

## LEGAL, REGULATORY & POLICY UPDATE

### PENSIONS AND SUPERANNUATION

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#### IN BRIEF

February was a month of significant announcements, starting with the highly anticipated release of the **Quality of Advice Review Final Report**. This was followed by the Government announcing the proposed **objective of superannuation** for consultation and proposed changes to the **concessional tax treatment of high balance superannuation accounts**. The **Privacy Act Review Final Report** was also released.

ASIC commenced court proceedings against a superannuation trustee for **greenwashing**, released an **Indigenous Financial Services Framework** and released a good practice guide for **Whistleblower** activity.

## COMMONWEALTH PARLIAMENT



### Superannuation Bills

February 2023  
Parliamentary Business

[LINK TO DETAILS](#)

#### Status key

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

Commonwealth Parliament sat for two weeks in February, from 6-9 February and a House-only sitting from 13-16 February 2023. One Bill relevant to superannuation was introduced to Parliament:

■ [Treasury Laws Amendment \(2023 Measures No. 1\) Bill 2023](#)

The following superannuation bill remained before the House of Representatives:

■ [Treasury Laws Amendment \(Consumer Data Right\) Bill 2022](#)

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](#)

■ [Treasury Laws Amendment \(Modernising Business Communications and Other Measures\) Bill 2023](#)

Additionally, Parliament passed a disallowance motion for the *Superannuation Industry (Supervision) Amendment (Annual Members' Meetings Notices) Regulations 2022*, originally made 1 September 2022, meaning any Notices not yet issued must conform with the original content requirements before the amended Regulations were introduced.

Parliament will next sit from 6 March 2023, and again in weeks commencing 20 March and 27 March 2023.



## MAJOR UPDATES



### Objective of Superannuation

20 February 2023  
*Consultation*

[LINK TO DETAILS](#)

Treasury released for consultation a draft objective of superannuation:

**The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.**

The intention of enshrining the objective is to provide a shared understanding of the role of the superannuation system and anchor any future superannuation policy settings to a meaningful base.

The consultation paper seeks feedback on the specific phrasing of the stated objective, as well as how the objective will be legislated, suggesting either incorporating into existing legislation (such as the SIS Act) or introducing a standalone Act. The consultation will close on 31 March.

*Superannuation trustees should consider the high-level policy implications.*



### Sustainability Standards

16 February 2023  
*Bill introduced*

[LINK TO DETAILS](#)

Schedule 2 of the *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023* seeks to amend the *Australian Securities and Investment Commission Act 2001* (ASIC Act) to empower the Australian Accounting Standards Board (AASB) to make sustainability standards.

Additionally, the Bill would enable the Audit and Assurance Standards Board (AUASB) to develop and maintain relevant auditing and assurance standards for sustainability purposes, and the Financial Reporting Council (FRC) to provide strategic oversight and governance functions in relation to the AASB's and AUASB's sustainability standards functions.

This Bill allows the AASB to establish, in the first instance, non-binding reporting requirements for sustainability that will, as far as is practicable, align with significant international developments, including the standards under development by the International Sustainability Standards Board (ISSB). The proposed standards would provide general guidance, assisting the relevant industry to prepare systems and processes for eventual transition to mandatory climate-related financial disclosures, as [foreshadowed by ASIC](#) recently.

The measures will commence the day after Royal Assent.

*Superannuation trustees should note this progress toward mandatory climate-related financial disclosures and ensure they keep abreast of further developments in this space.*



### Superannuation account thresholds

28 February 2023  
*Announcement*

[LINK TO DETAILS](#)

The government announced their intention to increase the tax payable on large superannuation balances, proposing to apply a 30% concessional rate to the future investment earnings of superannuation account balances in excess of \$3 million. This would be an increase from the current 15% tax rate, which would still apply to any amount up to \$3 million.

The change is proposed to take effect from 1 July 2025.

Consultation is expected to be released shortly before supporting legislation is introduced.

