NOVEMBER 2023

LEGAL, REGULATORY & POLICY UPDATE

IN THE PAST MONTH:

- OBJECTIVE OF SUPERANNUATION BILL
- SUSTAINABLE FINANCE STRATEGY
- QUALITY OF ADVICE LEGISLATION
- SUPERANNUATION IN RETIREMENT
- SUPERANNUATION TAX CONCESSIONS

Jessica Pomeroy
Senior Regulatory Consultant

IN BRIEF

There was plenty of activity in Parliament this month with three new Bills introduced, including the long-awaited Bill to legislate the objective of super.

Treasury released several significant consultations, including the Government's Sustainable Finance Strategy which incorporates the introduction of mandatory climate-related financial disclosures and supporting taxonomy. Superannuation in Retirement and Delivering Better Financial Outcomes was also released.

ASIC was also busy with its enforcement activities, announcing 2024 enforcement priorities, issuing several infringement notices and receiving a successful judgement in several Federal Court cases.

COMMONWEALTH PARLIAMENT

Superannuation Bills

November 2023
Parliamentary Business

LINK TO DETAILS

Status key

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

Commonwealth Parliament sat for several weeks throughout November, with three new superannuation-related Bills introduced:

- *Superannuation (Objective) Bill 2023*
- *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023*
- *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023*

These sit alongside the following Bills remaining before Parliament:

- *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*
- *Treasury Laws Amendment (Consumer Data Right) Bill 2022*

Finally, several Bills received Royal Assent:

- *Social Security and Other Legislation Amendment (Supporting the Transition to Work) Bill 2023*
- *Statutory Declarations Amendment Bill 2023*
- *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023*

Additionally, the Senate Legal and Constitutional Affairs Legislation Committee issued its report in relation to the *Identity Verification Services Bill 2023* and *Identity Verification Services (Consequential Amendments) Bill 2023*, recommending significant amendments to both Bills to improve the privacy safeguards and introduce an interim review after 12 months.

Senate Inquiry into Insurance in Super

27 November 2023
Inquiry

LINK TO DETAILS

An Inquiry *Improving consumer experiences, choice, and outcomes in Australia's retirement system* has been referred to the Senate Economics References Committee ('Committee'). Largely relating to insurance in superannuation, the Terms of Reference include a review of the:

- Regulatory impediments to the innovation and uptake of insurance products in superannuation;
- Policy options to support flexibility in the retirement income system across pensions, home ownership, insurance and financial advice;
- Interaction between various types of insurance and social security and impact on retirement outcomes and sustainability; and
- Impact of climate change on insurance premiums and asset valuations.

The Inquiry was confirmed following a series of recent reports about insurance claims handling delays and complaints.

Closing date for submissions is 23 February 2024 with the Committee due to Report to Parliament by 30 June 2024.

Superannuation trustees should review the Terms of Reference and consider submitting a response to the Inquiry.

Modern Slavery Amendments

30 November 2023
Bill introduced

LINK TO DETAILS

The *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* was introduced into Parliament. The Bill would **establish an Anti-Slavery Commissioner as an independent statutory office holder**.

The Bill also confirms the Commissioner's functions as relating to addressing modern slavery and supporting victims of modern slavery. The Commissioner's functions include consulting and liaising with a range of persons, and advocating to the Commonwealth Government, in relation to modern slavery.

The appointment of an Independent Commissioner has featured as a key recommendation within several reports since the *Modern Slavery Act 2018* was enacted, along with feedback across a range of stakeholders.

The Bill is scheduled to commence on the earlier of a date fixed by Proclamation, or 12 months after Royal Assent is received.

Superannuation trustees should note the Bill.

Failure to Pay Superannuation a Form of Wage Theft

29 November 2023
Bill amendment

LINK TO DETAILS

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* was amended in the House of Representatives to make the **failure by an employer to pay superannuation contributions a form of 'wage theft'**.

As originally introduced, failure to pay or underpayment of superannuation contributions were explicitly excluded from the wage theft provisions contained within the Bill. However, the exclusion was removed in an amendment moved by the cross bench.

The Bill also seeks to **increase the civil penalty provisions** that apply to the failure to pay wages, and also **introduces criminal liability for an intentional non-payment or underpayment**. These expanded penalties would also apply to unpaid superannuation contributions.

Superannuation trustees should note the amendment and ensure employer relationship advisors are aware of the proposed changes. Trustees should monitor progress of the Bill within the Senate.

Objective of Superannuation Bill

16 November 2023
Bill introduced

LINK TO DETAILS

The *Treasurer* introduced the *Superannuation (Objective) Bill 2023* into Parliament which seeks to legislate the objective of superannuation as:

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 Bill would require Parliament to assess future proposed changes to superannuation legislation for compatibility with this objective and **include a Statement of Compatibility with the objective** in the explanatory materials accompanying all Commonwealth Bills and Regulations relating to superannuation (unless an exception applies).

