

LEGAL, REGULATORY & POLICY UPDATE

PENSIONS AND SUPERANNUATION

INSIDE THIS EDITION

- ACCESS TO SUPER OF CHILD SEXUAL ABUSE OFFENDERS
- PAYMENT TIMES REPORTING REVIEW
- NON-ARMS LENGTH INCOME
- APRA ENFORCEMENT ACTIVITY



Jessica Pomeroy
Senior Consultant

IN BRIEF

It was a relatively quiet start to the 2023, with little activity from regulators and Parliament not scheduled to resume until February. However, a key development was the release of a consultation to introduce measures to prevent child sexual abuse offenders from shielding their assets in the superannuation system.

To the relief of large APRA-regulated trustees, the long-awaited reforms to the NALE Rules were released by the ATO for consultation. APRA also reiterated their focus on prioritising member outcomes with enforcement action initiated against a superannuation trustee.



COMMONWEALTH PARLIAMENT



Superannuation Bills

January 2023
Parliamentary Business

[LINK TO DETAILS](#)

Status key

- House of Reps.
- Committee
- Senate
- Royal assent

Without any sitting days in January, there was little activity and movement regarding pending superannuation legislation. The following superannuation related bills remained before the House of Representatives:

- [Treasury Laws Amendment \(Modernising Business Communications and Other Measures\) Bill 2022](#)
- [Treasury Laws Amendment \(Consumer Data Right\) Bill 2022](#)

Both of these Bills are listed on the draft agenda for debate in the House of Representatives for the week commencing 6 February.

Several bills remain before the Senate, most importantly the bills related to the FAR and CSLR which will be the subject of further consultation:

- [Financial Accountability Regime Bill 2022](#)
- [Financial Services Compensation Scheme of Last Resort Levy Bill 2022](#)
- [Financial Services Compensation Scheme of Last Resort Levy \(Collection\) Bill 2022](#)
- [Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#)

The draft Senate legislative agenda has not listed any of these Bills for debate in the first sittings of Parliament for 2023, which commenced on **Monday 6 February**.

Both houses are planned to sit for three weeks in March, in each of the weeks commencing, 6, 20, and 27 March.



MAJOR POLICY UPDATES



Compensation for Child Sexual Abuse Victims Through Super

19 January 2023
Consultation

[LINK TO DETAILS](#)

Treasury released for consultation two complementary proposals that would **prevent offenders of child sexual abuse from hiding assets** within superannuation to avoid making payment to victims.

The two proposals provide the court the ability to:

- order the release of **'additional contributions'** to satisfy payment of unpaid compensation orders to victims; and
- request the offender's **superannuation account details** to provide the victim visibility of whether additional contributions have been made.

The consultation seeks feedback on several important details in relation to the proposals, including:

- How an **'additional contribution'** is defined and assessed and the **deeming period** that should apply;
- How the proposed changes should **interact with existing bankruptcy** legislation and the potential to change these existing laws;
- Whether **spouse or other family of the offender** may be subject to the regime if in receipt of additional contributions from the offender;
- Proposed **tax treatment** of released amounts (tax-free);
- Treatment of **defined benefit** schemes; and
- **Retrospective application** of the law.

Feedback is sought by 16 February 2023. The government intends to introduce draft legislation into Parliament in the first quarter of 2023.

Superannuation trustees should review the paper and consider the implementation impact. Given explicit support of these measures from the Opposition, these reforms are likely to move quickly.



Payment Times Reporting Review

6 December 2022
Review

[LINK TO DETAILS](#)

Treasury announced an independent review of the *Payment Times Reporting Act 2020* ('the Act') and released the **Terms of Reference** for the review. **The Review is required under the Act** and must be performed within 6 months after the second anniversary of commencement. The Act also prescribes the matters subject to review.

The review will consider whether:

- the operation of the Act is meeting the **objectives** as set out in the Act;
- related government policies, including those relating to **electronic invoicing**, have improved the payment terms and performance of reporting entities in relation to their small business suppliers; and
- whether **mandating one or more maximum payment periods** would be more effective in improving payment terms, whilst considering a range of proposals and impacts of maximum payment periods.

The government has appointed the Hon Dr Craig Emerson to conduct the review and will issue a written report by 30 June 2023. Public consultation will also be performed.

Superannuation trustees should consider the consultation and proposed maximum payment periods to assess the potential impact on internal finance functions.



Non-Arms Length Rule Amendments

24 January 2023
Consultation

[LINK TO DETAILS](#)

Treasury released a consultation paper *Non-arm's length expense rules for superannuation funds* which seeks feedback in relation to proposed amendments to the **Non-Arm's Length Income (NALI)** and **Non-Arm's Length Expenditure (NALE)** rules.

