

LEGAL, REGULATORY & POLICY UPDATE PENSIONS AND SUPERANNUATION

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IN BRIEF

Parliament has been quiet in the lead up to the May Commonwealth Budget, but it was still a busy month of policy and regulatory change. Significantly, the Government announced their intention to require employer superannuation contributions to be made at the same time as the wages they relate to are paid.

ASIC was busy and released an updated RG 78 for Reportable Situations, provided clarification and an extension to the IDR Reporting obligations for certain entities and released a disclosure and transparency inventory for superannuation trustees.

APRA also released the Choice Heatmap, while a significant review and consultation of the of the AML/CTF legislation was also announced.

COMMONWEALTH PARLIAMENT



Superannuation Bills

April 2023
Parliamentary Business

[LINK TO DETAILS](#)

Status key

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

There were no sitting days in April for the Commonwealth Parliament. The following bill remains before the House of Representatives:

- [Fair Work Legislation Amendment \(Protecting Worker Entitlements\) Bill 2023](#)

The following bills remain before the Senate:

- [Financial Accountability Regime Bill 2023](#)
- [Treasury Laws Amendment \(Financial Services Compensation Scheme of Last Resort\) Bill 2023](#)
- [Financial Services Compensation Scheme of Last Resort Levy Bill 2023](#)
- [Financial Services Compensation Scheme of Last Resort Levy \(Collection\) Bill 2023](#)
- [Treasury Laws Amendment \(Modernising Business Communications and Other Measures\) Bill 2023](#)
- [Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#)
- [Housing Australia Future Fund Bill 2023](#)
- [Treasury Laws Amendment \(Consumer Data Right\) Bill 2022](#)

The following Bill was referred by the Senate to the Senate Economics Legislation Committee, with report due 26 May 2023:

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

There are no further sitting days scheduled until the Commonwealth Budget sessions between 9-11 May, then mid-June before both houses are sitting again.



MAJOR UPDATES

ASIC Breach Reporting
- RG 78 Updates27 April 2023
Regulatory Guidance[LINK TO DETAILS](#)

ASIC released updated *Regulatory Guide 78: Breach reporting by AFS licensees and credit licensees* (RG 78) in relation to notifying ASIC of reportable situations and announced minor changes to the prescribed form used to report via the ASIC Regulatory Portal.

RG 78 clarifies aspects of the existing guidance and provides new guidance in response to operational issues that have arisen since the regime began on 1 October 2021.

RG 78 has been amended to provide additional guidance on how licensees should report certain information to ASIC and cater for the forthcoming changes to the ASIC prescribed form, due to take effect 5 May 2023.

Specifically, RG 78 now includes:

- clarification of circumstances in which licensees may **group multiple reportable situations** into one report to ASIC;
- new guidance on the information to include when licensees **describe a reportable situation**; and
- new guidance for licensees on ASIC's expectations when licensees are providing **updates related to a reported breach** (at least every 6 months).

Superannuation trustees and other AFS licensees should review the updated RG 78 to ensure reportable situations are reported to ASIC in accordance with ASIC's expectations.

Financial Reporting
and Auditing11 April 2023
Exposure Draft[LINK TO DETAILS](#)

The Government released Exposure Draft Regulations for consultation to support Schedule 6 of the *Treasury Laws Amendment (2022 Measures No.4) Bill 2022* which seeks to impose financial reporting and auditing obligations on registrable superannuation entities (RSEs) that are consistent with the requirements that apply to public companies and registered schemes.

The draft Regulations prescribe requirements for the preparation, lodgement, disclosure and publication of information and documents by RSEs and includes:

- the **types of reports and associated content** that must be prepared and lodged by an RSE Licensee to comply with the new regime;
- disclosure of remuneration details to include '**key management personnel**' of the RSE Licensee, and the publication of remuneration details within a new director's report;
- fund information reported in the **periodic fund information report** to include outsourced service providers, key management personnel and a record of attendance at board meetings by directors; and
- several clarifications or amendments that do not practically affect the existing obligations of an RSE Licensee, such as removing redundant definitions and duplication of obligations across legislation.

Feedback to the consultation is requested by 5 May 2023.

Superannuation trustees should consider the proposed reporting requirements and whether a submission to Treasury is warranted.



ASIC Internal Dispute Resolution Reporting

1 May 2023
Legislative Instrument

[LINK TO DETAILS](#)

ASIC released [ASIC Corporations \(Amendment\) Instrument 2023/282](#) which amends [ASIC Corporations \(Internal Dispute Resolution Data Reporting\) Instrument 2022/205](#) which is the underlying instrument supporting the internal dispute resolution data reporting requirements.