The Bill does not propose to change the operation or interpretation of superannuation law, nor the regulatory supervision activities currently performed, but is intended to codify the system's purpose.

> *Superannuation trustees should monitor progress of this Bill through Commonwealth Parliament, although no direct impact on superannuation trustees or service providers is expected.*

Better Targeted Tax Concessions

30 November 2023
Bill introduced

LINK TO DETAILS

The *Assistant Treasurer and Minister for Financial Services* introduced two Bills which seek to implement a reduction in the concessional taxation applied to large superannuation balances. Collectively, the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023* and *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023* would insert Division 296 into the *Income Tax Assessment Act 1997* and **impose a 30% headline concessional tax rate on investment earnings on superannuation balances that exceed $3 million** ('Division 296 tax').

Where an individual's Total Superannuation Balance (TSB) is less than $3m, the new Division 296 tax regime would not apply, with earnings continuing to be taxed at a headline rate of 15%.

Significant detail underpins the proposed reforms, including:

- **Carry-forward provisions for periods of negative earnings** to offset against future Division 296 tax liabilities;
- Modifications to the calculation of an individual's TSB where a **family law split** applies, or the individual holds a **defined benefit interest**;
- Introduction of an '**adjusted TSB**' which incorporates withdrawals and contributions made throughout the financial year to adjust the calculation of superannuation earnings;
- Collection of the Division 296 tax will be at an individual level through the ATO and not applied directly to the superannuation fund; and
- Exclusions to the regime, including constitutionally protected funds and Judges pension schemes.

The changes would commence from the 2025-26 financial year.

> *Superannuation trustees should carefully review the Bills. Whilst the administration of the regime will be largely undertaken by the ATO, changes are expected to ATO reporting processes and fund collateral.*

MAJOR UPDATES

Sustainable Finance Strategy

2 November 2023
Consultation

LINK TO DETAILS

Treasury released the Government's *Sustainable Finance Strategy* ('Strategy') for consultation. The Strategy outlines the immediate reforms the Government has identified to be most important for **supporting sustainable finance in Australia** and sets the foundations for greater alignment between finance and sustainability goals.

The Strategy sets out the Government's plan across three key pillars:

- **Improve Transparency on Climate and Sustainability** by establishing a framework for sustainability-related financial disclosures and developing a sustainable finance taxonomy; support credible net zero transition planning by requiring transition plans to be disclosed; and **developing a labelling system for investment products marketed as sustainable**, including for managed funds and superannuation.
- **Strengthen Financial System Capabilities** by enhancing ASIC supervision and enforcement capabilities; continuing to support APRA and the Council of Financial Regulators' (CFR) Climate Working Group in their climate and sustainability work and in addressing data and analytical challenges; and ensuring fit-for-purpose regulatory frameworks are in place, with a particular focus on superannuation as a vehicle to support effective investor stewardship.
- Enhance **Australian Government Leadership and Engagement** by issuing Australian sovereign green bonds to attract green capital (first issuance in mid-2024); continuing to support the Clean Energy Finance Corporation in their work; promoting international alignment and consistency in global standards; and positioning Australia as a global sustainability leader by leveraging international engagement on sustainable finance and blended finance commitments.

Closing date for submissions was 1 December 2023.

> *Superannuation trustees should carefully consider the Strategy and ensure relevant stakeholders from across the business are engaged given the breadth and significance of the reforms proposed. Several initiatives would require significant resources to implement should they proceed as planned.*

FRAA Review Cycle

30 November 2023
Bill introduced

LINK TO DETAILS

The Government is seeking to **amend the frequency of reviews performed by the Financial Regulator Assessment Authority** (FRAA).

Currently, the FRAA is tasked with undertaking a review of the effectiveness and capability of both APRA and ASIC every 2 years. However, Schedule 5 of the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023* seeks amend the review cycle to **every 5 years**.

The Explanatory Memorandum accompanying the Bill explains the current 2-year cycle does not provide sufficient time for the FRAA to meaningfully evaluate the performance of the regulators, nor give sufficient time for APRA and ASIC to respond to the evaluation.

The proposed change would commence the day after Royal Assent.

> *Superannuation trustees should note the proposed change.*

Delivering Better Financial Outcomes

14 November 2023
Consultation

LINK TO DETAILS

Treasury released *Exposure Draft Treasury Laws Amendment (2024 Measures No. 1 Bill) 2024* for consultation which seeks to implement the first tranche of the Quality of Advice Review Report recommendations.

