QMV LEGAL

LEGAL & REGULATORY UPDATE

PENSIONS AND SUPERANNUATION

INSIDE THIS EDITION

SUBSCRIBE

Gabriela Pirana
Senior Associate

IN BRIEF

Parliament focused its attention on superannuation with the introduction of the ***Your Future, Your Super Bill*** *and legislation looking to extend the temporary relief given to companies to facilitate* ***virtual execution of documents and meetings****.*

We also saw the passage of ***advice fees in superannuation*** *and* ***closure of eligible rollover funds*** *legislation, which included important amendments relating to the ability of* ***trustees to voluntarily transfer amounts to the ATO****.*

A number of consultations were also announced with feedback sought on the ***scheduled review of AFCA*** *and draft revisions to the vulnerable member provisions in the* ***Insurance in Super Voluntary Code of Practice****. The consultation on* ***Derivative Transaction Rules*** *was also extended.*

MAJOR UPDATES

Commonwealth Parliament

28 February 2021

Parliamentary Business

LINK TO DETAILS

Commonwealth Parliament sat between 2 February and 25 February 2021 and passed the following superannuation related legislation, which is awaiting Royal Assent:

- *Financial Sector Reform (Hayne Royal Commission Response No 2) Bill 2020*
- *Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020* (amended by the Senate)

The following bills were also introduced to the House of Representatives:

- *Treasury Laws Amendment (Your Future, Your Super) Bill 2021*
- *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021*

We have provided a more detailed summary of the above legislation in the following pages. The following superannuation related bills remain before Parliament:

- *Treasury Laws Amendment (More Flexible Superannuation) Bill 2020*
- *Treasury Laws Amendment (2020 Measures No. 4) Bill 2020*
- *Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020*

Parliament is next scheduled to sit on 15 March 2021.

Superannuation trustees should ensure they are prepared for any changes required as a result of this legislation, noting the passed bills related to financial advice in super and voluntary transfer of member account to the ATO, and the significant reforms proposed by the Your Future, Your Super bill.

Advice fees in super

25 February 2021
Royal assent

LINK TO DETAILS

Parliament passed the *Financial Sector Reform (Hayne Royal Commission Response No 2) Bill 2020* and has received Royal Assent.

The Bill implements several Hayne Royal Commission recommendations through amendments that seek to:

- Improve disclosure requirements where a lack of independence is observed in providing personal advice to a retail client;
- Require licensees that receive fees under ongoing fee arrangements to provide further documentation detailing the arrangement to the client and obtain written consent before fees can be deducted from the client's account;
- Remove the ability to deduct ongoing financial product advice fees from a MySuper product; and
- Provide that advice fees can only be charged to a member where certain conditions are satisfied.

The measures are due to commence from 1 July 2021.

> *Superannuation trustees should ensure that consideration is given to identifying and terminating any ongoing arrangements which may be in place for deduction of advice fees from MySuper accounts. Arrangements should also be made to ensure compliance with the written consent requirements where such fees are deducted from non-MySuper accounts.*

Your Future, Your Super

17 February 2021
Bill introduced

LINK TO DETAILS

Following consultation on draft legislation late last year, the government introduced *Treasury Laws Amendment (Your Future, Your Super) Bill 2021* into Parliament to legislate the Your Future Your Super reforms announced in the 2020-21 Budget. The Bill was referred to the Senate Economics Legislation Committee on 18 February 2021 with a report due by 22 April 2021.

Schedules 1 and 2 of the Bill, which prescribe changes to Stapling and Annual Performance Test provisions, contain only minor changes to the draft legislation. However, the provisions relating to "best financial interests" in Schedule 3 of the Bill contain more significant changes, specifically with respect to:

- proposed provisions affecting director liability and obligations with respect to non-compliance with operating standards,
- ensuring that the trustee does not make payments or investments prescribed by the regulations, and
- reversal of the evidential burden as related to an alleged breach of the best financial interest duty.

Additionally, Schedule 3 proposes to amend the Portfolio Holdings Disclosure rules to remove the current exemption that enables trustees to not disclose up to 5% of investment items of a commercially sensitive nature.

See our recent article for further detail regarding the Bill and the key changes.

> *Superannuation trustees should prioritise a review and impact assessment given the proposed commencement of 1 July 2021 and the significance of the reforms. The proposed changes could have a broad impact on strategy, investments, administration, and decision record keeping.*

Electronic AGM and Document Execution

17 February 2021
Bill introduced

LINK TO DETAILS

The government introduced *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* into Parliament. Schedule 1 of the Bill seeks to extend, until 15 September 2021, the temporary relief given to companies to use technology to hold virtual meetings, distribute meeting related materials and validly execute documents.

