

SUBMISSION

Submission to APRA – Superannuation transfer planning: Proposed enhancements

13 March 2023

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General Manager, Policy

via email: superannuation.policy@apra.gov.au

13 March 2023

Dear Sir / Madam,

Superannuation transfer planning: Proposed enhancements

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this feedback in response to your consultation on the Discussion Paper *Superannuation transfer planning: Proposed enhancements* (Discussion Paper).

ABOUT ASFA

ASFA is a nonprofit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.3 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 17 million Australians with superannuation.

GENERAL COMMENTS

ASFA member organisations support the general intent of the Discussion Paper, of trustees being prepared for transfers.

Having said that, concern has been expressed about the need to balance the costs of complying with any obligations against any benefit obtained, to ensure that the requirements are in the best financial interests of the members of the fund.

Should not create new specific obligation but enhance existing requirements

Members have indicated support for an approach whereby trustees enhance existing business activities, such as the Business Performance Review, including the Member Outcomes Assessment, to monitor the necessity of a merger, as opposed to creating new specific obligations with respect to transfers.

New obligations will divert resources from day to day business activities, and improvements to member outcomes, towards planning for events that may never occur. It is difficult to see how this is in the best financial interests of members.

Members have suggested that trustees should not be required to plan transfers where there is not a reasonable likelihood of there being a trigger for a transfer.

Any obligations should be limited in scope and not be too specific or detailed

Members have cautioned that if any new obligations to prepare are to be created, any such requirements should be confined to market scanning and monitoring, developing criteria for potential merger partners, identifying triggers for action and potential barriers to a successful transfer.

Any preparation requirements must not be too specific or detailed, as this will result in members incurring a significant cost each year, when most cases will never eventuate into a transfer.

Successor Fund Transfers (SFTs) are complex and bespoke. Funds and products are structured differently, have different governing rules and different arrangements and operations.

Given this - and the two key tests that trustees need to address, equivalent rights and members' best financial interests – it is challenging for trustees to be able to pre-plan a transfer to any great extent.

Preparation for a transfer when reasonable prospect of a trigger

An appropriate approach may be for a trustee to have an appreciation of potential merger partners and triggers for a potential transfer.

Should there be a reasonable prospect of a trigger occurring, the trustee should put sound preparation in place to support a transfer should one eventuate.

'Sound preparation' could include:

- the development of a pro-forma 'roadmap', that evaluates the resources, information and tools required to facilitate a transfer
- plans for Board and Regulator engagement
- draft project plans
- templates for
 - communicating to members and other key stakeholders
 - completing assessments of 'equivalent rights'
 - resourcing plans.

This would enable trustees to act relatively quickly should it be determined that member outcomes are not being delivered or an opportunity to transfer members in from another fund presents itself.

Need to retain separation between 'Strategic planning' and 'Transfer guidance'

Members have indicated that there is a need to continue to maintain a separation between 'Strategic planning' (SPS 515), which may extend to triggers for transfers, and 'Transfer guidance' (SPG 227).

In particular, Transfer guidance needs to consider Successor Fund Transfer (SFTs) resulting from voluntary activity, as well as those that have resulted from poor member outcomes.

Need for specific APRA guidance with respect to transfers

Many funds have limited experience of transfers, especially smaller funds.

Given this, and the number and complexity of issues involved in transfers, members generally are of the view that it would be beneficial for APRA to work with the industry on further developing guidance with respect to transfers.

The guidance could incorporate:

- a checklist outlining areas that a trustee will need to take into consideration when agreeing to and implementing a transfer
- lessons learned from industry transfers that have occurred (in other words, 'tips for new players' / 'traps for the unwary').

By way of example, there could be guidance with respect to different scenarios, for example how trustees should approach circumstances where a member is in both a MySuper and a Choice option.

Universal sharing of common challenges and experience would raise awareness of issues and enable trustees to be more prepared. Importantly this would enable member transfers to happen in a more timely manner and would produce a more consistent approach to member transfers.

Transferring trustees' engagement with APRA

Given the bespoke nature of an SFT, when an SFT is being contemplated and/or implemented the ability for direct engagement by the trustees of the transferring and receiving funds with specialist SFT resources within APRA, that would be able to take into consideration the specific circumstances of the SFT, could prove extremely useful.

Interaction with CPS 190 and contingency planning

Member organisations have indicated that the industry would benefit from clear guidance with respect to how any new requirements for transfer planning and obligations regarding contingency planning (required in CPS 190) could be addressed with a single approach and plan.

Conflicts of interest

Member organisations have observed that it is difficult to achieve unconflicted decision-making in practice, for example an initial review of potential transferring funds can be done at arms' length but then conflicts will emerge.

MySuper

Member organisations noted that Capital Gains Tax (CGT) rollover relief is only available if all assets of a fund are transferred and, according, this means that a transfer of MySuper members only generally is not in the best financial interests of members.

Barriers to transfers need to be mitigated

Last year ASFA formed a 'Successor Fund Transfers' Working Group (SFTWG) to identify issues that impede the efficiency of mergers and propose some solutions.

The SFTWG developed a briefing note that was sent to the Assistant Treasurer and Treasury in September, which can be found in the Annexure to this submission (Briefing Note). We understand that Treasury has provided a copy of the Briefing Note to APRA.

It is imperative that the barriers to transfers are mitigated, to reduce the inefficiencies and costs of effecting an SFT.

Interaction with Your Future, Your Super

Member organisations have identified that interaction with the Your Future, Your Super performance test also acts as an impediment to mergers.

In particular, the prohibition on accepting new members materially reduces the appeal of the fund as a merger party and impedes the Best Financial Interests analysis. Further, members have recommended that, if funds are merging, a fund that has failed the performance test should be exempt from sending the prescribed letter to its members or the letter should be able to be tailored to refer to the SFT taking place.

Competition law

Finally, members have raised concerns that there may be issues with respect to competition law that may need to be considered. An undue focus on fund mergers to address identified past issues could force mergers that create too few 'mega-funds' that do not need to actively compete and could reduce competition significantly.

SPECIFIC COMMENTS / CONSULTATION QUESTIONS

ASFA member organisations have provide the following responses to the Consultation Questions in the Discussion Paper.

Transfer preparedness

Member organisations have indicated that trustees should be required to 'consider', but not to 'plan for', transfers out.

Trustees should be required to identify potential triggers for a transfer, however, transfer 'planning' incurs undue costs and detracts from the trustee's focus on maintaining and improving member outcomes. Maintaining a refreshed plan is resource intensive and would not be in the best financial interests of members.

Trustees should monitor against the pre-determined trigger framework for indications that a fund may need to consider either an SFT, as well as evaluate any changes to the fund's circumstance that may affect any assessment of any potential transfers. Transfers out have significant cost and effect on the members of the funds, including disruption and a potential deterioration in service and performance during the transfer, and should be a last resort.

Members have indicated that trustees should not be required to undertake significant preparatory steps unless, and until, it is reasonably likely that a trigger may be met.

Trigger frameworks

Member organisations have observed that there will be a need to consider fund structures, governing rules and complexity and that the triggers for transfer will be different for different funds.

RSE Licensee decision making

The member propositions of products differ and, as such, identification of potential SFT partners, and due diligence, should not be required to take place until a trigger is reasonably likely to occur.

SFTs are bespoke. Trustees should be required to demonstrate in their business plans that they have sufficient knowledge of the industry and their peer funds / products, however, due diligence should not be required at this stage.

Given that an SFT is a significant undertaking, and has a material effect on members, it is likely that an SFT is perceived to be an action of last resort.

Member organisations have indicated that migrating MySuper members only generally is not in the best financial interests of members, as CGT loss rollover relief is available only where all fund assets are transferred.

Execution phase guidance

Members have indicated that APRA should undertake a separate consultation with clear objectives with respect to SPG 227, in order to address separate considerations.

This should be linked to a further review of product rationalisation impediments / improvements, and should not be connected to SPS 515, which should address barriers and roadblocks to transfers.

