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How 2024 is shaping up for super trustees

In the first half of the year, financial services regulators have continued to focus on several priorities for the superannuation sector identified in their corporate plans, enforcement priorities and other publications. This article looks at what has happened so far and considers what the sector might expect in the second half of the year.

At the start of 2024, we set out the **top 10 priorities** we suggested that superannuation trustees (**trustees**) keep at the top of their agendas for the year. These were based on emerging regulatory trends including the announced strategic and enforcement priorities of financial services regulators the Australian Securities and Investments Commission (**ASIC**) and the Australian Prudential Regulation Authority (**APRA**). As a recap, we expected that the following areas would be important for trustees in 2024:

1. Staying focused on retirement outcomes
2. Uplifting member service standards
3. Distributing products to the target market
4. Avoiding inadvertent greenwashing
5. Protecting superannuation balances
6. Getting reporting right
7. Achieving and maintaining operational and technological resilience
8. Getting farther with FAR
9. Reviewing dispute resolution processes
10. Improving insurance offerings

What has happened so far?

1. Retirement outcomes: spotlight on the RIC and choice products

As indicated in our previous article, in their Corporate Plans for 2023-24, ASIC and APRA each signalled their intent to remain laser focused on retirement outcomes as part of their strategic and enforcement priorities. In the first half of this year, we have seen this manifest in two key areas: trustees' implementation of the retirement income covenant (**RIC**) and their oversight of choice product performance.

On 2 July 2024, ASIC and APRA released an industry update summarising trustees' responses to a voluntary survey on their progress and planned improvements since the release of ASIC and APRA's information report, *Implementation of the retirement income covenant: Findings from the joint APRA and ASIC thematic review* in July 2023. In the 2023 report, the regulators had identified a lack of urgency by trustees in embracing the RIC following a thematic review of trustees' implementation of the RIC.

In the 2024 update, ASIC and APRA identified that, although trustees' responses indicated that progress had been made in several areas since the thematic review, some "significant gaps" remain.[1] In particular, trustees had only made incremental progress to measure and track retirement income strategies, and only one in five trustees expected to complete planned improvements to promote the availability and access to retirement-focused information to members by June 2024.[2] Trustees' responses indicated they had experienced several challenges in implementing the covenant, including uncertainty around the financial advice framework, privacy, security, and cost concerns on collecting more member data, and a lack of member engagement and financial capability.[3]

In the media release accompanying the update, ASIC and APRA called on trustees to bolster efforts to track and measure the impact of their retirement strategies to improve members' retirement outcomes.[4] With the regulators expecting all trustees to assess gaps in their retirement income strategies and identify opportunities to accelerate progress in closing these gaps, including leveraging examples of progress outlined in their update paper,[5] trustees would be well advised to follow suit.

In February 2024, ASIC also called on trustees to improve oversight of choice superannuation investment options performance and address issues.[6]

In ASIC's report REP 779 *Superannuation choice products: What focus is there on performance?* (**Report 779**), ASIC examined the conduct of trustees, financial advisers and Australian financial services licensees to assess why some members continue to invest in persistently underperforming choice superannuation investment options. ASIC's review appraised the focus on performance, since investment in persistently underperforming choice products adversely affects member retirement outcomes.[7]

In Report 779, ASIC identified that there is often insufficient focus on performance and a lack of transparency about persistent underperformance of these options.[8] Consequently, ASIC outlined several expectations of trustees including to prioritise investment performance throughout the product lifecycle, maintain systems to detect and address persistent underperformance and effectively communicate with members about performance.[9]

With ASIC indicating that it will continue to work closely with APRA to drive better investment governance practices and use regulatory powers where trustees are not meeting their obligations,[10] it would be wise for trustees to review their own practices now and uplift any areas that fall short of ASIC's expectations.

2. Member service standards: focus on death benefit claims

In our previous article, we discussed the government and regulatory warnings since late last year of an impending crackdown on poor member services.

