

LEGAL, REGULATORY & POLICY UPDATE PENSIONS AND SUPERANNUATION

INSIDE THIS EDITION

- SUPER AS A WORKPLACE ENTITLEMENT
- YFYS REVIEW OUTCOMES
- ASIC REPORT INSURANCE IN SUPER
- SFT AND IFT PROTOCOL UPDATE
- TAX CONCESSIONS CONSULTATION



Jonathan Steffanoni
Managing Partner

IN BRIEF

It was a busy month for Commonwealth Parliament with three full sitting weeks for both houses. A bill was introduced to legislate superannuation contributions as a workplace entitlement, whilst Treasury released a consultation on the proposal to increase the tax payable on superannuation balances above \$3m.

The Regulators were also busy with ASIC releasing their final report on insurance in superannuation and the ATO updating the SFT protocol to include intra-fund transfers, among other changes.

COMMONWEALTH PARLIAMENT



Superannuation Bills

March 2023
Parliamentary Business

[LINK TO DETAILS](#)

Status key

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

Commonwealth Parliament sat for 3 weeks in March, during which time several pieces of legislation were introduced.

- [Fair Work Legislation Amendment \(Protecting Worker Entitlements\) Bill 2023](#)
- [Financial Accountability Regime Bill 2023](#)
- [Treasury Laws Amendment \(Financial Services Compensation Scheme of Last Resort\) Bill 2023](#)
- [Financial Services Compensation Scheme of Last Resort Levy Bill 2023](#)
- [Financial Services Compensation Scheme of Last Resort Levy \(Collection\) Bill 2023](#)

The following Bills were passed by the House and have been referred by the Senate to the Senate Economics Legislation Committee, with reports due by 3 May 2023 and 26 May 2023 respectively:

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

The Senate Economics Legislation Committee issued its reports recommending the following Bills be passed:

- [Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#)
- [Treasury Laws Amendment \(Modernising Business Communications and Other Measures\) Bill 2023](#)
- [Housing Australia Future Fund Bill 2023](#)

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



MAJOR UPDATES

Your Future Your
Super Review
Outcomes4 April 2023
Exposure Draft[LINK TO DETAILS](#)

The Government released *Superannuation Industry (Supervision) Amendment (Your Future, Your Super - Addressing Underperformance in Superannuation) Regulations 2023* which is intended to address issues raised within Treasury's [review of the Your Future, Your Super reforms](#) that was undertaken in September 2022.

As the feedback from stakeholders in relation to the review primarily focussed on the annual performance test, responding to this feedback forms the first part of the Government's response to the review. The proposed changes are intended to address several unintended consequences of the reforms in relation to the annual performance test and include:

- A prospective increase to the lookback period from 8 years to 10 years to incentivise trustees to focus on long-term decision making;
- Amendments to the covered asset classes with corresponding fee, tax and index assumptions to improve the accuracy of the test and reduce the incentive for trustees to avoid certain investments; and
- Amendments to the notification content requirements to include tailored content where a Part 6A product has failed the performance test for two consecutive years and content specific to trustee-directed products.

The government is seeking feedback on the proposed Regulations by 2 May 2023 to enable the changes to be implemented prior to the extension of the performance test to trustee-directed products in August 2023.

Superannuation trustees should review the amendments to determine the impact of the extension of the lookback period and additional asset classes on the expected performance test results. Consideration should also be given to the impact of these changes on trustee-directed products, and where a trustee is at risk of failing the performance test, ensuring communication teams are aware of the new disclosure requirements within the notification to beneficiaries.



FAR and CSLR Bills

8 March 2023
Bills re-introduced[LINK TO DETAILS](#)

The Senate discharged the previously introduced bills related to the Financial Accountability Regime (FAR) and Compensation Scheme of Last Resort. Corresponding bills were subsequently re-introduced and passed by the House of Representatives.

The Assistant Treasurer and Minister for Financial Services said the Government has re-introduced the FAR Bill to include changes proposed by Senator David Pocock that 'articulate more clearly the scope of the Minister's exemption power'.

Proposed amendments to the FAR Bill from the cross bench in the house weren't successful, with the government and opposition both disallowing proposed amendments to apply civil penalties to individual executives covered by the regime.

Superannuation trustees should note the re-introduced bills and ensure preparations for FAR are well underway given the legislation is expected to pass in the next Parliamentary sittings in May, commencing 18 months after royal assent.



Superannuation as a Workplace Entitlement

29 March 2023
Bill introduced

[LINK TO DETAILS](#)

The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* was introduced to Parliament which seeks to legislate superannuation as a workplace entitlement within the National Employment Standards (NES).

