

# LEGAL & REGULATORY UPDATE

## PENSIONS AND SUPERANNUATION

### INSIDE THIS EDITION

- Your super, your choice
- Early release scheme extension
- Pandemic related relief extensions
- Legislative framework review
- SCT to AFCA transition




**Jonathan Steffanoni**  
Partner, QMV Legal

### IN BRIEF

September marks six months since the **Coronavirus pandemic measures** overturned the legislative and regulatory agenda for 2020. As we approach the **Commonwealth Budget** on 6 October, we saw significant parts of the legislative agenda still in Parliament, consultation on hold, pandemic measures, and extended regulatory relief.

There were however some significant announcements, with the Law Reform Commission commencing a complete review of the **Financial Services Law** legislative framework, extension of the early release scheme, and **Your Super Your Choice Act**.

As usual there were important technical updates with **Fee & Cost Disclosure**, the transition from the **SCT** and **AFCA**, and some interesting case law concerning **legal privilege**.

## COMMONWEALTH PARLIAMENT



### Commonwealth Parliament

30 September 2020  
Parliamentary  
business



Commonwealth Parliament sat between 24 August and 3 September, and passed two superannuation related Acts (also summarised below):

- [Treasury Laws Amendment \(Your Superannuation, Your Choice\) Act 2020](#)
- [Coronavirus Economic Response Package \(Jobkeeper Payments\) Amendment Act 2020](#)

A new Bill was also introduced to the House of Representatives:

- [Treasury Laws Amendment \(Self Managed Superannuation Funds\) Bill 2020](#)

While three Bills remain before Parliament:

- [Treasury Laws Amendment \(Reuniting More Superannuation\) Bill 2020](#)
- [Treasury Laws Amendment \(More Flexible Superannuation\) Bill 2020](#)
- [Family Law Amendment \(Western Australia De Facto Superannuation Splitting and Bankruptcy\) Bill 2019](#)

Parliament is next scheduled to sit between 6-8 October, however none of these Bills are listed on the Senate or House draft legislation program. Parliament will sit again from 9-12 November, with a limited number of sitting days (especially for the Senate) remaining to pass legislation this year.

*Superannuation trustees should note the status of these Bills, and revise any implementation planning to ensure that adequate resources are in place to implement if passed into law.*



## Your Super Your Choice

3 September 2020  
*Royal assent*

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Your Superannuation, Your Choice) Act 2019* passed both Houses and received royal assent. The Act amends the *Superannuation Guarantee (Administration) Act 1992* to enable employees under **new workplace determinations or enterprise agreements** (made on or after 1 January 2021) to exercise **choice of superannuation fund** for their compulsory employer contributions.

The Bill was amended in the Senate, requiring that APRA complete a review into the operation of the amendments within 30 months of its commencement with the purpose to identify any unintended consequences of the amendments on the operation of defined benefits schemes, including their ongoing viability and profitability, and consider whether the amendments are necessary to rectify any unintended consequences.

*QMV Legal recommends that superannuation trustees assess the extent of any impact, and the effect of the changes on future member flows and ensure financial modelling accounts for any such changes. Trustees may also consider ensuring that contributing employers affected are aware of the changes.*



## JobKeeper & Superannuation

1 September 2020  
*Royal assent*

[LINK TO DETAILS](#)

The *Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Act 2020* passed both houses and received Royal Assent. The Act extends the JobKeeper scheme to 28 March 2021 (previously to end on 31 December 2020).

The [key changes](#) as announced by the Government include:

- From 3 August 2020 the relevant date of employment for an eligible employee will move from 1 March to 1 July 2020; and
- Post 28 September 2020, organisations will only have to demonstrate they have met the relevant decline in turnover in the previous quarter.

The *Superannuation Guarantee (Administration) Amendment (Jobkeeper Payment) Regulations 2020* which provide that salary or wages that do not relate to the **performance of work** and are only paid to an employee to satisfy the wage condition for getting JobKeeper payment are excluded salary or wages for the purposes of calculating the SG Charge Shortfall Amount remain.

*Superannuation trustees should note the extension and adjustments, importantly however, the superannuation guarantee operation will otherwise remain unchanged.*



## SMSF Members

2 September 2020  
*Bill introduced*

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020* was introduced to Parliament to legislate the **increase of allowable members in an SMSF from four to six**, as initially announced in the 2018-19 Budget.