Whilst acknowledging the rules are generally operating appropriately, the Government referred to industry feedback which highlighted the **risk a minor breach of the existing NALI rules may result in disproportionately severe consequences**, especially where the relevant expenditure was general in nature.

The consultation seeks to address these concerns and proposes two amendments to the existing arrangements:

- SMSF and Small APRA Funds (SAFs) would be subject to a new upper limit of fund income taxable as NALI of 5 times the level of the general expenditure breach, or all fund income if the imposed penalty exceeds the amount of all fund income; and
- Large APRA-regulated funds would be exempt from the NALI provisions for general expenses.

The changes only apply to **general expenses which have a sufficient nexus to all ordinary and/or statutory income** of a given fund (e.g. fees for auditing, accounting and actuarial services). Where the NALE relates to a specific fund asset, the existing NALI rules would continue to apply to any income derived from that specific asset.

The ATO has previously released a [Ruling](#) in relation to this issue and announced it would not allocate compliance resources to determine whether the NALI provisions applied for general expenses for income years from 2018-19 to and including 2022-23. The ruling also sets out what the ATO consider to be general expenses of a fund.

Feedback is requested by 21 February 2023.

Superannuation trustees should review the consultation and engage with internal tax and finance teams to assess the impact these changes will have to existing policies and procedures.



Social Security Agreement with Serbia

21 January 2023
Media Release

[LINK TO DETAILS](#)

The Australian Government and the Republic of Serbia signed a new **social security agreement** to provide greater access to retirement benefits to individuals who split their time across countries.

The bilateral arrangement, expected to come into effect in 2024, will allow:

- former Serbian residents living in Australia to have better access to Serbian retirement pensions;
- former Australian residents living in Serbia to access the Australian Age Pension without having to return to Australia; and
- individuals to combine periods of residence in Australia with periods of insurance contributions in Serbia to satisfy the minimum requirements to access an Australian or Serbian pension.

Additionally, workers temporarily seconded to Australia or Serbia will no longer have to pay compulsory superannuation and pension contributions in both their home country and host country, removing the onus of double payments.

Superannuation trustees should take note of the announcement.



REGULATOR UPDATES



APRA Priorities 2023

2 February 2023
Policy

[LINK TO DETAILS](#)

APRA released the **2023 policy and supervision priorities**, reaffirming the strategic objectives set out in APRA's Corporate Plan and aiming to ensure Australia's financial system is 'protected today and prepared for tomorrow'. Across the broader financial services industry, APRA will focus on:

- **Preserving the resilience of regulated entities** focused on cyber and operational resilience, and climate-related financial risk maturity;
- **Transforming the governance, culture, remuneration and accountability**, focussing on board capability, composition and tenure;
- **Resolution and recovery and exit planning**; and
- **Direction for data collections**, including formalising the collection of non-financial risk data in areas such as remuneration, climate change and the Financial Accountability Regime (FAR).

For the **superannuation industry** specifically, APRA will continue to focus on holding trustees to account in **delivering member outcomes**, by:

- **Rectifying sub-standard industry practices**, ensuring trustees are undertaking business planning and performance monitoring appropriately, focused on best financial interest duty and expenditure;
- **Eradicating unacceptable product performance** through the Annual Performance Test and Heatmaps; and
- **Influencing improved retirement outcomes** and implementation of the Retirement Income Covenant within trustee operations.

Superannuation trustees should note APRA's stated priorities for the upcoming 12-18 months and ensure allocation of resourcing appropriately reflects key priority areas.



AFCA Systemic Issues Report

15 December 2022
Report

[LINK TO DETAILS](#)

The **Australian Financial Complaints Authority (AFCA)** released their inaugural *Systemic issues insights report* for the 2021-2022 financial year. In accordance with [ASIC RG 267 Oversight of the Australian Financial Complaints Authority](#), AFCA is required to identify, refer and report systemic issues, and serious contraventions to regulators.

A total of **67 systemic issue reports** were made to a Regulator by AFCA in the financial year, 9 of which were relating to superannuation. AFCA observed a **lack of resourcing and investment** in both internal dispute resolution (IDR) and external dispute resolution (EDR) functions as being a key factor resulting in non-compliance against the relevant obligations.