*Superannuation trustees should consider the policy implications and impact of this proposal on their membership and prepare for the consultation.*



## Quality of Advice Review Final Report

8 February 2023  
*Final Report*

[LINK TO DETAILS](#)

Treasury released the final Quality of Advice Review Report which was submitted to the Government by Michelle Levy on 16 December 2022. The report contained 22 recommendations, including changes to:

- Definition of Personal Advice to broaden to include any personal interaction or communication when holding information pertaining to the customers financial situation, needs or objectives;
- General Advice to remain a financial service but remove the general advice disclaimer;
- Only Relevant Providers can provide advice for which the client pays a fee for service and commissions are payable;
- Introduce a 'good advice' duty to ensure advice provided is fit for purpose and in all circumstances would be considered 'good advice';
- Simplify the existing statutory best interests duty;
- Family situation and social security entitlements must be taken into account when providing superannuation advice;
- Easing of superannuation advice fee rules and consent arrangements;
- Statement of Advice to become optional and only provided upon the client's request;
- Provide option to make all information contained within the Financial Services Guide available online; and
- Amendments to the definition of wholesale client and consent rules.

A key finding underpinning the recommendations as stated within the report:

*"High quality advice is not always, and perhaps not often, comprehensive advice – it is advice that responds to the needs of consumers. Many consumers need incidental, simple and limited advice, sometimes frequently."*

A consultation is expected to be released in the near future.

*Superannuation trustees should review the report in further detail and remain abreast of the ongoing developments in relation to this initiative given the significant impact any recommendations are likely to have across the broader superannuation industry.*



## Financial Advisor Registration

16 February 2023  
*Bill introduced*

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023* was introduced to Parliament which seeks to introduce a broad range of measures, albeit largely technical in nature. Schedule 1 to the Bill relates to financial advice and will amend the *Corporations Act* to:

- allow ASIC to approve applications from more than one licensee to register on the Financial Advisers Register the same relevant provider, and
- allow assisted decision-making to be used for any purpose for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers to register a relevant provider.

The amendments would allow the relevant provider to provide financial advice on behalf of multiple licensees, as long as the relevant provider is registered in relation to one of them.

The measures will commence the day after Royal Assent.

*Superannuation trustees should review to determine whether any changes to the registration of their financial advisors are required.*



## Housing Affordability Legislation

9 February 2023  
*Legislation introduced*

[LINK TO DETAILS](#)

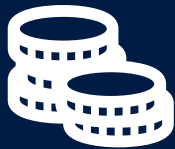
The Government released a series of bills into Parliament with the intention of legislating a previous commitment to facilitate investment into social and affordable housing by institutional investors, including superannuation funds.

The bills introduced are as follows:

- [Housing Australia Future Fund Bill 2023](#): will establish the \$10B Housing Australia Future Fund (HAFF) to fund the delivery of 30,000 social and affordable homes and allocate an additional \$330 million;
- [National Housing Supply and Affordability Council Bill 2023](#): will give effect to the Government's 2022 election commitment to establish the Council to support the Government to develop housing supply and affordability policy through research and advice; and
- [Treasury Laws Amendment \(Housing Measures No. 1\) Bill 2023](#): amends the *National Housing Finance and Investment Corporation Act 2018* (NHFIC Act) by replacing references to the NHFIC with 'Housing Australia', introduces an annual review mechanism to allow the government to monitor the activities and effectiveness of Housing Australia, and makes consequential amendments to other legislation to enable the effective operation of the HAFF from commencement.

The Bills have been referred to the Senate Economics Legislation Committee with a report due 22 March 2023.

*Superannuation trustees should consider the release of this legislation against the investment strategy decisions of the trustee.*



## AFCA Fees and Charges

27 February 2023  
*Approach document*

[LINK TO DETAILS](#)

AFCA updated and released *AFCA Approach to superannuation fees and charges* document. This document sets out AFCA's approach to assessing complaints which allege that a fee or charge debited from a superannuation product was not disclosed and/or a corresponding service was not provided.

