

# LEGAL & REGULATORY UPDATE

## PENSIONS AND SUPERANNUATION

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**Jonathan Steffanoni**  
Partner, QMV Legal

### IN BRIEF

*Although Parliament has been quieter than the preceding months on legislative change, there were plenty of important developments in October.*

*The decision in the **ASIC v Westpac** case is important for superannuation trustees, providing judicial interpretation on the limits of general advice, which appear to be narrower than prior to the decision.*

*We saw some sensible changes to the **Consumer Data Right**, and the first step towards **Open Super** with the senate select committee of Fintech & RegTech consulting on the topic.*

*ASIC also provided some guidance on expectations concerning **PMIF** related member communications.*

## MAJOR UPDATES



### Putting Members' Interests First

29 October 2019  
Guidance

[LINK TO DETAILS](#)

ASIC issued a letter to superannuation trustees about its expectations of trustees in relation to member communications about the Putting Members' Interests First (PMIF) and Protecting Your Super Package (PYSP) reforms and ongoing communications about insurance in superannuation. ASIC expects trustees to help their members understand and make good decisions by:

- providing balanced and factual communications, that include appropriate context about the reforms; and
- tailoring communications to the needs of their members (including appropriate tailoring of language, structure and communication method).

ASIC's letter provides five points for trustees to consider in getting the message to members right.

*QMV Legal recommends superannuation trustees review or seek independent review of any proposed communications planned to be sent to members and consider the extent to which the proposed communications are consistent with the trustee's regulatory obligations and ASIC's expectations.*



## ASIC v Westpac [2019] FCAFC 187

28 October 2019  
Case

[LINK TO DETAILS](#)

*The Federal Court of Appeals has allowed ASIC's appeal against the decision in ASIC v Westpac [2018] FCA 2078 and dismissed Westpac's cross appeal.*

The case related to whether a Westpac's telephone campaign targeted at influencing existing members to transfer and consolidate other superannuation balances into the Westpac funds constituted general or personal financial advice.

In deciding in favour of ASIC, the court determined that "the decision to consolidate superannuation funds into one chosen fund is not a decision suitable for [...] General Advice. It is a decision which requires attention to the personal circumstances of the customer."

The court held that the communication was an "implied recommendation" for the customer to consolidate their superannuation into Westpac, and that the objectives, financial situation, and needs of the customers should reasonably ought to have been considered in providing the recommendation.

The decision also affirmed the prior decision of the Federal Court that Westpac was in breach of its statutory and AFS licensing obligations to provide services fairly, efficiently, and honestly.

*QMV Legal recommends that superannuation trustees ensure that all financial advice service provided is consistent with the narrower interpretation of the statutory threshold of general financial advice. Particular attention should be directed at reviewing any call centre scripts or guides, or other member communications thought to be general advice only*



## Consumer Data Right

17 October 2019  
Legislation

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2019 Measures No 2) Bill 2019* has passed by both houses of Parliament and would amend the *Competition and Consumer Act 2010* to create a requirement that consumer data rules include a requirement to delete CDR data in response to a request from a consumer (often referred to as the right to be forgotten).

The Bill also details instances in which the rule must not require deletion of all or part of the CDR data, including if the accredited data recipient is required to retain the data by or under an Australian law or a court/tribunal order; or the data relates to any current or anticipated: legal proceedings or dispute resolutions proceedings to which the accredited data recipient is a party or to which the CDR consumer is a party.

The change aligns Australia's CDR data protection regime more closely with the European General Data Protection Regulation (GDPR).

Furthermore, the Senate Select Committee on Financial Technology and Regulatory Technology is consulting on the extension of the Consumer Data Right to superannuation and pensions.

*QMV Legal recommends that superannuation trustees intending to register as an authorised data recipient for Open Banking ensure that systems and processes are in place to enable the deletion of CDR data upon request. Consideration should also be given to any record keeping obligations, which may complicate compliance, and to whether changes are needed to member disclosure materials. Close attention should also be paid to the likely extension of the regime to superannuation funds as data holders.*



## Ending Grandfathered Commissions

28 October 2019  
Legislation

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019* passed both houses and received assent.

The Bill removes grandfathering arrangements for conflicted remuneration and other banned remuneration from 1 January 2021 and enables regulations under which amounts that would otherwise have been paid as conflicted remuneration are rebated to affected customers.