Relevant to superannuation, the Exposure Draft seeks to implement:

- **Recommendation 7** to clarify that **a financial advice fee may be deducted from a member's superannuation account** for payment to a financial advisor for the provision of personal financial advice, and confirm advice fees payable for personal advice are tax deductible for the fund and do not constitute a superannuation benefit payment;
- **Recommendation 8** to **streamline the consent and fee deduction disclosure requirements for ongoing advice arrangements** by replacing the annual Fee Disclosure Statement requirement with simplified disclosure and consent requirements;
- **Recommendation 10** to provide flexibility for providers of personal advice to make the information in a **Financial Services Guide** available on the provider's website as an alternative means of disclosure;
- **Recommendations 13.1 and 13.3** to clarify monetary and non-monetary benefits paid to a licensee by a retail client do not constitute conflicted remuneration;
- **Recommendation 13.2** to confirm **payment of an advice fee from a superannuation account to a licensee does not constitute conflicted remuneration**; and
- **Recommendation 13.4** to **remove the exception to the ban on conflicted remuneration** that applies where the licensee or a representative has not given financial product advice in relation to a financial product in the preceding 12 months.

The Exposure Draft does not strictly align with the initiatives contained within Streams 1 and 2 of the Government's Roadmap for Financial Advice Reforms, as announced in response to the Quality of Advice Review Report, however there is significant overlap.

Various commencement dates and transitional arrangements are proposed across the initiatives. Feedback on the consultation is sought by 6 December 2023.

Superannuation trustees should carefully review each proposal within the Exposure Draft. Advice fee deduction arrangements should be reviewed, and digital teams should be engaged for discussions regarding FSG flexibility.

Superannuation in Retirement

4 December 2023
Consultation

LINK TO DETAILS

Treasury released for consultation *Retirement Phase of Superannuation Discussion Paper ('Paper')* which seeks feedback on mechanisms to improve the effectiveness of the retirement phase of superannuation.

The Paper details the existing challenges with the retirement phase and proffers potential solutions across three broad themes:

- **Supporting members to navigate retirement income** by improving education and member communication materials; introducing default settings (such as default drawdown rates); and simplifying the overall retirement income environment by improving the interaction between superannuation, age pension and other support systems;
- **Supporting trustees to deliver better retirement income strategies** introducing standardising product disclosure frameworks and applying existing comparison and performance tools (eg. Performance Test) to retirement phase products; and
- **Making lifetime income products more accessible** by reducing the cost of insuring longevity risk and introducing a standardised retirement product with simplified features that would be offered under default arrangements.

The Paper speaks to the increasing relevance and importance of the retirement phase of superannuation. Specifically, the recent thematic review by ASIC and APRA into how superannuation trustees have implemented the Retirement Income Covenant is referenced, noting the lack of progress made in improving member's retirement outcomes.

Feedback to the consultation is sought by 9 February 2024.

> *Superannuation trustees should review the Paper and strongly consider responding to the Consultation.*

Cyber Security Strategy and Plan

22 November 2023
Report

LINK TO DETAILS

The Department of Home Affairs released its *2023-2030 Australian Cyber Security Strategy* ('Strategy') and accompanying *Action Plan*. The Strategy is the roadmap which sets out **the Government's vision of becoming a world leader in cyber security by 2030** and encompasses six 'cyber shields' that will be employed to achieve this.

Cyber shield 4 is particularly relevant to superannuation as it relates to improving the cyber-readiness of Australia's critical infrastructure systems. **The Government will undertake a review of Australia's critical infrastructure regulatory landscape to ensure it is fit for purpose**, recognising recent large-scale cyber breaches which indicate gaps in cyber security regulation.

To implement the measures contained in the Strategy, **the Action Plan details the key initiatives** that will commence across government over the next two years. The first tranche of initiatives, Horizon 1, focuses on strengthening Australia's cyber security foundations and will address the critical gaps in Australia's cyber shields.

The Government will shortly release a Consultation Paper to work directly with industry to inform proposed legislative reform on new initiatives to address gaps in existing laws and make amendments to the *Security of Critical Infrastructure Act 2018* to strengthen protections for critical infrastructure. The consultation period will run until March 2024.

> *Superannuation trustees should remain abreast of developments and review the Consultation Paper when released.*

POLICY AND REGULATION

ASIC Enforcement Priorities 2024

21 November 2023
Announcement

LINK TO DETAILS

ASIC announced its enforcement priorities for 2024 which include several new priorities relevant to the superannuation sector. These priorities are a **focus on member services failures, misconduct relating to the erosion of superannuation balances, the reportable situations regime and insurance claims handling**.

The release of the 2024 enforcement priorities coincides with ASIC's recent announcement of its intention to undertake strong, targeted enforcement action with **particular focus on member outcomes in the superannuation sector**. ASIC cited the civil penalty proceedings recently commenced against AustralianSuper for the alleged failure to address multiple member accounts. ASIC affirmed this to be a wider issue across the superannuation industry and confirmed it expected to take further action in relation to member services failures within the superannuation sector in future.

