Article Information

Author: Lisa-Marie McKechnie, Kathy Neilson, Kerry Jacobs
Service: Banking & Finance, Corporate & Commercial, Corporate Governance, Regulatory Compliance & Investigations, Superannuation
Sector: Financial Services, Not-for-Profit

Top 10 Super Trustee Priorities for 2024

2024 brings with it a new unique set of challenges for superannuation trustees in this time of increasing regulatory scrutiny. Piper Alderman highlights the 10 top priorities for super trustee agendas this year – don't miss it!

Amid Australia's ever-expanding retirement savings pool (now currently at $3.6 trillion), emerging digital technologies in the superannuation sector and a global spotlight on environmental, social and governance issues, 2024 brings with it a new unique set of challenges for superannuation trustees. These challenges are compounded by increasingly heightened scrutiny of the superannuation sector from the Australian Securities and Investments Commission (**ASIC**) and the Australian Prudential Regulation Authority (**APRA**) as part of their role to protect Australians from financial harm, deter from misconduct and preserve the integrity of Australia's financial system. To help trustees stay on top of the current and emerging legal and regulatory challenges in the industry, here are ten suggested priorities to keep at the top of their agenda for 2024.

1. **Staying focused on retirement outcomes**

Since 1 July 2022, registrable superannuation entity (**RSE**) licensees have had an obligation to support their members in optimising retirement outcomes under the retirement income covenant – a legislative framework under which RSE licensees must assist their members in maximising retirement income, managing risks to the sustainability and stability of retirement income and having flexible access to funds during retirement. The covenant, introduced as a response to the Financial System Inquiry, is intended to improve individuals' standard of living in retirement, increase the range of retirement income products available, and empower superannuation trustees to provide members with an easier transition into retirement.[1]

However, a review conducted by APRA and ASIC in 2023 on the implementation of the covenant concluded that, although there were areas of better practice, overall, there was a pressing need for further work by RSE licensees to improve members' retirement outcomes.[2]

Furthermore, the 2023 annual performance test found that, in the choice products tested, around one in five products had significantly poor performance over eight years.[3] Around 30 per cent of products had significantly high administration fees.[4] The Albanese government has stressed that these results are subpar and that "trustees should be able to demonstrate the value they provide" by ensuring "that every dollar is being spent in the best financial interests of members."[5]

It is no surprise then, in the context of Australia's ageing population and expanding superannuation pool, that APRA and ASIC have each signalled their intent to remain sharply focused on retirement outcomes as part of their strategic and enforcement priorities for 2024.[6] Whilst ASIC intends to "take strong action against misleading conduct and poor governance in the superannuation sector, especially where misconduct erodes members' balances,"[7] APRA is focused on retirement outcomes by "providing insights about investment performance and increasing focus on retirement outcomes" and through "targeted supervision of the implementation of the retirement income covenant."[8]

The 2023 APRA and ASIC report setting out findings from their review of RSE licensees' implementation of the covenant (**Report 766**) highlighted several priority actions required by RSE licensees to enhance retirement outcomes of members.[9] These actions span across the areas of understanding members' needs, designing fit-for-purpose assistance and overseeing strategy implementation.[10] Given APRA's and ASIC's clear expectations that RSE licensees consider the findings in Report 766 and address, with urgency, any gaps in their approach,[11] a prudent trustee would be wise to take heed and act accordingly.

2. **Uplifting member service standards**

With ASIC warning the superannuation sector that it needs to lift its performance in providing member services,[12] superannuation trustees need to evaluate their current member service standards and, where necessary, improve efforts in this area to ensure to meet ASIC's expectations.

Late last year, ASIC publicly announced its commitment to addressing member services failures as one of its 2024 enforcement priorities.[13] Through ASIC's surveillance and enforcement work over recent years, it has become apparent that member services provided by superannuation funds are falling short of ASIC's expectations.[14]

ASIC's focus on addressing member service failures comes as no surprise considering the significant rise in complaints against superannuation funds in recent years. In 2022-23, superannuation complaints lodged with the Australian Financial Complaints Authority (**AFCA**) increased by 32% on the previous year.[15] Within this, there was a 136% rise in complaints about insurance claim delays, including the payment of death benefits.[16]

ASIC is undertaking an industry review on improving the delivery of superannuation fund member services, which will initially look at trustee compliance with obligations relating to the handling of death benefit claims.[17]

ASIC's enforcement activity at the tail end of 2023 serves as another example of its concerns about member service failures. In an ASIC first, ASIC brought civil penalty proceedings against TelstraSuper for alleged failures to comply with the internal dispute resolution requirements that came into effect in October 2021.

