

Super Update

November 2023



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Draft bills for reduction in earnings tax concession for large balances

Treasury released two draft bills for consultation on 3 October which will implement the government's proposed reduction in tax concessions for individuals with more than \$3 million in super.

There have been no changes to the high level design of the measure — it will continue to apply to individuals with a total superannuation balance at the end of the year greater than \$3 million, the threshold will not be indexed, and the earnings will be estimated in the same manner as originally proposed, which will capture unrealised gains. There has also been no change to the proposed commencement date of 1 July 2025.

Negative earnings will be able to be carried forward, and refunds of tax will be available to departing temporary residents who receive a Departing Australia Superannuation Payment, because the tax concessions they received on their super are already recovered on departure from Australia under existing rules. But no refunds will be applicable for any period when an individual is an Australian resident but not a temporary resident, and there will be no refunds (or offsets against other tax liabilities) for an individual who withdraws all of their super from the system at a time when they have negative earnings being carried forward.

As expected, the mechanism for the collection of the additional tax has been modelled on that of the existing Division 293 tax, including the use of a deferred debt account for any tax referable to a defined benefit interest. Individuals with both defined benefit and accumulation interests will only have the proportion of the tax referable to the defined benefit portion deferred.

The tax itself will be referred to as “Division 296 tax” after the section of the 1997 Tax Act in which the main provisions will be located. This means that some affected individuals could receive tax assessments (and/or have deferred debt accounts) for both Division 293 tax and the new Division 296 tax, a distinction which is unlikely to be meaningful to most people outside the superannuation industry.

The draft legislation does not include any details on how defined benefit interests, including defined benefit pensions, are to be valued for inclusion in an individual’s total superannuation balance (TSB). These details will be in regulations that are yet to be released. In general, however, TSB will no longer be calculated using an individual’s transfer balance account. Instead, a new definition of TSB will be included in the tax legislation, which will be used for all purposes (not just the new Division 296 tax) once the change commences. TSB will generally be equal to the total withdrawal value of each of the individual’s superannuation interests (i.e. the value as if the individual had the right to cause the interest to cease and they voluntarily did so). However, regulations will be able to provide for a different value.

The draft legislation includes lists of items that will be allowed for in the calculation of an individual’s superannuation (referred to as an “adjusted TSB”) at the end of each year. Regulations will also enable additional items to be allowed for as needed.

There will be exemptions from the payment of the tax for child recipients of income stream benefits at the end of the income year, individuals who have received a structured settlement contribution as a payment for a personal injury in the current or any previous year, and for people who have died before the last day of the income year.

Virtually all of the detail on how the new tax will apply to defined benefits will be in the regulations that have not yet been released. This includes how defined benefits (including defined benefit pensions) will be valued for the purpose of TSB, how employer contributions and insurance proceeds will be measured for adjusted TSB purposes, and how “insurance” payments will be determined for those funds that are still permitted to self-insure defined benefit members’ death and TPD benefits. We would encourage the government to ensure that sufficient time is provided for the draft regulations to be reviewed by industry, given the absence of any detail on these issues released to date.

Treasury consultation on payday super

Treasury released a consultation paper on 9 October on the government’s proposal to align the payment of super contributions with that of employees’ salaries and wages — a measure now called “Securing Australians’ Superannuation”.

The measures proposed include:

- legislating for SG contributions to be paid at the same time that salaries/wages are paid
- corresponding changes to the calculation of SG charge and new penalties to encourage compliance, with the final design of the new compliance model to be informed by the outcomes of the consultation
- additional investment to support the ATO’s data matching capabilities, along with two new performance measures for the ATO.

There are two models that could be used for payday super:

- “employer payment” — where SG contributions must be paid on the day that salaries/wages are paid
- “due date” — where contributions must be received by the super fund within a certain number of days following payday.

Draft updates to member outcomes prudential materials

On 21 September APRA released a discussion paper on proposed changes to prudential standard SPS 515 Strategic Planning and Member Outcomes and supporting prudential practice guides SPG 515 and SPG 516. This follows the assessment of feedback submitted in response to two earlier discussion papers on member outcomes (released in August 2022) and transfer planning (released in November 2022). The proposed updates cover a broad range of areas under the headings of strategic and transfer planning. The materials have also been updated to incorporate obligations and guidance relating to the retirement income covenant.