Further, ASIC stated it will retain focus on several 2023 priorities including **greenwashing and compliance with design and distribution obligations**. Governance and director's duties failures have also been added as enduring priorities.

> *Superannuation trustees should continue to be vigilant in delivering member outcomes and remain cognisant of ASIC's increased focus on the sector. Noting ASIC's focus areas, trustees should undertake a review of duplicate account practices and sustainability disclosures, if not already completed.*

2023 Performance Test Insights Report

29 November 2023
Report

LINK TO DETAILS

APRA released *Insights Paper – 2023 Performance Test* which provides additional insights to superannuation product performance since the inaugural Performance Test in 2021. The Report reviews the administration fees and investment returns of MySuper products and trustee-directed products (TDPs) which were introduced to the Performance Test in 2023.

Key insights from the report include:

- **significant variance exists in the administration fees paid** by fund members within each of the product segments, indicating scope for fee reductions across the industry, particularly for TDPs;
- **TDPs offered through platforms generally have the highest fees**, with APRA recommending trustees review whether the additional services provided are delivering value for money to members;
- **larger funds tend to charge lower administration fees**, which reinforces the efficiency and cost-saving benefits of scale; and
- while most MySuper products and non-platform TDPs outperformed the investment component of the performance test, **more than half of all platform TDPs are failing to meet the benchmark**.

In addition to the report, APRA released each product's numerical results for this year's performance test, which show how products performed relative to the tailored benchmarks beyond the “pass” and “fail” results announced in August. **These numerical results replace the Heatmaps** for this year, as APRA announced it will transition to a comprehensive transparency package from next year.

> *Superannuation trustees should carefully review the report and where they have underperforming products, ensure actions are taken to improve member outcomes.*

Superannaution Data Transformation

30 November 2023
Consultation

LINK TO DETAILS

APRA is seeking feedback on its proposal to **enhance its superannuation data collections** as part of Phase 2 'Depth' of the Superannuation Data Transformation (SDT) program.

APRA is proposing to amend five existing reporting standards, introduce six new reporting standards and replace eight pre-SDT reporting standards. APRA is also proposing to discontinue (without replacing) one redundant reporting standard. The changes proposed include:

- **RSE Licensee Profile**: enhance data currently reported on the RSE licensee ownership structure, directors and board committees to better understand governance practices and effectiveness of superannuation trustees;
- **RSE Profile**: enhance data currently reported on products, menus and options to collect details on promotor funds and sub-funds and employer sponsor sub-funds and their relationship to products;
- **Investments – Liquidity**: introduce reporting of data liquidity management practices including the key liquidity demand drivers, sources of liquidity, and details of liquidity stress factors;
- **RSE Licensee financial statements**: introduce reporting on the statement of financial position for RSE Licensees, statement of comprehensive income, changes in trustee reserves/capital and related party payments; and
- **Indirect Investment Costs**: enhance data currently reported to collect the annual indirect investment costs with each investment manager.

Feedback on the consultation is due 31 March 2024, with APRA planning to issue a response to the consultation in September 2024. **Roundtables will be held with stakeholders in February 2024**.

Subject to consultation feedback, APRA proposes that the first reporting reference period is 30 June 2025 for annual reporting and 30 September 2025 for quarterly reporting with due dates in November 2025 and December 2025, respectively. APRA will consult on proposals for the confidentiality and publication of data after the proposed reporting standards have been determined.

> *Superannuation trustees should review APRA's proposals and consider the availability of this data. Trustees may need to engage with a range of stakeholders and service providers to enable future compliance.*

Charitable Giving to Superannuation

1 December 2023
Consultation

LINK TO DETAILS

The Productivity Commission released its Draft Report *Future foundations for giving* which details the trends in philanthropic giving in Australia, including the opportunities and obstacles to increasing giving. The Report sets out numerous key findings and recommendations for Government to address these barriers and is seeking public feedback on the proposals.

Relevant to superannuation, the Productivity Commission investigated the potential to apply greater tax concessions for bequests made through a death benefit distribution from a superannuation product.

Whilst finding there was no case to be made for reducing tax payable, it is seeking information from stakeholders, including superannuation funds, on options to better allow individuals to nominate their superannuation death benefit to be paid to a charity.

Feedback on the Report is requested by 9 February 2024.

> *Superannuation trustees should consider making a submission.*

Streamlining Financial Reporting Architecture

21 November 2023
Media Release

LINK TO DETAILS

The Treasurer announced the Government's intention to restructure Australia's financial reporting entities. Specifically, it will combine the **Australian Accounting Standards Board** (AASB), the **Auditing and Assurance Standards Board** (AUSB) and the **Financial Reporting Council** (FRC) into a single entity. This is planned to take effect 1 July 2026.