Effective as of 1 January 2021, all remuneration of the following kinds will be subject to the bans:

- the payment and receipt of benefits which have the potential to influence financial advice provided to retail clients about financial products;
- platform operators accepting volume-based shelf-space fees; and
- financial services licensees and authorised representatives of financial services licensees from charging asset-based fees to retail clients in relation to borrowed amounts.

The Bill implements the Government's response to Recommendation 2.4 of the Final Report of the Hayne Royal Commission.

*QMV Legal recommends that superannuation trustees review all operational and commercial arrangements relating to the provision of advice services to ensure that they account for the upcoming bans, and that any financial advice related fees are permitted under the fund's governing rules and statute.*



## Salary Sacrifice Loophole

22 October 2019  
Legislation

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019* passed both houses and received assent.

Schedule 7 of the Bill closes the loophole in the operation of the Superannuation Guarantee (SG) which saw employers being able to reduce SG Charge liabilities by amounts voluntarily "salary sacrificed" by employees.

The amendments amend the Superannuation Guarantee (Administration) Act (SGAA) to ensure that an individual's salary sacrifice contributions cannot be used to reduce an employer's minimum SG contributions.

The Bill passed the senate with amendments, including bringing forward the effective date by six months to 1 January 2020. This means the provisions will apply to employer SG shortfalls for quarters beginning on or after 1 January 2020, instead of 1 July 2020.

*QMV Legal recommends that superannuation trustees ensure that any business functions and systems involved in contributions management are reviewed to ensure that operational and assurance processes accommodate the changes.*



## TECHNICAL CHANGES AND UPDATES



### AML-CTF

17 October 2019  
Legislation

[LINK TO DETAILS](#)

The *Anti-Money Laundering and Counter-Terrorism Financing and other Legislation Amendment Bill 2019* was introduced into parliament. Proposed amendments include:

- expanding the circumstances in which reporting entities may rely on customer identification and verification procedures by a third party;
- explicitly prohibiting reporting entities from providing a designated service if customer identification procedures cannot be performed; and
- expanding exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports (SMRs) and related information with external auditors.

*QMV Legal recommends that superannuation trustees review the Bill and determine what impacts it may have on their fund, including on any material outsourcing arrangements. This may include considering whether any policies and procedures need to change or whether there are any opportunities to streamline processes.*



### Portfolio Holdings Disclosure

28 October 2019  
Legislation

[LINK TO DETAILS](#)

ASIC issued *ASIC Corporations (Amendment) Instrument 2019/1056*, which defers the first reporting date for trustee compliance with 1017BB(1) of the *Corporations Act 2001* in relation to a reporting day occurring before 31 December 2020.

Section 1017BB requires trustees to make information relating to investment of assets publicly available. Subsection (1) requires trustees to make specific information, such as total value and total weighting, about each of its investment options publicly available on its website no later than 90 days after each reporting day.

*QMV Legal recommends superannuation trustees review any plans to implement compliance related changes are aligned to the revised commencement date.*



### Taxation and interest on ATO-held super

17 October 2019  
Legislation

[LINK TO DETAILS](#)

The *Treasury Laws Amendment (2019 Measures No 2) Bill 2019* has passed both houses and received assent. The Bill includes changes to amend:

- tax law to extend concessional taxation treatment to genuine redundancy and early retirement scheme payments to amounts paid to individuals who are 65 or more years of age provided the dismissal or retirement occurs before they reach pension age;
- the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to allow for regulations to be made to prescribe a rate of interest payable on amounts held by the ATO which are proactively reunified into a person's super account, and the *Superannuation (Unclaimed Money and Lost Members) Regulations* to prescribe a rate of interest payable on inactive low-balance accounts and amounts proactively reunified.

*QMV Legal recommends that superannuation trustees review the Bill to ensure that arrangements are in place internally and with service providers to comply*



## GUIDANCE AND POLICY



### TPD Insurance Claims Review

17 October 2019  
Thematic Review

[LINK TO DETAILS](#)

ASIC has released Report 633 *Holes in the safety net: A review of TPD insurance claims*, summarising the findings and recommendations from its thematic review of TPD insurance in Australia.

