

LEGAL, REGULATORY & POLICY UPDATE PENSIONS AND SUPERANNUATION

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IN BRIEF

There was plenty of movement in superannuation legislation through Parliament in September, with several superannuation bills being introduced and others progressing through the Senate and receiving Royal Assent.

A Bill to broaden AFCA's jurisdiction regarding handling superannuation-related complaints was introduced to Parliament, and we saw an exposure draft of the bill which would reduce the tax concessions on high superannuation balances.

Finally, APRA released an amended version of SPS 515 Strategic Planning and Member Outcomes and updated the associated guidance, announcing its intention to revoke previous guidance on the sole purpose test and SFTs and wind ups.

COMMONWEALTH PARLIAMENT



Superannuation Bills

September 2023
Parliamentary Business

[LINK TO DETAILS](#)

Status key

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

Commonwealth Parliament sat from 4 September to 14 September. The following new bills were introduced:

- [Housing Australia Future Fund Bill 2023 \[No. 2\]](#)
- [Treasury Laws Amendment \(Support for Small Business and Charities and Other Measures\) Bill 2023](#)
- [Identity Verification Services Bill 2023](#)
- [Identity Verification Services \(Consequential Amendments\) Bill 2023](#)

The following superannuation-related bills remain before the Senate:

- [Statutory Declarations Amendment Bill 2023](#)
- [Treasury Laws Amendment \(Consumer Data Right\) Bill 2022](#)
- [Treasury Laws Amendment \(2023 Measures No. 1\) Bill 2023](#)

The following bills passed Parliament and received Royal Assent:

- [Housing Australia Future Fund Bill 2023](#)
- [Treasury Laws Amendment \(2023 Measures No. 3\) Bill 2023](#)
- [Treasury Laws Amendment \(2023 Law Improvement Package No. 1\) Bill 2023](#)

Commonwealth Parliament will sit for one week in October from 16 - 19 October.

Additionally, the [Crimes Amendment \(Corrupt Benefits for Trustees\) Bill 2023 \(NSW\)](#) passed NSW Parliament and received Royal Assent on 20 September 2023. This Bill introduced an element of corruption to the offence of corrupt benefits for trustees and provides more certainty when appointing a new trustee as part of a merger of successor fund transfer.



MAJOR UPDATES



Better Targeted Tax Concessions

3 October 2023
Exposure Draft[LINK TO DETAILS](#)

Treasury released *Exposure Draft Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023* and *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023* which collectively **seek to enact changes to superannuation tax concessions** as announced in the 2024-24 Federal Budget.

The Bills would reduce the headline tax concessions for individuals with a **total superannuation balance (TSB) above \$3 million** by imposing an **additional 15% tax on individuals based on the TSB held above this threshold**. Income on superannuation balances below \$3 million would remain at 15%. This additional tax would be imposed through inserting a new Division 296 into the *Income Tax Assessment Act 1997* and thus is referenced within the Bill as **'Division 296 tax'**.

The Bill also proposes to:

- **carry forward periods of negative investment earnings** on balances over \$3 million to offset against periods of future Division 296 tax;
- **levy the Division 296 tax on individuals** (not superannuation funds) and allow payment of this tax through either releasing amounts from their superannuation balance or using non-superannuation money;
- **allow deferral of a defined benefit Division 296 tax debt to a 'Division 296 debt account'** for that superannuation interest until such time that interest becomes payable;
- **apply an adjusted TSB formula to ensure any contributions or withdrawals** made within the period are appropriately recognised; and
- **designate certain earnings as 'excluded superannuation earnings'**.

These changes would **commence from the 2025-26 income year** onwards. Feedback to the consultation is sought by 18 October 2023.

Superannuation trustees should review the Exposure Draft as soon as practicable given the significance of the changes announced. Whilst the changes would be of limited direct impact to trustees (as the scheme will primarily be administered by the ATO), significant updates will be required to fund collateral and training requirements for member-facing teams.