The bill would insert a new Division 10A into the *Fair Work Act 2009* and require employers to make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* (SGC Act) in relation to the employee.

Currently, unpaid superannuation can only be pursued as an employment entitlement in limited circumstances and only under the terms of a modern award or enterprise agreement. By including an entitlement to superannuation contributions in the NES, a broader range of employees will be able to enforce and recover superannuation contributions.

The obligations would complement the existing powers of the ATO to recover superannuation guarantee charge amounts when a shortfall is recorded, and act as an additional enforcement mechanism.

The bill will also introduce a new civil penalty for non-compliance by an employer when making superannuation contributions to their employees. It would also be open to a court to make other orders, including compensation, for contravention of the obligations.

The legislation will commence on the first 1 January, 1 April, 1 July or 1 October after the end of the period of 6 months beginning on the day the Bill receives the Royal Assent.

Superannuation trustees should note this development and ensure employer-facing teams are across the proposed changes to facilitate discussions with contributing employers. Fund collateral may also require updating to ensure members are aware of employer obligations.



AFCA Rules Update

27 March 2023
Bill introduced

[LINK TO DETAILS](#)

AFCA released *AFCA Rules and Operational Guidelines – Proposed amendments* for consultation. The amendments are intended to support the implementation of a suite of recommendations as made by the *Independent Review Report* into the AFCA scheme published in November 2021. A total of 13 proposals are made across several key themes:

- Managing paid representative and complainant conduct within the scheme to ensure fairness and timely resolutions;
- Appropriate offers of settlement or previously settled matters to be explicitly excluded where AFCA considers appropriate compensation has already occurred;
- Complaints lodged by sophisticated or professional investors to be excluded from AFCA jurisdiction;
- Changes to the Forward Looking Review mechanism;
- Clarifying the rules where a Determination is not accepted by the complainant or where an error is made; and
- Minor technical changes to clarify AFCA's reporting and transparency obligations.

The consultation closes on 22 May 2023. The new Rules and Operational Guidelines are expected to commence from 1 July 2024.

Superannuation trustees should review the proposed rule changes and consider how this may impact existing complaint management processes and disclosures.



Better Targeted Tax Concessions

31 March 2023
Consultation

[LINK TO DETAILS](#)

Treasury released *Better Targeted Tax Concessions Consultation Paper* which provides further detail regarding the government's recent [announcement](#) to increase the concessional tax rate on investment earnings on superannuation balances above \$3 million.

The paper provides an overview of the proposed model, identifying who will be affected, how the tax will be calculated and how the rules will be applied to individuals and superannuation trustees. Specific proposals include:

- Scope of the regime to apply to APRA-regulated funds and SMSFs equally, with further consultation on how the regime will apply to defined benefit schemes and constitutionally protected funds;
- Proposed commencement date of 1 July 2025, thereby subjecting any individual with a total superannuation balance (TSB) of \$3m or above on 30 June 2026 to the regime;
- Ability to carry-forward periods of negative earnings to offset future positive earnings; and
- ATO to administer the scheme and leverage existing reporting and administration mechanisms to minimise impact on superannuation trustees.

The paper also provides detailed methodology and examples on the calculation of tax payable on earnings above the \$3m threshold. Feedback is requested by 17 April 2023.

Superannuation trustees should review the consultation and consider the impact on ATO reporting requirements, amongst other potential impacts.



ASIC Report on Insurance in Superannuation

22 March 2023
Final Report

[LINK TO DETAILS](#)

The *Australian Securities and Investments Commission (ASIC)* released a report detailing its findings from a review into progress by superannuation trustees to improve arrangements for life insurance in superannuation.

The review looked at whether trustees had made progress in addressing the issues raised by ASIC in various public communications since 2019 and were meeting new regulatory obligations. ASIC's review found:

- many trustees have made changes to the design of their insurance arrangements to better meet member needs and provide value for money, such as by changing restrictive "total and permanent disability" definitions;
- many trustees have worked with their insurers to streamline their claims processes to make them easier for members to navigate, and taken steps to enhance their oversight of insurers' claims handling practices; and
- some trustees have improved the way they explain their insurance offerings to make it easier for members to understand their insurance and make appropriate decisions for their circumstances.

However, the review also found that trustees have not made sufficient effort in all areas and recommends that trustees focus on proactively using data to promote better value for money, focus claims handling on member experience, and make member communications clearer to promote better decision making.

Superannuation trustees should consider possible areas of improvement in insurance related communications and claims handling.