Member organisations have indicated that difficulties with ensuring of equivalent rights and the reversal of the onus of proof with respect to acting in members' best financial interests may necessitate the provision of some kind of limited protection for trustees.

Members have indicated that SFTs are incredibly complex transactions and there are significant challenges including, but by no means limited to:

- taxation law:
 - CGT rollover relief – this is available only for a full closure of a fund and not for a partial transfer of members (e.g. MySuper members) which raises issues with satisfying the member's best financial interests obligation
 - inherent issues with the way transfer balance credits and debits are calculated for term allocated pensions
- benefits and features – a comprehensive analysis and assessment is required with respect to fund benefits and features, for example standing instruction flexibility; auto reweighting; corporate actions; member and adviser online reporting; member and adviser capability to make changes online on a straight through basis; online withdrawals and availability of particular investments
- employer contributions – transferring members requires members to update their contribution details with their employer, with the transferring fund potentially needing to continue to receive and on-forward contributions to the new fund or reject the contributions back to the employer, but there is no infrastructure to allow those contributions to be redirected en masse
- legacy income streams – the inherit complexity of legacy income streams - SFTs from an older fund to a newer one may necessitate a significant IT development, trust deed amendment and staff training to account for members in legacy income streams.
- pension standards – these require a minimum pension to be paid before transfer, and a new minimum pension paid afterwards - there is no consideration for members who, for example, have drawn an annual minimum payment prior to the SFT taking place
- pension commencement capital inflexibility - given the complex nature of these transactions, trustees products may not be in a position to determine a member's specific tax liability until well after the SFT has been actioned - this means the transferring fund may determine a refund of taxes deducted from the member's interest after the receiving fund has already commenced the pension
- defined benefits – the new fund needs to be able to administer defined benefits
- insurance – agreement will need to be reached with the receiving insurer with respect to existing insurance benefits, term and conditions, premiums and auto acceptance for customised employer insurance arrangements and defaults for future new employees
- investment choices – mapping and assessment of existing investment options gains those available in the receiving fund
- advice fees – consideration will need to be given whether existing member advice fee arrangements can be grandfathered into the receiving fund.

Post transfer and winding up activities

Members have observed that generally partial transfers are not in the best financial interests of members, due to the inability to claim CGT loss rollover relief.

Attachment A

With respect to Attachment A of the Discussion Paper, member organisations have indicated that, while the requirements appear to be reasonable, they are of the view that the statutory timeframe for completion - within 90 days - is not realistic and needs to be reviewed. Trustees need to be satisfied that both the equivalent rights (including benefits and fees) and the members' best financial interests tests are met, and often this would not be achievable within 90 days.

Requirement 4 – members have indicated that there will be a need for APRA to be transparent with respect to the 'reason to believe' criteria.

Attachment B

Planning

Member organisations indicated that, while they support trustees being able to demonstrate that they regularly consider, and where necessary plan for, future circumstances that may necessitate a transfer of some/all members, they should not be required to undertake an analysis of potential transfer options until such time as it appears likely that a trigger for a transfer will occur.

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Should you have any queries with respect to this, please contact me on (03) 9225 4021 or via fgalbraith@superannuation.asn.au.

Yours sincerely



Fiona Galbraith
Director, Policy

FUND MERGERS AND SUCCESSOR FUND TRANSFERS (SFTs) – NEED FOR A NEW APPROACH EXECUTIVE SUMMARY

1. BACKGROUND TO SUCCESSOR FUND TRANSFERS

The concept of a ‘Successor Fund Transfer’, or SFT, is simple – the transfer of members’ benefits from one superannuation fund (‘transferring fund’) to another fund (‘successor fund’) without needing to obtain the consent of the affected members.

1.1. Legislation with respect to SFTs

SFTs are governed under Regulation 6.29 and 6.02 of the SIS Regulations.

1.2. Guidance with respect to SFTs

The current guidance is Prudential Practice Guidance *SPG 227 – Successor Fund Transfers and Wind-ups*

https://www.apra.gov.au/sites/default/files/spg_227_successor_fund_transfers_and_wind-ups_0.pdf

2. THE REGULATORY FRAMEWORK, AND APRA AS REGULATOR, DRIVING CONSOLIDATION

Consolidation of the industry is a clear policy, with underperforming and/or unsustainable products or funds needing to look to merge with another fund.

Given this, it is imperative that the Government, regulators and other agencies look to do what they can to ensure that the interest of members are protected, that the member experience is as positive as possible and that the risks and costs of performing an SFT are kept to a minimum.

3. ISSUES AFFECTING MEMBER EXPERIENCE, AND THE RISKS AND COSTS OF EFFECTING AN SFT

An ASFA Working Group has identified a number of issues that can detrimentally affect members’ experience, and/or increase the risk and cost of an SFT.

Unless mitigated, these issues have the potential to detrimentally affect members – through increasing costs or delaying, or even frustrating, an SFT that may have been in the best interests of members. Costs ultimately are borne by the members and, as such, it is in the best financial interests of members to keep these to a minimum.

Table 1 below provides an executive summary of issues that have the most potential to detrimentally affect members’ experience and/or increase significantly the risks and costs involved in implementing an SFT, including some suggestions as to potentially how they could be mitigated.

Attached in the Annexure is

- 1 some further background information with respect to SFTs
- 2 some further information with respect to the issues identified in Table 1; and
- 3 a table of the remaining issues identified by the Working Group (Table 2).

SUCCESSOR FUND TRANSFERS

TABLE 1 - ISSUES THAT HAVE MOST SIGNIFICANT DETRIMENTALLY EFFECT ON MEMBER’S EXPERIENCE AND/OR ON RISKS & COSTS

Matter Obligation/requirement	Issue Effect on member experience/risk/cost	Alternative/solution What is being proposed
A. TRANSFERRING FUNDS WITH ISSUES THAT MAKE IT DIFFICULT FOR THE SUCCESSOR FUND TRUSTEE TO JUSTIFY A SUCCESSOR FUND TRANSFER		
1. Equivalent rights and best interests assessment Use of ‘alternate path’	If transferring fund has issues that make an SFT difficult it can be challenging for successor fund to determine that the SFT in best interests of their members	Use existing, or create new, alternative ‘equivalent rights’ process where the transferring fund has issues that make an SFT difficult. These ‘alternate paths’ could include APRA utilising its power under Part 18 of the SIS Act to approve the transfer of benefits in one fund to another fund amending Part 18 to make it easier to use, including making it mandatory for APRA to grant approval, provided certain conditions are met, and removing condition precedent that reasonable attempts to bring about an SFT have failed extending the scope of the <i>Financial Sector (Transfer and Restructure) Act 1999</i> beyond ADIs, life and general insurers to include superannuation funds a statutory ‘safe harbour’ re equivalent rights and best interests.
B. NEED FOR APRA TO HAVE A GENERAL POWER TO GRANT RELIEF FROM LEGISLATIVE REQUIREMENTS		
2. APRA only has limited relief powers	APRA only has relief powers with respect to certain provisions in the SIS legislation.	Amend the SIS legislation to give APRA a general power to be able to grant relief from any provision to trustees effecting a Successor Fund Transfer, subject to any reasonable conditions as APRA determines.
C. CAPITAL GAINS TAX RELIEF		
3. Rationalisation of asset holding structures	Transferring assets out of holding structures crystallises a CGT liability.	<ul style="list-style-type: none"> • provide relief for certain rollovers and transfers of assets and capital, and revenue loss transfers, where the beneficial interest in income and capital from assets does not change; or • allow super funds to be “head companies” of a tax consolidated group
D. INTERACTION OF SUCCESSOR FUND TRANSFERS WITH MYSUPER – PROHIBITION ON MULTIPLE MYSUPER PRODUCTS AND STATUS OF MYSUPER TO MYSUPER TRANSFERS		
4. MySuper did not address Successor Fund Transfers	<p>1) Need to allow multiple MySuper products Often it is difficult to agree equivalent rights, especially where aspects of transferring or successor fund have been tailored for their membership, which means it’s not always feasible to have a single MySuper product</p> <p>2) Transfers from MySuper to MySuper Trustees of funds transferring from one MySuper product to another face the same regulatory hurdles to ensure equivalency as do trustees effecting a more strategic merger.</p>	<p>1) Need to allow multiple MySuper products Provide that, if the transferring fund has authority to offer a MySuper product, that authorisation can be transferred automatically to the successor fund. This could be for a specified period, to allow the successor fund to integrate the two products, or if there are reasonable grounds and/or both products are of sufficient size, the two products could be permitted to continue. Alternatively, legislate the specific ability for APRA to make an ‘SFT’ MySuper approval, in addition to the existing powers with respect to the material goodwill and large employers exceptions.</p> <p>2) Transfers from MySuper to MySuper If an SFT were from one MySuper to another then, with respect to equivalent rights, this would be deemed to be sufficient in and of itself.</p>