The restructure is intended to make Australia's financial reporting bodies more efficient, effective and fit for purpose in the preparation and implementation of sustainability-related financial disclosure standards.

The AASB has been tasked with developing sustainability standards and recently released Exposure Draft legislation setting out proposed **climate-related financial disclosure requirements** for Australian entities. The AASB will continue to progress this work until the restructure occurs.

Draft legislation on the restructure is forthcoming, with consultation sought in relation to the governance of the single combined entity and appropriate transitional arrangements.

> *Superannuation trustees should note the announcement and remain abreast of developments, although limited immediate impact is envisaged.*

SPS 510 Governance

21 November 2023
Prudential Standard

LINK TO DETAILS

APRA has remade *Prudential Standard SPS 510 Governance* ('SPS 510') to cater for consequential amendments required through the release of *Prudential Standard CPS 511 Remuneration* ('CPS 511') which commenced on 1 January 2023.

CPS 511 sets out a range of requirements for APRA-regulated entities to ensure remuneration arrangements provide appropriate incentives to individuals to prudently manage the risks they are responsible for, and that there are appropriate consequences for poor risk outcomes. The commencement of CPS 511 occurred on 1 January 2023 for Significant Financial Institutions (SFI's) and will be complete by 1 January 2024.

As a consequence, **several obligations relating to remuneration contained within SPS 510 have become redundant as these matters are covered in the new CPS 511**. Such matters include requirements regarding Board Remuneration Committees and Remuneration policies.

The amendments apply to RSE licensees that are not SFIs from 1 January 2024. RSE licensees that are SFIs were previously carved out from applying these requirements under SPS 510.

> *Superannuation trustees should ensure compliance with SPS 510.*

MyGovID

23 November 2023
Media Release

LINK TO DETAILS

The Assistant Treasurer and Minister for Financial Services announced the Australian Taxation Office (ATO) has introduced increased security protocols for individuals logging in to access ATO services though MyGov.

Individuals who currently use myGovID to access ATO services will be required to use that myGovID for all future logins. This seeks to prevent other parties obtaining fraudulent access to an individual's MyGov account via other means, such as MyGov usernames and passwords.

Further, the Government announced its intention to **introduce Digital ID legislation into Parliament** to create a safer ID system with stronger privacy protections.

> *Superannuation trustees should note the change and ensure member services teams are aware of developments in this space.*

ASIC Cyber Security Assessment

13 November 2023
Report

LINK TO DETAILS

ASIC released *Report 776 Spotlight on cyber: Findings and insights from the cyber pulse survey 2023* (REP 776) which **calls upon organisations to strengthen their cyber security practices**. REP 776 summarises the results from ASIC's cyber pulse survey 2023 which was a voluntary self-assessment of a regulated entity's cyber resilience.

ASIC determined a weighted average participant cyber maturity score of 1.66 (on a scale of 0 to 4), indicating **organisations are reactive rather than proactive in managing their cyber security**. Of a total of 697 participants, 12 were recorded as superannuation trustees.

The top four areas of improvement across participants were:

- **Supply chain risk management** with 44% of participants not managing third-party or supply chain risk;
- **Data security** as 58% have limited or no capability to protect confidential information adequately;
- **Consequence management** with 33% of participants not having a cyber incident response plan; and
- **Adoption of cyber security standards** with 20% of participants not adopting a standard to enable a consistent and comprehensive approach to managing and responding to cyber security risks.

Organisations listed phishing, Ransomware and business email compromise as the top cyber security threats posed to their operations.

This aligns with the release of the Australian Signals Directorate (ASD) *Annual Cyber Threat Report 2022-2023* which details the key cyber security incidents and trends within the year. Financial and insurance services comprised 4.7% of the cyber security incidents reported, with the **primary type of cybercrime reported for businesses being email compromise**.

> *Superannuation trustees should ensure a thorough review of REP 776 to ensure any gaps identified by ASIC have been addressed and adherence to the better practices described within.*

Sanctions List Update

6 November 2023
Designations made

LINK TO DETAILS

The Department of Foreign Affairs and Trade (DFAT) Sanctions Office has made **two new instruments which implement a ban on the export of machinery** and related parts to **Russia and areas of Ukraine** temporarily under Russian control. The changes were consulted on earlier this year as part of Australia's **autonomous sanctions regime**, and have been given effect by the following instruments:

- *Autonomous Sanctions (Export Sanctioned Goods—Russia) Amendment (No. 1) Designation 2023*; and
- *Autonomous Sanctions (Export Sanctioned Goods—Specified Ukraine Regions) Designation 2023*.

DFAT has also updated its Russia/Ukraine "sanctions snapshot" which sets out the restrictions imposed in relation to Russia's threat to the sovereignty and territorial integrity of Ukraine.