In May 2024, ASIC announced that it was undertaking a multi-year review of industry practices and compliance with laws relating to member services, focussing initially on a two-phase review of how trustees handle death benefit claims.[11] ASIC highlighted that, since "[p]eople making death benefit claims are usually under emotional and/or financial stress", it is "especially important that trustees approach these claims in a way that is timely, clear and respectful".[12]

Following the first phase of ASIC's death benefit claims work, which focussed on public website communications and resources about death benefit nominations and how to make a death benefit claim, ASIC published an article outlining its observations, including that:

- between 2021 and 2023, there was a sharp increase in death benefits complaints—including a sevenfold increase in those about delays in death benefit claims handling—to the Australian Financial Complaints Authority (**AFCA**);
- the legislative regime governing death benefit claims and beneficiary nominations is complex and the related processes will vary depending on the fund's governing rules and relevant legislation;
- trustees can do more to assist members to understand, put in place, and update binding death benefit nominations – whilst all 22 websites reviewed had some information about death benefit beneficiary nominations, the quality of information was poor in some areas; and
- despite the criticality of effective communication about death benefit claims handling, website communications about how to make a claim were, as a whole, quite poor.[13]

In the article, ASIC called on trustees to act now by reviewing ASIC's observations and considering how they can improve communications with consumers about death benefits and, to be prudent, trustees should act accordingly. ASIC also indicated that its work in this area will continue, with the next phase of ASIC's death benefit claims work involving ASIC examining a sample of trustees' relevant data and processes in detail assessing whether there have been contraventions of the law. Trustees should monitor ASIC's website for further insights expected to be released in a public report later this year.[14]

3. Product design and distribution: review of TMDs for choice products

Consistent with ASIC's 2024 strategic priority to address poor product design and distribution,[15] in Report 779, in which ASIC examined trustees' focus on the performance of choice products, ASIC reviewed the target market determinations (**TMDs**) for these products.[16]

For context, the design and distribution obligations require trustees to have TMDs for choice products that describe who a product is appropriate for and that set out distribution arrangements to make sure products are likely to reach consumers for whom they are suitable. TMDs must specify review triggers, which are events and circumstances that would reasonably suggest that the determination in relation to a product is no longer appropriate: see s 994B(5)(d) of the *Corporations Act 2001* (Cth).

In Report 779, although, positively, ASIC identified that some products it assessed had review triggers tied to meeting investment option objectives, ASIC observed that most of the other products included a trigger based on a negative member outcomes assessment, rather than performance. Furthermore, two products did not have any performance-related review triggers in their TMDs.

ASIC highlighted in the report that TMD review triggers should be designed to be triggered when the product is not providing appropriate investment options, which would include when options are persistently failing to meet anticipated performance outcomes. With ASIC indicating that this is part of good product governance,[17] trustees should consider the action points set out in Report 779 to assess whether their current practices sufficiently consider member outcomes in this area or whether their TMDs require uplifting.

4. Greenwashing: ASIC has two Federal Court wins

On 5 June 2024, the Federal Court found that LGSS Pty Limited, the trustee of Active Super (**Active Super**), made various false and misleading representations concerning its environmental, social and governance (**ESG**) credentials in breach of the *Australian Securities and Investments Commission Act 2001* (Cth).

Specifically, the Court found that, from 1 February 2021 to 30 June 2023, Active Super made misleading and deceptive representations in its marketing materials in relation to investments in gambling, coal mining, Russian entities and oil tar sands, which it had claimed were eliminated or restricted by ESG screens.[18]

The case is the second time that ASIC has been successful in the Federal Court in relation to greenwashing, having won its first civil penalty action against Vanguard Investments Australia Ltd on 28 March 2024.

The case serves as an important reminder to trustees making environmentally friendly, sustainable or ethical claims as to the importance of not engaging in greenwashing practices.

ASIC has made it clear that greenwashing continues to be one of its top priorities, with Deputy Chair Sarah Court stating in a media release about the Active Super decision that, "[t]his is a significant outcome which shows our commitment to taking on misleading marketing and greenwashing claims made by companies in the financial services industry. ASIC took this case because it sends a strong message to companies making sustainable investment claims that they need to reflect their true position."[19]

The Active Super matter has been listed for a further hearing at which the Court will consider the form of declaratory relief. Pecuniary penalties will also be determined by the Court at a later date.

