THOMSON GEER
LAWYERS

ADVICE | TRANSACTIONS | DISPUTES
Domestic & Cross Border

SHIFTING GEER OCTOBER 2014

28 OCTOBER 2014

Welcome to Shifting Geer, Thomson Geer's superannuation newsletter for the period 22 September 2014 – 24 October 2014

APRA AND ASIC UPDATES

APRA new and updated Reporting Framework FAQs
(October 2014)

APRA has released the following FAQs:

- FAQ 117: Does APRA intend to change the asset class information required under the 500 series of reporting forms?
  - Abridged Answer: No, APRA does not have any current intention to change the asset class types and sub-classes, nor the investment vehicle types, within its existing reporting framework.
  - APRA sought feedback from the superannuation industry in relation to asset class information up until 15 September 2014. The outcomes of this consultation are expected to be communicated to the superannuation industry in March 2015.
- FAQ 118: How should an RSE licensee split dollar value and percentage value fees, costs and taxes when reporting on Reporting Form SRF 702.0 Investment Performance (SRF 702.0)?
  - Abridged Answer: If some, or all, of the fee, cost or tax is charged as a dollar amount per member, report the dollar amount component of fees, costs and taxes in the relevant 'dollar amount' columns. Do not also convert this amount to a 'percentage value'.
  - If none of the fee, cost or tax is charged as a dollar amount per member, leave the 'dollar amount' columns blank.
  - If some, or all of the fee, cost or tax is charged as a percentage of member balance, report the percentage value component of fees, costs and taxes in the relevant 'percentage value' columns. Do not also convert this amount to a dollar amount.
  - If none of the fee, cost or tax is charged as a percentage of member balance, leave the 'percentage value' columns blank.
- FAQ 119: What process is involved when an RSE, defined benefit RSE, PST, ERF, SAF or SMADF is winding up, and which forms are required to be submitted as part of the wind-up return?
  - Abridged Answer: SIS Regulation 11.07(6) requires a trustee to notify APRA (**Notice**) of a decision to wind-up a superannuation fund. Notice must be given as soon as practicable after making the decision and before the winding-up has commenced, as required under SIS Regulation 11.07(7).

  - APRA allocates the wind-up return upon receiving Notice and generates the return once the wind-up has occurred. To assist with this process, APRA requests that, as part of the Notice, the trustee notifies APRA of the expected wind-up date. APRA requests that further notification be provided if any changes to the expected wind-up date occur.

  - A trustee to whom Reporting Standard SRS 602.0 *Wind-up* (**SRS 602.0**) applies must submit Superannuation Reporting Form SRF 602.0 *Wind-up* in respect of the year of income of the fund within three months of the date that the entity has been wound up.

- FAQ 120: Where an RSE licensee changes the information disclosed in a MySuper product dashboard, is the RSE licensee required to submit a new, ad-hoc Superannuation Reporting Form SRF 700.0 Product Dashboard (SRF 700.0) return to APRA, or is the RSE licensee required to resubmit an existing version of SRF 700.0?

  - Abridged Answer: Where information required under Reporting Standard SRS 700.0 Product Dashboard is changed such that a product dashboard is required by law to be updated, a trustee is required to submit a new, ad-hoc SRF 700.0 return to APRA within 28 calendar days after the update to the product dashboard takes effect.

  - Please notify APRA as soon as practicable of any changes to a MySuper product dashboard via super.statistic@apra.gov.au to allow for the timely allocation of the ad-hoc return.

- FAQ 121: Where an RSE licensee changes the fees and costs disclosed in a Product Disclosure Statement (PDS) relating to a MySuper product, is the RSE licensee required to submit a new, ad-hoc Superannuation Reporting Form SRF 703.0 Fees Disclosed (SRF 703.0) return to APRA, or is the RSE licensee required to resubmit an existing version of SRF 703.0?

  - Abridged Answer: Where information required under Reporting Standard SRS 703.0 Fees Disclosed is changed such that a PDS relating to a MySuper product is required by law to be updated, a trustee is required to submit a new, ad-hoc SRF 703.0 return to APRA within 28 calendar days after the update to the PDS takes effect.

