QMV LEGAL

LEGAL, REGULATORY, & POLICY UPDATE

DECEMBER 2023

IN THE PAST MONTH:

- QUALITY OF ADVICE REVIEW RESPONSE
- RISK RESERVE FUNDING & TAX
- 29QC CONSISTENCY EXEMPTION
- ADVISER SERVICE FEE TAXATION
- SUPERANNUATION IN RETIREMENT

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IN BRIEF

An important year for trustees of superannuation funds came to a close with several major reform Bills now before Parliament. The year ahead doesn't appear to be much quieter from a legislative and regulatory change perspective, with new reviews initiated focusing on retirement and insurance in superannuation.

There were also technical changes to keep policy wonks busy, with the ATO issuing guidance on taxation treatment of both adviser service fees and a draft determination on the deductibility of payments from a fund to the trustee to be used as a quasi-risk reserve.

The long-standing deferral of the consistency requirement under s29QC of the SIS Act enters its second decade with a further two years relief.

COMMONWEALTH PARLIAMENT

Superannuation Bills

December 2023
Parliamentary Business

LINK TO DETAILS

Status key
- House of Reps. (green)
- Committee (yellow)
- Senate (red)
- Royal Assent (blue)

Commonwealth Parliament sat in early December before breaking for Christmas. Two new superannuation-related Bills were introduced and referred to the Senate Economics Legislation Committee:

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

These join several Bills which remain before Parliament:

- (green) *Housing Australia Future Fund Bill 2023 [No. 2]*
- (yellow) *Superannuation (Objective) Bill 2023*
- (red) *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023*
- (red) *Treasury Laws Amendment (Consumer Data Right) Bill 2022*

Finally, several Bills received Royal Assent:

- (blue) *Social Security and Other Legislation Amendment (Supporting the Transition to Work) Bill 2023*
- (blue) *Identity Verification Services Bill 2023*
- (blue) *Identity Verification Services (Consequential Amendments) Bill 2023*

Parliament will resume sitting on 6 February 2024.

MAJOR UPDATES

Quality of Advice Review – Government Final Response

7 December 2023
Announcement

LINK TO DETAILS

The *Assistant Treasurer and Minister for Financial Services* released the government's final response to the Quality of Advice (QoA) Review. This builds upon the Government's initial response in June 2023 which provided a position on 14 of the 22 recommendations made within the QoA Report. This response addresses the remaining eight recommendations, with the Government having committed to:

- Introduce a **modernised and flexible best interests duty**, with the **existing safe harbour steps to be removed** (responds to recommendations #4 and #5);
- Introduce a **new class of financial adviser** who will not be able to receive a fee or commission for any personal advice provided, will be subject to additional standards such as the modernised best interests duty, with the licensee being wholly responsible for the advice provided (responds to recommendation #3);
- Introduce **a framework to broaden the scope of advice that superannuation funds can provide**, and provide clarity on the advice topics which can be paid for from a superannuation account (both collectively charged and from an individual member's account) (responds to recommendation #6); and
- **Replace the existing Statement of Advice with a principles-based record of advice** which must be provided to the client and contain the (1) scope/subject matter of the advice, the (2) details of the advice given, (3) reasons for the advice and (4) cost of advice (responds to recommendation #9).

The Government will also review the *Financial Planners and Advisers Code of Ethics 2019* to ensure it remains fit for purpose.

The Government will not proceed with four recommendations made within the QoA Review:

- Introducing the **'good advice' duty** (rec. #1),
- Removing the obligation to give a **general advice warning** (rec. #2),
- Amending the Design and Distribution Obligations **(DDO) Distribution requirements** (rec. #12.1), and
- Amending the **DDO Reporting requirements** (recommendation #12.2).

The government has indicated its intention to consult industry and consumer stakeholders on the design of the draft legislation and expects to introduce legislation to Parliament by the end of 2024.

Trustees of superannuation funds should note the policy position and consider participating in upcoming consultations. If legislated, the changes would provide a significant opportunity for trustees to expand the role that financial advice plays in servicing members.