In ASIC Chairman Joe Longo's interview with the *Financial Review* on 10 January 2024, he stated that the pool of Australians' retirement savings was having a profound effect on the economy, and that every working person is "entitled to a basic level of service in connection with their accounts."[18] In the interview, he confirmed that this was "a major priority" for ASIC in the next year 2024.

The address of the Hon Stephen Jones MP, Assistant Treasurer and Minister for Financial Services, to the AFR Super and Wealth Summit 2023 also put the superannuation industry on notice with the warning that "funds must urgently lift their game" on customer service as five million Australians are now either retiring or approaching retirement.

As a response to both government and regulatory warnings of the impending crackdown on poor member service, trustees of superannuation funds should continue to invest resources into the delivery of quality member service and improvement of technological and training offerings, to ultimately raise the standard of service provided to members.

3. **Distributing products to the target market**

In 2024, ASIC will remain focused on driving compliance with the design and distribution obligations (**DDO**s) and superannuation trustees would be wise to keep this at the top of their agenda.

Jane Eccleston, Senior Executive Leader, Superannuation and Life Insurance at ASIC, recently said that:

[ASIC] will look closely at the way that superannuation trustees collect, assess and respond to data about consumer outcomes from their products. It is critical that trustees respond to poor outcomes that they identify by making the necessary changes to either their products or their product governance arrangements. [ASIC has] ongoing work in relation to reducing harm caused by poor performance and harmful distribution of choice products in particular.[19]

In the last financial year, ASIC announced that it had issued close to 80 interim stop orders to address poor design and distribution of products; this cemented DDO stop orders as ASIC's "go-to" regulatory tool.

On June 2023, ASIC announced the first interim stop order on a superannuation product under the DDOs. The order, valid for 21 days, was made in respect of a product promoted by Spaceship Capital Limited due to deficiencies in its target market determination. Following the order, Spaceship Capital Limited remediated the deficiencies, which led to ASIC revoking the interim order and no final orders were made.[20]

Looking ahead, ASIC will increase its focus on compliance with all requirements, including the 'reasonable steps' requirement – that is, the requirement that product issuers or distributors take reasonable steps that will or are reasonably likely to result in products being distributed consistent with the target market determination.[21] Consistent with its enforcement activity to date, ASIC has stated that it will take "disruptive and enforcement action" to address poor design and distribution of products, including by issuing stop orders in relation to superannuation and other financial products.[22]

Trustees should make it a priority to assess their compliance with the DDOs by conducting internal reviews (on both the design and distribution of their products, as well as how they respond to data about consumer outcomes from their products) in response to ASIC's promise of a crackdown in this area and the future threat of further DDO stop orders.

4. **Avoiding inadvertent greenwashing**

Amid increasing regulatory scrutiny that is set to intensify, superannuation trustees making environmentally friendly, sustainable or ethical claims must now, more than ever, be wary not to engage in greenwashing practices—that is, the practices of misrepresenting such claims.

Following the increase in consumer demand for, and the availability of, sustainability-related financial products in the Australian market, there has been a growing risk of greenwashing and, in turn, consumers being confused or misled.

As a result, whilst the regulatory requirements for communications about sustainability-related products are not new—such as the prohibitions against misleading and deceptive statements and conduct, as well as disclosure obligations—regulators are increasingly taking action against financial services providers over the issue of greenwashing.

In 2023, ASIC launched its first court action against alleged greenwashing conduct, commencing civil penalty proceedings against Mercer Superannuation (Australia) Ltd for allegedly making misleading statements regarding the sustainable nature of some of its superannuation products. Shortly afterwards, ASIC commenced greenwashing civil penalty proceedings against Vanguard Investments Australia and LGSS Pty Ltd.

For 2024, ASIC has again announced greenwashing and sustainable finance as one of its enforcement priorities. ASIC's focus will be on net zero statements and targets made without reasonable basis, use of terms like "carbon neutral", "clean" or "green" not founded on reasonable grounds, and use of inaccurate labelling or vague terms in sustainability-related funds.[23]

Trustees should be alert to and cognisant of any financial products or services that may fall foul of anti-greenwashing obligations. Trustees can turn to ASIC's Information Sheet 271 for information on greenwashing and questions to consider when offering or promoting sustainability-related products. Trustees should also keep an eye out for ASIC and other regulators' public communications on the issue of greenwashing, taking additional precautionary heed to ASIC's repeated warning of its impending pursuit of companies over greenwashing.

