

AIST

11 March 2022

General Manager
Policy Development
Policy and Advice Division
Australian Prudential Regulation Authority

Email: superannuation.policy@apra.gov.au

Dear Sir/Madam

Strengthening Financial Resilience in Superannuation

Brief

AIST would like to see the information gathered during this consultation to be considered in any future making of prudential standards affecting profit-to-member superannuation funds which have markedly different business models to commercial funds and other non-super financial services. AIST would particularly like the policy settings around the Operational Risk Financial Reserve to be reviewed.

About AIST

Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public sector superannuation funds.

As the principal advocate and peak representative body for the \$1.6 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST advocates for financial wellbeing in retirement for all Australians regardless of gender, culture, education, or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

Submission

AIST would like to thank APRA for the opportunity to provide input to this consultation.

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AIST has been discussing the issues raised in this and related consultations with our member funds over recent months. We understand that, while responding to this consultation is voluntary, several of our member funds will be providing their own submissions addressing the questions in more detail.

AIST strongly supports financial resiliency of super funds and the processes, planning and scenario testing that fund trustees undertake to ensure they continue to meet members' needs. We believe funds should have access to the financial resources necessary to manage their business, ensure they are sustainable into the future, can operate through volatile times and continue to deliver on their business plan and member outcomes objectives. Recent events which have resulted in volatile markets have evidenced that overall Australian super funds are well placed to manage external shocks.

Sources and purpose of financial resources

In the profit-to-member sector, the fundamental source of financial resources is revenue from fees charged to members.

The level of fees levied on members needs to be appropriate and reviewed regularly to ensure they are not unreasonably eroding member balances and reflect the costs incurred by the trustee in managing the fund for members. Fee setting must consider the costs of business operations, levels of reserves and maintenance of a surplus for future strategic initiatives, contingencies and long-term sustainability, while also remaining competitive and ensuring the best financial interests of members. The absence of shareholders with a financial stake in the profit-to-member sector ensures that any collection and use of revenue is done with the guiding principle that the money first and foremost belongs to members, and any use of that money must be to their benefit.

Industry competition, creation of mega funds, YFYS performance test are all driving fee compression across the industry. This is positive for members but has the potential to effect fund sustainability in the future and/or could result in fee increases. Many funds across the industry require significant investment in technology, operating platforms and systems to modernise and improve value proposition to their members. Currently, access to limited capital is restricting the process of innovation and transformation.

Revenue from fees is also the source of funding for the reserves of the fund. General reserves are maintained to manage operating costs and reserve excess fee amounts, and funds are additionally required to maintain a separate Operational Risk Financial Reserve (ORFR) to make good on any losses experienced by members from an operational risk event.

Together these are the main sources of financial contingency. As this is the basis for the financial position of the business, all revenue, costs and reserves are subject to a range of risk management, audit and governance functions, rigorous review and oversight, formal budgeting processes and continuous forecasting methodologies. Reserve amounts are disclosed in publicly available financial statements and funds are managed in accordance with regulatory standards and individual fund policies.

Reserves

AIST believes the role and funding of the ORFR does require review as large funds are carrying significant reserves that are in many cases overfunded. Use of the ORFR is tightly regulated and several funds have raised concerns that these amounts have generally remained untouched since their establishment, and if used are generally topped up in the same period. The economic outcome is that any draw-downs from the reserve are effectively funded out of current year fees so the reserve does not act as a true reserve.

The blunt 0.25% of the funds capital that must be held in the ORFR means that for large funds, this amount is now becoming a very significant sum, and one that cannot contribute to the returns that are attributed to members. This leads to large reserves of non-productive capital that continues to grow for no perceived benefit, and do not reflect the true operational risks of the fund.

Presently, the quantum of capital required to be held has no correlation to the risk management frameworks, strategies and resourced deployed in a superannuation fund. A prudently managed fund with extensive resources is required to hold the same percentage of capital as one that is less well managed.