Modernising Australia's Payments System

8 December 2023
Consultation

LINK TO DETAILS

Treasury released two separate Consultation Papers in relation to reforming Australia's payments system. The first consultation, *Payments System Modernisation: Regulation of Payment Service Providers Consultation Paper* seeks feedback in relation to a suite of proposals to update the payments regulatory framework. The *Payments Systems (Regulation) Act 1998* would be updated to address policy issues posed by new payment technologies, and Payment Service Providers (PSPs) would be subject to a new licensing framework.

The Paper sets out a list of payment functions that may be performed by a PSP. Where a PSP is undertaking one of these payment functions, an **AFSL would be required**. Whilst no direct impact to superannuation trustees, the Payment Facilitation Services payment function captures **superannuation clearing houses**, requiring an AFSL if not already held.

The second consultation *Winding Down Australia's Cheques System Consultation Paper* seeks feedback on the opportunities and challenges in transitioning away from the cheques system by 2028. The Government has committed to maintaining access to cash throughout Australia.

Trustees of superannuation funds should consider the extent of dependencies of business processes on the proposed changes to the payments system.

Trustee Risk Reserves Tax Deductibility

6 December 2023
Draft Determination

LINK TO DETAILS

The ATO issued *Draft Taxation Determination Income tax: trustee risk reserves – deductibility of payments made by a superannuation fund to its trustee* (TD 2023/D3). This outlines the ATO's views on the **tax deductibility of payments made to a trustee risk reserve** for the purposes of complying with section 56 of the *Superannuation Industry (Supervision) Act 1993* that took effect 1 January 2022.

TD 2023/D3 outlines the ATO's position in relation to whether the payments are tax deductible to the fund under section 8-1 of the *Income Tax Assessment Act 1997* under two different scenarios:

- Where the fund is making **an additional risk reserve payment to the trustee** for the trustee to build a sufficient reserve to be able to pay any relevant penalties, and **the additional payment is separate and distinct** from its existing ongoing and recurrent charges for trustee services, **the payment will not be tax deductible**.
- Where the fund is making a payment to the trustee for trustee services and **where the trustee is increasing its existing ongoing and recurrent charges for those services** to reflect the increased cost of providing its services, **the payment will be tax deductible**.

Feedback to the draft ruling is requested by 19 January 2024.

Trustees of superannuation funds that have the power to remunerate itself should consider the tax treatment of any such transactions having regard to the draft taxation determination.

POLICY AND REGULATION

Sustainability of Insurance in Super

7 December 2023
Letter to RSE Licensees

LINK TO DETAILS

APRA issued a letter to all RSE Licensees which detailed the results of a survey conducted at the end of 2022 in relation to life insurance practices in superannuation. The survey was performed to **determine how the insurance and superannuation industries were responding APRA's expectations that steps be taken to ensure group insurance offerings and benefits are sustainably designed and priced, provide value to members and adequately reflect the underlying risk and expected experience.**

APRA identified 3 specific areas of concern:

- **Premium volatility:** APRA confirmed this is still evident however is expected to abate significantly from this point on given recent legislative change;
- **Availability and provision of data**: APRA observed minimal progress in relation to the availability and provision of data and noted RSE licensees continue to experience challenges in obtaining member data from employers; and
- **Tender practices**: responses indicated that the time provided for insurers and reinsurers to engage in tenders was generally adequate.

APRA will continue to monitor progress on these issues.

> *Trustees of superannuation funds should ensure group insurance offerings align with APRA expectations and undertake measures to address any gaps identified.*

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.

> *Trustees of superannuation funds should note the prospect of allowing registered charitable organisations to be nominated as a beneficiary to a death benefit. Any legal or practical issues or constraints to the idea should be shared with the Productivity Commission as part of the consultation.*

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.