  - Please notify APRA as soon as practicable of any changes to the fees and costs disclosed in a PDS relating to a MySuper product via super.statistic@apra.gov.au to allow for the timely allocation of the ad-hoc return.

- FAQ 122: What is the difference between fees, costs and expenses within the APRA reporting forms?

  - Abridged Answer:
    Fee: means an amount that is directly charged to a member (regardless of who pays the fee) and will form part of the fee disclosure required in PDS'. Reporting Standard SRS 540.0 Fees collects information on fees as do Reporting Forms SRF 700.0, SRF 702.0 and SRF 703.0.

  - Cost: means an indirect or embedded amount that the trustee draws from members that may or may not be disclosed and can take the form of a deduction from a member's return, contributions or balance. SRF 700.0, SRF 702.0 and SRF 703.0 collect information

on fees and costs including costs which form part of the indirect cost ratio.

  - Expense: means the amount that the RSE licensee incurs in operating the fund. SRF 331.0 Services collects information on expenses as does SRF 330.0, SRF 330.1 and SRF 330.2 (all) *Statement of Financial Performance*.

- FAQ 123: How should RSE licensees determine which investments to report to APRA on Reporting Form SRF 532.0 Investment Exposure Concentrations (SRF 532.0)?

  - Abridged Answer: The specific instructions to SRF 532.0 state that a trustee must report large exposures only on SRF 532.0. A large exposure means an investment that represents at least 1% of the assets of the fund.

  - APRA acknowledges that in many cases, the value of fund's assets is not calculated and reconciled until the mid-point between the reporting period end and the reporting due date, given that the fund's assets comprise total investments plus accounting assets. This means that in certain cases, trustees are not able to determine large exposure thresholds until late in the reporting due period, creating challenges for the timely submission of information under SRF 532.0.

  - APRA, in considering this, and the purpose of the information collected on SRF 532.0, will accept a trustee's determination of the RSE level large exposure threshold based on 'total investments' rather than 'total assets' of the RSE.

  - APRA will consider revising Reporting Standard SRS 532.0 in this respect. In the meantime, APRA will adjust the D2A validation rules to reflect this flexible approach.

APRA has updated:

- FAQ 97: How should an RSE licensee incorporate derivative exposures when reporting directly held and indirectly held investments on Reporting Form SRF 533.0 Asset Allocation (SRF 533.0)?

Prudential Standard SPS 220 Risk Management (SPS 220): Risk Management Declaration

(1 October 2014)

APRA has confirmed that it will amend the Risk Management Declaration required under paragraph 33 of *SPS 220 Risk Management* so that it will include the concept of "materiality", as required under APRA Prudential Standard *CPS 220 Risk Management* that applies to ADIs, general insurers and life companies.

APRA proposes to amend Attachment A so that it reads:

"For the purposes of paragraph 33 of this Prudential Standard, an RSE licensee's risk management declaration must cover the following matters, confirming that in all material respects:"

- the trustee has in place systems for ensuring compliance with all prudential requirements;

- the systems and resources that are in place for managing and monitoring risks, and the risk management framework, are appropriate to the trustee, having regard to the size, business mix and complexity of the trustee's business operations;

- the trustee has assessed the risks of outsourcing any business activity, and is satisfied that the risks and relevant controls relating to these risks are appropriate to the trustee having regard to the size, business mix and complexity of the trustee's business operations and the operational capabilities of the trustee itself;
- the risk management and internal control systems in place are operating effectively and are adequate having regard to the risks they are designed to control;
- the trustee has an RMS that complies with this Prudential Standard, and that the trustee has complied with each measure and control described in the RMS;
- the trustee is satisfied with the efficacy of the processes and systems surrounding the production of financial information for each superannuation fund within its business operations;
- the trustee has adequate reporting systems and internal controls supporting the preparation and reporting of accurate financial and statistical information to APRA; and
- information provided to APRA accurately represents the transactions for the year and financial position at year end in accordance with the provisions of the SIS Act and *Financial Sector (Collection of Data) Act 2001*.