The recent changes address 'grandfathered' commission arrangements and acknowledge that under the Future of Financial Advice (FOFA) reforms to the *Corporations Act* benefits and commissions given to a financial services licensee or representative under arrangements entered into before 1 July 2013 were allowed to continue until 1 January 2021.

The Approach explains that AFCA generally considers a trustee's decision not to refund a fee or charge for access to financial advice debited to an account before 1 July 2013 is fair and reasonable, as long as the fee was permissible, the agreed or required advice service was provided, and the fee was sufficiently and meaningfully disclosed.

For commissions paid before 1 January 2021 under 'grandfathered' arrangements, AFCA will consider if a trustee has complied with its obligations under the arrangement and the governing rules of the fund. AFCA will consider if a trustee is complying with its legal obligation to rebate commissions deducted under 'grandfathered' arrangements charged to members from 1 January 2021.

*Superannuation trustees should note AFCA's position in relation to these fees and ensure that, where these grandfathered arrangements may apply, fund procedures in relation to handling fee complaints aligns with AFCA's expectations.*



## GUIDANCE AND POLICY



### ASIC Indigenous Financial Services Framework

14 February 2023  
Publication

[LINK TO DETAILS](#)

ASIC published the *Indigenous Financial Services Framework* ('the Framework') which forms part of ASIC's role in supporting positive financial outcomes for First Nations people.

The Framework sets out four key learnings that will inform ASIC's work with First Nation consumers:

- First Nations peoples had unique, established economies before colonisation that continued today and should be understood, respected, and maintained;
- First Nations peoples have been prohibited and excluded from participating in the Australian financial system;
- Financial wellbeing affects all aspects of First Nations peoples' lives; and
- First Nations peoples have many different versions of financial success that need to be accepted and empowered.

The Framework supports the ongoing work performed by the Indigenous Outreach Program (IOP) to provide advice, insights and support to industry to ensure engagement with First Nations people is culturally appropriate and sensitive.

ASIC encourages all stakeholders with a role in the financial system to engage with the Key Learnings and build an understanding of First Nations peoples' perspectives and experiences to facilitate positive financial outcomes for First Nations people.

*Superannuation trustees should review the Framework in conjunction with a broader review of providing trustee services to First Nations people. The Framework should be considered alongside the [AUSTRAC Alternative Identification guidance](#) released in December 2022.*



### ASIC Enforcement Priorities

15 February 2023  
Media Release

[LINK TO DETAILS](#)

ASIC has warned businesses it will be targeting greenwashing, predatory lending and misleading insurance pricing promises this year, as part of a continuing focus on protecting consumers from financial harm.

This follows the release of ASIC's latest enforcement [report](#) for the last quarter of 2022 which also outlined the full list of enforcement priorities.

Separately, ASIC released the [Regulatory Developments Timetable](#) which allows a user to view the planned initiatives per industry and associated timetable for release of further guidance or instrument. This information will be published every 6 months and is published at a point in time with no iterative updates made.

*Superannuation trustees should ensure ASIC's enforcement priorities are known across the trustee and service providers and appropriate resourcing is provided.*



## ASIC Whistleblower Review

2 March 2023  
Report

[LINK TO DETAILS](#)

ASIC released *REP 758 Good practices for handling whistleblower disclosures* which details the findings of ASIC's review into the whistleblower policies and practices of 7 large companies undertaken in 2022. One superannuation trustee was included in the review. ASIC's intention in undertaking the review was to identify scalable good practices to share with other firms.

ASIC identified 7 areas of good practice in the arrangements for handling whistleblower disclosures:

- **Strong foundation for the program** exists with supporting structures to accompany the policy, including defined roles and responsibilities and clear operational procedures and guidelines;
- **Strong whistleblowing culture** where whistleblowing is widely promoted and whistleblowers are actively supported;
- **Sufficient resources and training** provided to all staff;
- A robust **monitoring, reviewing and improvement program** is in place to ensure the policy and program remains effective;
- Information obtained from the disclosures is **reviewed and communicated** to senior staff, with appropriate action undertaken;
- **Clear executive accountability** alongside broader oversight across a diverse range of business stakeholders; and
- **Effective director oversight and engagement.**

ASIC expects firms to analyse the features and good practices identified in this report and consider how they can be scaled and tailored to suit their operations.