The report identifies four industry-wide issues that insurers and superannuation trustees must fix:

- poor consumer outcomes from the 'activities of daily living' test;
- frictions in claims handling leading to withdrawn claims;
- consumer harm arising from poor data; and
- insurers with higher than predicted declined claim rates.

ASIC notes that while the review was focused on insurers, superannuation trustees play a 'crucial role in the delivery of life insurance to superannuation fund members' and expects trustees to:

- act in members' best interest by providing access to affordable insurance products that are suitably designed for their members; and
- play a robust role alongside insurers in ensuring a good claims experience for consumers.

ASIC's expectation includes advocating for claims with reasonable prospects of success, as well as actively engaging with the consumer's claim journey to make sure processes are simple, timely and transparent, including management of insurance-related complaints.

*QMV Legal recommends that superannuation trustees undertake a review of insurance arrangements to ensure cover is providing real value to members. Trustees should also review claims processes to ensure that adequate administration arrangements are in place to facilitate access to good quality data.*



### Director & Officer Oversight of Non-Financial Risk

2 October 2019  
Report

[LINK TO DETAILS](#)

In its report *Director and officer oversight of non-financial risk*, ASIC's Corporate Governance Taskforce warns that "boards must recognise that they are accountable for mitigating all risks – financial and non-financial – facing a company."

Among other things, the taskforce found that while companies often had frameworks and structures in place to support board oversight of non-financial risks, in practice execution was deficient. This included management operating outside of board approved risk appetites with the tacit acceptance of the boards and boards not holding themselves accountable to operating in accordance with charters.

*QMV Legal recommends that superannuation trustees review risk frameworks and appetite statements with non-financial risks in mind and ensure that appropriate processes are in place to confirm that funds operate within the board's strategic goals and risk appetite.*



## Financial Product Disclosure

14 October 2019  
Report

[LINK TO DETAILS](#)

ASIC and the Dutch Authority for the Financial Markets have issued a joint report titled *Disclosure: Why it shouldn't be the default*. The Report focuses on the 'real-world' operation of disclosure, which shows that, and explains why, disclosure and warnings can be less effective than expected, or even ineffective, in influencing consumer behaviour.

Both regulators agree that while disclosure is necessary, it is not alone sufficient to drive good outcomes. Key insights include:

- disclosures do not solve the complexity in financial markets: people struggled to differentiate good from bad deals when they had to take into consideration more than two or three product attributes;
- disclosure must compete for consumer attention: a consistent finding of Australian research is that many consumers do not access long disclosure documents about financial products at all, and those that do skip large parts;
- one size does not fit all: Decision-making styles, the sources of information and advice people draw on and how people engage with information vary;
- disclosure can backfire in unexpected ways such as consumers placing a higher degree of trust in a salesperson as a result of disclosure of a conflict of interest; and
- warnings do not always work as intended: FCA researchers have suggested that 'warning fatigue' may be a relevant factor.

*QMV Legal recommends superannuation trustees review the report and consider its implications on product disclosure statements, member booklets, fee disclosures and product dashboards.*



## Modern Slavery

23 October 2019  
Guidance

[LINK TO DETAILS](#)

[LINK TO MEDIA](#)

The Government has finalised guidance material relating to reporting obligations under the *Modern Slavery Act 2018*.

The Act applies to companies generating significant revenues (over \$100 million in a reporting period), including superannuation fund trustees. Organisations subject to the requirements have reporting obligations under the Act.

The guidance makes it clear that the operations of superannuation funds include internally managed investment portfolios and assets, while externally managed portfolios, such as those managed by another fund manager, may be more appropriately considered a part of the reporting entity's supply chains. The supply chains of superannuation funds include their external investment managers, who provide a service by managing their portfolios.

*QMV Legal recommends that superannuation trustees review the guidance material and specifically, the superannuation related hypothetical, to ensure compliance with reporting obligations. Superannuation trustees covered by the regime should review operations, investments, and service supply chains to ensure adequate monitoring mechanisms are in place.*





## APRA Data Collection

29 October 2019  
Implementation Plan

[LINK TO DETAILS](#)

APRA issued an email update on its new Data Collection Solution. Key takeaways from the APRA update – the majority stemming from APRA's extended implementation timelines, include:

- A key challenge for APRA and the industry is the complexity of migrating all existing collections in their current form, while ensuring the benefits of the new solution are realised;
- AUSkey will be decommissioned by 31 March 2020 and in order for entities to continue to access D2A beyond this time, they will be required to obtain a myGovID and be authorised to act on behalf of their entity in Relationship Authorisation Manager;
- The test environment is now expected to be released in mid-2020; and
- APRA's recent survey of reporting entities showed that around three quarters of entities still complete their submissions manually, despite the availability of alternative file-based submission methods in D2A.