Matter Obligation/requirement	Issue Effect on member experience/risk/cost	Alternative/solution What is being proposed
E. FORCED COMMUTATION OF PENSIONS		
5. Forced commutation of pensions Creates issues for members	It is in best interests of pensioner members for a pension to be treated as if it is continuing as same pension. Forced commutations have detrimental consequences for members.	A number of minor legislative changes are required to ensure pensioner members do not suffer detriment, effectively treating the pension as if it were continuing.
F. MATTERS THAT DO NOT TRANSFER FROM THE TRANSFERRING FUND TO THE SUCCESSOR FUND		
6. 1) SIS / Corps Act Member directions given to transferring fund 2) AML / CTF Act Suspicious matter reports 3) Family Law Act Court orders 4) Employer participation agreements	1) SIS / Corps Act Examples of this include <ul style="list-style-type: none"> investment choice re contributions Binding Death Benefit Nomination authority to deduct adviser fees. 2) AML / CTF Act 'Tipping off' rules mean transferring trustee is not permitted to advise successor trustee. 3) Family Law Act Courts orders and agreements executed prior to the SFT need to be remade. 4) Employer participation agreements Each employer participation agreement r has to be novated on a case by case basis.	1) SIS / Corps Act Either <ul style="list-style-type: none"> insert a general 'deeming provision' to effect that direction given to transferring trustee is deemed to have been given to successor trustee; or amending each relevant provision to similar effect, on a 'provision by provision' basis. 2) AML / CTF Act Legislation / rules should be amended to create an exception to permit a transferring trustee to be able to advise the successor trustee. 3) Family Law Act Legislation should be amended such that any court order/agreement naming trustee of transferring fund is deemed to have named the trustee of the successor fund and is binding on that trustee. 4) Employer participation agreements The SIS Act be amended to facilitate the statutory novation of standard employer-sponsor participation agreements.
G. STATE CRIMES ACTS – POTENTIAL NEED TO APPROACH SUPREME COURTS - POSSIBILITY OF SIS ACT OR PRUDENTIAL STANDARD TO OVERRIDE STATE LEGISLATION		
7. State Crimes Acts – providing indemnities	When appointing a successor trustee, transferring trustee needs to approach the Supreme Court(s) for consent to provide an indemnity. It is an open question whether this is also the case when providing an indemnity to a successor trustee	Amendments to the SIS Act to override conflicting State legislation should be considered. The Commonwealth Government could consider requesting the States to amend their Crimes Act to exclude trustee of super funds, provided they are acting in accordance with regulatory requirements. Note: Mercy Super / HESTA made an application in the Supreme Court of Queensland that was heard on Tuesday 13 September 2022. Mercy Super and HESTA argued that a SFT does not constitute an 'appointment' of a trustee for the purposes of the Queensland Crimes Act. The Judge indicated that he would publish his decision and reasons by mid-October.
H. CREATION OF INDUSTRY ADVISORY PANEL ON SUCCESSOR FUND TRANSFERS		
8. Need for expertise and experience in SFTs	Successor Fund Transfers generate a number of legal, regulatory and operational issues that necessitate expertise	Create an Industry Advisory Panel, utilising people from the industry with experience in Successor Funds Transfers and legal, regulatory and/or operational expertise, to provide advice to APRA / ASIC with respect to the issues involved in Successor Fund Transfers.

1. FURTHER INFORMATION WITH RESPECT TO SFTs

1.1. Background with respect to SFTs

The concept of a ‘Successor Fund Transfer’, or SFT, is simple – the transfer of members’ benefits from one superannuation fund (‘transferring fund’) to another fund (‘successor fund’) without needing to obtain the consent of the affected members.

The key defining feature that differentiates a SFT from an ‘ordinary’ transfer of a member’s benefit is that it does not require the consent of the member. As such, generally a SFT is the only feasible method for winding-up a superannuation fund and transferring the members, and the assets underlying their benefits, to another super fund.

Given the absence of member consent there is a need for member protection. In addition to being subject to the general trust law fiduciary duties with respect to the exercise of trust powers, duties and discretions, the legislation with respect to SFTs imposes an obligation on the trustee of the transferring fund to agree with the trustee of the successor fund that ‘equivalent rights’ will be conferred upon the members being transferred.

The concept of an SFT came about with the making of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) – over 28 years ago when the industry was comprised largely of relatively small corporate super funds – and has not been materially reviewed or revised in that time.

1.2. Legislation with respect to SFTs

Regulation 6.29 of the SIS Regulations, as made, specified as follows:

6.29. *Except as otherwise provided by the Act, a member’s benefits in a regulated superannuation fund must not be transferred from the fund unless:*

- (a) the member has given to the trustee the member’s written consent to the transfer; or*
- (b) the transfer is to a successor fund.*

Under regulation 6.02 a ‘successor fund’ was defined as follows:

successor fund, *in relation to a transfer of benefits of a member from a fund (called the ‘original fund’), means a fund which satisfies the following conditions:*

- (a) the fund confers on the member equivalent rights to the rights that the member had under the original fund in respect of the benefits;*
- (b) before the transfer, the trustee of the fund has agreed with the trustee of the original fund that the fund will confer on the member equivalent rights to the rights that the member had under the original fund in respect of the benefits*

1.3. Guidance with respect to SFTs

The current guidance with respect to SFTs is Prudential Practice Guidance *SPG 227 – Successor Fund Transfers and Wind-ups*

https://www.apra.gov.au/sites/default/files/spg_227_successor_fund_transfers_and_wind-ups_0.pdf

1.4. The regulatory framework, and APRA as regulator, driving consolidation

ANNEXURE

Consolidation of the industry is a clear policy, with trustees with underperforming and/or unsustainable products or funds needing to look to merge with another fund.

Frequently this is stated to be based on a consideration that a merger would be in the best financial interests of the members.

Having said that, we have been advised of instances where products with good investment returns, where the employer bears some or all of the costs (to the considerable benefit of members) have been subject to pressure to consider a successor fund transfer to another fund. If this were to take place the members are likely to lose the benefit of the employer subsidisation and end up in a worse financial position.

The only effective method by which to achieve a large-scale transfer of members benefits is through an SFT.

Given this, it is imperative that the Government, regulators and other agencies look to do what they can to ensure that the interest of members are protected, that the member experience is as positive as possible and that the risks and costs of performing an SFT are kept to a minimum.