The Minister for Foreign Affairs also made an instrument which implements changes to Australia's UN Sanctions regime (adds certain individuals to the consolidated list of sanctioned persons and entities).

Superannuation trustees should ensure reasonable steps are being taken to screen against the consolidated list and avoid any sanctioned activities or financial dealing in sanctioned entities or individuals.

AFCA Compensation Approach

6 November 2023
Consultation

LINK TO DETAILS

The Australian Financial Complaints Authority (AFCA) released a consultation seeking feedback on its **approach to handling Financial Advice and Managed Investment Scheme (MIS) complaints where compensation may be payable**.

The *AFCA Approach to determining compensation in complaints involving Financial Advisers and Managed Investment Schemes* ('draft Approach') documents the current approach adopted by AFCA in relation to these types of complaints. The draft Approach has been formally documented to support complainants and guide financial firms to better understand how AFCA considers investment and advice complaints and assist in efficiently and effectively resolving these disputes. It will also be applied by AFCA case managers and decision makers to ensure that AFCA deals with these types of complaints consistently.

The draft Approach sets out how AFCA considers:

- **liability and compensation** in relation to financial advice firms and Responsible Entities (REs) where the advice firm has provided advice on interests in an MIS;
- **proportionate liability statutes** in relation to complaints involving financial advisers and MIS'; and
- its powers to **join a party to a complaint** if the party is an AFCA member and fairness when apportioning loss in these complaints.

The consultation closed on 1 December 2023, with the final Approach expected to be published in late 2023 or early 2024.

Superannuation trustees should note the consultation.

TECHNICAL UPDATES

Extension of s29QC Disclosure Obligations

6 November 2023
Legislative Instrument

LINK TO DETAILS

ASIC is proposing to **extend the existing relief** for superannuation trustees from being required to disclose information in a manner that is consistent with the APRA reporting standards.

Section 29QC of the *Superannuation Industry (Supervision) Act 1993* requires public disclosures (such as those within a Product Disclosure Statement) to be calculated consistently with how that information is calculated and reported to APRA under the APRA reporting standards.

However, this provision was subject to *ASIC Class Order [CO 14/541]* which provided for an exemption for superannuation trustees to comply with this obligation. The Class Order is due to expire on 1 January 2024. **ASIC proposes to extend the operation of the Class Order for a further two years to 1 January 2026.**

The exemption was introduced by ASIC to address the uncertainty on how superannuation trustees should achieve the disclosure obligations given the evolution of APRA's reporting standards under the Superannuation Data Transformation project. ASIC considers the current exemption to be operating efficiently and continues to be a necessary component of the legislative framework.

Feedback on the proposal to extend was sought by 4 December 2023.

> *Superannuation trustees should note the planned extension.*

ASIC Supervisory Cost Levy

7 November 2023
Legislative Instrument

LINK TO DETAILS

ASIC made two legislative instruments in relation levies imposed on ASIC's regulatory population, including superannuation trustees.

ASIC (Supervisory Cost Recovery Levy—Regulatory Costs) Instrument 2023/777 determines ASIC's regulatory costs and the attribution to each industry sub-sector for the 2022-23 financial year so as to facilitate the collection of industry levies to recover those regulatory costs.

ASIC (Supervisory Cost Recovery Levy—Annual Determination) Instrument 2023/778 specifies certain matters about size and composition of ASIC's regulated population and of the metrics that apply to each industry sub-sector within that regulated population for the 2022-23 financial year.

Collectively, **these Instruments provide ASIC with the figures to calculate the levies payable** by each leviable entity for the 2022-23 financial year. ASIC will use the figures in these instruments in preparing the invoices for the levies which will be sent out to the industry in **January 2024**.

ASIC's regulatory costs for the financial year are $349,531,836 of which $29,603,269 is attributed to 87 superannuation trustees.

> *Superannuation trustees should note the levies and ensure finance and accounting teams are prepared for the issue of levies in January 2024.*

APRA Quarterly Statistics Insurance Supplementary Data

21 November 2023
Announcement

LINK TO DETAILS

APRA released an additional round of data to form part of the June 2023 edition of its *Quarterly Superannuation Product Statistics* (QSPS) relating to **default insurance arrangements**.

The June 2023 edition was the first QSPS release and leverages the new reporting standards implemented in Phase 1 of the Superannuation Data Transformation project to increase the transparency of the superannuation industry. This has been expanded to include tables containing information on insurance offered to superannuation members on a default basis.

Five new insurance data tables have been added covering default Life cover, Total and Permanent Disability (TPD) cover, Income Protection (IP) cover, bundled Life and TPD cover, and bundled Life, TPD and IP cover.

The information provided within each new table includes limited insured member details including age and gender, along with their insurance cover details including occupation category, default cover amounts, premiums payable, and claims admittance rates for different member cohorts.