GUIDANCE AND POLICY



Managed Investment Scheme Review

8 March 2023
Media Release

[LINK TO DETAILS](#)

The government announced a forthcoming consultation in relation to the managed investment scheme (MIS) regulatory framework. Citing several significant scheme failures since the introduction of the current framework, the review will consider whether the regulatory framework is fit-for-purpose, identify potential gaps, and consider what enhancements can be made to reduce undue financial risk for investors.

Several options for reform will be considered, including:

- The appropriateness of existing retail vs wholesale client thresholds;
- Whether certain MIS investments should be able to be marketed and sold to retail investors;
- the various roles and obligations of responsible entities and whether the governance, compliance and risk management frameworks for MIS are appropriate;
- the interaction between Commonwealth and State legislation when regulating real estate investments;
- the appropriateness of current 'investor rights; and
- liquidity and insolvency provisions.

Consultation is expected to be released in mid-2023 with the final report handed to the Government in 2024.

Responsible Entities should note the forthcoming consultation and consider areas for potential uplift in relation to the reform scenarios announced.



Disclosure of Subsidiary Information

16 March 2023
Consultation

[LINK TO DETAILS](#)

Treasury released *Exposure Draft Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Financial reporting by public companies* for consultation. The draft legislation is a transparency measure requiring the public disclosure of information on listed and unlisted public companies' subsidiaries.

Companies who currently produce financial statements in relation to a consolidated entity will be required to include a 'consolidated entity statement' within their financial reporting that includes the following information:

- names of each entity and whether the entity was a body corporate, partnership or trust at the end of the financial year;
- if the entity is a body corporate, where the entity was incorporated or formed, and the percentage of ownership of each of those entities that are body corporates at the end of the financial year; and
- the tax residency of each of those entities during the financial year.

Where the company is not required to produce financial statements in relation to a consolidated entity, a company's financial report must include a statement to that effect.

The measures are proposed to take effective for financial years from 1 July 2023 and are intended to align with the previous consultation by the government on a beneficial ownership register. Consultation closes 13 April 2023.

Superannuation trustees should consider whether a consolidated entity statement will be required and ensure the relevant information for reporting is available for commencement.



ATO SFT & IFT Reporting Protocol Updates

3 March 2023
Updates

[LINK TO DETAILS](#)

The Australian Taxation Office (ATO) has published its [Successor and intra fund transfer reporting protocol](#), which provides technical guidance on a range of aspects to help funds manage change and reduce the impact to members, during and after a successor fund transfer (SFT) or an intra fund transfer (IFT). The protocol was recently updated to include:

- intra-fund transfer (IFT) guidance;
- a new section on limited-service period (also known as black-out periods);
- detailed guidance on actioning release authorities;
- tips and useful links for Digital Identity Management and Access Manager; and
- detailed guidance on Transfer Balance Account Reports and actioning Commissioner's commutation authorities.

The protocol also contains guidance on practical administration, consistent application of the law and their perspective of industry best practice, including for complex superannuation processes.

Superannuation trustees should note these updates, as these may be relevant in relation to any prospective internal or successor fund transfer.

TECHNICAL AMENDMENTS



Minor & Technical Amendments

15 March 2023
Consultation

[LINK TO DETAILS](#)

Treasury has released for consultation the exposure draft of the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Minor and technical amendments (Cth)* (the draft Bill) and the *Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Minor and technical amendments (Cth)* (the draft Regulations).

The draft Bill and draft Regulations seek to amend relevant legislation to ensure that the laws operate as intended by correcting technical or drafting defects, removing anomalies, and addressing unintended outcomes and make other technical changes. The draft Bill proposes to amend:

- the *Superannuation Industry (Supervision) Act 1993 (Cth)* to clarify the definition of 'year of income' which has the same meaning as in the *Income Tax Assessment Act 1936 (Cth)*
- the *Australian Securities and Investments Commission Act 2001 (Cth)* to create a scheme for claims handling and settling service by:
 - updating the definition of financial service to include persons who provide a claims handling and settling service in the list of persons who provide financial service; and
 - adding in the list of false and misleading practices those that relate to claims handling and settling service.

The draft Regulations proposes to make minor and technical amendments to the *Australian Prudential Regulation Authority Regulations 2018 (Cth)* by removing reference to the Superannuation Complaints Tribunal.

Superannuation trustees are unlikely to need to take any action to implement these changes, however consideration should be given to assess whether there is any minor impact.



Illegal Early Access to Super

29 March 2023
Factsheet

[LINK TO DETAILS](#)

The ATO updated their website and released a factsheet to support superannuation trustees in their conversations with members regarding the requirements for an early release of superannuation.

The [website](#) updates speak to the dangers of attempting to claim early access to superannuation illegally, warns of illegal early access schemes and provides guidance on what an individual should do if they are approached by a promoter of such schemes.