AIST proposes that the level of the ORFR be flexible to account for a risk measure of the fund, rather than a simple % of FUM. One suggestion is to consider a dollar-based level calculated with a more detailed approach to quantifying operational risk. The interaction of the ORFR with other reserves should be reviewed. Excess levels of reserves could be moved into the general/administration reserve for contingency funding or funding of programs to fix potential operational risk areas.

The purpose and allowable uses of reserves should also be considered. As funds in the ORFR can only be drawn upon to remediate a risk event loss that has already occurred, it cannot be used to mitigate the likelihood of potential future events.

AIST believes there is opportunity to broaden the possible uses of those reserves to include other purposes connected to prudent risk management of the operations of the fund. For example, access to the ORFR to update/upgrade/modernise technology systems that could create risk if not undertaken, could see funds able to address future risk earlier, and therefore more cost effectively. These uses would still be aligned with the overall purpose of the reserve, for example, in reducing future risk which would in turn reduce the likelihood of a future claim on the ORFR.

Insurance

Liability insurance is a secondary source of financial resources for financial contingencies, but there are market limitations on the insurance available, legal limitations on what can be covered, and individual policies are subject to excesses and exclusions.

Funds are hesitant to provide information to this consultation about their specific policies for commercial sensitivity reasons, but further would be in breach of strict confidentiality clauses imposed by insurers to manage the risk of targeting by bad actors if coverage details are known.

IFS Insurance Solutions have prepared a paper for trustees outlining the insurer perspective to this consultation. They outline the types of insurance available, typical excesses, exclusions and considerations that a trustee should be aware of and we include their valuable insights as an attachment to our submission.

Contingency expenditure

Until recent legislative changes trustees were not obliged to retain any capital as all costs of operating the fund were able to be met by the fund, and costs of operating the trustee were met on a cost-recovery basis. While the fund and the trustee are distinct entities in a legal sense, operationally they are one and the same as the trustee exists solely to manage the interests of the fund.

The delineation between fund and trustee and the interpretation and application of the law to each has been considered in some detail by the Courts in recent months, with the Courts determining that viability of the trustee to continue in its role as trustee is vital to ensuring that members' best financial interests are protected. This is in accordance with the submissions of APRA in its role as *amicus curiae*.

“APRA’s written submissions emphasised that “member outcomes are a critical consideration in the determination of the Application.”¹

The outcome of these cases is that many profit-to-member funds are now creating a capital base within the trustee as a protection against insolvency risk.

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AIST funds would appreciate clarity from APRA on how it foresees funds creating that capital base efficiently, whether a trustee fee or other mechanism is appropriate, what an appropriate capital base should be and how it can be used, e.g. to fund or settle issues within subsidiary companies.

Further, several funds are currently undergoing or planning future mergers. Reserve equalisation within the merger process is complex and could potentially result in mergers not proceeding. APRA’s views on reserve equalisation would be welcomed, especially where there is significant mismatch between the reserves of each merging entity.

For further information regarding our submission, please contact [REDACTED], Senior Manager Advocacy & Research on [REDACTED]

Yours sincerely,

[REDACTED]

Eva Scheerlinck

Chief Executive Officer

¹ J Kelly, Re QSuper Board, [2021] QSC 276



**Insurance
Solutions**

APRA Discussion Paper

Strengthening Financial Resilience in Superannuation

IFS Insurance Solutions Response to RSE licensees

February 2022

Prepared By
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Better results.

Executive summary

In November 2021 APRA issued a discussion paper titled 'Strengthening Financial Resilience in Superannuation'. As APRA acknowledged the superannuation landscape has changed considerably and further changes in industry structure and composition are anticipated in the future.

APRA invited written submissions on the questions set out in the Discussion Paper.

IFS Insurance Solutions has been at the forefront of insurance for the Industry Superannuation sector for over 25 years. Our knowledge base of the superannuation sector is second to none and we pride ourselves on our expertise and knowledge of insurance products for the super industry.

As the pre-eminent provider of risk and insurance consulting services to industry superannuation funds we have prepared this paper to assist in your response to certain Insurance related questions.