5. **Protecting superannuation balances**

In 2024, ASIC's enforcement priorities include misconduct that results in the systemic erosion of superannuation balances, meaning that superannuation trustees need to review their practices as a matter of priority and, where necessary, address any shortcomings that fail to protect superannuation balances.

The rapidly increasing cost of living in Australia has exacerbated concerns about the erosion of the superannuation base, necessitating the spotlight on further protection of retirement savings. In line with ASIC's expectations, trustees should be able to provide assurance to members that their superannuation savings are not being eroded and the products in which they are investing are designed to maximise retirement outcomes and sufficiently balance risk.[24]

The focus on protecting retirement savings from erosion is not new, with the introduction of the *Protecting Your Super Package* in the 2018-19 Budget being intended to ultimately increase Australians' superannuation balances. As part of this reform, trustees were required to cap certain fees and to no longer offer insurance by default in some circumstances.

Trustees must be alert to the circumstances where it may be able to prevent a member's superannuation balance from being eroded, including identifying and rectifying instances where members may have multiple accounts within the fund, or where there are incorrect fees (including for insurance) being charged to members. Trustees must take heed of ASIC's reverberating warning of its focus on addressing misconduct that results in the erosion of superannuation balances, lest they wish to attract the ire of the regulatory watchdog.

6. **Getting reporting right**

With ASIC's impending plans to undertake a targeted surveillance of RSE licensees with low numbers of reportable situations and to take enforcement action where appropriate,[25] superannuation trustees would do well to ensure that their comprehensive reporting requirements are being consistently met.

The reportable situations regime, introduced in 2021, requires trustees to report to ASIC all instances of potential misconduct, including significant breaches or likely significant breaches of core obligations. Considered the cornerstone of Australia's financial services regulatory structure,[26] reporting for breaches serves as the conduit to allow early detection of significant non-compliant behaviours, and to enable its timely rectification. Through early detection and intervention, which are key to minimising the breadth of harm to consumers,[27] emerging threats and imminent harm in the financial services industry may be successfully neutralised and eliminated.

The compliance and cooperation of trustees with the breach reporting regime is integral, and failure to do so may result in penalties, with the ramifications also extending to members who may suffer financial loss and damage. Early detection by trustees is crucial, as it allows increased opportunity for rectification and mitigation of the recurrence of the same breach.[28]

Trustees should take note of the guidance provided in Regulatory Guide 78, released by ASIC, which provides greater certainty as to when a reportable situation arises and clarifies operational issues.[29] Trustees should also work with ASIC (as is ASIC's intent) to implement solutions that will improve the consistency and qualify of reporting practices, ultimately ensuring the objectives of the reportable situations regime are met.

7. **Achieving and maintaining operational and technological resilience**

All superannuation trustees should ensure that adequate measures are in place to prevent, detect and respond to scam, fraud and cyber threats, especially in light of ASIC's classification of these issues as imminent and its commitment to undertake further work to monitor this.[30] Trustees should ensure the existence of robust cyber resilience and risk-management practices, amidst ASIC's promise to combat digitally-enabled misconduct through active supervision of regulated entities.[31]

APRA has similarly indicated its intention to work closely with the entities it regulates—which includes RSE licensees—to strengthen cyber protections to minimise the risk of material disruption to critical services.[32] This is part of APRA's broader focus on operational resilience in response to recommendations made by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[33] and on the back of the recent cyber incidents.

Whilst ASIC intends to take enforcement action where "there are egregious failures to mitigate the risks of cyber attacks" and "governance failures relating to cyber resilience",[34] APRA indicates that it will act on breaches of *Prudential Standard CPS 234 Information Security* (**CPS 234**) to strengthen minimum cyber standards and ensure regulated entities are remediating issues identified in CPS 234 independent assessments.[35]

Trustees should, in alignment with APRA's implementation of *Prudential Standard CPS 230 Operational Risk Management*, which will be effective from 1 July 2025, continue to identify control weaknesses, focus on business continuity and third-party risk management to ensure these risks are managed appropriately and engage with industry to improve the way non-financial risk data is collected and used to assess the effectiveness of regulated entities' operational risk management practices.