Financial Accountability Regime

3 October 2023
Media Release[LINK TO DETAILS](#)

APRA and ASIC jointly published an information package to support the financial services industry in implementing the Financial Accountability Regime (FAR). The information package comprises:

- the **Joint Administration Agreement between APRA and ASIC** setting out the framework within which the regulators will work together to administer the FAR; and
- a joint information paper providing **guidance for ADIs on transitioning from the BEAR to the FAR**.

APRA and ASIC further confirmed their intention to **shortly publish the Regulator Rules** that were released for consultation in July 2023, and which **prescribe the information for inclusion in the register of accountable persons**.

Superannuation trustees should note the announcement.



Statutory Declarations

7 September 2023
Bill introduced

[LINK TO DETAILS](#)

The Government introduced the *Statutory Declarations Amendment Bill 2023* into Parliament which seeks to **permanently allow Commonwealth statutory declarations to be executed electronically**. The Bill seeks to amend the *Statutory Declarations Act 1959* (the Act) to enable a statutory declaration to be validly made in one of three ways:

- **traditional paper-based**, requiring wet-ink signatures and in person witnessing;
- **electronically**, through the application of an electronic signature and witnessing via an audio-visual communication link; and
- **digitally verified**, using a **prescribed online platform** that verifies the identity of the declarant through a digital identity service provider.

A digital service would be prescribed as an approved online platform or as an approved identity service through regulations.

[Temporary measures](#) were introduced because of the Coronavirus pandemic which enabled Statutory Declarations to be completed electronically, however these provisions are due to expire on 31 December 2023. The Bill also contains several safeguards that will apply to digital verification and allow Regulations to prescribe additional safeguards.

Superannuation trustees should note the introduction of the legislation and ensure digitally verified statutory declarations are incorporated into fund procedures and collateral.



Non-Arms Length Expenses (NALE)

13 September 2023
Bill introduced

[LINK TO DETAILS](#)

The Government introduced *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* into Parliament which includes measures relating to **non-arm's length expense rules** for superannuation entities.

Schedule 7 **exempts large APRA-regulated funds**, including exempt public sector superannuation funds and PSTs **from the non-arm's length income rules (NALI) to the extent they relate to non-arm's length expenses (NALE)**. These entities would still be subject to the remaining non-arm's length income rules for income derived on a non-arm's length basis.

The Bill follows the release of an [Exposure Draft bill](#) containing the same measures in June, and an updated ATO [Law Companion Ruling LCR 2021/2](#) which confirmed the ATO's enforcement approach to NALE.

The measures would commence on the first 1 January, 1 April, 1 July or 1 October after the day the Bill receives Royal Assent and **apply to income derived from the 2018-19 financial year onwards**.

Superannuation trustees should ensure internal finance teams are aware of this latest update and continue monitoring for further change.



AFCA Jurisdiction

13 September 2023
Bill introduced

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* also contains provisions to **expand the jurisdiction of AFCA in relation to superannuation-related complaints.**

A [recent decision](#) by the Full Federal Court found AFCA is unable to consider superannuation-related complaints that do not meet the definition of a 'superannuation complaint' as defined in s 1053 of the *Corporations Act 2001*. This has resulted in the **unintended consequence** of AFCA being unable to hear complaints that would otherwise be expected to fall within their jurisdiction.

Schedule 8 of the Bill seeks to reverse this decision and would allow AFCA to hear superannuation-related complaints even if the circumstances of the complaint do not meet the definition of a superannuation complaint. **No changes are proposed to the definition of a superannuation complaint.**

This would reinstate the original intention of the legislation.

Superannuation trustees should ensure their complaints handling team are aware of this clarification.