A new factsheet *Accessing your super early may be illegal* reiterates this information and is intended to support superannuation trustees when speaking to members who are seeking early access to superannuation.

Superannuation trustees should note the updates and ensure member-facing teams are aware of the guidance. Consideration should be given to updating processes to include provision of the factsheet as appropriate.



Remaking Relief for IDPS Schemes

28 March 2023
Consultation

[LINK TO DETAILS](#)

ASIC is seeking feedback from operators of investor directed portfolio services (IDPS) and responsible entities of IDPS-like schemes on proposals to remake 'sunsetting' class orders. ASIC released *Remaking ASIC class orders on platforms: [CO 13/762] and [CO 13/763]* proposes to remake:

- Class Order [CO 13/762] Investor directed portfolio services provided through a registered managed investment scheme; and
- Class Order [CO 13/763] Investor directed portfolio services.

These class orders afford relief to IDPSs and IDPS-like schemes, to tailor the requirements of the *Corporations Act 2001* to the nature of the schemes. [CO 13/763] establishes the regulatory framework for IDPSs and exempts IDPSs from the requirement to be a registered managed investment scheme, amongst other requirements, while [CO 13/762] modifies provisions of the *Corporations Act 2001* and provides responsible entities relief from some of the managed investment scheme, fundraising, financial product disclosure and other investor rights provisions. The class orders will sunset on 1 October 2023 if not remade. Feedback is requested by 28 April 2023.

Superannuation trustees and operators of IDPS and IDPS-like schemes should review the consultation and consider whether feedback is warranted.



ALRC Interim Report Tranche 2 Regulations

6 March 2023
Consultation

[LINK TO DETAILS](#)

Treasury released for consultation draft *Treasury Laws Amendment (Measures for Consultation) Regulations 2022: ALRC Financial Services Interim Report Tranche 2*, to make amendments to the *Corporations Regulations 2001* and the *Australian Securities and Investments Commission Regulations 2001*. This supports the changes in the *Treasury Laws Amendment (Measures for consultation) Bill 2022: ALRC Financial Services Interim Report Tranche 2* released for consultation on 12 December 2022.

The Regulations will implement recommendations of the Australian Law Reform Commission's (ALRC's) Interim Reports A and B on its *Review of the Legislative Framework for Corporations and Financial Services Regulation*.

The Regulations also make other improvements to simplify the *Corporations Regulations* relating to the use of definitions. These include clarifying the meaning of defined terms, using consistent headings for definitions sections to improve navigability and accessibility.

Superannuation trustees do not need to take any action to implement these changes but should stay abreast of developments in this space.



ENFORCEMENT ACTIVITY



ASIC Interim Stop Order – Interactive Brokers Australia

9 March 2023
Civil Penalty Proceedings

[LINK TO DETAILS](#)

ASIC has made two interim stop orders preventing Interactive Brokers Australia Pty Ltd from issuing Stock Yield Enhancement Program (SYEP) Derivatives to retail investors because of deficiencies in the product's target market determination (TMD) and product disclosure statement (PDS). ASIC made the interim orders to protect retail investors from acquiring SYEP Derivatives where they may not be suitable for their financial objectives, situation or needs. ASIC is also concerned that the PDS is defective.

Retail investors in SYEP Derivatives are exposed to risks related to securities lending, including the impact of short selling on the value of their securities, counterparty risk if Interactive Brokers defaults, loss of voting rights and tax consequences associated with substituted dividend payments and corporate actions.

ASIC was concerned that the TMD for SYEP Derivatives:

- inappropriately included in the target market investors who declare that their investment objectives include preservation of capital and income generation, or hedging, whereas these objectives are likely inconsistent with the features and risks of the product;
- included knowledge and experience criteria for the target market that are not described with objective, tangible parameters;
- specified an unreasonably long period for distributors of SYEP Derivatives to report complaints and other matters to Interactive Brokers; and
- specified inadequate and poorly defined triggers for reviewing whether the TMD remains appropriate.

The enforcement activity highlights the importance of ensuring that TMDs and product disclosure appropriately align product attributes with the target market.



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](#)



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@qmv-solutions.com



Marina Ferraro
LLB(Hons), B.Comm
Special Counsel
0413 802 673
mferraro@qmv-solutions.com



David Reckenberg
LLB (Hons), B.Ec
Special Counsel
0411 265 284
dreckenber@qmv-solutions.com



Jessica Pomeroy
MBA, BA
Senior Regulatory
Consultant
0400 708 447
jpomeroy@qmv-solutions.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.