

LEGAL, REGULATORY & POLICY UPDATE PENSIONS AND SUPERANNUATION

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IN BRIEF

The Commonwealth budget came and went without any unexpected surprises for trustees of superannuation funds. There were, however, several important policy consultations initiated by Treasury. Two of these seek to legislate changes which would remedy "unintended consequences" of decisions in the Federal Court.

Commonwealth Parliament was quiet, with all superannuation related Bills now before the Senate. All eyes will be on the Senate's agenda during the winter sessions, with the Financial Accountability Regime finally looking poised for passage (unless I'm wrong, which is more likely than not).

ASIC enforcement activity during May was visible, with significant "912A" civil penalty decisions going in ASIC's favour in the Federal Court.

COMMONWEALTH PARLIAMENT



Superannuation Bills

May 2023
Parliamentary Business

[LINK TO DETAILS](#)

Status key

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

Commonwealth Parliament sittings in May were dedicated to the **Budget** and related **Budget Estimates** sittings. This meant that there wasn't much movement on the outstanding Bills which could affect superannuation trustees.

The following bills remain before the Senate:

- [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](#)
- [Treasury Laws Amendment \(Modernising Business Communications and Other Measures\) Bill 2023](#)
- [Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#)
- [Housing Australia Future Fund Bill 2023](#)
- [Treasury Laws Amendment \(Consumer Data Right\) Bill 2022](#)
- [Treasury Laws Amendment \(2023 Measures No. 1\) Bill 2023](#)

There are eight sitting days scheduled for the Senate between 13 and 22 June, and there is an expectation that the Financial Accountability Regime package of Bills will be listed for debate.



MAJOR UPDATES



Resolution Planning Prudential Standard

18 May 2023
Announcement

[LINK TO DETAILS](#)

APRA issued a final version of *Prudential Standard CPS 900 (Resolution Planning)*, which will be determined with a commencement date of 1 January 2024.

APRA also released a final version of the related *Prudential Guidance CPG 900 (Resolution Planning)*. Changes from the earlier draft version include:

- Clearly stating that the obligations are **enlivened on notice** from APRA to the regulated entity;
- Clarifying the definition of a non-significant financial institution by reference to the threshold of \$30 billion combined total assets; and
- Specifying the critical function identification requirements.

The new prudential standard and guidance form part of APRA's "**Strengthening crisis preparedness**" reforms and support APRA's strategy to promote the financial stability of the Australian financial system in times of stress.

Superannuation trustees should review the finalised standards and guidance to ensure preparedness for the commencement of the regimes.



AFCA Jurisdiction

18 May 2023
Consultation

[LINK TO DETAILS](#)

Treasury has released exposure draft legislation intended to **broaden the jurisdiction** of the Australian Financial Complaints Authority (AFCA).

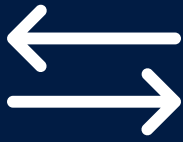
The exposure draft *Treasury Laws Amendment (Measures for Consultation) Bill 2023: AFCA jurisdiction to hear superannuation matters Bill* seeks to address the consequences of the recent Federal Court decision in [MetLife v Australian Financial Complaints Authority \[2022\] FCAFC 173](#).

The decision held that **AFCA did not have jurisdiction** to hear complaints relating to superannuation unless the complaint was specifically listed in section 1053(1) of the *Corporations Act 2001* (Cth).

The draft Bill seeks to expand AFCA's jurisdiction so that:

- complaints specifically listed in section 1053 will be treated as superannuation complaints and will be subject to the additional provisions set out in Part 7.10A, Division 3; and
- other complaints relating to superannuation will be able to be heard in AFCA's non-superannuation jurisdiction.

Superannuation trustees should note the planned change and consider any impact on internal dispute resolution procedures. The scope of complaints that AFCA may have jurisdiction over is potentially broader than previously.



Consumer Data Right Expansion to Super on Pause

26 May 2023
Announcement

[LINK TO DETAILS](#)

The Government announced the expansion of the Consumer Data Right (CDR) to superannuation, insurance and telecommunications has been paused to allow time to ensure the CDR is working as effectively as possible within the existing banking sector. The CDR will continue to extend into the non-bank lending sector and energy industries as planned.