A key change is the **6-month extension** of the initial reporting period to 31 December 2023 for a sub-set of firms previously designated a 30 June 2023 initial reporting period. Firms with an initial reporting period of 30 June 2023 that have NOT been granted an extension (a 'second tranche firm') are specifically listed within a new Schedule 1 of the instrument.

RSE licensees are amongst those designated a second tranche firm, and therefore still required to report for 30 June 2023 initial reporting period.

Several other changes and clarifications have been made, including:

- amending the **definition of a 'closed' complaint** to exclude complaints that have been re-opened during the period;
- an **extension of the report due date** from one month to two months after the end of the reporting period end date;
- renaming the 'initial cohort' to 'first tranche firm'
- how firms with no complaints during the period must provide this information to ASIC.

ASIC also noted the IDR data reporting handbook has been updated effective 28 April 2023 to provide greater clarity on recording IDR data and reporting it to ASIC, and will be released shortly.

Superannuation trustees should review the instrument and ensure they are clear on the initial reporting period that applies to them. Project teams should ensure the data captured and reported reflects the new clarifications made by ASIC in the instrument and handbook.



Pay Day Super

2 May 2023
Announcement

[LINK TO DETAILS](#)

The Government announced its intention to legislate to require employers to **pay employee superannuation contributions on the same day as the related salary and wages** are paid. The intention of the reforms is to enable employees to better track and manage superannuation payments, reducing the risk of non-payment and wage theft.

The reforms would take effect **1 July 2026**, allowing employers time to implement process and payroll system changes as required. The ATO will also be allocated additional resources to help detect unpaid super and given enhanced targets for the recovery of payments.

This follows a raft of recent superannuation announcements by the Government, including introducing superannuation as a [workplace entitlement](#) and legislating the [objective of superannuation](#).

Treasury and the ATO are expected to release consultation within the second half of the year.

Superannuation trustees should note the announcement and work with employers and their providers to ensure a streamlined process when the changes are introduced and to minimise member contribution disruptions. The availability of real-time contribution data should be considered to provide members visibility of contributions received.



GUIDANCE AND POLICY



Inventory of Transparency and Disclosure Obligations

11 April 2023
Information Sheet

[LINK TO DETAILS](#)

ASIC released *Information Sheet 278: Inventory of superannuation trustee transparency and disclosure obligations* which **consolidates superannuation trustee transparency and disclosure obligations**.

The Information Sheet outlines relevant obligations under the *Corporations Act 2001*, *Superannuation Industry (Supervision) Act 1993* and associated Regulations and is designed to assist superannuation trustees in complying with the various disclosure and transparency obligations that apply by publishing the information in one place. No new obligations are created by the Information Sheet.

The Information Sheet is interactive and contains links, expandable menu options, a glossary and search functionality. The obligations cover four key categories with several sub-categories within each, including:

- **Transparency:** remuneration and payments, product dashboards, annual member outcomes, target market determinations, annual member meetings, fund and product documentation, retirement income strategy;
- **Member focused disclosure and communications:** Product Disclosure Statement, Financial Services Guide, fund information, & annual report;
- **Other notices to members:** Periodic statements, significant event notices, transaction confirmations, inactive insurance notices, reportable situation notifications; and
- **Disclosure on request:** information for concerned persons, employer-sponsors, RSE auditors and others.

The information provided includes the audience/channel the disclosure needs to be communicated to, the frequency and timing of the information or disclosure, links to other relevant guidance or further information and the source of the obligation within legislation.

The Information Sheet is limited to obligations contained in legislation administered by ASIC, and excludes APRA instruments, family law splitting and obligations that are not generally applicable to trustees. The Information Sheet will next be reviewed in the third quarter of 2023.

Superannuation trustees should consider undertaking a review of current member disclosure practices to ensure alignment with the obligations outlined in the Information Sheet.



CPS 230 APRA Update

13 April 2023
Announcement

[LINK TO DETAILS](#)

APRA released an updated timeline for implementation of *Prudential Standard CPS 230 Operational Risk Management (CPS 230)*, citing stakeholder feedback requesting more time to prepare for the upcoming changes. Accordingly, APRA intends to:

- move the **effective date for the new standard to 1 July 2025**; and
- provide **transitional arrangements** for pre-existing contractual arrangements with service providers, applying from the earlier of the next contract renewal date or 1 July 2026.