> *Trustees of superannuation funds should consider the themes raised in the discussion paper as possible future areas of policy development. Ensuring that the retirement income strategy remains aligned with the themes in the discussion will best position trustees to adapt to any future changes.*

FSB Third Party Risk Management Toolkit

4 December 2023
Announcement

LINK TO DETAILS

The *Financial Stability Board* (the global organisation responsible for coordinating national financial regulators and setting standards) has published a final version of a toolkit for financial regulators and institutions to assist in **third party risk management** and oversight. The toolkit includes:

- a list of **common terms and definitions** to improve clarity and consistency regarding third-party risk management across financial institutions, enhancing communication among relevant stakeholders.
- tools to help financial institutions **identify critical third-party services** and manage potential risks throughout the lifecycle of a third-party service relationship.
- tools for supervising how financial institutions manage third-party risks, and for identifying, monitoring and **managing systemic third-party dependencies** and potential systemic risks.

The toolkit has been designed to complement and build on relevant existing standards and guidance by international standard-setting bodies and financial authorities (including APRA), but not replace them.

> *Trustees of superannuation funds should include consideration of the toolkit when planning for CPS230 (Operational Risk) related changes.*

TECHNICAL UPDATES

Financial Advisor Exam Changes

14 December 2023
Consultation

LINK TO DETAILS

Treasury released *Corporations (Relevant Providers—Education and Training Standards) Amendment (2023 Measures No. 1) Determination 2023* (amending Determination) which seeks to **amend the existing financial advisor exam requirements**.

The amending Determination would make two changes to the exam principles as approved by the Minister in *Corporations (Relevant Providers—Education and Training Standards) Determination 2021* to:

- amend the exam format to be **multiple-choice only**; and
- remove the requirement that an **individual must have already met the qualifications standard before sitting the exam**.

The changes are expected to increase the efficiency in administering the exam and prevent unnecessary delay in candidates sitting the exam.

Feedback on the consultation is requested by 10 January 2024.

> *Trustees of superannuation funds that offer personal financial product advice should note the proposed changes.*

Disclosure & reporting consistency (s29QC)

21 December 2023
Instuments made

LINK TO DETAILS

ASIC made *ASIC Superannuation (Disclosure and Reporting Consistency Obligations) Instrument 2023/941* to **extended the existing relief** from compliance with subsection 29QC(1) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), which came into law in 2013 but has never commenced due to continued regulatory relief.

The subsection requires that **information given to the public be calculated in the same way that the information is reported to APRA** under the *Financial Sector (Collection of Data) Act 2001*.

This instrument provides for continued relief from compliance with subsection 29QC(1) of the SIS Act until 1 January 2026 on substantially the same terms as ASIC CO 14/541, which expired on 1 January 2024 (but was repealed on the new relief instrument being made).

> *Trustees of superannuation funds should note the extension and are unlikely to be required to make any changes other than ensuring compliance management systems reflect the continue deferral.*

End Benefit Exemption Consultation

8 December 2023
Consultation

LINK TO DETAILS

Treasury released *Taxation Administration (Meaning of End Benefit) Instrument 2023* (2023 instrument) for consultation which seeks to remake *Taxation Administration Act 1953 (Meaning of End Benefit) Instrument 2013* without change. The instrument is due to sunset on 1 April 2024.

The 2013 instrument **excludes defined benefit family law superannuation payments from being an 'end benefit'** as defined in the *Income Tax Assessment Act 1997* (ITAA). Excluding these interests from the 'end benefit' definition has the effect of **deferring payment of a Division 293 tax liability**, which applies an additional 15% tax to concessional contributions where an individual has income that exceeds a threshold.

The accompanying Explanatory Memorandum justifies the family law benefit exclusion by stating affected *"… individuals have not in substance received a benefit from their superannuation fund, and as such it would not be appropriate to treat these payments as an end benefit*".

> *Trustees of superannuation funds should note the proposed extension and ensure administration procedures are aligned with the proposed extension.*

Reduced input tax credits in respect of adviser services fees

13 December 2023
Regulations made

LINK TO DETAILS

The *Australian Taxation Office* (ATO) has issued revised guidance in relation to the ability for trustees of superannuation funds to claim **reduced input tax credits** (RITC) for **financial adviser service fees**.

The guidance states that under arrangements where the trustee pays the fee, but the member receives the services, the Commissioner's view is that trustees are not eligible to claim RITCs for the adviser services fees, as the trustee is not the recipient of a supply for which the fees are consideration.