The intended expansion of the CDR to action initiation will continue, with consultation on the assessment and development of a framework to support action initiation to be undertaken.

In an effort to increase consumer awareness and education regarding the CDR, funding has been allocated to create a trust brand strategy. This is also intended to assist consumers to identify where they can access CDR-enabled providers, products and services.

A strategic assessment of the CDR toward the end of 2024 is planned to inform government of the future expansion into other industries, including superannuation.

Superannuation trustees should note the delayed commencement and ensure portfolio budgets and planning reflect the announcement.

GUIDANCE AND POLICY



Your Super, Your Choice Review Defined Benefits

10 May 2023
Legislative Impact Assessment

[LINK TO DETAILS](#)

APRA released findings from a **Legislative Impact Assessment** of the amendments to the *Superannuation Guarantee (Administration) Act 1992* (SGAA), introduced by the *Treasury Laws Amendment (Your Superannuation, Your Choice) Act 2020* (YSYC Act).

The review was required to assess any **unintended consequences of the expanded choice of fund rights for defined benefit (DB) schemes**, including the ongoing viability and profitability of these schemes.

APRA's review did not identify any unintended consequences on the operation or ongoing viability and profitability of defined benefit schemes that can be attributed to the amendments to the SGAA.

As a result, APRA's view is that no further amendment to the SGAA or any other Act is required as a consequence of the YSYC Act amendments.

Superannuation trustees should note the findings and consider the impact of the YSYC Act to be permanent and ongoing for the purposes of strategic, financial, and actuarial planning.



Defined Benefit Invalidity Pension Taxation

5 May 2023
*Exposure draft
regulations*

[LINK TO DETAILS](#)

Treasury commenced consultation on regulations to support measures in the *Treasury Laws Amendment (2022 Measures No 4) Bill 2022* that impact the **tax treatment** of some **defined benefit** (DB) invalidity income streams.

The reforms are related to the decision in *Commissioner of Taxation v Douglas*, that invalidity pension payments under certain Military Superannuation Schemes **were not superannuation income streams** within the meaning of the *Income Taxation Assessment Act 1997* (ITAA97). Invalidity benefits were considered superannuation lump sum payments.

The decision may also have impacted **other defined benefit pensions** (including permanent incapacity incomes streams) to the effect that they no longer satisfied the definition of a capped defined benefit income stream for the purposes of determining the transfer balance cap.

The draft regulations would confirm that all other defined benefit pensions are to **be treated as superannuation income streams** for the purposes of section 307-70 of the ITAA97.

Superannuation trustees should liaise with administration services providers to ensure all defined benefit income streams are accurately administered for the purposes of the transfer balance cap reporting.



AFCA Report on Systemic Issues

24 May 2023
Report

[LINK TO DETAILS](#)

AFCA released the second edition of their *Systemic Issues Insights Report* for Quarters 1 and 2 for the 2022-23 financial year. The report contains case studies, findings and key insights into systemic issues raised across the financial services industry, including superannuation, for the period.

Relevant to superannuation, AFCA reported 5 systemic issues as identified and confirmed within the period. AFCA also detailed two superannuation case studies, both relating to systemic issues identified in the administration of insurance benefits:

- a superannuation fund did not provide members with of death and disability insurance as required under MySuper legislation and was unable to produce evidence of members having opted-out; and
- a superannuation fund did not provide members appropriate disclosure outlining the opt-in arrangements before cancelling their insurance.

AFCA took the opportunity to remind superannuation trustees of the importance of keeping accurate client records and ensure efficient access to such records as a fundamental expectation of every firm. AFCA further observed that firms that take accountability for systemic issues and make appropriate changes to organisational culture are best placed to prevent future issues arising.

Superannuation trustees should review the report and ensure appropriate protocols are in place for the accurate administration of insured benefits.



ASIC Design & Distribution Obligations Media Release

3 May 2023
Announcement

[LINK TO DETAILS](#)

ASIC released *Report 762 Design and distribution obligations: Investment products* on 3 May 2023. The report details ASIC's findings following a risk-based review of how investment product issuers are meeting the DDO.