The next release will be in January 2024 for the September 2023 edition.

> *Superannuation trustees should note the expanded dataset and consider how this may be utilised for benchmarking activities.*

Superannuation Data Transformation

23 November 2023
FAQs

LINK TO DETAILS

APRA published **new and updated frequently asked questions (FAQs) and two updated worked examples** for the Superannuation Data Transformation (SDT) project. The new and updated FAQs clarify:

- 550.0 aa: Reporting of Operational cash on SRF 550.1;
- 550.0 ab: Reporting asset allocation classifications for investments not available at the reporting date; and
- 705.0 f: Reporting of Gross Investment Return on SRS 705.1.

APRA also made updates to the worked example on reporting expenses under SRS 332.0 Expenses including providing an example on Related Party Reporting (Table 4). APRA also made updates to the SRS 550.0 Asset Allocation worked example.

> *Superannuation trustees should review the amended FAQs and examples.*

IDPS Electronic Disclosures

29 November 2023
Legislative Instrument

LINK TO DETAILS

ASIC made *ASIC Corporations (Amendment) Instrument 2023/876* which makes minor amendments to *ASIC Corporations (Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme) Instrument 2023/668* and *ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669*.

The amendments were made to **clarify the operation of the provisions that permit operators to give investors electronic access to information about the investor's investment transactions and holdings**.

Specifically, investors may be given electronic access to their investor information (instead of receiving quarterly reports) provided that the investor has agreed, or if the investor has been notified, and has not opted out of, receiving the information via electronic access.

> *Superannuation trustees with IDPS schemes should note the amendments.*

ENFORCEMENT ACTIVITY

ASIC v OnePath Custodians

29 November 2023
Judgment

LINK TO DETAILS

The Federal Court has ordered superannuation trustee OnePath Custodians Pty Ltd (OnePath) to **pay a $5 million penalty for making false or misleading representations** about its right to continue charging fees, and for **failing to provide services to members efficiently, honestly and fairly** due to its misleading conduct and by deducting fees when not entitled to do so.

Between December 2015 and November 2021, OnePath made false or misleading representations to members of the superannuation product 'Integra Super' about Adviser Service Fees and deducted $3.8 million in fees from members for **advice services they did not receive**. OnePath told members they had to pay a fee for advice from a 'Plan Adviser' even after the member had been transferred to a division of Integra Super where they were not entitled to receive advice services.

During this period, OnePath issued letters to approximately 766 members and annual statements to approximately 15,962 members, containing the false or misleading representations.

OnePath admitted to the conduct and agreed to a penalty of $5 million. The Court also ordered OnePath to publish a notice on its website regarding the breaches.

ASIC v HESTA

10 November 2023
Infringement Notice

LINK TO DETAILS

ASIC undertook action against H.E.S.T. Australia Limited (HESTA) for contravention of section 12DB(1)(e) of the *Australian Securities and Investments Act 2001* in relation to its 'Balanced Growth' investment option performance.

HESTA paid a total of $48,600 to comply with **three infringement notices** issued by ASIC which alleged HESTA made **false and misleading statements across social media and within a webinar by disclosing the 10-year investment performance of the Balanced Growth option without specifying the period the figures related to.**

Between 23 August 2022 and 21 October 2022, and again 21 October 2022 to 20 June 2023, HESTA published an advertisement on social media claiming an 8.87% and 8.53% (respectively) average investment return "over the past 10 years", whereas the periods in question were to 30 June 2021 and 30 June 2022 (respectively).

Further, from 9 December 2022 to 18 July 2023, HESTA published a webinar stating a hypothetical consumer with a $50,000 balance would have realised a net return of approximately $67,000 had they retained the Balanced Growth investment option for 10 years "right up to today". ASIC found this to be incorrect, with the net return being overstated by between $3,878 to $10,353.

ASIC claimed the advertisements and webinar may cause consumers to believe the returns disclosed were to the present day, when they were actually between 5-14 months out of date.

ASIC's findings were the result of a significant review of superannuation fund advertising performed across a range of media platforms in 2022, with 7,408 advertisements assessed by ASIC.

ASIC v Morningstar

1 December 2023
Infringement Notices

LINK TO DETAILS

ASIC issued **two infringement notices to Morningstar** Investment Management Australia Limited (Morningstar) for two separate breaches of section 12DF of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

ASIC alleged Morningstar engaged in conduct that was **liable to mislead the public as to the nature or the characteristics of the Morningstar International Shares (Unhedged) Fund**. ASIC claimed investors were exposed to controversial weapons investments, despite Morningstar's Environmental, Social and Corporate Governance (ESG) Policy stating that such investments would be excluded.

Morningstar paid a **total of $29,820 to comply**. Payment of an infringement notice is not an admission of guilt or liability.