The temporary relief was originally introduced by the Government in response to the Coronavirus pandemic and is due to sunset 21 March 2021. The government has signalled its intention to make this relief permanent beyond September as part of its Digital Business Plan and has consulted on draft legislation looking to make permanent changes to the *Corporations Act 2001* in relation to both virtual meetings and electronic document execution.

The new rules allow:

- shareholder meetings (including Annual General Meetings, directors meetings and members of registered schemes meetings) to be held virtually, provided that the members as a whole have a reasonable opportunity to participate;
- documents relating to the meetings to be provided and signed electronically;
- meeting minutes to be kept electronically;
- documents executed without a company seal to be signed electronically and the signatories do not need to sign the same copy;
- documents executed with a seal to be executed electronically and the witness may use alternative technology to observe the fixing of the seal; and
- a person to opt-in to receive hard copies of documents relating to a meeting or resolution.

The Bill has been referred to the Senate Economics Legislation Committee for inquiry and report by 12 March 2021.

Superannuation trustees should familiarise themselves with the changes and ensure mechanisms are in place to facilitate the opt in to receive hard copies of documentation. There may also be opportunities to streamline the contract execution policies and procedures.

Family Law Court Reform

18 February 2021
Bills passed

LINK TO DETAILS

Parliament passed the *Federal Circuit and Family Court of Australia Bill 2019* and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019*.

Together, these Bills create a new single court structure, the Federal Circuit and Family Court (FCFC), combining the existing Federal Circuit Court and Family Court of Australia.

This change creates a single point of entry for families and apply a consistent set of rules, processes and procedures for the Court.

Superannuation trustees should consider the impact of this change in relation to the administration of Family Law Splits and the required documentation as provided by the new Court.

Reuniting More Super and ERFs

25 February 2021
Bill passed subject to amendment

LINK TO DETAILS

The Senate passed *Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020* subject to amendment and the House made the Senate requested amendment. Schedule 1 of the Bill seeks to facilitate the closure of all Eligible Rollover Funds (ERF) by requiring an ERF to:

- transfer member balances of less than $6,000 to the ATO by 30 June 2021, and
- transfer all remaining balances by 30 June 2022.

Schedule 2, added via a Senate amendment, proposes to enable a superannuation provider to voluntarily transfer an amount to the ATO where it considers it to be in the best interests of the member. These voluntary transfers will be included in the amounts that the ATO can proactively reunite with an active superannuation account or person directly as appropriate.

Superannuation trustees should ensure they are prepared for the formal passing of this legislation and to ensure internal processes are updated to reflect the closure of ERFs. Trustees may also wish to review their business rules, processes and disclosure pertaining to transfers to ERFs and ATO transfers, with consideration given to the circumstances in which a Trustee chooses to voluntarily transfer amounts to the ATO.

Insurance and Claims Handling

18 February 2021
Regulations made

LINK TO DETAILS

The government made *Financial Sector Reform (Hayne Royal Commission Response) (2021 Measures No. 1) Regulations 2021*. The Regulations amend the *Corporations Regulations* to make handling an insurance claim a 'financial service' under the *Corporations Act*.

Although superannuation trustees are exempt from this change, this may be of relevance to superannuation trustees as ASIC is likely to take these reforms into consideration when determining how claims handling obligations are to be defined for trustees providing a 'superannuation trustee service'.

ASIC have also noted that updates to existing relief instruments and regulatory guidance is under review in lieu of these changes and will be communicated to trustees in due course.

Superannuation trustees should review internal insurance and claims handling services and with consideration given to the Draft Information Sheet released by ASIC regarding their expectations in relation to these services.

TECHNICAL CHANGES AND UPDATES

NSW Property Tax

25 February 2021
Proposal

LINK TO DETAILS

New South Wales is consulting on a change to its property tax system that would give people the choice to avoid the upfront cost of stamp duty and instead pay a much smaller annual property tax. The proposed policy framework includes the following:

- An annual property tax on land value consisting of a fixed amount plus a rate applied to unimproved land value.
- A choice between paying property tax at the time of purchase.
- No change to current property ownership where duty already paid.
- Lower rates for residential owner-occupied and primary product as compared to residential investment and commercial properties.
- Price thresholds would limit the number of properties initially eligible.

Superannuation trustees should remain apprised of the reforms and monitor any impact on any new property investments in New South Wales.