Disclaimer

The following information is intended to be of a general nature only. It does not take into account your objectives, financial situation or needs. Before acting on any information, you should consider the appropriateness of the information provided and the nature of the relevant financial product having regard to your objectives, financial situation and needs. You should read the relevant policy wording/PDS prior to making a decision, including a decision about whether to acquire or continue to hold a financial product, and seek independent advice if required.

Please provide a summary of the insurance coverage held by the RSE licensee and/or the RSE licensee directors?

It is common practice for RSE Licensee to purchase the following Insurance Policies:

Super Fund Liability/Trustee Liability/Professional Indemnity Insurance

The main Insuring Clause for this type of Policy is:

The Insurer will pay on behalf of the Insured all Loss and Defence Costs resulting from a Claim first made against the Insured arising from the performance or a failure to perform Professional Services and notified to the Insurer during the Period of Insurance (or any applicable Discovery Period).

This policy will respond to the following types of claims against the Corporate Entity/RSE Licensee/Corporate Trustee:

- A written communication containing a demand for compensation, damages or other relief
- Any civil or arbitral proceeding
- Any criminal prosecution or proceeding
- Any administrative or regulatory proceeding
- Any alternative dispute resolution proceeding
- Any external dispute resolution proceeding

This type of policy will have an excess that that entity is responsible for, the excess will apply to each and every Claim and will typically be between \$100,000 to \$1,000,000 depending on the Assets Under Management

Crime Insurance

We typically see the following two Insuring Clauses under a Crime Policy:

Internal Fraud

The Insurer will indemnify the Insured for the loss of Money, Securities or Property resulting from a Fraudulent Act of an Employee, including any person acting in collusion with such Employee, which is first discovered and reported to the Insurer during the Period of Insurance.

External Fraud

The Insurer will indemnify the Insured for the loss of Money, Securities or Property resulting from a Fraudulent Act of a Third Party, other than an Employee or a person acting in collusion with such Employee, which is first discovered and reported to the Insurer during the Period of Insurance.

This type of policy protects theft by employees or third parties.

Directors and Officers Liability

A Directors and Officers Liability policy will have the following two Insuring Clause:

Directors and Officers Liability Cover

The Insurer will pay to or on behalf of each Insured Person all Loss and Defence Costs resulting from a Claim first made against an Insured Person during the Period of Insurance (or any applicable Discovery Period) except to the extent that the Company has paid such Loss.

Company Reimbursement Cover

The Insurer will pay to or on behalf of the Company all Loss and Defence Costs resulting from a Claim first made against an Insured Person during the Period of Insurance (or any applicable Discovery Period) for which the Company has granted indemnity to the Insured Person.

Similar to the Super Fund Liability/Trustee Liability/Professional Indemnity Insurance policy, this policy will respond to the following types of claims against a Director or Officer of the Corporate Entity/RSE Licensee/Corporate Trustee

- A written communication containing a demand for compensation, damages or other relief
- Any civil or arbitral proceeding
- Any criminal prosecution or proceeding
- Any administrative or regulatory proceeding
- Any alternative dispute resolution proceeding
- Any external dispute resolution proceeding

The policy has two Insuring Clauses, *Directors and Officers Liability Cover* and *Company Reimbursement Cover*, the *Directors and Officer Cover* will respond to Claims made against the Director and where the Director is not indemnified by the Corporate Entity/RSE Licensee/Corporate Trustee. The excess under this part of the policy is typically Nil.

Where indemnity has been granted by the Corporate Entity/RSE Licensee/Corporate Trustee, Insurers will normally require an excess of \$75,000 to \$250,000.

Cyber Liability

Cyber Liability is a relatively new type of Insurance Policy purchased by Corporate Entities/RSE Licensee/Corporate Trustees, this type of policy was first purchased by entities from 2014. Cyber Insurance is increasingly becoming an essential part of the financial lines insurance program for many financial services providers and we would estimate that now over 90% of Trustees purchase a Cyber Liability policy to mitigate their Cyber Risk Exposure

The risk of a cyber incident or data breach is considered to be significant and the associated costs in addressing such an incident to be wide ranging and substantial.