*Superannuation trustees should review the report against their own whistleblower policies and practices to ensure the insights and expectations as provided in the report are met.*



## APRA SDT Strategic Forum Notes

2 March 2023  
Meeting Notes

[LINK TO DETAILS](#)

APRA released notes to the Superannuation Data Transformation (SDT) Strategic Forum held on 14 February 2023. The purpose of this forum is to contribute to the understanding and resolution of strategic issues arising throughout the implementation of SDT project.

Key discussion points from the meeting include:

- Reporting Standard SRS332.0 Expenses is not in scope for audit for the year ending June 2023;
- A response paper will be released shortly to the consultation on Minor Amendments to Phase 1 reporting standards and will include recent changes to the SIS Regulations and amended timeframes for future consultations;
- APRA will reduce consultations to two per financial year while still allowing for consultation during the peak year-end reporting period based on feedback received and will publish and amended timeline and milestones to the website shortly; and
- Updates have been made to APRA Connect and additional monitoring is underway to understand the root causes of issues that are causing the system processing to be slow at times;

The next meeting will be held on 16 May 2023.

*Superannuation trustees should review the notes from the meeting, especially those stakeholders managing implementation of the SDT for the trustee. Revised dates announced for the project should be considered.*



## Privacy Act Review Report

16 February 2023  
*Consultation*

[LINK TO DETAILS](#)

The Attorney-General's Department released the *Privacy Act Review Report* ('the Report') and is seeking feedback on the recommendations contained within. The Terms of Reference for the Review was to consider whether the scope of the *Privacy Act 1988* ('the Act') and its enforcement mechanisms remain fit for purpose.

A total of 116 proposals were made across 3 key themes:

- **What information should be protected and who should protect it:** there is uncertainty regarding what information should be protected under the Act and a requirement for recalibration to address contemporary privacy risks and meet community expectations.
- **What privacy protections should apply:** greater transparency is required to enable individuals to make genuine and informed choices on how their data is handled, and greater protections are required for consumers when entities are handling their personal data in high-risk situations.
- **How should breaches of privacy be enforced:** enforcement of privacy obligations needs to be strengthened as there are limited mechanisms for consumers to take recourse for privacy breaches, and the Notifiable Data Breaches scheme should be strengthened and streamlined.

The Report has been informed by feedback received in response to an Issues Paper in October 2020 and Discussion Paper in October 2021. Feedback on the Report is sought by 31 March 2023.

*Superannuation trustees should review the report to determine the potential consequence should the proposals be adopted. Where applicable, trustees may wish to submit a response to the consultation.*



## 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.*



## TECHNICAL AMENDMENTS



### Transfer Balance Cap Indexation

8 February 2022  
*Announcement*

[LINK TO DETAILS](#)

The general Transfer Balance Cap is due to be indexed by an increment of \$200,000 on 1 July 2023.

As confirmed in an announcement on the Australian Taxation Office (ATO) website, this means individuals who commence a retirement phase income stream for the first time after 1 July 2023 will have a transfer balance cap of \$1.9 million. Individuals who commenced a retirement phase income stream prior to this date will receive a proportionate increase to their available cap somewhere between \$1.6m and \$1.9m, providing they have not previously exceeded the cap, in which case no indexation will be applied.

The calculation of an individual's transfer balance cap from 1 July 2023 will be performed by the ATO as at close of business 30 June 2023.

Consequently, the defined benefit cap will also increase to \$118,750.

*Superannuation trustees should ensure all fund collateral is updated to reflect this change and that administration teams have implemented the necessary system updates.*



### APRA Heatmaps

24 February 2023  
*Announcement*

[LINK TO DETAILS](#)

APRA reissued the 2022 MySuper Heatmap to ensure that international index data is correctly reflected in the relevant investment and performance test metrics.