ASIC prioritised the initial review of investment products because of concerns that investors were being inappropriately exposed to high-risk products. The key **target market deficiencies** ASIC identified across investment product issuers include:

- target markets defined too broadly – 15 stop orders;
- unsuitable investor risk profiles used – 21 stop orders;
- inappropriate levels of portfolio allocation used – 10 stop orders; and
- unsuitable investment timeframes and/or withdrawal features, not reflecting the product's risks and liquidity profile – 18 stop orders.

ASIC also observed that many of these deficiencies appeared when issuers relied on **TMD templates** without customising them appropriately.

Superannuation trustees should ensure they are comfortable that the target market determinations are appropriate, as ASIC has indicated that closer scrutiny of compliance with DDO was on ASIC's agenda.



APRA Supervisory Levies

25 May 2023
Consultation

[LINK TO DETAILS](#)

Treasury and APRA have released a joint consultation in relation to the financial institutions' **supervisory levies** for the 2023-24 financial year. The financial industry levies are set to recover the operational costs of APRA and other specific costs incurred by certain Commonwealth agencies, including Treasury and the Australian Taxation Office.

Levies funding of \$111.6 million comprises of \$70.1 million for APRA's supervision of the superannuation industry, and has increased from \$102.5 million in 2022-23. The levy minimum has increased to \$12,500 for 2023-24. The levy maximum has been unchanged at \$800,000 for 2023-24.

Levies funding in 2023-24 represents 42.3 per cent of total levies, compared to 39.5 per cent in 2022-23, which is driven by the increased time spent by APRA on the superannuation industry due to **increased supervisory and enforcement intensity**, and implementation of the *Your Future, Your Super* measures.

Superannuation trustees should consider the changes when budgeting for 2023-24.



Work Test Determination

10 May 2023
Announcement

[LINK TO DETAILS](#)

The Deputy Commissioner of Taxation made a determination in the form of the *Taxation Administration (Remedial Power - Work Test for Personal Superannuation Contributions) Determination 2023*. The instrument modifies the operation of subsection 290-165(1A) of the ITAA97.

The modification ensures that **individuals aged 67 to 75 years** who are employees under the expanded definition of "work test" in section 15A of the *Superannuation Industry Supervision Act 1993*, remain eligible to claim a deduction for their personal superannuation contributions.

The need for the instrument arises from the relocation of the operative provisions from the SIS Act to the ITAA97, and different definitions.

The modification ensures the previous eligibility criteria for deducting personal superannuation contributions is maintained and provides certainty for affected individuals.

Superannuation trustees should note the continuation.



Use of Multi-Factor Authentication

26 May 2023
Announcement

[LINK TO DETAILS](#)

APRA affirmed their expectation that all APRA-regulated entities utilise and review the coverage of **multi-factor authentication (MFA)** within their operating and technology environments. APRA considers the use of MFA as one of the most effective controls available to prevent adverse access to a device or network containing sensitive information.

APRA directed entities to *Prudential Standard CPS 234 Information Security (CPS 234)* which requires entities to maintain information security capabilities that are commensurate with the risk of vulnerability and threats to the entity, and the sensitivity and level of information being protected.

APRA identified that, although widely used, **there are gaps in the implementation of MFA across regulated entities** which may materially affect stakeholders, including customers, both financially and non-financially. Where gaps exist, APRA may consider this to be a **material security control weakness** in accordance with CPS 234 and trigger a requirement for the entity to notify APRA of the weakness.

APRA plans to review CPS 234 in due course to clarify expectations on information security controls and provide additional guidance for industry.

Superannuation trustees should review their information security protocols and assess whether MFA should be implemented or any improvements that could be made. Trustees should engage with their administrator and other service providers who may hold member data to confirm appropriate information security protocols are in place.



Reporting Standards & SDT Project

23 May 2023
Consultation

[LINK TO DETAILS](#)

APRA has made several determinations under the *Financial Sector (Collection of Data) Act 2001*, which replace or introduce **new superannuation reporting standards**.