A Cyber insurance policy is designed to cover a wide range of costs including:

First Party costs:

- Communication expenses – notification mail-outs, call centre, advertising
- Costs incurred in restoring or replacing lost or damaged data or software
- Non-Physical Business Interruption – Increased costs of working
- Cyber Extortion / ransom
- Reputational protection expenses, i.e. Public Relations expenses

Third Party Costs:

- Regulatory costs – fines, penalties, reporting costs (ASIC and Office of Australian Information Commissioner)
- Privacy, Confidentiality and Security Liability, i.e. compensation and defence costs from a claim against you for network security breach

Financial Planner Professional Indemnity

Depending on the type of advice provided by the trustee it is not uncommon to see Trustees who provide Personal advice to members to purchase a separate standalone Professional Indemnity Policy.

Nil Excess Superannuation Trustee Legal Expenses Insurance

In August 2021, IFS Insurance Solutions launched a newly developed and exclusive insurance product available to Superannuation Trustees.

This new and exclusive product to IFS Insurance Solutions was designed to help mitigate the impact of changes to Section 56 and 57 of the Superannuation Industry (Supervision) Act 1993 that will prohibit Trustees from using member funds to indemnify the Trustee.

The Superannuation Trustee Legal Expenses Insurance Policy will provide the following Trustee Protection:

Indemnify You against Legal Expenses incurred in:

- defending a civil or criminal penalty; or
- seeking to reduce the amount of a civil or criminal penalty

for an alleged breach of any statute or regulation whilst acting in Your capacity as a trustee of the superannuation fund(s) for which You are trustee.

In addition to the main insuring clauses the policy will also extend to cover:

- Legal Expenses incurred in defending a prosecution in a Court of criminal jurisdiction.
- Legal Expenses incurred in defending any dispute or legal proceedings under the Privacy Act 1988.
- Legal Expenses incurred in an appeal against the suspension, revocation, imposed alteration of or refusal to renew a Statutory Licence.

The deductible, or excess, is the amount that an entity will contribute towards any claim. The excess for this policy is **Nil**.

This policy has been designed with the intent to fill the gap between the first dollar spent and the excess under a standard Trustee Liability Insurance Policy.

Trustees should look to their Trustee Liability Policies to respond to any Legal Expenses above the limit of indemnity and to cover any Civil Penalty or Pecuniary Penalty.

How is this insurance held (by the RSE licensee directly or by a related entity)? Where it is held by a related entity, please describe any contingencies in place in the event the insurance becomes unavailable.

The IFS Insurance Solutions wording is a specialist wording, focused on providing insurance to the superannuation fund, trustee company and subsidiaries. Accordingly, the insurance cover is framed firstly around the identified superannuation fund. It then extends to current trustees of the fund and, importantly, automatically covers any future alternative trustees were appointed by the court or otherwise (and focused on that trustee relationship).

The benefit of this more specialist approach is twofold. First, the insured superannuation fund has additional comfort under the IFSIS wording, that there will be ongoing and automatic cover in the event that changes in trustee need to be made during the policy period. Second, the cover is not dependent on the fund being 'managed' by an asset manager – rather it is tied simply to the trustee being appointed as a trustee, removing the potential for dispute as to the existence or extent of fund management undertaken by the trustee.

The Trustee agrees to act on behalf of all Insureds with respect to our Policy, meaning the RSE licensee directly holds the insurance.

In the event that Insurance becomes unavailable a Super Fund Liability/Trustee Liability/Professional Indemnity Insurance policy will provide the following protection:

Discovery Period

In the event that this Policy is not renewed or replaced the Insured shall be entitled to a Discovery Period of:

- (a) Ninety (90) days for no additional premium;
- (b) Twelve (12) months subject to the payment of the additional premium specified in the Schedule.

The entitlement under sub-paragraph (b) of this clause shall lapse unless the Insured pays the additional premium specified in the Schedule within 30 days of the expiration of the Period of Insurance.