APRA plans to release a final version of the standard, together with draft supporting guidance, in mid-2023.

Superannuation trustees should note the update, ensuring implementation teams are aware of the changes regarding existing contracts and the revised timelines.



APRA Choice Heatmap

26 April 2023
Publication

[LINK TO DETAILS](#)

APRA published the latest Choice Heatmap which represents the state of Choice products as of 30 June 2022. Key findings include:

- **One in five Choice investment options with an eight-year history significantly underperformed** the heatmap benchmarks, which is an improvement on the 2021 Heatmap which identified one in four significantly underperformed benchmarks;
- **Two thirds of Choice investment options that are closed to new members had poor (28%) or significantly poor (39%) performance** relative to the heatmap benchmarks.
- **Average annual administration fees are higher in Choice products that are closed to new members** (\$225) when compared with open Choice products (\$149) and MySuper products (\$137).

The results prompted APRA Deputy Chair Margaret Cole to announce:

"APRA's supervision of poorly performing Choice products will intensify, and trustees can expect even greater scrutiny of their product offering. Trustees with products that are underperforming or have unjustifiably high fees – or both – will need to explain why they haven't already moved their members to products with better performance and better fee structures."

APRA also released an [Insights Paper](#) and [Methodology Paper](#) to support the Heatmap.

Superannuation trustees should review the Heatmap to understand the performance of their Choice products against industry benchmarks and ensure the results are incorporated into the next Member Outcomes Assessment and Business Performance Review cycle.



AML/CTF Regime Modernisation

20 April 2023
Consultation

[LINK TO DETAILS](#)

The Attorney-General released for consultation *Modernising Australia's anti-money laundering and counter-terrorism financing regime* which proposes several reforms to simplify and extend the current Anti-Money Laundering Counter-Terrorism Financing (AML/CTF) regime.

The consultation is in two parts, with Part 1 containing most of the proposed reforms. These reforms will **simplify and modernise the operation of the regime**, acknowledging the need to simplify the Act and Rules and streamline the obligations.

Specific proposals include:

- streamline Parts A and B of an AML/CTF program into a single program;
- additional instruction and guidance for undertaking risk identification and mitigation strategies;
- modernising the tipping off provisions;
- expansion of the AML/CTF regime to digital currencies; and
- retaining the existing COVID-19 exemptions that provide flexibility in customer due diligence processes.

Part 2 proposes to **extend the regime to certain high-risk professions** including lawyers, accountants, conveyancing and trust/company service providers and real estate agents ('tranche-two entities').

Closing date for submissions is 16 June 2023, with a second round of consultation expected to be released in September 2023.

Superannuation trustees should review the proposals and consider whether a submission is warranted. Consideration should be given to any complexities currently experienced when drafting a response.



Combining Product Performance Histories

20 April 2023
Consultation

[LINK TO DETAILS](#)

APRA released a draft technical determination for consultation and information sheet in relation to the 2023 Performance Test.

This follows the recent release of [Exposure Draft regulations](#) which would provide APRA with the power to create a legislative instrument to combine the product performance histories for lifecycle products. [Superannuation Technical Determination No. 1 of 2023: Actual and benchmark return formulae modifications](#) would modify certain return formulae and adapt the Performance Test in circumstances where the MySuper product performance histories must be combined. This would also remove the need for APRA to make individual determinations for every affected MySuper product.

APRA is seeking feedback on these proposals by 11 May 2023.

Separately, APRA released an information paper [Combining trustee-directed product performance histories – APRA's approach](#) which describes APRA's approach for combining performance histories of trustee-directed products (TDPs). This approach will not apply to TDPs that are lifecycle products for the 2023 Performance Test, but APRA noted may be included for future years.

The APRA website has been updated to reflect the proposed changes, including the Your Future, Your Super Frequently Asked Questions webpage with new [FAQs](#).

Superannuation trustees should note the proposals along with the previously announced Exposure Draft regulations to assess overall impact on the 2023 Performance Test for both MySuper and Choice products.



Financial Advisor Education Standards

18 April 2023
Consultation

[LINK TO DETAILS](#)

The Government released Exposure Draft *Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Recognising experience in the financial advice industry* for consultation. The intent of the draft legislation is to recognise experienced financial advisors ('**experienced provider**') as having met the education and training requirements set out in s 921B of the [Corporations Act](#) and provide additional flexibility for new entrants.