2. TABLE 1 - FURTHER INFORMATION WITH RESPECT TO THE ISSUES IDENTIFIED IN TABLE 1

No	Matter Obligation / requirement	Source Legislation / Standard etc	Responsible entity Government/ Agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
A) TRANSFERRING FUNDS WITH ISSUES THAT MAKE IT DIFFICULT FOR SUCCESSOR FUND TRUSTEE TO JUSTIFY A SUCCESSOR FUNDS TRANSFER					
1.	<p>Equivalent rights and best interests assessment</p> <p>Where transferring fund has issues that make it difficult for the successor fund to justify the SFT as being in the best interests of their members - use of 'alternative path'</p>	<p><i>Superannuation Industry (Supervision) Act 1994</i></p> <p><i>Superannuation Industry (Supervision) Regulations 1994</i></p> <p><i>Regulation 1.03.</i></p>	<p>Treasury</p> <p>APRA</p>	<p>If transferring fund has issues that make SFT difficult it can be challenging for successor fund to determine that the SFT in best interests of their members</p> <p>Generally members of the successor fund are unlikely to benefit from the transfer, especially if there will be no significant benefits from economies of scale.</p>	<p>Where a fund has issues that make an SFT difficult, use existing, or create new, 'alternate path'.</p> <p>The threshold 'condition precedent' would be that APRA would determine that a fund has issues that make an SFT difficult, in which case there would be an 'alternate path'. These 'alternate paths' include</p> <ul style="list-style-type: none"> • APRA utilising its power under Part 18 of the SIS Act to approve the transfer of benefits in one fund to another fund • amending Part 18 to make it easier to use, including making it mandatory for APRA to grant approval, provided certain conditions are met, and removing condition precedent that reasonable attempts to bring about an SFT have failed • extending the scope of the <i>Financial Sector (Transfer and Restructure) Act 1999</i> beyond ADIs, life and general insurers to include superannuation funds <p>creating a statutory 'safe harbour' re equivalent rights, especially with respect to the successor fund and the SFT being in the best financial interests of members, provided certain minimum requirements are met.</p>
B) NEED FOR APRA TO HAVE A GENERAL POWER TO GRANT RELIEF FROM LEGISLATIVE REQUIREMENTS					
2.	<p>APRA only has relief powers with respect to certain provisions</p>	<p><i>Superannuation Industry (Supervision) Act 1993</i></p> <p><i>Superannuation Industry (Supervision) Regulations 1994</i></p>	<p>Treasury</p> <p>APRA</p>	<p>APRA only has relief powers with respect to certain provisions in the SIS legislation.</p> <p>The SIS legislation, when creating obligations and imposing requirements on trustees, does not explicitly address Successor Fund Transfers. Frequently both the transferring fund trustee and successor fund trustee face issues in complying with some provisions in the SIS legislation.</p>	<p>We recommend that the SIS legislation be amended to give APRA a general power to be able to grant relief from any provision to trustees effecting a Successor Fund Transfer, subject to any reasonable conditions as APRA determines.</p>

ANNEXURE

No	Matter Obligation / requirement	Source Legislation / Standard etc	Responsible entity Government/ Agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
C) CAPITAL GAINS TAX RELIEF					
3.	Rationalisation of asset holding structures	<i>Income Tax Assessment Act 1997</i>	Treasury ATO	Historically, different asset holding structures have emerged over time that are inefficient going forward. Under the current law transferring assets out of these structures up to the successor super fund (or to fewer and/or more modern or suitable investment vehicles that the successor fund invests through) would crystallise a tax liability.	<p>There are a couple of possible alternative solutions. One would be to amend the legislation to provide certain revenue and CGT rollovers for the transfer of assets and capital, and revenue loss transfers, where the beneficial interest in income and capital from assets does not change. An alternative could be, for example, to allow super funds to be “head companies” of a tax consolidated group, such that they could choose to form a tax consolidated group consisting of all their Australian owned subsidiary members. In this context it is important to note that:</p> <ul style="list-style-type: none"> • CGT relief has been available for corporate restructures since the commencement of the CGT regime in 1985, in recognition of the fact that restructures often are necessary for efficiency and the imposition of a CGT acts as a significant impediment to restructures taking place • As CGT would be imposed on a restructure, which would have the effect of reducing members’ benefits, it is difficult for trustees to justify restructuring as being in the best financial interests of members. Given this, the trustees generally decide not to restructure, which means no CGT is collected. While this measure has a notional effect on revenue, as restructures generally do not take place because of the CGT that would be imposed, in practice little, if any, revenue is collected from this measure.

No	Matter Obligation / requirement	Source Legislation / Standard etc	Responsible entity Government/ Agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
D) INTERACTION WITH MYSUPER – PROHIBITION ON MULTIPLE MYSUPER PRODUCTS AND STATUS OF MYSUPER TO MYSUPER TRANSFERS					
4.	<p>MySuper did not address SFT</p> <p>1) Need to allow multiple MySuper products</p> <p>Prohibition on multiple MySuper products (other than large employer or material goodwill exception)</p> <p>2) Transfers from MySuper to MySuper</p>	<p><i>Superannuation Industry (Supervision) Act 1993</i></p> <p><i>Part 2C</i></p>	<p>Treasury</p> <p>APRA</p>	<p>1) Need to allow multiple MySuper products</p> <p>This is a structural issue causing significant difficulties, generally with larger mergers where it is not feasible to consolidate into a single MySuper. The Super System Review did not address issues around how MySuper products were to be ‘retrofitted’ into the system, including how existing products would be converted into a MySuper or SFTs. The Review Final Report stated <i>[I]ntegrity of the MySuper concept requires that trustees would generally not be able to present a prospective member with choice between different MySuper products. ...[T]he Panel recognises that there would be situations where a trustee would have multiple distinctly-branded products within a single RSE legal structure. In those circumstances, one MySuper would be permitted under each brand name. ...The overarching principle is that a member is only presented with, or defaulted into, the one MySuper product.</i> This ‘one MySuper’ recommendation was interpreted narrowly, such that Part 2C only allows a fund to have one MySuper, other than limited exceptions re large employers and material goodwill. Often it is not feasible to accommodate ‘equivalent rights’ through one MySuper. While the trustee can approach APRA for approval for a second MySuper under the exceptions, this takes time and resources and is not always granted.</p> <p>2) Transfers from MySuper to MySuper</p> <p>Trustees of funds transferring one MySuper to another MySuper face the same regulatory hurdles to ensure equivalency and best interests as trustees seeking a</p>	<p>1) Need to allow multiple MySuper products</p> <p>We recommend that the SIS Act be amended to provide that</p> <ul style="list-style-type: none"> • if the transferring fund has authority to offer a MySuper product, that authorisation can be transferred automatically to the successor fund in the event of an SFT. This could be for a specified period, to allow the successor fund to integrate the two products, or if there are reasonable grounds and/or both products are of sufficient size, the two products could be allowed to continue. • alternatively, the SIS Act could be amended to enable APRA to make an ‘SFT’ MySuper approval, in addition to the existing powers with respect to material goodwill and large employers. <p>2) Transfers from MySuper to MySuper</p> <p>A transfer of benefits from one MySuper product to another MySuper product would be deemed to provide ‘equivalent rights’, without there being a need for the trustees to agree</p>

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				more strategic merger, necessitating significant work.	'equivalent rights'.
E) FORCED COMMUTATION OF PENSIONS					
5.	Forced commutation of pensions Transferring member account attributes Minimum pension requirements	<i>Superannuation Industry (Supervision) Regulations 1994</i> Part 1A	APRA Treasury ATO	<p>Regulators have taken the view that a transfer of a pension account has the effect that the pension account is commuted, rolled-over and a new pension commenced in the successor fund.</p> <p>Forced commutations can have detrimental consequences for members.</p> <p>1) Transferring member account attributes Member account attributes do not always transfer to the new pension in the successor fund as they should. It is in the best interest of pensioner members for the pension to be treated as if it were continuing as the same pension.</p> <p>The ATO has developed transfer protocols that provide a mechanism to avoid some of the negative consequences that can arise (such as locking in a tax-free component smaller than the maximum available in the transferring fund), however, trustees need to approach APRA for relief on a case-by-case basis. While APRA generally will give relief to allow a pension to be able to continue in the successor fund, it would be preferable if the SIS Act were amended such that relief was not required.</p> <p>2) Minimum pension requirements Members are required to meet minimum pension requirement in both the transferring fund and successor fund. This can result in a form of 'double-counting', which requires the member to draw down the minimum amount in both funds.</p>	<p>We recommend a number of minor amendments be made to the SIS legislation to ensure pension members do not suffer any detriment, effectively treating the pension as if it were continuing, including to member account attributes, pre 2007 pensions and ATO reporting.</p> <p>With respect to the minimum pension requirements, we recommend that the SIS Regulations should recognise that, in the event of an SFT, the minimum pension requirement in the transferring fund and successor fund should be pro-rated.</p>

