



## RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS IN SUPERANNUATION 22 JULY 2019 – 16 AUGUST 2019

### 1. APRA AND ASIC UPDATES

#### 1.1 ***APRA Consultation on remuneration requirements for all APRA-regulated entities (23 July 2019)***

APRA proposes to create a new prudential standard (*CPS 511 Remuneration*) relating to remuneration requirements across all APRA-regulated industries.

The core elements are to:

- a) strengthen governance of remuneration frameworks and outcomes, in particular through an expanded Board role, where the Board needs to be active and have direct oversight;
- b) set overarching remuneration objectives that inform design of all remuneration arrangements and influence remuneration outcomes;
- c) limit the use of financial performance metrics (for example, share price); and
- d) set minimum deferral periods (up to seven years) for senior executives.

#### *Remuneration framework*

A trustee must maintain a remuneration framework that is appropriate to its size, business mix and complexity that includes a documented remuneration objective that must:

- a) promote effective management of both financial and non-financial risks, and sustainable performance;
- b) promote the financial interest, and reasonable expectations, of beneficiaries; and
- c) support the prevention and mitigation of misconduct risk.

#### *The Board's role*

The Board must:

- a) approve the remuneration policy and establish a Board Remuneration Committee; and
- b) establish a formal process for the Board Remuneration Committee to consult the Board Risk Committee and Chief Risk Officer, to enable risk outcomes to be appropriately reflected in remuneration outcomes for persons in special role categories.

#### *The Board Remuneration Committee*

The Board Remuneration Committee must:

- a) have at least three members who must be non-executive directors of the entity;
- b) obtain comprehensive reporting that will allow it to assess whether remuneration outcomes of all remuneration arrangements align with the entity's remuneration objectives;
- c) have free and unfettered access to other Board committees;
- d) have free and unfettered access to risk and financial control personnel and other relevant parties (internal and external); and
- e) if choosing to engage third-party experts, have the power to do so in a manner that ensures that the engagement, including any advice received, is independent.

#### Review of the remuneration framework

The remuneration framework's compliance must be reviewed at least annually and be subject to a triennial review by operationally independent persons.

#### Remuneration design

Trustees must design all variable remuneration arrangements to align with their remuneration objectives and these must incorporate:

- a) appropriate remuneration design tools which allow variable remuneration adjustments when and if required;
- b) financial and non-financial risks that could materially impact the entity's risk profile, performance, long-term soundness or the promotion of the financial interest and reasonable expectations of beneficiaries and which, at a minimum, cover the material risks set out in APRA Prudential Standard *SPS 220 Risk Management*;
- c) the need for payout and vesting schedules to be commensurate with the possible range of risk and performance outcomes;
- d) an assessment of whether remuneration objectives have been met in a multiyear framework over the entity's business and strategic time horizon; and
- e) the cost and quantity of capital and liquidity required to support business activities, where appropriate for the role.

Trustees must not accelerate the vesting of unvested variable remuneration for persons no longer employed, unless specific exceptions have been made in the remuneration policy.

#### Remuneration outcomes

Trustees must ensure that variable remuneration outcomes:

- a) are commensurate with performance and risk outcomes; and
- b) are adjusted downwards, to zero if appropriate, through tools that are triggered when remuneration objectives are not met, or in response to significant unexpected or unintended consequences which impact the effective management of both financial and non-financial risks, sustainable performance, long-term soundness of the entity and have

an impact on promoting the financial interest, and reasonable expectations, of beneficiaries.

Entities must ensure that variable remuneration is paid or vested only if payment or vesting:

- a) does not compromise the entity's long-term soundness, or the promotion of the financial interest, and reasonable expectations, of beneficiaries;
- b) is justified on the basis of the performance achieved and effective management of both financial and non-financial risks of the entity and the relevant business unit, and, the performance of the person concerned; and
- c) meets the entity's remuneration objectives.

Trustees must ensure that variable remuneration outcomes are linked to and are supported by their performance management system, code of conduct and consequence management processes.

#### Special role categories

Entities must prudently manage the variable remuneration arrangements of all persons in special role categories.

The Board Remuneration Committee must annually assess and make recommendations to the Board on the remuneration arrangements and variable remuneration outcomes for persons in special role categories as follows:

- a) individually for senior managers and highly-paid material risk-takers;
- b) collectively for other material risk-takers; and
- c) collectively for risk and financial control personnel.

Entities must also ensure that the variable remuneration arrangements for risk and financial control personnel:

- a) reflect the independence and authority of those personnel in carrying out their functions;
- b) are set in accordance with the objectives of their functions; and
- c) are not influenced by the performance of the business activities they control.

#### Deferral and clawback for significant financial institutions

A significant financial institution (this is likely to be trustees of funds with assets greater than \$30 billion) must:

- a) defer 60% of CEO's total variable remuneration for at least seven years from the inception of the variable remuneration component; and
- b) for senior managers and highly-paid material risk-takers, defer 40% of their total variable remuneration for at least six years from the inception of the variable remuneration component.

Vesting of these amounts may only occur after four years from the time of inception and no faster than on a pro-rata basis.

Submissions are due 23 October 2019.

1.2 **ASIC Information Sheet 241 – Prohibition on influencing employers’ superannuation fund choice: section 68A of the SIS Act (31 July 2019)**

ASIC has issued guidance in respect of the prohibitions contained in amended SIS, section 68A, which prohibits a trustee, or its associates, from using goods or services to influence employers to nominate a default superannuation fund for employees, or to encourage employees to choose or retain a particular superannuation fund.