AFCA also noted several observations and made recommendations across all areas of the financial services industries, including:

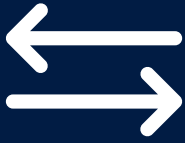
- Reliance on **manual processes** – firms with a heavy reliance on manual processing were more likely to report human error related issues.
- **Legacy IT systems** – transitions from legacy systems to new systems can cause issues where insufficient testing is performed, or where discrete system updates are applied to legacy systems.
- **Concurrent usage of multiple IT systems** – breakdowns in processes that run across different IT systems and software were observed.

This is the first of two reports to be issued by AFCA in 2023.

Superannuation trustees should consider the key themes arising from the report, especially the observed lack of resourcing by superannuation trustees in handling complaints.



TECHNICAL AMENDMENTS



Derivative Transaction Rules

19 December 2022
Legislative Instrument

[LINK TO DETAILS](#)

ASIC released several instruments relating to **Derivative Transaction Reporting** to provide both continuity of existing provisions and make amendments for future reporting. These amendments follow a series of consultations in relation to the Rules.

The [ASIC Derivative Transaction Rules \(Reporting\) 2022](#) (the '2022 Rules') repeals and remakes, without change, the [ASIC Derivative Transaction Rules \(Reporting\) 2013](#). The purposes of the 2022 Rules is to extend the current provisions until 20 October 2023.

The [ASIC Derivative Transaction Rules \(Reporting\) 2024](#) will repeal and remake the 2022 Rules with a series of technical amendments to the reporting obligations commencing from 1 October 2024.

The [ASIC Derivative Transaction Reporting webpage](#) has been updated to reflect these changes, along with relevant associated information.

Superannuation trustees should ensure investment teams are aware of the amendments to the OTC reporting requirements that are forthcoming.

ENFORCEMENT ACTIVITY



APRA Enforcement and Diversa Trustees

24 January 2023
Media Release

[LINK TO DETAILS](#)

APRA imposed **additional licensing conditions** on Diversa Trustees Limited (Diversa) which are intended to address concerns regarding:

- the adequacy of Diversa's **resources to manage risks** and meet regulatory and compliance obligations;
- heightened inherent business risks driven by the **complex structure and operations** of Diversa; and
- the ability of Diversa to deliver quality **member outcomes**, including in relation to **high fees** and **poor investment performance**.

The conditions imposed effective 23 January 2023 require Diversa to:

- enhance its **governance and risk frameworks**, with a particular focus on **third party service providers**;
- improve **member outcomes** through the development and implementation of a plan to address persistently high fees; and
- conduct an **independent review** to ensure that APRA's concerns have been adequately addressed.

APRA stated the new licensing conditions will codify recommendations made to Diversa within a third-party review of the operating model.

In announcing the licensing conditions, APRA Deputy Chair Margaret Cole reflected on the additional complexity embedded within the independent trustee model, stating: "... *one trustee having oversight over a substantial number of funds, sub-funds and products, requires significant resourcing to ensure quality member outcomes.*"

Superannuation trustees should note APRA's commentary and focus on member outcomes in imposing the additional licensing conditions, particularly as related to the significant resourcing required to maintain such arrangements.



ABOUT QMV LEGAL

QMV Legal is committed to assisting superannuation trustees and their members achieve the best retirement outcomes through good governance, timely regulatory compliance, and pragmatic legal advice.

Being closer to the business operations and technology of running a superannuation fund provides QMV Legal with a unique insight into the legal issues faced by superannuation funds.

[LEARN MORE ABOUT QMV LEGAL & SUBSCRIBE](#)



SUPERANNUATION & FINANCIAL SERVICES



GOVERNANCE & TRUSTEE DUTIES



REGULATORY CHANGE & COMPLIANCE



CONTRACTS & TENDER MANAGEMENT



DISCLOSURE & COMMUNICATIONS



MANAGED INVESTMENTS & ESG

FLEXIBLE LEGAL COUNSEL

QMV Legal provides an innovative legal and regulatory **flexible legal counsel service for superannuation trustees** which includes pro-active, efficient, and client specific legal and regulatory change advice.

CONTACT US

If you have any questions or need assistance, you can contact us directly via the details below:



Jonathan Steffanoni
JD, BA, Dip.FS, FASFA
Managing Partner
0434 835 966
jsteffanoni@qmvolutions.com



Gabriela Pirana
JD, BSc.
Senior Associate
0450 814 596
gpirana@qmvolutions.com



David Reckenberg
LLB (Hons), B.Ec
Special Counsel
0411 265 284
dreckenberg@qmvolutions.com



Jessica Pomeroy
MBA, BA
Senior Consultant
0400 708 447
jpomeroy@qmvolutions.com



In the spirit of reconciliation QMV Legal acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.