Document Verification Service

13 September 2023
Bill introduced

[LINK TO DETAILS](#)

The *Identity Verification Services Bill 2023* ('IVS Bill') and *Identity Verification Services (Consequential Amendments) Bill 2023* were introduced to Parliament. Collectively, these Bills intend to **establish new primary legislation that provides a legislative framework to support the operation of identity verification services.**

Identity verification services are commonly used by Government departments, including the Australian Taxation Office, and financial services providers, including superannuation funds, to verify the identity of their customers in accordance with AML/CTF obligations.

Whilst broadly applicable, these Bills would:

- Authorise 1:1 matching of identity through the **Document Verification Service** (DVS) to verify biographic information (such as name or date or birth) against government issued identification documents, with the consumers consent; and
- Authorise the Attorney-General's Department to **develop, operate and maintain the identity verification facilities** used to provide the verification services.

A range of **privacy safeguards** would also be introduced on users of the services given the sensitive nature of the information managed, including consent and notice requirements, privacy impact assessments, breach reporting obligations and annual compliance reporting.

Commencement will occur the day after receiving Royal Assent.

Superannuation trustees should consider the use of the DVS both for internal identification verification as well as other government services their members may utilise to manage their superannuation and pensions.



Private Equity Asset Treatment – Canva

4 September 2023
Review

[LINK TO DETAILS](#)

APRA undertook a review of RSE licensees that were identified as holding the private equity technology company, Canva Pty Ltd (Canva), in late 2022. APRA selected Canva as the focus of a **targeted review of unlisted asset valuation governance** given Canva's public profile as an asset in a higher-risk asset class.

The purpose of the review was to understand what actions RSE licensees took with respect to Canva to allow APRA to **assess compliance with APRA's unlisted asset valuation governance requirements** and expectations, and to form a view on **key superannuation sector risks**.

Whilst APRA identified the majority of RSE licensee governance practices were appropriate, APRA did identify several instances of:

- **inadequate interim revaluation triggers** in valuation policies;
- **deficiencies in information provided to the Board;**
- **gaps in Board skillsets**, willingness to challenge information provided and access to expertise; and
- **a lack of consideration of the expected performance and unit pricing impact** of valuation decisions.

APRA has continued to address these issues with the relevant RSE licensees and utilised the findings to inform planned thematic reviews on unlisted assets and liquidity risks, in addition to further developing APRA's approach to stress testing.

Superannuation trustees should note APRA's findings in relation to the implementation of SPS 530 and ensure the trustee's unlisted asset valuation practices align with APRA's expectations.



Superannuation Data Transformation

4 October 2023
FAQs

[LINK TO DETAILS](#)

APRA released two new and three updated frequently asked questions (FAQs) on the Superannuation Data Transformation (SDT) project:

- **FAQ 1.17 (updated):** where externally managed investment data is not available by the due date, APRA expects RSE licensees to report the best available data, or if not possible, report 999.
- **FAQ 1.25 (updated):** APRA intends to revoke pre-SDT Reporting Standards SRS 533.0 Asset Allocation, SRS 702.0 Investment Performance and SRS 530.0 Investments in December 2023.
- **FAQ 332.0.u (updated):** where a service provider is a related party only due to a standard employer sponsor relationship and no conflict of interest arises under *SPS 521 Conflicts of Interest*, no relationship is required to be reported in 'Service provider relationship type' in Table 1 and Table 4 of SRS 332.0.
- **FAQ 251.3 j (new):** the cost of cover should be reported to four decimal places under SRF 251.3 to ensure accuracy in reporting.
- **FAQ 705.0 g (new):** the reporting period for 'indirect costs (non-RSE licensee)' is annually for the year ending 30 June and are not required to report this data quarterly.

The worked example for SRS 550.0 Asset Allocation was also reissued.

Superannuation trustees should ensure SDT project teams are aware of the amended FAQs.