The following reporting standards have been revoked and replaced:

- [SRS 101.0 Definitions for Superannuation Collections](#)
- [SRS 251.0 Insurance](#)
- [SRS 332.0 Expenses](#)
- [SRS 550.0 Asset Allocation](#)
- [SRS 605.0 RSE Structure](#)
- [SRS 606.0 RSE Profile](#)
- [SRS 705.0 Components of Net Return](#)
- [SRS 705.1 Investment Performance and Objectives](#)
- [SRS 706.0 Fees and Costs Disclosed](#)

Following the implementation of the new standards as part of the **super data transformation project**, APRA further released minor amendments to nine of the reporting standards. These minor amendments aim to clarify aspects of the standards based on industry feedback.

APRA has also made several updates to the **frequently asked questions** page in relation to these standards, which essentially forms regulatory guidance on the standards.

Superannuation trustees should ensure that the updated versions of these reporting standards are relied on when preparing and lodging reporting.



Modern Slavery Report Review

25 May 2023
Report

[LINK TO DETAILS](#)

The Attorney General tabled their *Report of the statutory review of the Modern Slavery Act 2018* (Cth) ('the Report') with Parliament. The review was announced in March 2022, followed by release of an Issues Paper for consultation in August 2022. The Report sets out the findings of the review and makes 30 recommendations for changes to the *Modern Slavery Act 2018* (Cth) ('the Act').

The recommendations include:

- The Australian Government initiate discussion with other jurisdictions on the definition of 'modern slavery' as it relates to reporting laws;
- Amend the definition of 'reporting entity' to one with a consolidated revenue of at least \$50 million for the reporting period, and further examine how this may be defined;
- Amendments to the mandatory reporting criteria and new inclusions such as reporting incidents, complaints, risk management practices;
- Amendments to the *Guidance for Reporting Entities*;
- Introduction of administrative improvements such as templates and online accessibility for submission of modern slavery statements; and
- Introduce penalties for specific non-compliance.

Superannuation trustees should note the recommendations and remain abreast of the Government's response to the Report when released.



TECHNICAL AMENDMENTS



Autonomous Sanctions

28 April 2023
Announcement

[LINK TO DETAILS](#)

The *Department of Foreign Affairs and Trade* (DFAT) has consulted on proposed amendments to the *Autonomous Sanctions Regulations 2011* (Cth). The amendments expand item 4, regulation 6 of the *Autonomous Sanctions Regulations 2011* (Cth) to introduce additional listing criteria.

New listing criteria under the existing autonomous sanctions regime in relation to Iran would relate to the **general oppression of the Iranian population**, in particular **women and girls**, and the undermining of good governance and the rule of law.

The proposed criteria would also allow the listing of Iranian persons and entities engaging in malign activities which undermine the sovereignty or territorial integrity of a country other than Iran.

Superannuation trustees should ensure that adequate membership, asset monitoring and screening activities are in place and kept up to date to identify any assets or persons that are designated under the regimes.



DFAT Consolidated List Updates

2 May 2023
Legislative instruments

[LINK TO DETAILS](#)

The Minister for Foreign Affairs has listed several legislative instruments with DFAT which add to the consolidated list of persons and entities subject to asset freezing under the Commonwealth's **United Nations and Autonomous Sanctions** regimes:

- Additions to the sanctioned persons and entities following advice from the United Nations Security Council Committee concerning ISIL (Da'esh), Al-Qaida and associated individuals; and
- Additions to the sanctioned persons and entities under the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) List 2012*.

DFAT has also commenced consultation on a ban on the **export of machinery and related parts to Russia** and areas of Ukraine temporarily under Russian control.

Superannuation trustees should ensure that adequate membership, asset monitoring and screening activities are in place and kept up to date to identify any assets or persons that are designated under regimes.



Victorian Stamp Duty

26 April 2023
Consultation

[LINK TO DETAILS](#)

The Victorian Parliamentary Economy and Infrastructure Committee commenced an inquiry into issues around **land transfer duty fees** and its instruments within the *Duties Act 2000* (Vic).