No	Matter Obligation / requirement	Source Legislation / Standard etc	Responsible entity Government/ Agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
F) MATTERS THAT DO NOT TRANSFER FROM THE TRANSFERRING FUND TO THE SUCCESSOR FUND					
6.	1) SIS / Corps Act Acts do not recognise that direction (such as an election, nomination or notice) given by member to transferring trustee as carrying across to successor fund	1) SIS/Corps Act <i>Superannuation Industry (Supervision) Act 1993</i> <i>Corporations Act 2001</i>	1) SIS/Corps Act APRA ASIC Treasury	1) SIS / Corps Act There are instances where the SIS & Corps Act do not recognise that a direction given to the transferring trustee as carrying across to the successor fund. This necessitates the member having to provide a fresh direction to the successor fund, with the fund not being able to give effect to the member's wishes until such time as a new direction is received. Examples include <ul style="list-style-type: none"> • where a member has exercised investment choice re their contributions – new contributions must be allocated to the MySuper product until the member gives a new election to the successor trustee (s 29WA) • where a member has made a Binding Death Benefit Nomination – successor trustee is not bound by nomination and must exercise its discretion • where a member has given the trustee the authority to deduct adviser service fees from their account – the successor trustee is unable to recognise the authority and give effect to the member's wishes. 	1) SIS / Corps Act We recommend the SIS Act & Corps Act be amended by <ul style="list-style-type: none"> • inserting a general 'deeming provision' to the effect that, in the event of an SFT, any direction given by a member to a transferring trustee is deemed to have been given to the successor trustee; or • amending each relevant provision to similar effect, on a 'provision by provision' basis. There are legislative precedents for this approach, including the transfer from a transferring fund to a successor fund of a <ul style="list-style-type: none"> • Family Law Flag; and • 'Protecting Your Super' insurance elections. ASFA addressed this issue in a submission to APRA on draft <i>Prudential Practice Guide SPG 227 Successor Fund Transfers and Wind-ups</i> in February 2017 https://www.superannuation.asn.au/ArticleDocuments/427/201709_APRA_SFT.pdf.aspx?Embed=Y In 2013 section 29WA was amended to insert a new sub-section 5 ¹ , to provide a regulation-making power to prescribe circumstances in which a direction given to one trustee is to be taken to be a direction given to the trustee of another super fund for the purposes of section 29WA. The Revised EM stated that <i>It is intended that the regulations to be made under this subsection will address the circumstances where a member has been moved from one fund to another under a successor fund transfer</i> . This clearly indicated an intent by the government to make regulations which recognise that, in an SFT, directions given to a transferring trustee are to be taken

¹ *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013*

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No	Matter Obligation / requirement	Source Legislation / Standard etc	Responsible entity Government/ Agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
	<p>2) AML / CTF Suspicious Matter Reports</p> <p>Breach of prohibition against 'tipping-off'</p>	<p>2) AML / CTF <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006 & Rules</i></p>	<p>2) AML / CTF AUSTRAC</p>	<p>2) AML / CTF If the transferring trustee has reported a suspicious matter, 'tipping off' rules mean it is not permitted to advise anybody else, including the successor trustee. If there is a suspicious matter this poses a money- laundering and/or terror financing risk & so the transferring trustee should be able to advise the successor trustee. While AUSTRAC will grant exemptions on a case-by-case basis, this can prove to be a very slow process.</p>	<p>to be a direction given to the successor trustee but unfortunately no such regulations have been made.</p> <p>2) AML / CTF The legislation should be amended to create an exception to the prohibition against 'tipping-off' to permit a transferring trustee to advise a successor trustee. Ideally this exception should be drafted broadly to recognise any effective change in ownership or control of a business/entity/operation. This could be accompanied by an obligation for reporting entities to notify AUSTRAC with AUSTRAC having the ability to override the exemption on reasonable grounds.</p>
	<p>3) Family Law Courts orders and agreements</p>	<p>3) Family Law <i>Family Law (Superannuation) Regulations 2001</i></p> <p><i>Superannuation Industry (Supervision) Regulations 1994</i></p>	<p>3) Family Law Attorney- General's Department</p>	<p>3) Family Law Courts orders and agreements executed prior to the Successor Fund Transfer will name the trustee of the transferring fund and so it is the transferring trustee that is bound by the order or agreement. Currently it is not possible to 'transfer' the order or agreement to the successor fund trustee.</p>	<p>3) Family Law Ideally the legislation should be amended such that, in the event of a Successor Fund Transfer, any court order or agreement made naming the trustee of the transferring fund is deemed to have named the trustee of the successor fund and is binding on that trustee.</p>
	<p>4) Employer participation agreements Legislative novation of participation agreements with Employers</p>	<p>4) Employer participation agreements <i>Common law</i></p>	<p>4) Employer participation agreements Treasury APRA</p>	<p>4) Employer participation agreements Generally each participation agreement with a standard employer-sponsor has to be novated on a case by case basis. This is an extremely time-consuming and onerous process. The trustee emails agreements out to all of the standard employer sponsors to be novated, however, it may be some time before they receive a response. Often the trustee needs to follow-up and sometimes it</p>	<p>4) Employer participation agreements We recommend that the SIS Act be amended to facilitate the statutory novation of standard employer-sponsor participation agreements. There is a precedent for statutory novation in the Life Insurance Act 1995 (sub-section 27A(5)).</p>

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	Must be done on a case by case basis			does not receive a response at all, all of which takes time and resources, and contributes to unnecessary costs.	
G) STATE CRIMES ACTS – POTENTIAL NEED TO APPROACH SUPREME COURT – POSSIBILITY FOR SIS ACT OR PRUDENTIAL STANDARD TO OVERRIDE STATE LEGISLATION					
7.	<p>State Crimes Acts - indemnities</p> <p>Need for Supreme Court consent to indemnity</p> <p><i>BT Funds Management [2022 NSWSC 401]</i></p> <p>http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NWSC/2022/401.html</p> <p>Orders made 23 March 2022.</p> <p>Court made orders giving its consent to certain conduct by BTFM, as trustee for the Retirement Wrap, which, absent consent, may have amounted to a</p>	<p>Four State Crime Acts</p> <ul style="list-style-type: none"> • NSW (s 249E of the <i>Crimes Act 1900 (NSW)</i>) • Queensland (<i>Criminal Code Act 1899 (Qld)</i> Sch 1, s 442F) • Victoria (<i>Crimes Act 1958 (Vic)</i>, s 180) • Western Australia (<i>Criminal Code Act 1913 (WA)</i>, s 535) 	<p>State governments</p> <p>APRA</p>	<p>There is concern that uncertainty about the reach of the State Crimes Act provisions has the effect that all SFTs will now require an application to the Supreme Court.</p> <p>Facts of the case</p> <p>BT wanted to pursue negotiations with potential successor trustee and Westpac (BT's owner) concerning the possibility of the successor trustee or Westpac</p> <ol style="list-style-type: none"> (1) paying all/part of BT's costs of the transaction (2) compensating members for losses they may suffer; (3) indemnifying BT in respect of claims, in respect of which it would otherwise be entitled to be indemnified out of the fund. <p>In each case the intention was that benefits would be passed on to members, either through a reduction in the amount BT would be entitled to recover or the payment of compensation to individual members for loss suffered.</p> <p>Statutory provisions</p> <p>In substance each of the provisions makes it a crime for a trustee to receive or to solicit a benefit from a person as an inducement or reward for the appointment of any other person to be a person entrusted with the property without the consent of either</p> <ul style="list-style-type: none"> • each person beneficially entitled to the property; or • the Supreme Court. <p>Penalty is 7 years jail.</p> <p>Issue</p>	<p>It is expected that an amendment to the SIS Act, which is expressed to apply to the exclusion of State legislation, would be effective to override the State Crimes Acts (subject to a constitutional law review). The provision in the SIS Act would have the effect of confirming the validity of the usual indemnities that a transferor fund trustee may provide to a successor fund trustee.</p> <p>The Commonwealth Government could consider requesting the States to amend their Crimes Act to exclude trustee of super funds, provided they are acting in accordance with regulatory requirements.</p> <p>Note: Mercy Super / HESTA made an application in the Supreme Court of Queensland that was heard on Tuesday 13 September 2022. Mercy Super and HESTA argued that a SFT does not constitute an 'appointment' of a trustee for the purposes of the Queensland Crimes Act. The Judge indicated that he would publish his decision and reasons by mid-October.</p>