An 'experienced provider' is an individual who:

- completed a **minimum of 10 years fulltime equivalent experience** as a financial advisor (cumulative) between 1 January 2007 and 31 December 2021, and
- who has **no recorded disciplinary actions** on the Financial Advisors Register before 31 December 2021.

Where an experienced provider wishes to rely on these transitional arrangements, a declaration must be completed and submitted to ASIC to update the Register of Relevant Providers with the declaration.

An experienced provider must still pass the financial advisor exam and comply with the Continuing Professional Development obligations.

The draft legislation would also enable **greater flexibility for a new entrant** to demonstrate that they satisfy the conditions of an approved qualification.

Feedback is sought by 3 May 2023.

Superannuation trustees should review the draft legislation and consider whether the transitional education criteria can be applied and update any new entrant onboarding procedures to incorporate the new flexibility.



Performance Test Communications

12 April 2023
ASIC Review

[LINK TO DETAILS](#)

ASIC undertook a review of the communications issued by the four trustees who failed the performance test for a second time in 2022, observing that although improvements had been made, **superannuation trustees must be more member-centric within these communications.**

ASIC's review looked at whether the communications reflected expectations set out in ASIC's Report 729 [Review of trustee communications about the MySuper performance test](#). ASIC made the following observations:

- performance test **communications were reactive** and did not follow a cohesive communication strategy, resulting in communications that were **inconsistent or lacked clarity**;
- **inconsistent messaging** about performance across the fund website;
- communications regarding short-term performance, product and mergers **needed to be balanced** or risked undermining the failed performance test; and
- **clear call-centre transcripts** are needed to facilitate the performance failure and to discuss options with members.

ASIC also observed that, although the trustees were contacted by ASIC ahead of the performance test failure to set expectations regarding member communication, trustees interpreted the obligations differently.

ASIC will continue monitoring underperformance notifications and consider regulatory action for failure to comply if appropriate.

Superannuation trustees should review the report and feedback from ASIC to ensure a best practice approach to member communications more broadly.

TECHNICAL AMENDMENTS



ATO Standard Choice Form Updated

20 April 2023
Announcement

[LINK TO DETAILS](#)

The ATO updated the *ATO Standard Choice Form* and associated [website](#) information following consultation and review from industry stakeholders and individual product testing.

Key changes include:

- **digitally fillable and interactive form** with simpler pathways;
- **clearer guidance** on what happens if an individual does not complete the choice form, in light of the stapled super fund reforms;
- uses more **plain-English** terms, reduces acronym use and streamlines amount of informational content; and
- removes non-compulsory fields such as fund address and phone number fields.

The changes to the form are cosmetic and designed to improve usability, so pre-existing versions of the form will continue to be compliant.

Superannuation trustees should note the update and ensure member and employer-facing teams are aware of the changes. Any collateral that references a specific website or existing Choice forms should be reviewed.



Superannuation Data Transformation FAQs

6 April 2023
FAQs Updated

[LINK TO DETAILS](#)

APRA released updated Frequently Asked Questions (FAQs) in relation to the Superannuation Data Transformation program. Altogether, APRA released 11 new FAQs for minor amendments:

- the applicable **transition period and updated reporting periods** that may apply between the old and new standards;
- how to report political donations, donations to a political party and marketing expenses, including **relevant reporting thresholds**;
- reporting exclusions that apply to **insurance only products** for SRS 550.0, SRS 705.0, SRS 705.1 and SRS 706.0;
- all investment options reported in SRF 605.0 table 3 should be reported in SRF 550.0 even where no data is available, and **resubmission requirements** when new information becomes available;
- extension to **best endeavours** reporting for SRF 550.0 to include the June 2023 quarter; and
- the difference between '**Investment Performance Start date**' and '**Inception date**' in SRS 605.0.

APRA also archived 26 FAQs that have since been incorporated into law.

Superannuation trustees should review the new FAQs and consider the impact to scheduled reporting requirements.



ATO First Home Super Saver Scheme

12 April 2023
Law Companion Ruling

[LINK TO DETAILS](#)

The ATO released *Addendum Law Companion Ruling First home super saver scheme LCR 2018/5* which amends existing LCR 2018/5 in relation to the First Home Super Saver Scheme (FHSSS). The amendments:

- incorporate the [recently legislated](#) increase in the maximum amount of voluntary contributions made over multiple financial years that are eligible to be released under the FHSSS ie from **\$30,000 to \$50,000**;
- clarify that **equitable proprietary rights** in real property may be acquired before settlement or completion of a contract; and
- make minor readability improvements.