5. Protecting super balances: headlining advice fee deductions

For 2024, ASIC announced 'misconduct resulting in the systemic erosion of superannuation balances' as one of its enforcement priorities, narrowing its focus from its enforcement priority of the previous year, which was 'misconduct in the superannuation sector' more broadly.

In May 2024, ASIC reinforced that systemic balance erosion remained a key concern in its call on trustees to revive their efforts to protect members from unscrupulous operators amongst findings of deficiencies in some trustees' oversight of advice fee deductions in report REP 781 *Review of superannuation trustee practices: Protecting members from harmful advice charges* (**Report 781**).[20]

Despite previous calls by ASIC and APRA for uplifted practices in joint letters issued in 2019 and 2021, ASIC's review of trustees' progress in addressing deficiencies in monitoring advice fee deductions found that these deficiencies continue to pose risks and cause detriment to members.[21]

With ASIC Commissioner Simone Constant warning that, "[a]s the conduct regulator for the superannuation industry, ASIC will consider acting against trustees found to have breached their obligations to members",[22] trustees should consider the information in Report 781 to assess their oversight policies, procedures and practices now, along with the 2019 and 2021 letters issued by ASIC and APRA, as is expected by ASIC,[23] to determine whether any adjustments are required.

6. Reporting: ASIC's annual insights into the reportable situations regime are imminent

The 2023-2024 financial year came to an end on 30 June 2024, meaning that the release of ASIC's annual publication on insights from the reportable situations regime is just around the corner.

The regime requires ASIC to publish information about the reports that it receives from Australian financial services licensees about self-reported matters (reportable situations) within four months after the end of the financial year.[24] This will be ASIC's third publication of the information provided under the regime.

With ASIC's second publication in October 2023 showing that little improvement had been made in key areas of concern that ASIC highlighted in its first publication,[25] it remains to be seen if these areas have been uplifted in the 2023-2024 financial year. This is particularly since ASIC had indicated it had commenced undertaking a targeted surveillance of licensees with low numbers of reportable situations, and warned that ASIC may take enforcement action where it considers there has been non-compliance with reporting requirements, to drive enhanced compliance with the regime.[26]

It also remains to be seen whether the modifications to the regime made under the *ASIC Corporations and Credit (Amendment) Instrument 2023/589* in October 2023, which amended the regime so that licensees did not have to submit notifications about certain reportable situations from 20 October 2023, have assisted licensees to comply with the regime. The instrument removed the requirement under the regime for licensees to have to report certain breaches of the misleading and deceptive conduct provisions, and the false and misleading representations provision. In addition, the instrument extended the reporting timeframe within which licensees must report a reportable situation that has underlying circumstances that are the same or substantially similar to an earlier reportable situation from 30 days to 90 days.

7. Operational and technological resilience: remaining centre stage

At the latest APRA and ASIC Superannuation CEO Roundtables on 27 and 28 March 2024, attended by 20 superannuation trustee chief executive officers (**CEOs**) and other executives, the theme of discussions was resilient and member-focused fund operations.[27] The regulators indicated that they are working collaboratively in this area, with APRA undertaking work in the area of operational resilience and ASIC ensuring member services are delivered efficiently, honestly and fairly.[28]

In the roundtable notes, APRA and ASIC emphasised that the work on operational resilience is essential for supporting robust fund operations.[29] The regulators encouraged trustees to maintain a strong focus on interactions members have with their funds in undertaking this work. From the regulators' perspectives, trustees' ability to respond in periods of stress will be bolstered by regulatory changes under the Financial Accountability Regime (**FAR**) and Prudential Standard CPS 230 Operational Risk Management (**CPS 230**), along with the current Prudential Standard CPS 234 Information Security (**CPS 234**). In addition, trustees' implementation work offers the opportunity to improve day-to-day member servicing.