The re-issue of the MySuper heatmap has not resulted in any changes to the products identified as having poor performance or significantly poor performance in December 2022, or to the performance test determinations issued in August 2022. The revisions are reflected in a separate tab within the Revisions tab of the 2022 MySuper Heatmap Excel file.

To support the amendments, APRA released a set of [FAQs](#).

*Superannuation trustees should note the update and ensure the latest Heatmap data is referenced.*



### Rationalising ASIC Instruments

16 February 2023  
*Consultation*

[LINK TO DETAILS](#)

The government released exposure draft legislation to move matters in legislative instruments made by the ASIC into the primary law and regulations. This is intended to reduce complexity within financial services laws and improve accessibility.

The *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Rationalisation of ending ASIC instruments (Tranche 2)* proposes to move four instruments across:

- ASIC Class Order [CO 13/520] (Part 1)
- ASIC Class Order [CO 13/655] (Part 2)
- ASIC Class Order [CO 13/657] (Part 2)
- ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835

Additionally, as relating to superannuation, *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 (Part 3)* would be repealed and a new section 941C(2A) inserted into the Corporations Act to exempt the trustee of a superannuation entity from providing a Financial Services Guide where the financial service is dealing in the ordinary course of operation of the superannuation entity.

*Superannuation trustees should note the amendments.*





## ENFORCEMENT ACTIVITY



### ASIC v Mercer - Greenwashing

28 February 2023  
*Civil Penalty Proceedings*

[LINK TO DETAILS](#)

ASIC commenced civil penalty proceedings against Mercer Superannuation (Australia) Limited (Mercer) for alleged greenwashing conduct, resulting in Mercer made false and misleading statements and engaged in conduct that could mislead the public.

The statements relate to seven 'Sustainable Plus' investment options offered by the Mercer Super Trust, of which Mercer is the trustee. These statements marketed the Sustainable Plus options as suitable for members who 'are deeply committed to sustainability' because they excluded investments in companies involved in carbon intensive fossil fuels like thermal coal, as well as exclusions applied to companies involved in alcohol production and gambling.

However, ASIC alleges members who took up the Sustainable Plus options had investments in including:

- 15 companies involved in the **extraction or sale of carbon intensive fossil fuels** (including AGL Energy Ltd, BHP Group Ltd, Glencore PLC and Whitehaven Coal Ltd);
- 15 companies involved in the **production of alcohol** (including Budweiser Brewing Company APAC Ltd, Carlsberg AS, Heineken Holding NV and Treasury Wine Estates Ltd); and
- 19 companies **involved in gambling** (including Aristocrat Leisure Limited, Caesar's Entertainment Inc, Crown Resorts Limited and Tabcorp Holdings Limited).

Although ASIC has previously issued infringement notices to other entities in response to alleged greenwashing, this is the first court action in this regard. The date for the first case management hearing is yet to be scheduled by the Court.

*Superannuation trustees should take note of ASIC's increasing scrutiny on alleged greenwashing activities, highlighting it as a [2023 enforcement priority](#). Trustees should ensure all fund collateral relating to investment strategies, goals and objectives are reviewed to ensure this information is accurately represented to stakeholders.*



### National Advice Solutions Anti- Hawking Conviction

21 February 2023  
*Court appearance*

[LINK TO DETAILS](#)

National Advice Solutions pleaded guilty to one count of breaching anti-hawking laws and ordered to pay a penalty of \$70,000. The current charges were brought under the previous anti-hawking provisions because they relate to conduct that allegedly took place prior to 5 October 2021.

Between August 2019 and June 2020, National Advice Solutions made unsolicited calls to consumers encouraging them to roll over their superannuation into different superannuation products. The company then charged an initial fee for the rollover as well as ongoing fees.

The matter was prosecuted by the Commonwealth Director of Public Prosecutions after an investigation and referral by ASIC.

The order follows the cancellation of the Australian Financial Services license by ASIC in December 2022 and the banning of the responsible managers for a period of 10 years.



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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.

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## CONTACT US

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



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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.