Single Touch Payroll

15 February 2021
Determination

LINK TO DETAILS

The ATO has made *Taxation Administration – Single Touch Payroll – Amounts to be Notified Determination 2021*. Employers must notify the ATO of certain amounts that relate to payments in respect of their employees using an approved form under the Single Touch Payroll (STP) regime. This instrument prescribes amounts which the ATO may choose to include as required amounts when future changes are made to the approved form.

This follows amendments to the way that superannuation guarantee (SG) contributions are required to be calculated and reported in relation to amounts salary sacrificed into superannuation, as well as the simplification of reporting under social security law by enabling voluntary reporting by employers of amounts relating to a payee's child support obligations to the ATO. The current approved form does not cater for these changes. The new reporting requirements commence from 1 January 2022.

Superannuation trustees should ensure their employer servicing teams are aware of the changes to the STP reporting requirements.

Derivative Transaction Rules

February 2021
Consultation Extension

LINK TO DETAILS

ASIC has extended the consultation deadline from 1 March 2021 to 15 March 2021 for its Consultation Paper 334 *Proposed changes to simplify the ASIC Derivative Transaction Rules (Reporting)*. The consultation paper sets out ASIC's first proposal to amend *the ASIC Derivative Transaction Rules (Reporting) 2013* made under s901A of the *Corporations Act*.

The paper includes the following topics of consultation:

- the unique transaction identifier; the unique product identifier;
- the critical data elements; the legal entity identifier;
- the scope of reportable transactions and reporting entities; and
- alternative reporting and delegated reporting.

This is the first of two consultation papers to be released before amended rules are made and the regulatory guide amended.

Superannuation trustees should have their investment reporting specialists review the paper and consider responding by the revised deadline.

GUIDANCE AND POLICY

AFCA Review

19 February 2021
Consultation

LINK TO DETAILS

The government has released the terms of reference for a review of the *Australian Financial Complaints Authority* (AFCA).

In accordance with the legislation underpinning the establishment of AFCA, an independent review of AFCA is required to be performed as soon as practicable after 18 months of AFCA's operation. This review was delayed as a result of the Coronavirus pandemic.

The review will consider whether AFCA has delivered against its statutory objectives by resolving complaints in a way that is fair, efficient, timely and independent. AFCA's internal review mechanism, the Independent Assessor, also forms part of the review.

Treasury will undertake this review and report to the Minister for Superannuation, Financial Services and the Digital Economy by no later than 30 June 2021.

Feedback provided by consumers, small businesses and financial firms is requested. Submissions are due by Friday 26 March 2021.

Superannuation trustees should review the terms of reference and consider providing a response. AFCA has specifically requested case studies and examples to be provided where possible.

Insurance in Super – Vulnerable Members

19 February 2021
Consultation

LINK TO DETAILS

Submissions are requested regarding draft revisions to the vulnerable member provisions within the Insurance in Super Voluntary Code of Practice (ISVCoP).

In 2020, the ISVCoP owners (AIST, ASFA and FSC) initiated a review into the vulnerable member provisions of the ISVCoP. The code owners convened a working group, comprising of superannuation funds, insurers, and administrators to assess whether the Code was appropriately responding to the needs of vulnerable members.

The working group has made several revisions to the vulnerable members section of the Code and is seeking feedback from interested stakeholders on these amendments.

The amendments include, but are not limited to:

- Inclusion of 'family violence' and 'isolation' as potential indicators for identifying a vulnerable member;
- Agreement to make policies relating to vulnerable members publicly available;
- Increased training and access to tools to support staff in identifying and assisting vulnerable members; and
- Improved access to interpretation services.

Feedback is requested by 29 March 2021.

Superannuation trustees should review the proposed amendments and consider whether they wish to provide a response to the consultation.

APRA Year in Review

5 February 2021
Review

LINK TO DETAILS

APRA released its 2020 Year in Review, outlining how APRA went about fulfilling its mandate as a forward-looking safety regulator for Australia's financial system. The review provides APRA's view on the financial environment and details its key activities for the year across the banking, insurance and superannuation industries.

Of particular focus was the response to the Coronavirus pandemic and specifically notes the following superannuation-related impacts:

- the introduction of an expanded Early Release Scheme (ERS) and consequent liquidity pressures;
- a significant increase in member enquiries whilst trustees managed the transition of staff to working from home; and
- new data collection and reporting processes to support the ERS.

Additional superannuation-related events were also noted:

- the introduction of the MySuper Product Heatmap;
- new Prudential Standard SPS 515 Strategy Planning and Member Outcomes and associated Business Performance Review; and
- a review into unlisted asset valuation by trustees.