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	breach of s 249E of the <i>Crimes Act 1900</i> (NSW)			When appointing successor trustee, transferring trustee needs to approach the Supreme Court for consent. There is an open question as to whether these provisions apply to the transfer of funds, as opposed to the appointment of a successor trustee.	
H) CREATION OF INDUSTRY ADVISORY PANEL ON SUCCESSOR FUND TRANSFERS					
8.	Need for expertise and experience in SFTs		Government Treasury APRA	Successor Fund Transfers generate a number of legal, regulatory and operational issues that necessitate expertise	Create an Industry Advisory Panel, utilising people from the industry with experience in Successor Funds Transfers and with legal, regulatory and/or operational expertise, to provide advice to APRA / ASIC with respect to the issues involved in Successor Fund Transfers

3. TABLE 2 - REMAINING ISSUES IDENTIFIED BY THE WORKING GROUP

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- B) [FAMILY LAW ISSUES](#)
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- D) [TAX ISSUES](#)
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3. TABLE 2 - REMAINING ISSUES IDENTIFIED BY THE WORKING GROUP

No	Matter Obligation/requirement	Source Legislation / Standard	Responsible entity Government / agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
A) SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993 AND REGULATIONS					
<p>There are two possible approaches that could be adopted with respect to this:</p> <ul style="list-style-type: none"> the SIS legislation could be amended to create a new part that specifically deals with SFTs and which addresses specific issues; or the relevant provisions could be amended on a case by case basis. 					
9.	<p>Putting Members’ Interests First (PMIF)</p> <p>Members with ‘default’ insurance in transferring fund uninsured in successor fund</p>	<p><i>Superannuation Industry (Supervision) Act 1993</i></p> <p>Section 68AAC</p>	<p>APRA/ASIC</p> <p>Treasury</p>	<p>Where an existing member aged under 25, who under the Putting Members’ Interests First (PMIF) provisions did not have to make an election to have insurance cover, is transferred to a successor fund, the successor trustee is not permitted to provide insurance unless the member ‘opts in’ to it.</p>	<p>We recommend amending the SIS legislation to create an exemption where, if a member with ‘default’ insurance under the PMIF provisions is transferred to a successor fund, the successor trustee is permitted to continue insurance cover in the successor fund.</p>
10.	<p>Portability provisions</p> <p>Do not recognise administrative ‘black out’ periods</p>	<p><i>Superannuation Industry (Supervision) Regulations 1994</i></p> <p>Regulation 6.34A</p>	<p>APRA</p> <p>Treasury</p>	<p>An application to have a benefit rolled-over to another product must be actioned within 3 business days. To implement the data transfers for an SFT, an operational ‘black-out’ period generally is necessary, usually a few business days but, where a change of administrator and IT systems is involved, it can be a few days longer. During the black-out period new transactions, including benefit rollovers, cannot be processed. The trustee has to make an application to APRA for relief with respect to the portability provisions, which can take time and involves resources and costs.</p>	<p>We recommend that the SIS legislation be amended to provide that, for the duration of an operational black-out period during an SFT, the portability requirements are suspended and recommence once the black-out period has ended.</p> <p>Prior to the amendment of the legislation APRA could</p> <ul style="list-style-type: none"> make a statement to the effect that, provided certain criteria are met, ‘no action will be taken’ if not prepared to publish a ‘no action position’ then, to minimise the cost and time involved in making an application for relief, APRA should, as a minimum, set out clear criteria which, if satisfied, would mean that relief is more likely to be granted, which would have the added benefit of ensuring consistency in supervisors’ approaches.

No	Matter Obligation/requirement	Source Legislation / Standard	Responsible entity Government / agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
11.	<p>Performance test letters</p> <p>Timing when SFT already in play</p>	<p><i>Superannuation Industry (Supervision) Act 1993</i></p> <p>Part 6A</p> <p><i>Superannuation Industry (Supervision) Regulations 1994</i></p>	<p>ASIC</p> <p>Treasury</p>	<p>There were instances where letters with respect to the under-performance test had to be sent to members just prior to the Significant Event Notice with respect to the Successor Fund Transfer.</p> <p>This makes it confusing for members and difficult for them to figure out what is in their best interest to do. We are aware of one fund where ASIC deferred the date by which the letters had to be sent until after the Successor Fund Transfer date, by which time there were no members to whom the letter could be sent and therefore there was no need it to be sent. While this achieved the desired outcome it necessitated a formal application to ASIC that took considerable time and resources and, as such, legislative relief would be preferable.</p>	<p>If a Successor Fund Transfer Deed has been signed and the Significant Event Notice is going to be sent to members within a prescribed period, the transferring trustee should be exempted from sending the letter with respect to performance. Conversely, if the performance letter is still to be sent, trustees should be permitted to tailor the communications to refer to the pending Successor Fund Transfer, to assist with members’ understanding.</p> <p>Guidance may also be required with respect to Trustee Directed Products, regarding any investment options that may be deemed to have failed the performance test.</p>
B) FAMILY LAW ISSUES					
12.	<p>Deferred Family Law splits</p> <p>Uncontactable or non responsive spouses</p>	<p><i>Family Law (Superannuation) Regulations 2001</i></p> <p><i>Superannuation Industry (Supervision) Regulations 1994</i></p>	<p>Attorney-General’s Department</p>	<p>The fact of a Successor Fund Transfer creates a splittable payment under the Family Law provisions but there are some complications with Defined Benefit members, as it crystallises their benefit. The transferring trustee needs to contact the non-member spouse to obtain payment instructions then, if the trustee has not received instructions after a reasonable period of time, determine that it is in the best financial interests of the non-member spouse to transfer their benefit to the ATO on the occurrence of the Successor Fund Transfer.</p> <p>This means that a deferred Family Law split can create delays with a Successor Fund Transfer if the spouse is uncontactable or non-responsive.</p>	<p>Ideally the legislation should be amended such that a Successor Fund Transfer is not a trigger for a splittable payment but instead the payment split carries across to the successor fund.</p>

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C) APRA – PRUDENTIAL STANDARDS, GUIDANCE AND PRACTICE					
13.	Defined Benefit Arrangements Initial investigation / triennial review cycle	<i>SPS 160 Defined Benefit Matters</i>	APRA Treasury	SP 160 requires an initial actuarial investigation – this represents an unnecessary expense.	APRA should grant relief from SP 160 to allow the successor trustee to be able to retain the existing triennial actuarial review cycle, with the next review performed in accordance with that cycle. While APRA will sometimes grant an exemption e.g. if the most recent valuation under the transferring fund was very recent, this requires individual application for relief which is costly and time consuming.
14.	Outsourced agreements – novation to successor trustee Subject to Outsourcing Standard	<i>SPS 231 Outsourcing</i>	APRA	SPS 231 Outsourcing Standard applies to agreements that are going to be transferred to the successor trustee. Complying with the obligations and requirements under the standard creates a lot of work during the transfer.	In order to facilitate the transfer of agreements as part of a Successor Fund Transfer, APRA should grant temporary relief from the Outsourcing Standard to allow the successor trustee a period of time after the transfer to review the agreements.
15.	Asset transfers Unlisted and illiquid assets	Potential new prudential standard	APRA	Significant cost and complexity can arise from asset transfers, especially where assets may be unlisted or are illiquid. Unlisted assets can have redemption windows and pre-emptive rights for other owners which affect the efficiency of the transfer. Some assets may be underperforming and/or there may be tax implications on transfer. These issues can affect the pace of integration and can also have an effect on the outcomes under APRA’S annual Performance Test.	APRA should ensure that trustees of funds with unlisted and/or illiquid assets are required to formulate an exit strategy that incorporates necessary changes to make their assets more amenable to redemption and cash transfer. This would ensure that these time-sensitive processes can be undertaken with minimal adverse effect on investment performance and member balances. The performance test should be modified such that any underperforming assets transferred to a successor fund as a result of an SFT do not adversely affect the performance test calculations for the successor fund.