The guidance is limited to arrangements where a member engages a financial adviser to provide them with personal advice. It does not consider arrangements where the trustee engages an adviser to provide non-ongoing, simple advice to its members, where a fee is collectively charged to all members (intra-fund advice).

The ATO has indicated that it will adopt a **prospective compliance approach** with the changed guidance for tax periods that end before 1 April 2024, and respect any private rulings that may be relevant.

> *Trustees should review arrangements for the payment of advice service fees to ensure RITCs aren't being claimed where ineligible.*

APRA Super Data Transformation Project

4 December 2023
Standards revoked

LINK TO DETAILS

As part of its **Superannuation Data Transformation Project**, APRA has revoked *Reporting Standard SRS 530.0 Investments* and *SRS 702.0 Investment Performance*. The last submission for these forms was for the period ending 30 September 2023 and these standards superseded.

APRA also announced that in relation to *SRS 533.0 Asset Allocation*, from the period ending 31 December 2023, trustees are exempted from reporting in respect of MySuper products with a single diversified investment strategy. The last reporting period required for SRF 533.0 in respect of MySuper products single diversified investment strategy was for the period ending 30 September 2023. APRA has not exempted RSE Licensees from reporting under SRS 533.0 in respect of MySuper products with a lifecycle investment strategy.

APRA has also revoked two transitional reporting standards for which no reporting is currently expected; *SRS 410.0 Accrued Default Amounts* and *SRS 530.1 Investments and Investment Flows*.

APRA has also updated an existing FAQ on the reporting standards revocation and added a new FAQ on *SRS 332.0 Expenses*, together with a revised worked example to the SDT frequently asked questions page.

> *Trustees of superannuation funds should ensure that reporting systems, process, and procedures are updated to reflect retirement of these standards.*

UN & Autonomous Sanctions

7 December 2023
Regulations made

LINK TO DETAILS

The Minister for Foreign Affairs determined several legislative instruments as part of **Australia's Sanctions regimes**. These instruments designate persons and entities as subject to the asset freezing regime:

- *Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Amendment (No. 3) Instrument 2023*
- *Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 11) Instrument 2023*
- *Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Democratic People's Republic of Korea) Amendment (No. 2) Instrument 2023*
- *Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Democratic People's Republic of Korea) Amendment (No. 3) Instrument 2023*

On 15 December, following receipt of advice from the **United Nations Security Council Committee** established pursuant to Resolution 2653, DFAT has updated the Consolidated List under Australia's UN Sanctions regime. The Department of Foreign Affairs and Trade has updated the Consolidated List with these changes under both regimes.

> *Trustees of superannuation funds should ensure that screening activities remain current and reflect these changes to the Consolidated List.*

ENFORCEMENT ACTIVITY

APRA Imposes Additional Licence Conditions on NGS

8 December 2023
Media Release

LINK TO DETAILS

APRA imposed **additional licence conditions on NGS Super Pty Limited** (NGS) after **significant deficiencies were identified within their cyber controls**. The additional licence conditions follow an internal report prepared by NGS' internal auditor in August 2022, a cyber incident that occurred in March 2023, and an independent tripartite review undertaken at APRA's request in April 2023.

The reviews identified deficiencies in compliance with *Prudential Standard CPS 234 Information Security* (CPS 234), while **the cyber incident resulted in a significant loss of data** and compromise of NGS' systems for a period.

Effective 11 December 2023, the additional licence conditions require NGS to engage an independent third party to:

- provide assurance regarding NGS' remediation activities and to address the recommendations contained in the internal audit and tripartite review reports; and
- conduct an operational effectiveness review of the CPS 234 controls and frameworks in place for NGS.

On completion of the review, NGS is required to provide APRA with an attestation from the NGS Chair that the remediation actions are complete and effective, and that the entity is compliant with CPS 234.

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.

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.

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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:

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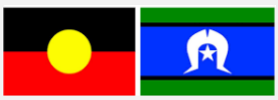

In the spirit of reconciliation QMV Legal acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.