The Bill seeks to amend the "self managed superannuation fund" definition in the SIS Act and other provisions that currently apply to small superannuation funds with fewer than five members.

The amendments also update the sign off requirements in the SIS Act about the accounts and statements that the trustees of an SMSF must ensure are prepared for each income year.

*QMV Legal recommends that superannuation trustees consider the potential impact on member transfers to SMSFs when completing their strategic and business planning activities.*



## REGULATIONS & LEGISLATIVE INSTRUMENTS



### Financial Advice Relief

23 September 2020  
Legislative Instrument

[LINK TO DETAILS](#)

ASIC registered [ASIC Corporations \(Amendment\) Instrument 2020/862](#) which extends the temporary relief measures related to COVID-19 intra-fund advice to **15 April 2021** (beyond the previous end of 15 October 2020).

The measure was initially implemented in April 2020 through [ASIC Corporations \(COVID-19 – Advice-related Relief\) Instrument 2020/355](#) which exempts an entity from complying with section 946C of the *Corporations Act* for the provision of COVID-10 advice to the extent it requires the provision of a Statement of Advice any earlier than 30 business days after providing the advice. The relief is temporary and subject to conditions.

ASIC has also amended its [no action position for superannuation trustees](#) to extend it until **31 December 2020** to align with the extension of the early release scheme.

*Superannuation trustees and AFS Licensees relying on the exemption should ensure that financial advice activities, compliance measures, business rules and conversation guides reflect the extension of the temporary relief.*



### AML-CTF Rule

10 September 2020  
Legislative instrument

[LINK TO DETAILS](#)

AUSTRAC has extended the Rule for streamlined **customer verification** under the COVID-19 early release scheme until 31 December 2020. The extension is in line with the Government's decision to continue the scheme until 31 December 2020.

Under the Rule ([Chapter 77 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 \(No.1\)](#)), where the payment under the early release scheme is approved by the ATO, superannuation funds do not have to conduct upfront customer verification for AML/CTF purposes. Other obligations under the AML/CTF Act still apply, including customer due diligence and suspicious matter reporting.

*Superannuation trustees relying on the existing relief in relation to the early release scheme should not the extension of the end date to the exemption.*



### CDR Accredited Intermediaries

1 October 2020  
Legislative instrument

[LINK TO DETAILS](#)

The ACCC and Treasury have made *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2020 (Accredited Intermediary Rules)* which permit the use of accredited intermediaries to collect data through an expansion of the rules relating to **outsourced service providers**. The changes commenced on 2 October 2020.

These amended rules mean accredited businesses can now ask other accredited businesses to obtain consumer data on their behalf, with consumer consent, and are intended to facilitate greater participation in **Consumer Data Right** by fintech firms.

Accredited superannuation trustees are now able to partner with accredited intermediaries to integrate additional member data (such as banking data) within online service and tools, and member services and financial advice.

*Superannuation trustees should consider strategic opportunities arising from the change and inclusion of intermediaries in the CDR ecosystem.*



## Electronic AGMs & Document Execution

21 September 2020  
*Legislative Instrument*

[LINK TO DETAILS](#)

The *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* was made extending relief initially provided in [Corporations \(Coronavirus Economic Response\) Determination \(No. 1\) 2020](#) to 22 March 2021.

The relief ensures that companies and other entities that are required to or wish to hold a meeting, such as an **Annual General Meeting** (AGM), may do so using technology rather than face-to-face meetings.

The Determination enables a quorum, votes, notices and the asking of questions to be facilitated electronically. The Determination also allows for meeting information to be circulated and accessed electronically.

The Determination alters the operation of section 127 of the *Corporations Act* to give certainty that when company officers **sign a document electronically**, the document has been validly executed.

Subsequently, in its [Digital Business Plan](#) the Department of the Prime Minister and Treasury announced intention to consult on making these temporary changes permanent.