GUIDANCE AND POLICY



SPS 515 Member Outcomes

21 September 2023
Consultation

[LINK TO DETAILS](#)

APRA released a Discussion Paper *Strategic and transfer planning: enhancing member outcomes* which sets out several proposed enhancements to *Prudential Standard SPS 515 Strategic Planning and Member Outcomes* (SPS 515). The proposed enhancements to SPS 515 include revisions to:

- ensure expenditure requirements better align with the best financial interests duty and, in relation to the retirement phase, to support the retirement income covenant;
- reflect supervisory observations on areas where the industry needs to lift the bar, with a particular focus on management of financial resources; and
- improve the management of risks to members being transferred across funds, in the context of heightened transfer activity.

The Discussion Paper follows two previous consultations on these proposals performed in August and November 2022, with specific feedback incorporated into proposed enhancements.

To support the Discussion Paper, APRA released an amended draft SPS 515, along with a draft *Prudential Practice Guide SPG 515 Strategic and Transfer Planning* (SPG 516) and *SPG 516 Business Performance Review* (SPG 516).

Feedback to the Discussion Paper is sought by 21 December 2023. APRA intends to finalise the SPS 515 framework by mid-2024, with commencement of the enhancements effective 1 January 2025.

Separately, APRA also confirmed their intention to retire the 2001 *Superannuation Circular 3.A.4 Sole Purpose Test* and is not planning to release an updated version. APRA cited evolving expectations, regulatory landscape and trustee experience as the reason.

Superannuation trustees should review the Discussion Paper and consider the potential impact on trustee operations.



Financial Advisor Registration Delay

18 September 2023
Legislative Instrument

[LINK TO DETAILS](#)

ASIC released *ASIC Corporations (Amendment) Instrument 2023/730* which further delays the requirement for relevant providers to be registered with ASIC as a precondition for providing personal financial product advice to retail clients.

The requirement to register with ASIC was introduced as part of the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* and was initially intended to commence 1 January 2023, but subsequently delayed until 1 October 2023. The new *Instrument 2023/730* further delays the requirement to register until 1 February 2024.

The reason for the delay, as was stated in the previous delay instruments, is to enable *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023* to pass Parliament, as it contains several provisions in relation to how ASIC would administer the registration process.

Superannuation trustees should note the delay.



CPS 511 Remuneration Implementation

6 September 2023
Review

[LINK TO DETAILS](#)

APRA released the results of a review into the planning and implementation of *Prudential Standard CPS 511 Remuneration* across all APRA-regulated entities. The review was undertaken in two phases between September 2021 and December 2022 and pre-dated the commencement CPS 511, thus **did not focus on entity compliance**.

In the first phase, APRA reviewed the implementation preparations of 15 entities, predominantly Significant Financial Institutions (SFIs), and engaged in **detailed assessments**. The second phase was a **one-off survey** of remaining SFIs, in total covering 39 entities. In both phases, APRA asked about CPS 511's **key requirements: remuneration framework, governance, design and consequence management**.

Given the timing of the review, entities were largely focussed on the design of their remuneration frameworks. Whilst broadly comfortable, APRA did identify common gaps in the approach:

- **limited progress implementing controls** to manage potential conflicts arising from compensation arrangements of 3rd party service providers;
- **inadequate understanding of how selected non-financial measures will drive desired behaviour**, risk outcomes and performance; and
- **insufficient rigour in the proposed processes to ensure remuneration consequences result** from poor risk management outcomes.

Findings from the review will be incorporated in *Prudential Guidance CPG 511 Remuneration* in future.

Superannuation trustees should consider APRA's findings as they provide insight into APRA's expectations and potential future directions in CPG 511.



Family Law Regulations

15 September 2023
Legislative Instrument

[LINK TO DETAILS](#)

The *Family Law (Superannuation) Amendment (2023 Measures No. 1) Regulations 2023* was released which makes several technical amendments to the *Family Law (Superannuation) Regulations 2001* ('Regulations'). The amendments are intended to **provide greater clarity about the meaning and application of certain terms and provisions** within the Regulations.

