determining whether this election is able to be provided electronically, a trustee would be expected to obtain its own legal advice and ensure it has a strong supporting rationale for the approach taken. APRA is aware of different views across the industry on this issue and is open to taking a pragmatic approach based on relevant circumstances.

Where trustees have concerns, they can discuss their approach with their APRA supervisor, providing details of the approach taken and their supporting rationale.

2.8 How does section 68AAA apply to a trustee's product offerings?

Section 68AAA requires that a trustee does not take out or maintain insurance for members under a MySuper or Choice product where the product is inactive for a continuous period of 16 months.

As outlined in FAQ 2.5, the changes apply to all Choice products, which includes pension, paid-up whole of life, endowment and risk-only superannuation products. The only exemptions that apply in respect of section 68AAA are in relation to defined benefit members, ADF Super members (including a person that would have been an ADF Super member in certain circumstances) or where an employer-sponsor contribution exemption applies (per section 68AAAE).

Where a member's rights in relation to insurance relate to any premiums paid prior to the prohibition applying and/or insurance cover provided for a fixed term that commences prior to the prohibition applying, the insurance opt-in changes protect members' rights under such insurance arrangements even where the trustee no longer takes out or maintains insurance in respect of that member due to the operation of section 68AAA. APRA expects that subsections 68AAA(7) and (8) would operate in limited circumstances, for example, in respect of pre-paid insurance offerings and limited term policies. APRA takes the view that group life policies should not be considered to be fixed term cover for the purposes of subsection 68AAA(8) in light of the policy intent of these provisions.

In APRA's view, the protection of the rights of members provided for in section 68AAA does not exempt these products from the requirement not to take out or maintain insurance for members where the product under which insurance is provided is inactive for a continuous period of 16 months.

2.9 Are insurance products where members are on claim, including income protection claims and lump sum claims, subject to the insurance opt-in changes?

Yes. Insurance products where members are on claim are subject to the PYSP insurance opt-in changes as these types of offerings are not excluded under section 68AAA.

Where members are on claim, APRA considers that the rights of these members in relation to the insurance benefit currently being paid would ordinarily not be affected by the insurance opt-in changes. That is, the operation of section 68AAA relates to the taking out or maintenance of insurance, not to the rights of a member in respect of the insurance cover. As such, while members currently on claim would ordinarily maintain their rights to the insurance benefit being paid, these members may still become inactive.

To reduce confusion to members currently on claim, APRA recommends that trustees ensure that all affected members are able to provide a written election for the continued provision of the insurance benefit for any future claims, or alternatively to make a contribution so that their superannuation product can remain active. APRA considers that any such written elections for the continued provision of the insurance benefit will be considered to remain effective for the particular product unless or until the member withdraws the election in writing. Trustees are required, at regular intervals, to notify members that have made an election how they can subsequently cease their insurance.

Mills Oakley comment

Important discussions around what constitutes the indirect costs that make up the capped fees and costs are warranted, and guidance would be welcomed.

1.3 **ASIC uses conflicted remuneration powers against SMSF advisers (12 June 2019)**

ASIC has confirmed that it commenced civil penalty proceedings R M Capital Pty Ltd (**RM Capital**) and its authorised representative, The SMSF Club Pty Ltd (**SMSF Club**), in relation to accepting conflicted remuneration.

ASIC alleges that SMSF Club advised its clients to set up SMSFs then use their SMSFs to buy real property marketed by a real estate agent, Positive RealEstate Pty Ltd (**Positive RealEstate**). ASIC asserts that SMSF Club had referral agreements with Positive RealEstate and that RM Capital was aware of this referral agreement.

ASIC contends that, from December 2013 to July 2016, each time a SMSF Club client used their SMSF to buy a property marketed by Positive RealEstate, Positive RealEstate paid around \$5,000 to SMSF Club. At times, Positive RealEstate paid these amounts directly to SMSF Club, while at others it paid them to RM Capital who passed on the majority to SMSF Club.