The ATO also an updated [Guidance Note](#) to support the FHSSS regime to reflect the amended eligibility requirements for individuals.

Superannuation trustees should ensure the changes are reflected in process and fund collateral and consider referencing the Guidance Note within member communications as an additional source of information.



AFCA and APRA Memorandum of Understanding

28 April 2023
Announcement

[LINK TO DETAILS](#)

APRA and AFCA have signed a **Memorandum of Understanding (MoU)** setting out how they will continue to work together. The MoU includes:

- Recognition of each parties' **distinct mandates and responsibilities** but shared interest in protecting and benefiting consumers;
- Agreement to develop and **maintain effective arrangements for engagement** through agreeing to (1) inform the other party proactively of new information; (2) consult the other party before undertaking an activity that may impact the other; (3) collaborate to achieve or improve regulatory outcomes in relation to policy development statistical collections; and (4) engage effectively with the other party and industry participants more broadly;
- Agreement to **share information** with the other party.

Superannuation trustees should note the announcement.



Change of Control and Ownership Rules

19 April 2023
Consultation

[LINK TO DETAILS](#)

APRA released for consultation a draft instrument *Superannuation Industry (Supervision) Act exemption No. 1 of 2023* to exempt a certain class of registrable superannuation entity (RSE) licensee directors from the **change of control and ownership provisions** of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

Currently, the SIS Act requires a person to obtain APRA approval to own or hold a **controlling stake of more than 15% in an RSE licensee**. However, an unintended consequence of the provisions has been identified for a subset of directors who have a direct control interest of 15% or less but deemed to have a 100% stake in the RSE licensee under the *Financial Sector (Shareholdings) Act 1998*.

As directors are considered associates of each other, each director shareholder is treated as having a 100% stake in the RSE licensee, and thus is deemed to have a controlling stake, requiring APRA approval.

The proposed class exemption would remove the requirement for a director in this situation to obtain APRA approval they are not entitled to a personal financial benefit from the shareholding.

Superannuation trustees should review the proposed exemption and determine any potential impact on the trustee directors. Consideration should be given to responding to the consultation by 17 May closure date.



ENFORCEMENT ACTIVITY



ASIC & Future Super Greenwashing Infringement Notice

2 May 2023
Infringement Notice

[LINK TO DETAILS](#)

ASIC issued Future Super Investment Services (Future Super), promotor of the Future Super Fund for the relevant period, with an infringement notice for alleged greenwashing activity.

The infringement notice relates to a Facebook post which ASIC alleged constitutes false or misleading conduct under section 12DB(1)(a) of the ASIC Act, as the post included the statement "*Naysayers don't join together and move nearly \$400million out of fossil fuels*".

ASIC contend the representations made were false or misleading as Future Super held approximately \$400m in funds under management at the time of the post, and no basis to represent that the entirety of those funds had been invested in fossil fuels prior to being invested in the Fund.

ASIC claimed the post "*overstated the positive environmental impact of the Fund*", and reiterated more broadly their expectations that industry can substantiate any sustainability claims made. ASIC also reminded industry that social media posts are not immune from ASIC action.

The post was published on 29 May 2019 and remained publicly available until October 2022. The infringement notice was \$13,320 and paid on 27 April 2023.

Superannuation trustees should closely monitor all communications and publications made in relation to sustainability to ensure no inadvertent misrepresentations are made to the market, including those via social media. Given the broad application of greenwashing activity on superannuation trustees, training and resources should be made available to all staff to ensure the obligations and consequences are known.



ASX Wolf Injunction

13 May 2023
Injunction

[LINK TO DETAILS](#)

The Federal Court has made permanent injunctions against social media "influencer" Tyson Robert Scholz (a.k.a. @ASX_Wolf), prohibiting him from carrying on a financial services business in Australia in contravention of the *Corporations Act*.

In December 2022, the Court found Mr Scholz had contravened s911A of the *Corporations Act* by carrying on a financial service business between March 2020 and November 2021, without an Australian financial services licence.

The Court has now permanently prohibited Mr Scholz from:

- hosting online groups for which a membership fee is charged, and in which messages are exchanged by members about share trades (either in a group chat or through direct messages from Mr Scholz), without an Australian Financial Services Licence; and
- carrying on a financial services business in Australia in contravention of s911A of the *Corporations Act*.

The decision demonstrates the active role that ASIC's surveillance activity plays in monitoring social media activity, and willingness to ensuring that financial services are only provided by licensed providers.



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