The amendments include the following clarifications:

- a lifetime pension which is subject to review to confirm a member spouse's eligibility is not precluded from being a lifetime pension;
- when a superannuation interest is a defined benefit interest;
- the difference between 'unsplittable interests' and 'unsplittable payments'; and
- pension payments from a lifetime pension are considered splittable payments from the time they become payable.

Superannuation trustees should ensure family law superannuation benefits are being administered in accordance with these clarifications.



TECHNICAL AMENDMENTS



DDO Extension

6 September 2023
Legislative Instrument

[LINK TO DETAILS](#)

ASIC released *ASIC Corporations (Amendment) Instrument 2023/706* which extends the operation of the *ASIC Corporations (Design and Distribution Obligations Interim Measures) 2021/784* instrument ('Instrument 2021/784') for a further five years to 5 October 2028.

Instrument 2021/784 was introduced in response to feedback on the Design and Distribution Obligations (DDO) regime at its introduction in October 2021, and was **intended to provide certainty on the application of the DDO** ahead of legislative changes proposed to be made by the Government to give effect to its intended operation. These include:

- relief for distributors to report to issuers if they received nil complaints during a reporting period;
- amend 'excluded conduct' definition to include **giving a PDS within the provision of personal financial product advice**; and
- confirms **employers are exempt** when providing a PDS to an employee for a default superannuation fund.

A consultation was recently held regarding the extension.

Superannuation trustees should note the extension.



Contribution Refunds

4 September 2023
Announcement

[LINK TO DETAILS](#)

The Australian Taxation Office (ATO) issued a reminder to all superannuation trustees on **how contributions must be refunded in accordance with the Data and Payment Standards**.

The ATO has identified **several problematic practices** undertaken by trustees when processing a contribution transaction error response (CTER) to refund contributions through the Small Business Superannuation Clearing House (SBSCH), including:

- Making a single bulk payment for multiple CTERs;
- Rejecting multiple contributions by lodging a single CTER and making multiple payments; and
- Not having a one-to-one relationship between a payment and an outcome/error response message.

The ATO have referred trustees to the [Member registration and contribution user guide](#). Refunds made that do not match the CTER can cause delays in payments being matched and returned to employers.

Superannuation trustees should ensure error response messages and associated payments are administered in accordance with the Data and Payment Standards.



ENFORCEMENT ACTIVITY



ASIC v AustralianSuper

8 September 2023
Civil Penalty Proceedings

[LINK TO DETAILS](#)

ASIC commenced civil penalty proceedings against AustralianSuper, alleging **failure to address multiple member accounts**.

Superannuation trustees must have a procedure for identifying and merging duplicate superannuation accounts at least annually, if the trustee reasonably believes that to do so would be in the best interests of the member.

ASIC alleges between 2019 and 2023 AustralianSuper failed to:

- set out a **procedure to identify and merge multiple accounts** of members in accordance with section 108A of the *Superannuation Industry Act 1993*;
- efficiently **identify, escalate and rectify** the ongoing failure to comply with that section and **remediate affected members**;
- promptly **identify and merge multiple accounts** in accordance with the required procedures;
- do all things necessary to ensure its financial services were provided **efficiently, honestly and fairly**;
- exercise the same degree of **care, skill and diligence** as a prudent superannuation trustee would have exercised; and
- perform its duties and exercise its powers as a superannuation trustee in the **best interests of its members**.

ASIC further alleges AustralianSuper were aware of the number of multiple member accounts and gaps in its policies and procedures as early as 2018 but did not take adequate measures to identify and rectify the issue until late 2021 and early 2022.

This action follows a [broad review of trustee practices](#) in relation to duplicate member accounts conducted by ASIC in December 2022, in which AustralianSuper was one of nine trustees reviewed at the time.

ASIC is seeking declarations, pecuniary penalties and other orders against AustralianSuper.



ABOUT QMV LEGAL

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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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