*Superannuation trustees should plan for any AGM of the trustee company that was planned to occur in the next six months and adopt appropriate measures to enable the meeting to occur electronically. Tentative plans could also be considered for adopting these measures permanently where appropriate.*



## Transfer of Residual SCT Complaints

21 September 2020  
*Legislative Instrument*

[LINK TO DETAILS](#)

The **Australian Financial Complaints Authority** (AFCA) is seeking submissions on changes to its Rules to make arrangements in relation to the **Superannuation Complaints Tribunal** (SCT) ceasing from 1 January 2021.

AFCA is proposing to amend its Rules to allow it to consider any remaining complaints that are unable to be finalised prior to the SCT ceasing operations.

The amendment also proposes to allow AFCA to consider any matters that are before the Federal Court on appeal from the SCT that are not finalised prior to SCT ceasing operations and require remittal back to be determined again or finalised in accordance with the Court's decisions. The proposed changes will not otherwise affect what complaints AFCA can consider.

*Superannuation trustees should identify any complaints remaining with the SCT or appeals to SCT determinations currently before the Federal Court.*

*Arrangements for the ongoing handling of these matters from 1 January 2021 should then be implemented where necessary.*



## Income Tax Regulations

21 September 2020  
*Legislative Instrument*

[LINK TO DETAILS](#)

Treasury released draft *Income Tax Assessment Regulations 2020*, which need to remake the existing *Income Tax Assessment Regulations 1997* which are scheduled to sunset on 1 April 2021.

The draft regulations include many superannuation related regulations, and makes significant changes to the drafting, structure, and guidance notes.

The remade regulations aren't intended to make affect the substantive meaning or operation of the provisions, however there are some instances where the operation has been changed slightly.

*Superannuation trustees should prioritise reviewing the proposed amendments to ensure that the redrafted regulations do not make any unintended changes to the operation of the law.*



## POLICY & GUIDANCE



### Fees and costs disclosure

September 2020  
Guidance

[LINK TO DETAILS](#)

ASIC provided clarity on the fees and costs disclosure regime and upcoming changes. In addition to laying out the major update to RG 97 released in November 2019 and the further minor amendments earlier this year, ASIC recommended that superannuation trustees should:

- update existing system builds to ensure that you will be able to meet the new requirements for fees and costs disclosure in PDSs and periodic statements in time;
- review your calculation methodologies, due diligence processes and governance arrangements for collecting and compiling fees and costs information;
- consider your arrangements with service providers, people offering investment opportunities and interposed vehicles and how the data is necessary for your products.

ASIC also notes that it has been working with APRA to align APRA's reporting standards with the fees and costs disclosure regime.

ASIC also made [ASIC Corporations \(Amendment\) Instrument 2020/853](#) which clarifies that if the total amount of administration fees and costs includes an amount that applies regardless of balance, the amount must be disclosed as follows:

Administration fees and costs	[ ]	For every \$50,000 you have in the superannuation product, you will be charged or have deducted from your investment \$[ ] in administration fees and costs, plus \$[ ] regardless of your balance.
-------------------------------	-----	---

*Superannuation trustees should review ASIC's guidance and consider mobilising a project team to ensure all processes and policies are aligned with the new requirements in time for the start dates.*



### ASIC Enforcement

22 September 2020  
Update

[LINK TO DETAILS](#)

ASIC released its **enforcement update report** for the period of 1 January to June 2020. Key superannuation related updates include:

- Completion of many of the outstanding investigations into referrals and case studies from the Royal Commission;
- The commencement of one civil penalty case related to alleged misleading and deceptive statements made to members;
- Prioritisation of misconduct related to superannuation and insurance;
- Implementation of pandemic-related enforcement priorities including addressing egregious governance failures within superannuation funds.

*Superannuation trustees remain aware of ASIC's enforcement strategies and priorities.*





## Early Release

3 September 2020  
Legislative Instrument

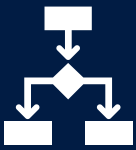
[LINK TO DETAILS](#)

Treasury made *Treasury Laws Amendment (Release of Superannuation on Compassionate Grounds) Regulations (No. 3) 2020 (Cth)*, which extends the deadline by which applications must be made for **coronavirus related early release** from 24 September 2020 to 31 December 2020.

The Regulations build on the amendments introduced via the *Coronavirus Economic Response Package Omnibus Act 2020*, which extended grounds of early release to individuals adversely affected by the coronavirus.