LEGISLATION

Treasury Legislation Amendment (Repeal Day) Bill 2014

(First Reading 23 October 2014)

The Repeal Day Bill proposes two primary amendments to the Superannuation Law as follows:

- repeal the SIS payslip reporting provisions.
  - The payslip reporting provisions require employers to include information prescribed by the SIS Regulations in employee payslips. It was intended that the SIS Regulations would require employers to report the amount of superannuation contributions and the date on which the employer expects to pay them. However, these regulations were never made as payslip reporting has proved to be more complex and expensive to implement than originally expected.
  - The *Fair Work Act 2009* and the *Fair Work Regulations 2009* require employers to include the amount of superannuation contributions they are liable to make in payslips. The repeal is designed to reduce duplication of the existing law; and
- amend the definition of "Australia" as currently used in the *Superannuation Guarantee (Administration) Act 1992*.
  - Currently the term "Australia", as expressed under the Act, is ambiguous and complex due to the nature of its definition and the adoption of cross references to concepts used in the income tax law (for example the term "Australian resident"). The Repeal Day Bill proposes to amend the Act to use only the income definition of Australia and to make clear that the superannuation guarantee entitlements or obligations do not apply to:
    - foreign resident employees for work done outside Australia (as defined for income tax purposes);

- Norfolk Island resident employees for work done in Norfolk Island or outside Australia (as defined for income tax purposes);
- foreign resident employers for work done outside Australia (as defined for income tax purposes); and
- Norfolk Island resident employers for work done in Norfolk Island.

The Explanatory Memorandum states that these amendments do not alter the on-going policy objective or the Commissioner's current administration of the superannuation guarantee system.

CASES

The Trustee for Rane Haulage Trust and Commissioner of Taxation [2014] AATA 733

(10 October 2014)

The Administrative Appeals Tribunal's (**Tribunal**) Deputy President has affirmed the Commissioner of Taxation's (**Commissioner**) decision to amend a Taxpayer's superannuation guarantee assessments.

Facts

In April 2013 the Commissioner notified the Taxpayer that he proposed to undertake an audit of the Taxpayer's employer obligations in respect of the period 1 July 2010 to 31 December 2012 (**Period**).

The Commissioner found that the Taxpayer had a superannuation guarantee shortfall for 6 of the Period's quarters (due to late payments subsequently made throughout the Period). The Taxpayer also lodged late superannuation guarantee statements, on 10 June 2013, in respect of those periods (rather than on the 28th day of the second month after the end of the period).

Late lodgement of the statements also meant that superannuation guarantee charge became payable on that date, under section 46 of the *Superannuation Guarantee (Assessment) Act 1992* (**SG Act**), as well as the 10% nominal interest component under section 31 of the SG Act.

The Taxpayer objected against the assessments, but the objections were disallowed. The Taxpayer sought the Tribunal's review of the Commissioner's decision on the basis that it considered the calculation of the nominal interest component to be unfair because it was calculated by reference to the date of lodgement of a form – which was many years removed from the date of contribution.

The Taxpayer submitted that the imposition of nominal interest component in this case was "unfair, inequitable and unreasonable" and it urged the Commissioner (and Tribunal) to apply section 37 of the SG Act to amend the nominal interest component to a lesser amount.

Section 37 states that the Commissioner *"may, subject to this section, at any time amend any assessment by making any alterations or additions that the Commissioner thinks necessary, whether or not superannuation guarantee charge has been paid in relation to the assessment"*. The Taxpayer's submission was that the Commissioner can make any alterations that he thinks necessary and therefore he should make an alteration that would remove, or at least reduce, the nominal interest component.

Decision

The Tribunal took the view that it appears to be a deliberate design feature of the legislation that, once a contribution is made late, then whether it is

made a day late or several years late will have no bearing on the calculation of the nominal interest component. What becomes important is not the date of contribution, but the date of lodgement of the statement with the Commissioner. Therefore, the question is whether, having regard to the clear and unambiguous terms of section 31, and the consequence that the nominal interest component has been correctly calculated by the Commissioner, section 37 authorises an amendment to the assessments to remove or reduce that interest component. In the Deputy President's view, it does not.