To assist APRA-regulated entities to comply with CPS 230, ASIC has recently published its finalised Prudential Practice Guide CPG 230 Operational Risk Management. In the finalised standard, key changes from the draft guidance include it being shortened and more focused on how to meet expectations set by CPS 230, smaller entities have an additional 12 months to comply with certain business continuity and scenario analysis requirements, there is a "day one" checklist for entities to assist in their implementation of CPS 230 and a three-year forward plan of APRA's intended approach to supervising CPS 230 to assist industry with implementation and planning.

With the start date of CPS 230 on 1 July 2025 fast approaching, trustees should continue to focus on reviewing and adjusting as necessary their operational risk management, business continuity, material service provider arrangements and governance practices now to ensure they are adequately prepared by the commencement date.

8. FAR: Getting FAR-ther again

In previous articles, we discussed the background to and key requirements of the new FAR and its implications for superannuation trustees, insurers and banks.

As a recap, the Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023 establishing the FAR finally passed both Houses of Parliament on 5 September 2023 and received Royal Assent on 14 September 2023. The FAR has applied to the banking sector since 15 March 2024 and will apply to the superannuation and insurance sectors from 15 March 2025.

On 14 March 2024, ASIC and APRA published a cross-industry information package on the FAR to assist trustees, insurers and banks prepare for the commencement of the FAR. Final updates to the package were released on 11 July 2024.[30] The package is comprehensive and comprises a number of documents including:

- an information paper—Regulatory Guide RG 279 Financial Accountability Regime: Information for accountable entities—to assist accountable entities and their accountable persons in understanding and complying with their obligations under the FAR and provide an overview on how ASIC and APRA will use their regulatory and enforcement powers;

- an updated accountability statement guide and template to help entities subject to the FAR enhanced notification obligations to prepare accountability statements; and
- reporting form instructions to assist entities in reporting FAR breaches to ASIC and APRA.[31]

Trustees should ensure that they thoroughly review all of the documents in the information package in preparation for FAR commencement.

9. Dispute resolution: IDR reports almost due

As discussed in our previous article, with ASIC signalling its intention to continue to monitor trustees' compliance with their internal dispute resolution (**IDR**) obligations in 2024, trustees would be wise to keep this at the top of their agenda.

Although ASIC has not announced any new enforcement actions against trustees for non-compliance with their dispute resolution obligations, ASIC's commencement of civil penalty proceedings against TelstraSuper late last year serves as a reminder that, as foreshadowed by ASIC, ASIC will not hesitate to use its full suite of regulatory tools, including enforcement action, where it identifies non-compliance.[32]

Trustees are required to submit an IDR report to ASIC every six months and the two-month submission window for the period of 1 January 2024 to 30 June 2024 to ASIC is now open.[33] The submission window will close on 31 August 2024.[34]

ASIC has previously indicated that the information from IDR reports may be an invaluable resource which will give greater visibility of where consumers are experiencing problems or where harms may be occurring within firms.[35] Failure to submit a compliant report during the submission window means that trustees will be in breach of their reporting requirements set out in *ASIC Corporations (Internal Dispute Resolution Data Reporting) Instrument 2022/205* and may involve penalties.

Trustees can turn to ASIC's IDR reporting handbook and IDR data reporting template available on ASIC's website for assistance in submitting their IDR reports.

10. Insurance in super: staying alert

In our previous article, we discussed how, in March last year, ASIC released report REP 760 *Insurance in superannuation: Industry progress on delivering better outcomes for members* (**Report 760**), examining the progress made by trustees to improve their insurance in superannuation arrangements. ASIC indicated that all trustees should use the examples and action points in Report 760 to deliver better insurance outcomes for their members. This is particularly since AFCA data for the 2022-23 financial year identified a 136% rise in complaints related to insurance claims delays, suggesting to ASIC that for some trustees, there was "an urgent need to act"[36].

Trustees have several specific and general obligations to deliver good outcomes for members in relation to insurance and a failure to deliver is a contravention of the law. Whilst ASIC has not announced any recent enforcement actions relating to insurance in superannuation, since ASIC foreshadowed this to continue to be an area of its focus for 2024, and has demonstrated that, where appropriate, ASIC will use its regulatory powers to ensure trustees are complying with their obligations,[37] trustees would be wise to not let this fall off their radar in 2024.