8. **Getting farther with FAR**

The long-awaited Financial Accountability Regime (**FAR**) will finally commence its maiden voyage in 2024. FAR will apply to superannuation trustees from 15 March 2025, meaning that trustees have to pay special regard to matters of operational risk to ensure operational resilience and to ensure compliance with the regime.

FAR was established as a response to the findings and recommendations of the Financial Services Royal Commission, having the key objective to strengthen the accountability requirements across the financial services industry. The intended effect of the new FAR was to improve the risk and governance culture of entities regulated by APRA, through its imposition of heightened accountability requirements. This is designed to ultimately contribute to a more transparent, better performing and more resilient financial services industry.

Superannuation trustees will need to remain vigilant and alert to the impending commencement of FAR. Failure to heed the numerous signposts warning of the impending FAR may result in a spectrum of penalties for the trustee, including disqualification, enforceable undertakings, injunctions, civil penalties and in some limited instances, criminal offences.

In addition, due to the overlapping requirements of, and application of the FAR regime, concurrently with CPS 511 *Remuneration* (**CPS 511**), superannuation trustees should adopt implementation steps from a synthesised framework which takes into account the FAR and CPS 511 requirements.

For further information on the FAR regime, please see our previous article.

9. **Reviewing dispute resolution processes**

ASIC has signalled that it will continue to monitor superannuation trustees' compliance with requirements and standards set out in RG 271 *Internal dispute resolution* (**RG 271**) in 2024.[36] Where non-compliance is identified, ASIC will consider the full range of regulatory tools that it has available, including enforcement action.[37]

This signalling follows ASIC's previous warnings that trustees needed to improve their internal dispute resolution systems, having identified through its surveillance activities that some trustees had sub-standard complaints-handling arrangements.[38] As mentioned above, AFCA complaints statistics for 2022-23 have also identified delay in insurance claims handling as being a significant issue.

In late last year, ASIC followed through on its warnings, commencing civil penalty proceedings against TelstraSuper for alleged failures to comply with internal dispute resolution requirements. ASIC alleged that TelstraSuper failed to adequately address two in five complaints within the relevant time period, and further failed to operate in an efficient, honest and fair manner.[39] The matter is ongoing, with the date for the first case management hearing yet to be scheduled as at 6 November 2023.[40]

To help ensure compliance with their internal dispute resolution obligations, trustees should review their own practices against the findings in ASIC's Report 751 Disputes and deficiencies: A review of complaints handling by superannuation trustees to determine whether uplifts are required to ensure complaints are handled adequately and promptly.

10. **Improving insurance offerings**

Lastly, superannuation trustees need to remain focused on delivering better insurance outcomes for their members, which includes following the examples and action points set out by ASIC in Report 760 *Insurance in superannuation: Industry progress on delivering better outcomes for members* (**Report 760**).

As at March 2023, around 8 million Australians with accumulation-phase superannuation accounts had some form of insurance through superannuation, with roughly 71% of those accounts with insurance having default insurance.[41] Given the scale and significance of insurance in superannuation, it comes as no surprise that addressing consumer harms in life insurance has been and continues to be a core priority for ASIC.

Report 760 provides detailed examples and action points to aid trustees in their deliverance of better insurance outcomes for their members. In Report 760, ASIC also makes it clear that, where trustees do not comply with their obligations to achieve good outcomes for members in relation to insurance, ASIC will use its regulatory powers where appropriate. With the significant 136% rise in complaints related to insurance claims delays identified by AFCA in data for the 2022-2023 financial year, as mentioned above, there is further indication that there is an urgent need for some trustees to act.[42]

[1] "Retirement Income Covenant," *Australian Government The Treasury*, https://treasury.gov.au/programs-and-initiatives-superannuation/retirement-framework.

[2] ASIC and APRA, 'Implementation of the retirement income covenant: Findings from the APRA and ASIC thematic review' (Information Report, July 2023).

[3] The Hon Stephen Jones MP Assistant Treasurer and Minister for Financial Services, 'Raising the bar on superannuation performance test update 2023' (Media Release, 16 June 2023), https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/raising-bar-superannuation-performance-test-update-2023.

[4] Ibid.