ASIC alleges that SMSF Club accepted more than \$730,000 in conflicted remuneration from Positive RealEstate, and therefore that these payments could reasonably be expected to have influenced financial product advice given by SMSF Club to its clients, thereby constituting banned conflicted remuneration under the Corporations Act's FOFA provisions.

ASIC also alleges that RM Capital was aware of the payments and did not take reasonable steps to stop the SMSF Club from accepting them. ASIC contends that as the authorising licensee for SMSF Club, RM Capital's failure to take reasonable steps to ensure SMSF Club's compliance also breached the law.

This will be the first case concerning the alleged breach of conflicted remuneration provisions. ASIC will contend that SMSF Club and RM Capital contravened the Act on as many as 259 occasions each. Each contravention attracts a potential civil penalty of up to \$1 million.

2. **LEGISLATION**

2.1 **ASIC Corporations (Amendment) Instrument 2019/514 (registered 4 June 2019)**

The Instrument amends *ASIC Corporations (Generic Calculators) Instrument 2016/207 (Principal Instrument)* which gives providers of generic financial

calculators relief from the requirement to hold an Australian Financial Services licence with an advice authorisation or (where they currently hold a licence) relief from the conduct and disclosure requirements in Divisions 2 to 4 of Part 7.7 of the Corporations Act in relation to that advice.

The relief only applies where the provider of a generic financial calculator takes reasonable steps to meet certain requirements, including using an assumed rate of inflation of 2.5%. Superannuation and retirement calculators, were exempt from this requirement until 1 July 2019.

Instrument's purpose

The Instrument sets out the assumed inflation rate that superannuation and retirement calculators must use to calculate the present value of estimates in order to be eligible for relief under the Principal Instrument.

Superannuation and retirement calculator providers must either used an assumed inflation rate of 3.2% or an alternative assumed inflation rate, as long as certain disclosure requirements are satisfied.

3.2% is equivalent to the assumed inflation rate used by ASIC's MoneySmart superannuation and retirement calculators. ASIC intends to periodically update the Principal Instrument to reflect any changes in the default inflation rate used by ASIC's MoneySmart superannuation and retirement calculators.

If a superannuation and retirement calculator uses an alternative assumed inflation rate to calculate the present value of estimates and that alternative rate does not include a component that reflects the cost of meeting increases in community living standards, the amendments require the calculator to display a clear and prominent statement:

- a) specifying that the present value of the estimate does not take into account the costs of meeting increases in community living standards; and
- b) explaining the implications of the present value not taking into account such costs.

The Instrument defers commencement of the above requirements from 1 July 2019 to 5 December 2019.

2.2 ***Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2019 (registered 13 June 2019)***

The Determination provides the interest rate for adjusting entitlements under certain *Family Law Act 1975* (Cth) orders or agreements and for splitting future superannuation benefits for the 2020 Financial Year adjustment period is 0.048%.

The Determination also provides the method by which the interest rate is calculated where an adjustment period includes other periods.

3. **CASES**

- 3.1 There were no cases of relevance during this period.

4. OTHER RECENT DEVELOPMENTS

4.1 ***ATO NAT 75198-05-2019 Inactive low-balance accounts – Authorising your fund to provide a written declaration to the ATO (May 2019)***

The Commissioner of Taxation (**Commissioner**) has issued a specific form to be used by members who intend to declare to the Commissioner that they are not inactive low-balance members, pursuant to *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth), section 20QA(1A)(b)(iv). The form states that members are to provide their superannuation fund trustee with the form so that the trustee can forward the same to the ATO.

4.2 ***Amendments to ATO Law Companion Rulings LCR 2016/8 Superannuation reform: transfer balance cap and transition-to-retirement reforms: transitional CGT relief for superannuation funds and LCR 2016/9 Superannuation reform: transfer balance cap (5 June 2019)***

The ATO amended both Law Companion Rulings in order to reflect recent amendments made by the *Treasury Laws Amendment (2018 Measures No. 4) Act 2019* (Cth) to the rules applying to reversionary transition to retirement income streams to ensure that reversionary beneficiaries can receive a reversionary TRIS, irrespective of whether a condition of release has been satisfied.

The amendments apply from 1 April 2019.



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