Other areas to watch

There are other areas in focus for financial services regulators this year that will require trustees' attention for the remainder of 2024. Notably, these include the following.

- **2024 annual performance test**: Trustees must ensure accurate and timely submission of the required data for APRA's annual performance test – APRA will use the data available to it as at 15 August each year and will not include any updated data received after this date other than in exceptional circumstances.[38]
- **Scams**: With regulators continuing their focus on scams this year and the recent Federal Court decision in *Braz v Host-Plus Pty Ltd* [2023] FCA 1454 imposing strict liability on trustees in relation to rollover scams, trustees should be continuing to keep their obligations under their Australian financial services licenses, superannuation legislation, fiduciary duties as well as the FAR front of mind.
- **Financial reporting and audit requirements**: ASIC's project work in superannuation includes monitoring implementation of these requirements for superannuation funds to ensure trustees properly implement new obligations requiring them to file fund financial statements and audit reports with ASIC, as well as publish those documents on the fund's website.[39]

We will continue to publish insights on regulatory activities in these and other areas as the year progresses.

How we can help

If you need assistance with addressing any of the issues raised above or other superannuation matters, please contact our superannuation lawyers at Piper Alderman.

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[3] ASIC and APRA, above n 2, 9.
[4] ASIC and APRA, above n 1.
[5] ASIC and APRA, above n 2, 5.
[6] ASIC, 'ASIC calls on industry to improve oversight of Choice super performance and address issues' (Media Release, 21 February 2024).
[7] ASIC, 'REP 779 Superannuation choice products: What focus is there on performance?' (Report, February 2024) 1.
[8] ASIC, above n 7, 4.
[9] ASIC, above n 6.
[10] ASIC, above n 7, 11.
[11] ASIC, 'Improving superannuation member services – Dealing with death benefit claims' (Article, 1 May 2024).
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] ASIC, 'ASIC Corporate Plan 2023-27: Focus 2023-24' (Report, August 2023) 10.
[16] ASIC, above n 7, 20.
[17] Ibid.
[18] *Australian Securities and Investments Commission v LGSS Pty Ltd (No 2)* [2024] FCA 665.
[19] ASIC Deputy Chair Sarah Court in ASIC, 'Court finds Active Super made misleading ESG claims in a greenwashing action brought by ASIC' (Media Release, 5 June 2024).
[20] ASIC, 'ASIC calls on super trustees to improve gatekeeping of member savings' (Media Release, 9 May 2024).
[21] Ibid.
[22] Ibid.
[23] ASIC, 'REP 781 Review of superannuation trustee practices: Protecting members from harmful advice charges' (Report, May 2024) 7.
[24] Section 912DAD of the *Corporations Act 2001* (Cth).
[25] ASIC, 'ASIC releases second publication on insights from the reportable situations regime' (Media Release, 31 October 2023).
[26] Ibid.
[27] APRA and ASIC, 'APRA and ASIC host Superannuation CEO Roundtables – March 2024' (Notes, March 2024).
[28] Ibid.
[29] Ibid.
[30] ASIC, 'ASIC and APRA issue final rules and information for the Financial Accountability Regime' (Media Release, 11 July 2024).
[31] The information package's guidance materials are available on ASIC's website: Financial Accountability Regime.
[32] Jane Eccleston in Superfunds, 'ASIC remains focused on improving superannuation outcomes for members' (Article, 4 October 2023).
[33] ASIC, 'IDR data reporting handbook' (Handbook, 28 April 2023) 6, available on ASIC's website: Internal dispute resolution data reporting.
[34] Ibid.
[35] ASIC, 'ASIC updates the implementation timeframe for the internal dispute resolution data reporting framework' (Media Release, 5 May 2023).
[36] Jane Eccleston in Superfunds, 'ASIC remains focused on improving superannuation outcomes for members' (Article, 4 October 2023).
[37] ASIC, 'REP 760 Insurance in superannuation: Industry progress on delivering better outcomes for members' 34.
[38] APRA, 'Your Future, Your Super Frequently Asked Questions' (Webpage, updated 7 June 2024).
[39] ASIC, 'Current projects and consultations' (Webpage, updated 1 September 2022).