ASIC v Mercer Financial Advice

23 November 2023
Judgment

LINK TO DETAILS

The Federal Court ordered Mercer Financial Advice (Australia) Pty Ltd ('Mercer') to pay a $12 million penalty after it was determined to have **failed to comply with its fee disclosure obligations and charged fees to customers without providing the requisite service**.

The Federal Court found Mercer contravened both the *Corporations Act 2001* and the *ASIC Act* in relation to inadequate issuing and contents of fee disclosure statements, the charging of ongoing fees for financial advice services without entitlement, and related system deficiencies.

From 1 July 2026 to 30 June 2019, Mercer:

- failed to invite more than 800 clients to attend annual review meetings, despite those clients being entitled to attend the meetings;
- failed to provide fee disclosure statements to over 500 clients;
- issued over 3,000 non-compliant fee disclosure statements; and
- charged 761 clients a combined total of more than $4.7 million in fees for services clients did not receive.

The cause of these failures was **largely attributed to Mercer having inadequate systems and processes** to ensure the fee disclosure statements were compliant. Mercer was also found to have breached its obligation to provide financial services **efficiently, honestly and fairly**.

ASIC v Telstra Super

6 November 2023
Civil Penalty Proceedings

LINK TO DETAILS

ASIC commenced civil penalty proceedings in the Federal Court against Telstra Super for **failing to comply with internal dispute resolution (IDR) requirements.** ASIC alleges Telstra Super contravened the *Corporations Act 2001* which requires financial services licensees to have an internal dispute resolution procedure that complies with the requirements made or approved by ASIC, and to comply with such IDR procedures and standards.

ASIC claims between 6 December 2021 and 23 May 2023, Telstra Super did not comply with their IDR procedures by (1) **failing to adhere to the timeframes** required for an IDR response, (2) not informing complainants about their **external dispute resolution rights**, and (3) not ensuring that its IDR procedure operated **efficiently, honestly and fairly**.

Of the 337 complaints received by Telstra Super over the period, ASIC alleges 40% of complaint responses did not comply with the IDR procedures, including 106 complainants who did not receive a response within the legislated 45-day timeframe. ASIC is seeking declarations, pecuniary penalties and other orders.

***Braz v Host-Plus Pty Ltd* [2023] FCA 1454.**

23 November 2023
Judgement

LINK TO DETAILS

The Federal Court allowed an appeal to an **Australian Financial Complaints Authority** (AFCA) determination by a member who was the victim of a fraudulent scheme to steal his entire benefit.

The member had provided **identity and other personal information to a third party** with the intent of establishing a Self-managed Superannuation Fund (SMSF), with the third party then using this information to request a transfer out of the member's entire benefit to a sham SMSF.

The member had unsuccessfully sought compensation from the trustee, and had a resulting complaint heard by AFCA. In its determination, AFCA had **determined the trustee's decision not to pay compensation to the member to be fair and reasonable** on the basis that the trustee had adhered to its legal obligations and internal controls in handling the fraudulent transfer request.

In deciding to remit the matter back to AFCA for re-determination, the Federal Court considered the lawfulness of a trustee acting on a transfer request under *Superannuation Industry (Supervision) Regulations 1993 (SIS Regs)* 6.28 and 6.33 which require that the **transfer request be made by the member**.

The Court reasoned that a forged request from a third party (which was not signed by the member or made with authority, consent, or knowledge) is **a matter which AFCA should have considered** in making its determination. The implication being that the *SIS Regs* do not require the transfer out of a benefit where the notice received by the trustee was not provided by or with the authority or consent of the member.

If this line of reasoning is further adopted by the Courts, this decision could be understood to **place a responsibility on the trustee** to ensure that its internal identify verification controls are robust enough to identify instances of fraudulent application being made by third parties that ostensibly appear to be valid.

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

FOLLOW US ON LINKEDIN

- SUPERANNUATION & FINANCIAL SERVICES
- GOVERNANCE & TRUSTEE DUTIES
- REGULATORY CHANGE & COMPLIANCE
- CONTRACTS & TENDER MANAGEMENT
- DISCLOSURE & COMMUNICATIONS
- MANAGED INVESTMENTS & ESG

FLEXIBLE LEGAL COUNSEL

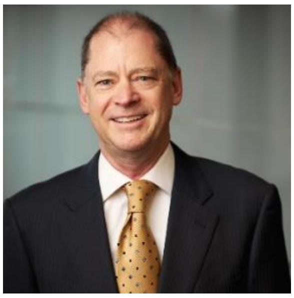
QMV Legal provides an innovative legal and regulatory **flexible legal counsel service for superannuation trustees** which includes pro-active, efficient, and client specific legal and regulatory change advice.

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@qmvsolutions.com

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



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

Marina Ferraro
Special Counsel
0413 802 673
mferraro@qmvsolutions.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.