The review is conducted in alignment with the strategic objectives outlined in its Corporate Plan and contains a range of metrics across the APRA-regulated industries, including analysis of industry composition, profitability and financial strength.

The document supplements APRA's Annual Report and Financial Statements which are submitted to the Australian Government after the end of each financial year (to June 30).

Superannuation trustees should review APRA's release to remain apprised of the state of the industry and APRA's initiatives and supervision activities.

ASIC Immunity Policy

24 February 2021
Policy

LINK TO DETAILS

ASIC released an immunity policy for certain contraventions of the *Corporations Act*, which includes serious offences such as market manipulation, insider trading and dishonest conduct in the course of carrying on a financial services business. Applications for immunity are only available to individuals, not corporations.

Under the policy, ASIC can grant immunity from civil penalty or criminal proceedings to an individual who:

- thinks they may have contravened, with at least one other person, a provision in Part 7.10 of the *Corporations Act*;
- wishes to apply for immunity from civil penalty or criminal proceedings; and
- intends to cooperate with ASIC in relation to the investigation and any court proceedings regarding the contravention.

Under the policy, immunity will only be available to the first individual who satisfies the immunity criteria and reports the misconduct to ASIC prior to commencement of an investigation into the conduct.

ASIC will review its immunity policy at least every two years.

Superannuation trustees should review any relevant policies (including whistleblower policy) and compliance management framework, and any relevant training to accommodate this ASIC policy.

Export Industry Investment

17 February 2021
Inquiry and Report

LINK TO DETAILS

The Joint Standing Committee on Trade and Investment Growth commenced an inquiry into the prudential regulation of investment in Australia's export industries.

The Committee announced the inquiry's terms of reference to examine the investment decisions of major financial institutions, including banks and superannuation funds, as well as the advice and guidance provided by financial regulators.

The inquiry appears to be directed at the role of regulatory guidance in relation to ESG risk management and its influence on levels of investment in the Australian coal and mining industry by the financial services sector, including superannuation funds.

The Committee is seeking submissions by interested parties by 31 March 2021.

Superannuation trustees should consider whether their investment teams wish to make a submission to the enquiry.

CASE LAW

General vs Personal Advice

January 2020
High Court Decision

LINK TO DETAILS

The High Court dismissed Westpac's appeal in *Westpac Securities Administration Ltd v ASIC* [2021] HCA 3, confirming that Westpac breached financial services laws by giving members financial product advice that was personal advice.

Specifically, the High Court confirmed that section 766B(3)(b) of the *Corporations Act*:

- poses the question of "whether a reasonable person might expect that Westpac had in fact considered one or more of the member's objectives, financial situation and needs and not whether the member might expect Westpac should have considered these circumstances;
- "considered" is equivalent to "took account of" and does not require "an active and comprehensive process of evaluation; and
- applies "to a situation in which the issue for decision by the client is focused upon one aspect of his or her financial affairs."

Superannuation trustees should review current campaigns and call centre scripts to ensure that personal advice is not being provided inappropriately.

ABOUT QMV LEGAL

QMV Legal is focused on providing pragmatic and expert legal advice which considers both the **nuance of superannuation law** and the commercial and operational objectives of superannuation trustees and providers.

Being **closer to the business** operations and technology of running a superannuation fund provides QMV Legal with a unique insight into the legal issues faced by superannuation funds.

LEARN MORE ABOUT QMV LEGAL

SUBSCRIBE TO QMV LEGAL & REGULATORY UPDATES

- SUPERANNUATION & FINANCIAL SERVICES LAW
- PRIVACY & DATA REGULATION
- INFORMATION TECHNOLOGY & ADMINISTRATION SERVICES
- REGULATORY CHANGE & POLICY
- SUCCESSOR FUND TRANSFERS
- MANAGED INVESTMENTS & ESG

LEGAL EXPERTS ON SUBSCRIPTION

QMV Legal provides an innovative legal and regulatory **subscription service for superannuation trustees** which includes pro-active, efficient, and client specific legal and regulatory change advice.

CONTACT US

If you have any questions or need assistance, you can contact us directly via the details below:

David Reckenberg
LLB (Hons), B.Ec
Managing Partner
0411 265 284
dreckenberg@qmvsolutions.com

Jonathan Steffanoni
JD, Dip.FS, FASFA
Partner
0434 835 966
jsteffanoni@qmvsolutions.com

Gabriela Pirana
JD, BSc.
Senior Associate
0450 814 596
gpirana@qmvsolutions.com

Jessica Pomeroy
Senior Regulatory Consultant
0400 708 447
jpomeroy@qmvsolutions.com