APRA has clarified that the strategic objectives set by the board must be specific and must support achieving outcomes for members. APRA expects that in most cases they would be readily measurable. If an objective is not able to be meaningfully measured, a prudent trustee would set clear qualitative criteria to determine if it has been achieved.

Financial projections in the business plan will need to demonstrate the ongoing financial soundness of the trustee's business operations, including under different potential scenarios, for at least the three year term of the business plan. Under the draft guidance, trustees who have products that failed the performance test will be expected to review their projections and underlying assumptions for the potential impacts of the failure on various factors including membership flows, fund expenses and projected fees.

There are new requirements around reserve management that will be raised from guidance in updated SPS 515. The trustee's reserving strategy will have to cover, for every reserve held, how it is managed, including an appropriate target amount for the reserve and how and over what period it will be established and replenished equitably having regard to different cohorts of members and intergenerational issues. Trustees will also be required to have a capital management plan governing the use of resources held at the trustee level to ensure the trustee remains in a sound financial position.

In either case "payday" will need to be defined. The government proposes to define it as every time a payment with an Ordinary Time Earnings component is made to an employee. This definition would capture payments such as termination payments which can occur outside the regular payday cycle.

The intention of the changes to the SG compliance model is to ensure that employees who receive contributions late are always compensated for lost earnings, but that employers are not unduly penalised for circumstances outside their control or small administrative errors. The paper notes that the due date model would provide incentives for employers, funds and intermediaries to ensure that SG contributions reach an employee's super account as close as possible to payday.

There is discussion on changes that will be required to fund reporting to the ATO. The paper also identifies that the current quarterly due dates for SG (which will be abolished under payday super) mean that June quarter SG payments sometimes count towards the member's concessional contribution cap in the financial year following the end of the quarter. As a result, transitional relief may be needed for contributions in the first year (2026-27) to ensure that employees don't inadvertently exceed either the contributions cap or the Division 293 tax threshold.

The paper asserts that the administrative burden of stapling has resulted in some employers seeking to avoid stapling by requiring that new employees actively choose a fund during onboarding, which has led to an increase in onboarding software that presents employees with funds that have paid to be advertised. Several options are discussed to deal with this, including a new digital ATO service to confirm the right super fund details and/or a ban on advertising super products during onboarding.

Finally, the paper notes that a new maximum contribution base will be needed, as there will be different timing frequencies for SG payment depending on when employers pay salary/wages — weekly, fortnightly or monthly. It also notes that changes will be needed to how benefit certificates are determined for defined benefit members.

The changes are proposed to commence from 1 July 2026, to allow time for system changes to be implemented by employers, super funds, intermediaries such as payroll software providers and the ATO. Consultation on the proposed changes closed on 3 November 2023.

There are enhanced expenditure and fee charging requirements in the draft prudential standard. When making expenditure decisions, trustees will need to be able to justify the purpose of the expenditure, including how it will support the trustee achieving its strategic objectives and member outcomes. Where the expenditure results in non-financial benefits for members or a benefit not directed towards promoting their financial interests, trustees will have to be able to demonstrate how it remains consistent with all legal duties and obligations. Expanded guidance suggests that robust governance and oversight of expenditure could take the form of an expenditure management framework with a defined risk assessment process for expenditure decisions. Trustees will also have to be able to demonstrate, for any fee charged to members, that the charging complies with all legal duties and obligations and is appropriate and proportionate having regard to, among other things, comparable fees charged in relation to comparable funds and the arm's length features and services that the fee relates to.

There have been some changes to APRA's original proposals on transfer planning. All trustees will need to be able to demonstrate that they regularly consider, and where necessary, plan for a transfer of members as a critical component of their business planning cycle. This will include setting triggers (which must include failing or expecting to fail the performance test) to identify when actions must be taken to improve outcomes for members or begin to prepare for a transfer of members. APRA considers that some preparation by trustees during the ordinary course of business is necessary to support the ability to act quickly when expected outcomes are not being met. But a formal action plan will not be required until a trigger is breached. APRA has also clarified that its proposed requirements for MySuper trustees to be prepared for a transfer out of MySuper assets will only be triggered where APRA notifies a trustee that its MySuper authorisation may be cancelled.