Temporary residents were only entitled to make a single application during the 2019-20 financial year, and the extension is therefore not applicable.

*QMV Legal recommends that superannuation trustees revise modelling for benefit payments, administrative arrangements, and communications with members to ensure the extension is effectively managed.*



## Legislative Framework

11 September 2020  
Referral

[LINK TO DETAILS](#)

As part of its response to the Royal Commission, the Government has asked the **Australian Law Reform Commission (ALRC)** to review the legislative framework for corporations and financial services law to identify ways to make it more adaptive, efficient and navigable. The ALRC has not been asked to recommend policy changes.

The Terms of Reference focus mainly on the *Corporations Act 2001 (Cth)* and the *Corporations Regulations 2001 (Cth)* with three subtopics and corresponding interim reports:

- The use of definitions in corporations and financial services legislation (due 31 November 2021);
- The coherence of the regulatory design and hierarchy of laws (due 30 September 2022);
- How the provisions contained in Chapter 7 of the Corporations Act and Regulations could be reframed or restructured (due 30 Nov. 2023).

A consolidated final report is due by 30 November 2023.

*Superannuation trustees should remain apprised of the ALRC's progress and consider participating in relevant ALRC consultations.*



## AFCA Complaints Update

23 September 2020  
AFCA Update

[LINK TO DETAILS](#)

AFCA announced the update of its [Datacube](#) to include information about all financial complaints lodged with it from 1 July 2019 to 30 June 2020.

This allows historical comparison with **complaints data** from AFCA's inception on 1 November 2018.

The AFCA DataCube allows anyone to see how insurers, banks, financial advisers, superannuation funds or other financial firms handle consumer complaints that are escalated to the Ombudsman.

The announcement also included AFCA's [COVID-19 complaints snapshot](#). 19% of COVID-19 complaints received between 3 March and 31 August 2020 related to Superannuation, totalling 817 complaints.

*Superannuation trustees should review the Datacube for insights into AFCA complaint data relating to their superfund, as well as industry complaints insights that may be useful as trustees focus on the transition to the new IDR framework.*



## Work Test & JobKeeper

1 October 2020  
APRA Website

[LINK TO DETAILS](#)

APRA published a new frequently asked question (FAQ 14), which outlines APRA's view on the interaction between **JobKeeper payments** and satisfying the 'work test' for the purpose of **voluntary superannuation contributions**.

APRA's view is that where an employer is receiving the JobKeeper wage subsidy for an individual, RSE licensees should consider the individual to be 'gainfully employed' for the purpose of the 'work test,' even if that individual has been fully stood down and is not actually performing work.

In APRA's view, it is appropriate for an RSE licensee to take this approach because the individual is still employed and is obtaining a valuable benefit from his/her employer.

*Superannuation trustees may wish to reflect this clarification in any communications or services provided to members, including the fund website and contact centre guidance.*



## Disability Income Protection

30 September 2020  
APRA Media Release

[LINK TO DETAILS](#)

APRA announced that it is set to resume its intervention into the life insurance market to stem ongoing heavy losses in respect of individual **disability income insurance (IDI)**.

The 30 September 2020 letter sets out the final sustainability measures that APRA initially introduced in its letter of 2 December 2019.

The sustainability measures consist of three key components:

- Consequence management (in the form of the IDII capital charge);
- Managing riskier product features (loan and business risks); and
- Data collection uplift.

APRA placed the onus on individual life companies, and the industry collectively, to move IDII to a sustainable state and thereby deliver better outcomes for policyholders.

*Superannuation trustees offering disability income protection benefits may wish to factor in some uncertainty in relation to the insurance policies and premiums available from life insurers and engage with insurers to understand any likely impact on member benefits and costs.*



## Digital Business Plan

29 September 2020  
APRA Media Release

[LINK TO DETAILS](#)

The Department of the Prime Minister and Treasury released a **Digital Business Plan** prior to the 6 October Commonwealth Budget. The Plan announces government funding for several initiatives, including:

- development of a **Digital Identity** system to enable more secure and convenient engagement with government services the private sector;
- Consulting on making permanent the temporary reforms to allow companies to hold **virtual meetings** and execute **documents electronically**; and
- Support for **Fintech** to export financial services and attract inward investment.