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No	Matter Obligation/requirement	Source Legislation / Standard	Responsible entity Government / agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
16.	Successor Fund Transfer not permitted within same entity	<p><i>Superannuation Industry (Supervision) Act 1993</i></p> <p><i>Superannuation Industry (Supervision) Regulations 1994</i></p> <p>APRA / Treasury</p>	<p>APRA</p> <p>Treasury</p>	<p>Under the SIS Regulations, the transferring trustee must agree with successor trustee that it will confer equivalent rights on the members transferred under the SFT. APRA has indicated that, where an SFT is taking place between two products/funds with the same trustee, the trustee is considered to be unable to agree with itself, i.e. legally it cannot agree with itself that the successor product/fund will confer equivalent rights. APRA recommends that a trustee contemplating such an SFT apply to APRA for a modification declaration concerning the SIS Regulations to facilitate the trustee's 'equivalent rights' agreement, however, these matters can take considerable time and resources to resolve.</p>	<p>We recommend that APRA provide guidance as to how a trustee wanting to effect an intra-fund SFT should apply to APRA for a modification declaration, to facilitate the trustee's 'equivalent rights' agreement.</p>
17.	Unclear whether election by transferring trustee can carry over to successor fund	<p><i>SIS Act</i> Section 68AAF</p>	<p>APRA</p> <p>Treasury</p>	<p>APRA has expressed view that election by transferring trustee does not carry across to successor fund. The prime example is a dangerous occupation classification applied to a category of members' insurance</p>	<p>We recommend that APRA provide guidance as to whether an election made by a transferring trustee can carry across to the successor fund.</p>
18.	<p>Defined Benefit (DB) arrangements</p> <p>Need for relief if fewer than 50 members</p>	<p><i>Superannuation Industry (Supervision) Regulations 1994</i></p> <p>Part 9</p> <p>Reg 9.04D</p>	<p>APRA</p> <p>Treasury</p>	<p>If there will be fewer than 50 Defined Benefit (DB) members and/or pension members the successor trustee will need to apply to APRA for relief with respect to transferring DB arrangements. In the worst case scenarios, where relief is not granted, DB members are being compelled to crystallise their benefit and lose their DB entitlement. Further, the cost of the resources involved in seeking relief from APRA is prohibitive, given the relatively small number of members involved.</p>	<p>We recommend that APRA provide guidance as to when it is likely to, and is likely not to, provide relief for DB arrangements with fewer than 50 members.</p>
19.	<p>In-house assets (IHA)</p> <p>Need to apply for fresh relief</p>	<p><i>SIS Act</i> Part 8</p>	<p>APRA</p> <p>Treasury</p>	<p>Where a transferring trustee has received relief with respect to the IHA requirements, the successor trustee needs to apply for fresh relief. Often this is where the trustee is investing through a related investment vehicle.</p>	<p>We recommend that, if the transferring trustee has obtained relief with respect to the in-house asset requirements, APRA treats this relief as if it is transferred across to the successor fund.</p>

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D) TAX ISSUES					
1. TAX ISSUES THAT HAVE A DELETERIOUS AFFECT ON MEMBER EXPERIENCE					
20.	Members unable to claim a tax deduction for non-concessional contributions or to split contributions with a spouse	<i>Income Tax Assessment Act 1997</i>	Treasury ATO	A member is only able to claim a tax deduction for after tax contributions and to split contributions with a spouse by giving a notice to the trustee of the fund to which the contributions were made. Unless the member gave the notice to the transferring fund prior to the SFT the member is no longer able to give the notice to the fund that received the contributions and therefore is not able to claim a tax deduction or split the contributions.	We recommend that the Income Tax Act be amended to recognise SFTs and allow the notices to be given to the trustee of the successor fund.
21.	Transfer of pending / undrawn terminal illness benefit	<i>Income Tax Assessment Act 1997</i> Section 303-10 Section 306-10(b) Section 292-90(2)(c)(vi)	Treasury ATO	An undrawn terminal medical condition benefit when rolled over in a Successor Fund Transfer will be considered a non-concessional contribution. Under section 303-10, a Terminal Medical Benefit is excluded from being a 'Roll-over Superannuation Benefit' under section 306-10(b) through the regulation applicable to that section. This has the consequence that the Terminal Medical Benefit cannot fall into the exclusion from the definition of 'Non-concessional Contribution' for Roll-over Superannuation Benefits under subparagraph 292-90(2)(c)(vi).	Add an additional exclusion item in paragraph 292-90(2)(c) to override sub-paragraph (vi) in so far as it relates to Terminal Medical Benefits.

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2. CAPITAL GAINS TAX					
22.	CGT - requirement that the transfer events all happen in the transfer year	<i>Income Tax Assessment Act 1997</i> Division 310 Subsection 310-45(3)	Treasury ATO	One of the requirements that closing superannuation funds must manage in order to qualify for rollover relief is that the CGT events all happen in the transfer year, being the year that the completion time occurs. This creates an unnecessary compliance burden on a transferring fund that in some situation means that rollover relief will not be obtained (e.g. sometimes Accumulation and DB members have to be dealt with separately, due to the complexity that can be involved in dealing with Defined Benefits). For CGT roll-over relief to be available under Division 310, the 'transfer events' in respect of the transferring fund's CGT assets must all happen in the same income year as the 'completion time', being when the transferring fund ceases to have any members (refer to subsection 310-45(3) of the ITAA 1997).	Amend Division 310 to provide for greater flexibility in relation to the timing of the transfer of the assets in a Successor Fund Transfer
23.	SFT of sub-set of members	<i>Income Tax Assessment Act 1997</i> Division 310	Treasury ATO	Typically, a Successor Fund Transfer may involve the transfer of all the members' benefits from a transferring fund. However, there are Successor Fund Transfers that involve the transfer of a group of members' benefits, for example, all the members' benefits in a sub-fund, or where pensioners are transferred separately to other members, or where DB members are transferred separately to accumulation members (a Partial SFT). Currently there is no loss or asset rollover relief in relation to the transfer of a sub-set of members in a Partial SFT.	Amend Division 310 of the ITAA 1997 to include loss and asset rollover relief in relation to the Successor Fund Transfer of a sub-set of members (Partial SFT).

No	Matter Obligation/requirement	Source Legislation / Standard	Responsible entity Government / agency	Issue What is affecting member experience or causing additional work/risk/cost	Alternative/solution What is being proposed
24.	Investments of transferring funds held via underlying investment trusts, rather than directly	<i>Income Tax Assessment Act 1997</i> Division 310	Treasury ATO	The trustee of the transferring fund may hold beneficial interests in the income and capital of underlying investment trusts, rather than holding assets directly. Transferring assets out of these structures to the successor fund (or to investment trusts the successor fund invests through), would crystallize a tax liability. Currently there is no asset rollover relief in relation to the transfer of assets out of these trusts to a successor fund, nor equivalent revenue and capital loss transfer relief.	Amend Division 310 of the ITAA 1997 to include asset rollover relief and loss transfer relief from investment trusts that transferring funds invest through to the successor fund (or trusts the successor fund invests through), replicating the relief that already exists in Division 310 for super investments held via pooled super trusts (PSTs) and life companies.
3. TAX - INCOME – ATTRIBUTION OF INCOME TO TRANSFERRING FUND, AS OPPOSED TO SUCCESSOR FUND, NECESSITATING FURTHER TAX RETURN					
25.	Ex dividends at SFT date	<i>Income Tax Assessment Act 1997</i>	ATO Treasury	There is an issue with respect to shares that have gone ex dividend at the date of the SFT. Technically, if the transferring fund has shares that are ex-dividend at the SFT date, the transferring fund is required to include the dividend (and franking credit if applicable) as assessable income. This can mean that a further tax return is required. By way of example, if an SFT had occurred on 30 June 2021, three of Australia' largest bank shares were ex-dividend. Technically a 30 June 2022 tax return would be required for the transferring fund.	Provide administrative guidance that the dividend (and associated franking credit) may be returned in the tax return of the successor fund when received