The Discovery Period is non-cancellable and any Claim or Investigation made or commenced during the Discovery Period shall be deemed to have been first made during the immediately preceding Period of Insurance.

The purchase of a Discovery Period does not increase or reinstate the Limit of Liability

In addition to the above a standard IFS Insurance Solutions policy also provides the following:

Retired Directors and Officers

If the Policy is not renewed, or replaced by a policy providing similar cover and a Discovery Period has not been invoked, indemnity under the Policy will extend to any retired Director or Officer for any Claim made or Investigation commenced during a period of eighty four (84) months immediately following expiry of the Policy, provided that the relevant conduct occurred before the Director or Officer retired.

And

Insured Person Discovery Period

If the Insured is entitled to but does not exercise its entitlements pursuant to clause 2.4 or 2.6, then any Insured Person shall have the right to a Discovery Period of up to eighty four (84) months.



The Discovery Period shall only apply to Insured Persons who have exercised the right to the Discovery Period and shall relate only to conduct which occurred during the Period of Insurance. It shall not apply to:

- (a) any cover to the Company;
- (b) any cover for any other Insured;
- (c) Loss indemnified by the Company.

The entitlement under this extension shall lapse unless written notice of the exercise of this right is given by the Insured Person within thirty (30) days after the Insured's rights pursuant to clause 2.4 and 2.6 have expired. This extension is conditional upon the Insured Person paying the applicable additional premium for the Discovery Period chosen within 90 days of the election.

For any director's liability insurance (such as Directors and Officers Insurance and Professional Indemnity), please provide information about the terms of the contract, such as: limits, deductibles, exclusions and the basis of cover (Losses occurring or Claims Made form)

The limits, deductibles and terms and conditions of your policy will be as per the Policy Documents, should you not yet have received your policy documentation we would recommend that you review the most recent financial lines renewal report.

We wish to advise Trustee's it is common for a Trustee Liability Policy or/and a Directors and Officers to have the following Confidentiality Clause:

Confidentiality

The Insured shall not disclose to any person the existence of this Policy, its Limit of Liability, the nature of liability indemnified, or the premium payable except as required by law.

We are aware that APRA have assisted several funds with the Trust Deed amendment and reviewed affidavits and documentation supplied by IFS Insurance Solutions, whilst these submissions and affidavits will include details of policy terms and conditions we find it unusual that APRA are requesting these details across the industry.

We obtained express permission from Insurers for our clients to include the current insurance policy documents as confidential exhibits to an affidavit, whilst this permission was granted we would not expect that Insurers would grant the same permission as part of a general request for submissions by APRA. The basis of cover for any Super Fund Liability/Trustee Liability/Professional Indemnity Insurance, Crime, Directors and Officers or Cyber Liability Policy will be on a 'claims made' basis. The only Territories to have 'Losses Occurring' for these types of policies would be French Territories which follow 'Napoleonic Code'.

Super Fund Liability/Trustee Liability/Professional Indemnity Insurance, Crime, Directors and Officers or Cyber Liability Policy policies provide a 'claims made' basis meaning a valid policy or 'run-off' policy must remain in force at all times for a claim to be met by an insurer.

Some of the key exclusions that apply include:

Directors and Officers Liability:

- Deliberate, wilful, intentional fraudulent, dishonest or malicious acts
- Prior claims and known circumstances
- War and Terrorism

Professional Indemnity:

- Deliberate, wilful, intentional fraudulent, dishonest or malicious acts
- Prior claims and circumstances
- Bodily Injury and Property Damage
- Assumed Liability
- Employment Wrongful Acts
- Payment of Benefits
- War and Terrorism
- Fee, Profit & Commission Exclusion
- Advice on outside products (Product range)

What factors are considered when making decisions regarding the types and levels of insurance acquired? How are these factors prioritised when deciding on insurance arrangements?