Instead, section 37 authorises the Commissioner to amend an assessment by making any alterations or additions that the Commissioner thinks necessary. An alteration to an assessment would be necessary if, but only if, it brought an assessment into alignment with the Commissioner's understanding of the facts and the law. For example, if the Commissioner had made an assessment on an initial understanding that an employee's wages were $12,000 when in fact they were $10,000, or an original assessment had incorrectly used a "charge percentage" of 10 when it should have been 9, the Commissioner would be empowered, and indeed obliged, to amend the assessment so that it reflected the true position.

However, as the Deputy President stated, the Commissioner cannot pretend that a statement was made in 2011 when in fact it was made in 2013. The Commissioner is not empowered to make assessments which, while perhaps consistent with some undefined notion of fairness, are nevertheless contrary to the law.

OTHER RECENT DEVELOPMENTS

Financial Ombudsman Service Annual Review for 2013-14
(issued 9 October 2014)

The FOS Annual Review for 2014 Financial Year shows the total number of disputes received remains relatively steady with FOS receiving 31,680 disputes, a decrease of 2% on the 2013 Financial Year. The number of disputes accepted declined by 3% to 23,454 disputes.

Superannuation fund disputes increased from 285 (2013 Financial Year) to 296 (2014 Financial Year). However dispute numbers were still lower than the 2011 Financial Year (379) and 2012 Financial Year (313).

Most superannuation disputes were about self-managed funds (35%) and retail funds (33%). People who lodged disputes about self-managed funds were most likely to complain about inappropriate advice (31%). Common issues in disputes about retail funds were inappropriate advice (16%) and failure to follow instructions/agreement (14%).

The most commonly accepted superannuation disputes by sales and service channel were adviser/planner 55% and superannuation fund trustee/adviser 18% disputes.

There were 458 non-income stream risk disputes during the 2014 Financial Year, up 7% on the previous year. Half the disputes about non-income stream risk products related to a decision made by the financial services provider.

The product at the centre of most superannuation related disputes was total and permanent disability insurance (29%). Denial of claim was the most common reason people lodged disputes about this product, followed by delay in claim handling.

Superannuation Complaints Tribunal Annual Report 2013-2014
(23 October 2014)

The SCT's Annual Report for the 2014 Financial Year provides the following breakdowns of complaints received by the SCT:

	Number of complaints within jurisidiction			
Nature of complaint	Number	%	Number	%
Death			**443**	**32.5**
Distribution	380	85.8		
Other	63	14.2		
Disability			**288**	**21.1**
Medical	78	27.1		
Other	210	72.9		
Administration			**633**	**46.4**
Disclosure/Misrepresentation	34	5.4		
Fees & Charges	52	8.2		
Insurance Premiums	112	17.7		
Delay	76	12.0		
Account balance	70	11.1		
Early Release	41	6.5		
Error	25	4.0		
Failure by fund to provide information when requested	19	3.0		
Misallocated contributions	17	2.7		
Exit fee	21	3.3		
Insurance cover	39	6.1		
Tax on excess contributions	11	1.7		
Administration - All other	116	18.3		
Total	**1,364**	**100.0**	**1,364**	**100.0**

Fund type	Number of complaints	Percentage of total (%)
Corporate	36	2.6
Industry	674	49.4
Retail	472	34.6
Public Sector	170	12.5
Other	12	0.9
Total	**1,364**	**100.0**

WRITTEN BY:

Mark Abramovich | Partner | +61 3 9641 8627 | mabramovich@tglaw.com.au
Luke Hooper | Senior Associate | +61 3 9641 8767 | lhooper@tglaw.com.au

SYDNEY
Level 25
1 O'Connell Street
Sydney NSW 2000
+61 2 8248 5800

MELBOURNE
Level 39
Rialto South Tower
525 Collins Street
Melbourne VIC 3000
+61 3 8080 3500

MELBOURNE
Level 20
385 Bourke Street
Melbourne VIC 3000
+61 3 9670 6123

BRISBANE
Level 16
Waterfront Place,
1 Eagle Street
Brisbane QLD 4000
+61 7 3338 7500

ADELAIDE
Level 7
19 Gouger Street
Adelaide SA 5000
+61 8 8236 1300

www.tglaw.com.au