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4. TAX - CREDITS, DEDUCTIONS AND OFFSETS					
26.	Franking credits – 45 day holding period requirement	<i>Income Tax Assessment Act 1997</i> Division 310	Treasury ATO	In undertaking the merger, Australian shares, or an interest in Australian shares, will be transferred from the transferring fund to the successor fund. These transfers need to be considered in order to determine if the super fund has held the shares sufficiently at risk for the purposes of the 45 day rule in order to claim the benefit of franking tax offsets. Although Division 310 of the ITAA 1997 provides for asset rollover relief when an asset is transferred from the transferring fund to the successor fund, there is no such relief for the operation of the qualified person rules. This means the successor fund will be treated as having acquired the Australian shares, or an interest, at the transfer date, such that the 45 day time period starts again. In relation to testing for franking credit entitlements, the holding period ceases on the SFT date for the transferring fund and commences on the SFT date for the successor fund.	The ‘qualified person’ rule should be amended to ensure that an SFT does not constitute a sale and purchase for the purposes of the 45 day rule.
27.	Deductions of merger costs – only one fifth is deductible	<i>Income Tax Assessment Act 1997</i> Section 40-880	Treasury ATO	In undertaking the merger, the transferring fund will incur expenditure that for tax purposes will be treated as ‘blackhole expenditure’ and deductible over five years under section 40-880 of the Income Tax Asst Act 1997 (ITAA 1997). Under the current law, the transferring fund will be entitled to a deduction for 20% of this expenditure in the first year. If the fund closes, the remaining undeducted balance is lost.	Amend section 40-880 of the ITAA 1997 to allow the successor fund to deduct the remaining balance of undeducted 40-880 expenditure over the period that it would have been deductible to the transferring fund

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5. TAX - LOSS OF CARRY FORWARD OR CURRENT YEAR TAX LOSSES, AND LOSS OF ATTRIBUTION ACCOUNT SURPLUS					
28.	Tax losses in downstream trusts of transferring fund	<i>Income Tax Assessment Act 1997</i> Schedule 2F	Treasury ATO	The trustee of the transferring fund may hold assets in trusts. These trusts may have carried forward or current year tax losses (that is, revenue losses). If as part of the Successor Fund Transfer, the units in the unit trust are transferred from the transferring fund to the successor fund, there may be, at the time of transfer, a failure of the 50% stake test (depending on the percentage interest the transferring fund has in the trust), such that the tax losses in the trust may be forfeited.	Amend the 50% stake test rules in Schedule 2F to ensure that a direct or indirect transfer of units in a trust does not cause a failure of the 50% stake test (that is, that the successor fund is treated as if it has the same interest as the transferring fund).
29.	CFC investments & attribution account surplus	<i>Income Tax Assessment Act 1997</i>	Treasury ATO	Where a super fund has an investment in a CFC and that investment has an attribution account surplus at the time of the merger, under the current law, there is no provision to transfer the attribution account surplus to the successor fund.	Amend the tax legislation to allow the attribution account surplus to move with the asset to the successor fund
6. TAX - TOFA CAN BE A BARRIER TO CHANGING CUSTODIAN					
30.	Changes of custodians & TOFA	<i>Income Tax Assessment Act 1997</i> TOFA	Treasury ATO	When a super fund puts its custody out to tender, one of the tax barriers to transferring custody to the successor fund is whether the new custodian has the same or different functionality when it comes to the tax reporting of certain instruments, in particular, certain TOFA instruments. Under the current law, once a super fund has elected a particular methodology, for example, the overall gain or loss method under TOFA, there is no provision that would allow the successor fund to change their methodology going forward if the proposed new custodian offered a different methodology (yet one permitted under the ITAA 1997), for example, the particular gain or loss method.	Amend the TOFA rules to allow for a successor fund to change their methodology in the event of a change in custodian or in a change to a custodian's tax reporting and calculation engine.

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7. TAX - INVESTMENTS WHERE, ON REDEMPTION, THE ASSESSABLE AMOUNT EXCEEDS THE ECONOMIC GAIN – IMPEDIMENT TO SUCCESSOR FUND TRANSFER					
31.	Risks associated with particular assets		Treasury	<p>There are types of investments where, on redemption, the assessable amount exceeds the economic gain (such as redemption of low par value shares with share premium comprising most of initial cost base, where the company’s accounting for the redemption does not DR the share premium account).</p> <p>In an SFT, assets like this must be rolled over unless the MV is less than cost base (as otherwise, the transferring fund records a capital gain, but the successor fund just receives an equivalently larger dividend on eventual redemption). The existence of assets like these in the transferring fund’s portfolio can act as an impediment to the transferring fund finding a suitable SFT partner, as most funds would prefer not to hold an asset where they will be taxed on more than the economic gain.</p>	Broad legislative change to the dividend provisions (or share buyback provisions) would ensure that being taxed on initially contributed capital cannot occur.
E) PROCEEDS OF CRIME ACTS - COMMONWEALTH AND STATE					
32.	<p>Proceeds of Crime - Restraining orders</p> <p>Transfer to a successor fund potentially a ‘dealing’ under the various Proceeds of Crime Acts</p>	<p><i>Proceed of Crime Act 2002 (Cth)</i></p> <p>State Crimes Acts</p>	<p>Attorney-General’s Departments (Cth)</p> <p>Attorney-General’s Departments (States)</p>	The transferring trustee generally is prohibited from dealing with the member’s benefit in the fund without the consent of the relevant authority - for the Commonwealth Act it is the Australian Federal Police (AFP).	<p>1) Commonwealth</p> <p>Amend the Proceeds of Crime Act (Cth) to clarify that a transfer of a member’s benefit to a successor fund does not amount to dealing with the member’s benefit, provided notification as to the restraining order is supplied to the successor trustee. Prior to this the relevant authority (AFP) could provide guidance & streamline processes.</p> <p>2) States</p> <p>Amend the various Proceeds of Crime Act to clarify that a transfer of a member’s benefit to a successor fund does not amount to dealing with the member’s benefit, provided notification as to the restraining order is supplied to the successor trustee. Prior to this the relevant authority could provide guidance & streamline processes.</p>

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F) STATE LAW					
33.	Stamp duty 1) Landholder and trust acquisition duties 2) Life insurance policies and other assets	Various State and Territory Stamp Duty Acts	States and Territories	1) Trustee incurs landholder and trust acquisition duties relating to assets transferred as part of a Successor Fund Transfer 2) Stamp duty applies to life insurance policies and other assets transferred to the successor fund This increases the costs of the SFT	1) Provide relief from landholder and trust acquisition duty as they relate to assets transferred as part of a SFT 2) Make life insurance policies and other assets transferred as part of a successor fund transfer exempt from stamp duty
G) UK LAW					
34.	QROPS members Some members who transferred amounts while the transferring fund was a QROPS may suffer tax consequences	UK legislation	HM Revenue & Customs Treasury	Transferring certain members who transferred an amount from the UK while the transferring fund was a QROPS potentially can trigger a personal tax liability for the member. While HMRC is improving re providing relief, this is still as time consuming and costly exercise.	Representations should be made by Treasury to HMRC to resolve this as a systemic issue affecting all Successor Fund Transfers from former QROPS funds
H) REGULATORS GENERALLY					
35.	Data migration Ensure seven years of history is sufficient		ASIC / APRA / ATO	While trust law, insurance and other considerations may compel trustees to transfer and retain some data that relates to periods more than seven years ago, including member 'instructions' such as beneficiary nominations, investment choice forms and authorities to deduct adviser service fees, a significant amount of data more than seven years old is not transferred to the successor trustee. Regulators - ASIC in particular - have requested / served notices to produce data going back more than seven years.	Regulators to provide clear guidance as to the circumstances in which they will request / demand data that relates to a period more than seven years ago