Whilst IFS Insurance Solutions cannot comment on the individual decisions made by each Trustee, there are a number of factors that need to be considered when determining the most appropriate level of cover for your fund including:

- Funds under management
- Risk Appetite
- Internalisation
- Outsourced arrangements
- Number of members
- Board Composition
- Outside directorships
- No. of employees
- Risk register outcomes
- Regulatory Framework
- Legislative Insurance requirements

Given our large portfolio of Industry Funds we are able to provide our clients with useful benchmarking data of the limits purchased by other funds on a deidentified basis. Our benchmarking data is Industry Fund specific and not just general financial lines organisations that might face very different risks and offer very different services. Whilst the data does not consider an individual funds own risk profile it gives funds additional insight into the limit trends of similar sized funds.

In determining the adequacy of your policy limits, the best possible way is to undertake a risk profiling exercise which determines the worst case scenario's (value and frequencies) followed by a policy gap analysis.

In the absence of risk profiling analysis it really comes down to risk appetite and ensuring the limit of indemnity is adequate to cover all possible losses during any one policy period. Essentially, you should transfer risk to an insurer that fits with your risk culture and appetite to retain risk.

ASIC's Regulatory Guide 126 also prescribes minimum limits of Professional Indemnity (PI) cover required for all AFSL license holders to protect retail clients

What are the challenges, if any, in obtaining and renewing insurance coverage and how are RSE licensees managing these challenges?

The Insurance market can either be described as a hard market or a soft market. A soft market is characterised by increasing insurance capacity being available, the oversupply leads to premiums decreasing and wordings broadening as Insurers fight to win business. On the other hand, a hard market, sees a contraction in capacity, insurers become more selective of the risks they write, premiums increase where risks are unchanged, Insurers restrict wordings and provide smaller lines.

- The Australian Insurance market has been affected more than other regions due to the Australian litigious environment
- Courts being sympathetic to individuals
- Class actions
- Royal commission
- Historic under-pricing of risks
- Worldwide hardening of the insurance market
- Premium, coverage costs
- Increased number of notifications received
- Quantum of claims paid by insurers is on an upward trend

We are currently experiencing the hardest insurance market in well over a decade. Although the market had been very soft for around ten years, it hardened dramatically in 2018. A number of factors – each of them affecting different sectors but ultimately affecting insurers – contributed to this. Those factors include:

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission), which was established in late 2017 and reported in early 2019; a noticeable and continuing increase in regulatory investigations and claims in the financial services sector, in part due to the Royal Commission;

The ongoing combustible cladding crisis which commenced in Australia in 2018; and the COVID-19 pandemic which has been ongoing since early 2020 and created considerable uncertainty in the market.

The current hard market has had considerable consequences for insurers and insureds.

One aspect of this is that many insurers are now unwilling to offer coverage to clients in particular sectors. This has predominantly affected clients that provide financial advice and financial services. For example, the major insurer AXA XL (London) ceased to provide coverage to financial institutions in September 2020. AXA XL (London) was previously one of the global leading insurers for this sector.

We have also observed the following trends in the Australian insurance market:

Premiums paid by industry superannuation fund trustees have increased. For example, over the last three years, we have seen premiums increase by approximately 25% annually, however it varies from client to client.

Excesses payable by industry superannuation fund trustees have also increased. For example, in 2014, the average excess across the market was around \$150,000. The equivalent figure now is around \$250,000, however it varies from client to client.

The number of claims made by industry superannuation fund trustees has increased dramatically. Before 2018, claims were rare. Since the Royal Commission, we have observed a considerable increase in the number of insurance claims made by industry superannuation fund trustees.

Despite the above challenges, cover is generally still available.

How does the RSE licensee and/or the RSE licensee directors assess the continuing adequacy of insurance coverage, and how often is this assessment undertaken?

Annually, as part of each renewal cycle, we recommend our clients review their current insurance program and specific requirements for the forthcoming 12 month policy period. This might include changes to your service offering, internalisation of previously outsourced functions and vice versa and/or proposed merger activity that may affect your risk profile and warrant further consideration of the current arrangements. It is also important that should any material changes occur to your business during the policy period these are disclosed and any impact on your insurance needs are considered.

It is also prudent to consider any new insurance products that may be available and relevant to your business and assess the benefits of either retaining the risk or transferring that to an insurer.