The terms of reference require the Committee to examine potential alternatives to land transfer duty by assessing models from interstate and international jurisdictions. Public hearings are underway, and a report is expected to propose alternative models in the coming months.

Superannuation trustees should consider the possible tax implications for any exposure to real property assets or investment opportunities in Victoria. The possibility of transitioning towards a land tax over a transfer duty (such as was introduced in NSW) may change the tax profile of certain assets.



Advisor Registration Extension

31 May 2023
Announcement

[LINK TO DETAILS](#)

ASIC is extending the date by which financial advisors must be registered to 1 October 2023. This considers Schedule 1 of the [Treasury Laws Amendment \(2023 Measures No. 1\) Bill 2023](#) ('the Bill') which would amend the *Corporations Act 2001* to allow ASIC to approve applications from one or more licensees to register on the Financial Advisers Register the same financial advisor. The delay will allow additional time for:

- Parliament to consider the improvements proposed by the Bill;
- ASIC to assist the financial advice industry to understand and comply with the registration requirement by issuing regulatory guidance and conducting webinars; and
- Australian financial service (AFS) licensees to understand the registration requirement and to make necessary applications to register their relevant providers with ASIC.

Advisors were required to be registered by 1 July 2023 prior to this announcement.

Superannuation trustees should note the delay and forthcoming regulatory guidance in relation to the registration of relevant providers.

ENFORCEMENT ACTIVITY



ASIC v MLC Life

May 2023
Federal Court decision

[LINK TO DETAILS](#)

The Federal Court has ordered MLC Limited (MLC) pay a \$10 million penalty for failing to pay promised benefits, resulting from a **lack of appropriate systems** to administer its insurance policies.

The Court also made declarations that MLC had contravened the *ASIC Act*, the *Corporations Act* and the *Insurance Contracts Act* for failures to:

- pay a rehabilitation benefit to 119 customers who had undertaken approved rehabilitation programs following injury and/or disability;
- have adequate processes to review and promptly update its medical definitions for critical illnesses in certain policies; and
- adequately train and monitor staff regarding communications to customers regarding the administration of their policy, including policy schedules and premium notices.

The Court held that MLC had made a **false or misleading representation** that services were of a particular standard, had benefits or contained conditions or rights, in connection with the supply or possible supply of financial services, and engaged in **misleading or deceptive conduct**, or conduct that was likely to mislead or deceive, in relation to financial services, breaching sections 12DA and 12 DB of the *ASIC Act*.

The Court also held that MLC had failed to do all things necessary to ensure that the financial services covered by its AFSL were provided **efficiently, honestly, and fairly**, and thereby contravened s 912A(1)(a) of the *Corporations Act*.

In addition to the \$10 million penalty, MLC has provided approximately \$11.8 million in remediation to approximately 1,000 impacted customers.

Superannuation trustees should note the decision, as similar obligations are relevant to their business and operations.



ASIC v AMP Superannuation

May 2023
Court decision

[LINK TO DETAILS](#)

The Federal Court found four companies that are or were part of the AMP Group breached the law when **charging life insurance premiums and advice fees** from the superannuation accounts of more than 2,000 deceased customers.

The Federal Court ordered two of these AMP companies to pay a combined penalty of \$24 million for the breaches.

In considering the basis for pecuniary penalties, the Court reasoned that *“Ultimately, the cause of the contravening conduct was the lack of a centralised complaints handling system coupled with a failure to ensure that information technology systems were programmed to be capable of giving effect to the terms of the products that had been issued. AMP Life’s information technology systems were a disconnected conglomeration of legacy systems involving product administration systems, workflow systems and complaints systems. The systems did not speak to each other and users of one system could not readily access relevant information stored in other systems. There was no evidence of the maintenance of records of how the systems were programmed to calculate death benefits.”*

The companies were found to have breached sections 12CB(1) and 12DI(3) of the *ASIC Act 2001*, and section 912A(1)(a) and (c) of the *Corporations Act 2001*.

Superannuation trustees should note the significance of the penalties, and reasoning in relation to the importance of accurate administrative systems and processes.



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CONTACT US

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