Finally, there are some other clarifications in the discussion paper. Key among these, some submissions had requested that APRA's circular on the sole purpose test be reviewed to provide greater certainty about those activities that are or are not consistent with the sole purpose test. However, APRA has decided to retire the circular and not issue new guidance on the test. SPG 227 Successor Fund Transfers and Windups will also be retired when the updated materials are finalised. Further, draft SPG 516 clarifies that APRA expects that a trustee would generally endeavour to undertake its outcomes assessment within two months of publication of the most recent APRA Heatmaps, and immediately prior to the business performance review, which would then inform the business planning process. APRA has also clarified the interaction between the transfer planning requirements in SPS 515 (which apply at the fund level) and CPS 190 Recovery and Exit Planning (which applies at the trustee level). In APRA's view it would be open to trustees to develop and maintain a single approach that

meets the requirements of both prudential standards, given the material impact that the ongoing viability of the trustee could have on its ability to sustain the funds under trusteeship.

Consultation on the draft materials closes on 21 December 2023. APRA intends to finalise the materials in the first half of 2024 ahead of commencement on 1 January 2025.

We expect most trustees would generally be supportive of APRA's proposed changes. We would encourage APRA to ensure that its Heatmaps are published in a timely manner to facilitate their use by trustees in outcomes assessments.

News in brief

Draft legislation for an objective for superannuation released

On 1 September Treasury released for consultation draft legislation for the objective for superannuation.

There were no changes to the objective articulated in the consultation paper released in February. The proposed objective remains to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way.

The draft explanatory material includes explanations of the key terms to be used in the definition. It also includes discussion of some considerations that policy makers should take into account when making changes to the superannuation system.

The Superannuation Objective Bill will require any bill or proposed regulation relating to superannuation to be accompanied by a statement of compatibility that includes an assessment of whether the bill or regulation is compatible with the objective. However, there will be a number of exceptions to this requirement, including:

- minor or technical matters such as consequential amendments, repeal of spent legislation or where new regulations are being made to replace existing regulations with no substantial change in policy
- legislative instruments that are not regulations such as prudential standards
- "excepted matters", which will include matters relating to a public sector scheme or the funds established under various Commonwealth legislation such as the Military Superannuation and Benefits Act or the Judges' Pension Act, as well as the allocation of a superannuation interest under the Family Law Act between the parties of a marriage or de facto relationship.

The Bill also clarifies that the objective will not affect the operation of any other Commonwealth law (other than the Superannuation (Objective) Act or Regulations), any fund’s governing rules or any power, duty, right or liability of any trustee acting in its capacity as a trustee. Consultation on the draft legislation closed on 29 September.

2023 Performance test results released

APRA released the results of the 2023 performance test on 31 August. The test was expanded to trustee-directed products for the first time this year. Only one MySuper product failed the test this year (the third year in a row that this product had failed) along with 96 trustee directed products — 76 out of 305 platform products and 20 out of 500 non-platform products. APRA noted that 75% of the failed trustee directed products were concentrated in products offered by four trustees. The sole MySuper product that failed has been closed to new members since 2022 and APRA reported that the trustee has plans to cease this product.

APRA warnings on operational risk management

In late August APRA released the transcript of a speech on operational risk management that included several warnings to regulated entities including super fund trustees.

APRA had observed a long period of insufficient investment in cyber security technology and in personnel with the necessary skills and experience, especially among smaller entities. APRA stated in the speech that it was rapidly losing patience at the slow pace of cyber uplift, and three years after the implementation of CPS 234 regulated entities should expect APRA to take strong action where an entity is found to be significantly wanting in its compliance with APRA’s information security requirements.

On the related topic of new operational risk prudential standard CPS 230, APRA noted that the two year period to the commencement date of 1 July 2025 was granted following appeals from industry for more time to prepare. Over 2024 APRA will be assessing entities’ preparations for the new requirements. APRA expects to see boards ensuring robust governance over the necessary change management process, including detailed gap analysis against the new requirements. Entities should have identified critical operations and material service providers by the middle of 2024 and be well positioned to set tolerance levels by the end of 2024. But APRA considers that perhaps the most significant change introduced by the new standard is the requirement for an end-to-end view of operational risk. Entities will no longer need to simply be aware of their own internal

operational vulnerabilities and have plans to mitigate them. From 1 July 2025, they must have the same level of understanding of their most critical third-party and fourth-party service providers.