Included in the Information Sheet are the following examples:

- a) corporate hospitality (breach of section 68A);
- b) free educational seminars relating to the payment of superannuation contributions to a fund (no breach of section 68A);
- c) discounted premiums on business insurance policies (breach of section 68A);
- d) clearing house facilities (no breach of section 68A);
- e) discounts on administration fees for employees (no breach of section 68A); and
- f) fund update over modest lunch (no breach of section 68A).

1.3 **APRA's new Data Collection Solution Implementation Plan (30 July 2019)**

APRA has released its new Data Collection Solution Implementation Plan which provides guidance for entities to assist in their preparation for transitioning to reporting using the new solution from the Direct to APRA (D2A) reporting tool.

In doing so, APRA confirms that it has chosen to extend the implementation timeline and will revise its dates by October 2019.

1.4 **ASIC Consultation Paper 321: Whistleblower policies (7 August 2019)**

ASIC is seeking feedback in respect of its proposed regulatory guidance for entities (including superannuation fund trustees) that must have a whistleblower policy under the Corporations Act.

ASIC's proposes to provide the following:

- a) guidance on the matters that must be addressed by an entity’s whistleblower policy under Corporations Act, section 1317AI(5); and
- b) good practice guidance (which is not mandatory) on establishing, implementing and maintaining a whistleblower policy; and
- c) additional good practice guidance on the matters that an entity should consider when establishing, implementing and maintaining its whistleblower policy.

Comments are due by 18 September 2019.

## 2. LEGISLATION

### 2.1 ***Treasury Laws Amendment (Putting Members' Interests First) Bill 2019 (23 July 2019)***

The Senate Economics Legislation Committee recommends that the government changes the date of the Bill's commencement to 1 December 2019.

### 2.2 ***Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019 (24 July 2019)***

The Bill was introduced into the House of Representatives and proposes to amend the:

- a) *Superannuation Guarantee (Administration) Act 1992* (Cth) to enable certain employees with multiple employers to apply for an employer shortfall exemption certificate which prevents their employer from having a superannuation guarantee shortfall if they do not make contributions for a period;
- b) *Income Tax Assessment Act 1997* (Cth) to ensure that a superannuation entity's non-arm's length income includes income where expenditure in gaining or producing it was not an arm's length expense; and
- c) *Income Tax Assessment Act 1997* (Cth), *Taxation Administration Act 1953* (Cth) and *Income Tax (Transitional Provisions) Act 1997* (Cth) to ensure that, in certain circumstances involving limited recourse borrowing arrangements, the total value of a superannuation fund's assets is taken into account in working out individual members' total superannuation balances.

### 2.3 ***Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 (24 July 2019)***

The Bill was introduced into the House of Representatives and proposes (among other things) to amend the *Superannuation Guarantee (Administration) Act 1992* (Cth) to ensure that an individual's salary sacrifice contributions cannot be used to reduce an employer's minimum superannuation guarantee contributions.

### 2.4 ***Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 (1 August 2019)***

The Bill was introduced into the House of Representatives and proposes to amend the Corporations Act to remove the grandfathering arrangements for conflicted remuneration in relation to financial advice as of 1 January 2021.

## 3. CASES

3.1 There were no cases of relevance during this period.

## 4. OTHER RECENT DEVELOPMENTS

### 4.1 ***Standing Economics Committee to expand inquiry into financial services sector and Royal Commission implementation (2 August 2019)***

The Federal Government has asked the House of Representatives Standing Committee on Economics to inquire into progress made by relevant financial institutions in implementing the recommendations of the Royal Commission

into Misconduct in the Banking, Superannuation and Financial Services Industry.

The inquiry's remit has also been expanded to include other major relevant financial institutions and leading financial services associations. This inquiry will complement the continuation of the broader inquiry into the four major banks which the Government announced in 2016.

This inquiry will help provide further transparency to the public on the work financial institutions are undertaking to implement recommendations from the Royal Commission and in doing so will contribute to restoring the community's trust in the sector.

The Government has asked the inquiry to commence as soon as possible.

#### 4.2 ***ATO Compassionate release of super (CRS) approval letters (5 August 2019)***

The ATO has stated that a number of trustees are unable to release benefits (on compassionate grounds) to their members when presented with an ATO CRS approval letter due to the address details being different to the address on the superannuation fund's system.

The majority of individuals often have tax agents appointed to manage their taxation affairs and as a result will have a different address with the ATO, as to what is held by funds. Accordingly, the ATO states that:

- d) when a trustee is presented with an approval letter by an individual seeking a CRS release, it is advisable that the trustee completes its own proof of identity processes to confirm the individual. The address doesn't need to match the address on the fund's system in order to release the super;
- e) trustees should use the ATO fund notification letter issued via the portal to validate the approval letter; and
- f) where the approval letter and fund notice don't match, the ATO should be contacted.

#### 4.3 ***ASIC view on emerging threats and harms (15 August 2019)***

John Price, the ASIC Commissioner has outlined seven strategic priorities forming part of ASIC's Corporate Plan:

- a) effective and efficient enforcement action;
- b) addressing the Royal Commission's recommendations and referrals;
- c) establishing ASIC as conduct regulator for superannuation;
- d) addressing harms in insurance;
- e) improving governance and accountability;
- f) protecting vulnerable consumers; and
- g) addressing poor financial advice outcomes.

##### **Establishing ASIC as conduct regulator for superannuation**

As part of its broadening regulatory ambit, ASIC is committed to delivering in its emerging role as the primary conduct regulator of superannuation. In particular, ASIC will:

- a) take decisive regulatory and enforcement action to deter misconduct;
- b) undertake the necessary supervision and surveillance of superannuation trustees, including more frequent on-site visits to ensure trustees act in the best interests of consumers;
- c) increase its consumer testing and shadow shopping;
- d) further its understanding of causes for consumer disengagement in superannuation; and
- e) work very closely with APRA to achieve good outcomes effectively and efficiently.