*Superannuation trustees should note these longer-term policy initiatives, considering the future prospect of a Digital Identity services in superannuation.*



## Financial & Regulatory Technology

2 September 2020  
Interim Report

[LINK TO DETAILS](#)

The Chair of the Senate Committee on Financial Technology and Regulatory Technology tabled an interim report containing **32 recommendations**. The Chair referred to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Service Industry as showing a need for more competition in the sector.

Several recommendations referred to superannuation specifically including that the Australian Government should:

- expand the **Consumer Data Right** to include other financial services, starting with the superannuation sector as the industry would benefit from increased transparency and consumer functionality; and
- foster a culture where superannuation funds **invest more widely**, including in Australian start-ups, consistent with the sole purpose test.

*Superannuation trustees should review the interim report for further insights into the recommendations and their potential future impact on trustee operations, particularly in relation to the possible extension of the CDR to superannuation trustees as data holders.*



## Corporate Criminal Responsibility

2 September 2020  
Final Report

[LINK TO DETAILS](#)

The **Australian Law Reform Commission** released its report on **Corporate Criminal Responsibility**, recommending significant changes to the criminal offences that would apply to corporations and employees of corporations.

Specific reference was made to the **Hayne Royal Commission** in the findings of the ineffectiveness of aspects of the existing regime.

The recommendations that would make a corporate accused guilty if any officer, employee, or agent of the corporation committed an offence, while acting within the actual or apparent scope of their authority.

Under the recommendations the person need not hold office as a director or a 'high managerial agent', whose responsibilities may be fairly assumed to represent the body corporate's policy, as is presently required.

Unless the corporation could prove that it took reasonable precautions to prevent the individual officer from committing the crime, it would be guilty.

*Superannuation trustees should review the recommendations and monitor the progress of any reforms and the impact on risk management, insurance, and employment practices.*





## CASES



## Client Legal Privilege & ASIC Notices

11 September 2020  
*Media release*

[LINK TO DETAILS](#)

ASIC issued a media release in relation to two recent Federal Court decisions which support ASIC's position on obligations to comply with ASIC Act notices and to clearly substantiate any claims for legal privilege.

Together, these decisions clarify obligations for those who receive ASIC notices requiring them to produce documents:

- Under section 33 of the ASIC Act, ASIC can require the production of specified documents in a person's "possession" for the purposes of an investigation. Those issued with such a notice are required to produce not only the documents in their physical possession, but those in their custody or under their control;
- A notice may require production of a large number of documents, but this does not mean the notice is too broad. The relevance of documents called for is a matter for ASIC to determine by reference to its investigation;
- The mere fact that a notice might be burdensome or oppressive because of the work and expense involved in complying with it will not, of itself, provide a reasonable excuse for non-compliance;
- Those making legal professional privilege claims over a document must be able to substantiate their claims;
- Producing a document to ASIC without claiming legal professional privilege can be a clear waiver of that privilege; and
- Those wishing to disclose a document to ASIC while maintaining a legal professional privilege claim over it should follow the instructions contained in the notice and seek ASIC's formal agreement.

ASIC highlighted that in appropriate cases, it will take steps to enforce compliance with its notices.

*Superannuation trustees should consider ensuring that legal professional privilege is adequately protected in relation to any relevant matters, and note ASIC's guidance in relation to any notices received.*

## 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



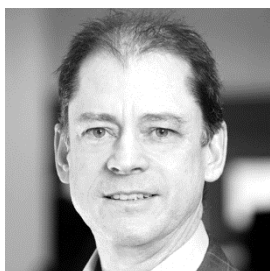
MANAGED INVESTMENTS & ESG

## 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@qmv-solutions.com](mailto:dreckenberg@qmv-solutions.com)



**Jonathan Steffanoni**  
JD, Dip.FS, FASFA  
Partner  
0434 835 966  
[jsteffanoni@qmv-solutions.com](mailto:jsteffanoni@qmv-solutions.com)



**Gabriela Pirana**  
JD, BSc.  
Senior Associate  
0450 814 596  
[gpirana@qmv-solutions.com](mailto:gpirana@qmv-solutions.com)