APRA superannuation statistical publications release

Highlights of APRA’s June 2023 Quarterly Superannuation Performance publication, issued on 22 August 2023, included the following:

	Jun 2022 (\$ billion)	Jun 2023 (\$ billion)	Change (%)
Total Superannuation assets	3,290.7	3,541.4	+7.6
Total APRA-regulated assets	2,243.6	2,452.5	+9.3
Of which: total assets in MySuper products	881.1	996.0	+13.0
Total self-managed super fund assets	843.7	876.4	+3.9

APRA noted that the growth in superannuation over the past year was driven by strong contribution inflows, reflecting higher employment growth, higher wage inflation and strong investment market returns. Contributions increased by 12.9% to \$165.2 billion in the year ending in June 2023. Benefit payments reached \$102.1 billion (increasing by 19.6% over the year). But net contribution flows fell by 4.5% compared to flows in the year to June 2023.

APRA’s MySuper statistical publication for the June 2023 quarter was also released on 22 August. This report contains data relating to product profile, asset allocation targets and ranges, investment performance and net returns, as well as fees and costs. Statistics are presented at an individual product or lifecycle stage level.

The June 2023 editions of APRA’s two new series quarterly publications, the Quarterly Superannuation Product Statistics and the Quarterly Superannuation Industry publications, were released on 5 October. The first of these includes, for the first time, data on fees and costs, investment performance, investment strategy and asset allocation for trustee directed products available through platforms; activity fees disclosed; and additional data on MySuper administration fees. APRA expects to expand both publications on a progressive basis.

Legislative update

Parliament rose on 14 September for the spring break and sat for a single week in October before resuming again in November. A number of bills relating to superannuation were passed by parliament before the break, including:

- the Financial Accountability Regime Act 2023, which introduces the new accountability regime (FAR) for the banking, insurance and superannuation industries, received Royal Assent on 14 September
- the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023 contains some minor and technical amendments, including updates to modernise communication methods available to individuals, businesses and regulators when interacting with each other, and received Royal Assent on 14 September
- the Treasury Laws Amendment (2023 Measures No. 3) Act 2023 contains the changes needed to create an experience pathway for financial advisers and received Royal Assent on 20 September

- the Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023 also received Royal Assent on 20 September. It contains a number of changes arising from the Australian Law Reform Commission's ongoing review of the legislative framework for corporations and financial services regulation.

However, the Treasury Laws Amendment (2023 Measures No. 1) Bill 2023, an omnibus bill which will, among other things, amend the tax legislation to align the income tax treatment of off-market share buybacks by listed public companies with on-market share buybacks, and empower the Australian Accounting Standards Board and Auditing and Assurance Standards Board to develop sustainability standards and auditing and assurance standards for sustainability purposes, is not yet law. The Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023, which includes the government's proposed changes to the non-arm's length expense rules for SMSFs and corrections to AFCA's legislation to allow it to hear certain superannuation complaints, is also yet to be passed.

A guide to key changes

The dates that follow were correct as at the time of publication of this edition of Super Update.

Date	Change
1 Jan 2024	Commencement of section 29QC of the SIS Act.
1 Jan 2024	Commencement of CPS 900 Resolution Planning.
1 Jan 2024	Commencement of CPS 511 Remuneration for super fund trustees that are not significant financial institutions, and commencement of uplifted remuneration disclosure requirements for all trustees (first financial year starting on/after this date).
1 Jul 2024	Start date for website disclosure of certain information relating to employer-sponsored sub-plans previously subject to ASIC relief.
1 Jul 2024	SG to increase to 11.5%.
1 Jan 2025	Commencement of CPS 190 Recovery and Exit Planning for superannuation.
1 Jan 2025	Proposed commencement of revised version of SPS 515 Strategic Planning and Member Outcomes.
1 Jan 2025	Proposed commencement of revised version of SPS 114 Operational Risk Financial Requirement.
15 Mar 2025	Financial Accountability Regime commences for super fund trustees.
1 Jul 2025	SG to increase to 12.0%.
1 Jul 2025	Commencement of CPS 230 Operational Risk Management.
1 Oct 2027	Start date for publication of product dashboard for certain Choice products.
1 Oct 2027	MySuper product dashboard to be included in periodic statements.

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