[5] Address to the AFR Super and Wealth Summit 2023 by the Hon Stephen Jones MP Assistant Treasurer and Minister for Financial Services, 31 October 2023, https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-afr-super-and-wealth-summit-2023.

[6] ASIC Deputy Chair Sarah Court, 'ASIC's 2024 enforcement priorities in the superannuation sector', keynote address to the Connexus Super Chair Forum (Speech, 1 February 2024), https://asic.gov.au/about-asic/news-centre/speeches/asic-s-2024-enforcement-priorities-in-the-superannuation-sector/.

[7] ASIC, ASIC Corporate Plan 2023-27, https://download.asic.gov.au/media/2cshqbxb/asic-corporate-plan-2023-27-focus-2023-24-published-28-august-2023.pdf.

[8] APRA, APRA Corporate Plan 2023-24, https://www.apra.gov.au/apra-corporate-plan-2023-24.

[9] ASIC and APRA, above n 2, 5-6.

[10] Ibid.

[11] Ibid.

[12] ASIC Deputy Chair Sarah Court, above n 6.

[13] Ibid.

[14] Ibid.

[15] AFCA, ‘Superannuation Complaints Annual Review 2022-23’, https://www.afca.org.au/annual-review-superannuation-complaints.

[16] Ibid.

[17] ASIC Deputy Chair Sarah Court, above n 6.

[18] Ronald Mizen, ‘ASIC to pursue riskier litigation strategy in 2024’, Australian Financial Review, (Article, 10 January 2024).

[19] Jane Eccleston in Superfunds, ‘ASIC remains focused on improving superannuation outcomes for members,’ Superfunds (Article, 4 October 2023) <https://www.superannuation.asn.au/asic-remains-focused-on-improving-superannuation-outcomes-for-members/.

[20] ASIC, ‘ASIC halts offer of Spaceship Super and Spaceship Voyager Funds’ (Media Release, 2 June 2023).

[21] Jane Eccleston in Superfunds, above n 19.

[22] ASIC, ‘ASIC Corporate Plan 2023-27: Focus 2023-24’ (Report, 28 August 2023).

[23] ASIC, ‘Red light for greenwashing’ (Article, 7 November 2023), https://asic.gov.au/about-asic/news-centre/articles/red-light-for-greenwashing/.

[24] ASIC, ‘ASIC’s 2024 enforcement priorities,’ https://asic.gov.au/about-asic/news-centre/speeches/asic-s-2024-enforcement-priorities-in-the-superannuation-sector/.

[25] See Jane Eccleston’s comments in SuperFunds, above n 19.

[26] Financial Sector Reform (Hayne Royal Commission Response) Bill 2020.

[27] Australian Securities and Investments Commission, *Report 594 Review of selected financial services groups’ compliance with the breach reporting obligation* (September 2018).

[28] Australian Securities and Investments Commission, ‘*Regulatory Guide 78: Breach reporting by AFS licensees and credit licensees*’ (April 2023).

[29] Australian Securities and Investments Commission, ‘*ASIC releases updated guidance for licensees on reportable situations*’ (Media Release, 27 April 2023).

[30] See Jane Eccleston’s comments in SuperFunds, above n 19.

[31] ASIC, ‘ASIC Corporate Plan 2023-27: Focus 2023-24’ (Report, 28 August 2023) 2.

[32] APRA, ‘APRA Corporate Plan 2023-2024’ (Report, 29 August 2023).

[33] Ibid.

[34] ASIC, ‘ASIC Corporate Plan 2023-27: Focus 2023-24’ (Report, 28 August 2023) 10.

[35] APRA, ‘APRA Corporate Plan 2023-2024’ (Report, 29 August 2023).

[36] Jane Eccleston in Superfunds, above n 19.

[37] Ibid.

[38] ASIC, ‘Superannuation trustees on notice to uplift complaints handling’ (Media Release, 9 December 2022).

[39] ASIC, ‘ASIC takes civil penalty action against Telstra Super in Australian-first case’, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-295mr-asic-takes-civil-penalty-action-against-telstra-super-in-australian-first-case/.

[40] Ibid.

[41] ASIC, ‘Report 760: Insurance in superannuation: Industry progress on delivering better outcomes for members’ (Report, March 2023), https://download.asic.gov.au/media/smpp02v3/rep760-published-22-march-2023.pdf.

[42] AFCA, above n 15. Also see Jane Eccleston’s comments in SuperFunds, above n 19.