What contingencies are in place for a scenario in which an insurance claim is unsuccessful, or if insurance becomes unavailable or is perceived as not representing value for money?

IFS Insurance Solutions has a specialised and experienced team to meet the market requirements of the Australian Superannuation Industry and regulatory environment. We pride ourselves on our broad in house written and legally reviewed Trustees Liability Insurance wording. Our business has invested significant time and capital in developing this policy to provide market leading coverage to clients whilst enabling continued access to the global insurance markets. The wording has been developed specifically for Australian Superannuation Funds.

Whilst it is rare for our policy not to respond to a claim given the broad nature of cover, we believe it would be prudent to have contingencies in place for a scenario in which an insurance claim is unsuccessful.

Generally, the purchase of insurance is always available however the specific terms and conditions of the insurance contract will vary between insureds depending on your claims experience and risk profile. In our experience even companies with ongoing APRA, SEC or FCA Investigations, companies with negative media attention or companies with sizable claims have been able to purchase insurance.

For an Insured with a poor claims history this cover will come at a cost which could be perceived to be not representing value for money. Unfortunately, because of basic concepts of an insurance contract, it can only be reviewed retrospectively whether it was not representing value of money.

Whilst the policy has been designed to be as broad as possible, should a loss fall outside the scope of your insurance arrangements funds should consider availability and access to Operational Risk Reserves as part of capital adequacy requirements or other capital set aside by the trustee to meet uninsured losses.

How are RSE licensees sourcing funds for the payment of civil or administrative penalties from 1 January 2022? To what degree have alternate avenues been considered when settling on the source of funding?

IFS Insurance Solutions have witnessed a large percentage of Trustees electing to purchase the newly developed Nil Excess Superannuation Trustee Legal Expenses Insurance policy. This policy was designed to help mitigate the impact of changes to Section 56 and 57 of the Superannuation Industry (Supervision) Act 1993 that will prohibit Trustees from using member funds to indemnify the Trustee.

Looking more closely at the actual penalty, should a Trustee seek to have the payment of a civil penalty covered by Insurance we would recommend that they review their insurance policy and check for the following key points:

- **Does the policy provide cover for the Insured Entity?**

IFSIS are aware of other Broker/Insurer wordings that provide cover for administrative or regulatory proceedings (i) into Insured Persons, or (ii) into insured entities but only where those proceedings are also made and continuously maintained against an Insured Person.

There is not, therefore, any cover for administrative or regulatory proceedings solely into the insured entity itself or for fines or penalties payable by the insured entity, significantly reducing the scope of available cover. This is in contrast to the IFSIS wording, where cover extends to any administrative or regulatory proceeding against an insured entity, and expressly includes liability for pecuniary fines and penalties (to the extent payment by the insurer is legally permitted).

- **Does the policy cover fines and penalties?**

IFSIS are aware of other Broker/Insurer wordings that expressly limit civil fines or penalties to only those imposed on an Insured Person. This is in contrast to the IFSIS wording, where cover extends to expressly includes liability for pecuniary fines and penalties (to the extent payment by the insurer is legally permitted).

- **Does your policy sublimit cover for Fines and Pecuniary Penalties?**

IFSIS are aware of other Broker/Insurer wordings that sub-limit this cover to only \$2.5m. This is in contrast to the IFSIS wording, where no sub-limit applies

- **Does your policy cover punitive, exemplary, aggravated or non-compensatory damages?**

IFSIS are aware of other Broker/Insurer wordings that remove this cover. This is in contrast to the IFSIS wording, where cover is not excluded.

- **Does your policy cover fines or penalties imposed as a result of a breach of the ASIC Act 2001?**

IFSIS are aware of another Insurer wording that will cover penalties or fines that are imposed as a result of a breach of the Superannuation Industry (Supervision) Act 1993 and the Corporations Act 2001 but does not extend to other legislation including the Australian Securities and Investments Commission Act 2001, Modern Slavery Act 2018, Privacy Act 1988.

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Our Services

- › Group Risk Insurance
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