*QMV Legal recommends that superannuation trustees remain cognisant of APRA's implementation plan and continue to engage with APRA on the impact of continued reporting and the preparation required to change current processes.*



## Pension Tax Bonuses

02 October 2019  
Guidance

[LINK TO DETAILS](#)

The ATO issued Practical Compliance Guideline PCG 2019/7 providing a transitional compliance approach for APRA regulated superannuation funds that provide a pension tax bonus to members where the superannuation funds are facing practical difficulties in complying with requirements.

The guidance defines pension tax bonus and provides that it will apply to a large APRA-regulated superannuation fund that:

- provides a pension tax bonus to a member who commences a superannuation income stream that is in retirement phase;
- it is not able, due to system constraints, to incorporate the value of the pension tax bonus into the opening balance of the new retirement phase income stream for the income year in which it commences;
- due to the above, is not able to ensure that the minimum pension payments as required by SIS Regulations are paid;
- correctly determines the opening balance of retirement phase income streams, and consequently minimum pension payments; and
- deploys a full system solution by 30 June 2020.

Where a superannuation fund satisfies all of the conditions, the ATO has indicated that it will not allocate compliance resources to review the calculation of the superannuation fund's exempt current pension income as a result of not incorporating the value of the pension tax bonus.

*QMV Legal recommends that superannuation trustees that provide pension tax bonus arrangements to members determine whether transitional compliance approach is required and engage the administration function to ensure administration systems are adequate to enable compliance.*



## Fintech & Regtech Senate Committee

23 October 2019  
Consultation

[LINK TO DETAILS](#)

The Senate has established the Select Committee on Financial Technology (FinTech) and Regulatory Technology (RegTech) to undertake a comprehensive inquiry into the current state of Australia's FinTech and RegTech industries and investigate opportunities for government to promote effective and sustainable growth in these sectors in order to enhance Australia's economic competitiveness. The committee will inquire and report on the following matters:

- the size and scope of the opportunity for Australian consumers and business arising from FinTech and RegTech;
- barriers to the uptake of new technologies in the financial sector;
- the progress of FinTech facilitation reform and the benchmarking of comparable global regimes;
- current RegTech practices and the opportunities for the RegTech industry to strengthen compliance but also reduce costs; and
- the effectiveness of current initiatives in promoting a positive environment for FinTech and RegTech start-ups.

The committee has called for written submissions to its inquiry by 31 December 2019.

*QMV Legal recommends that superannuation trustees review the Committee's issues paper and consider a written submission detailing the impacts, barriers and opportunities they see as related to superannuation.*



## ASIC SMSF Fact Sheet

11 October 2019  
Guidance

[LINK TO DETAILS](#)

ASIC has issued a media release and fact sheet (MR19-277) which warned Australian investors considering establishing their own self-managed superannuation fund (SMSF) to be particularly aware of the potential downside to such a strategy, and that many Australians set up SMSFs that are inappropriate for their circumstances. The eight situations are:

- a low superannuation balance, and would have a limited ability to make future contributions;
- the client wants a simple superannuation solution;
- the client wants to delegate all of the running of the SMSF to a paid advice-provider;
- the client wants to delegate all of the investment decision making to someone else;
- the client does not have a lot of time to devote to managing their financial affairs;
- the client has little experience making investment decisions;
- the client, or suggested trustee, is an undischarged bankrupt or has been convicted of an offence involving dishonesty (because undischarged bankrupts and persons convicted of an offence involving dishonesty are prohibited from acting as a trustee); and
- the client has a low level of financial literacy.

*QMV Legal recommends that superannuation trustees ensure representatives involved in providing financial advice are aware of the guidance.*



## 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.

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## 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  
[dreckenberq@qmvnsolutions.com](mailto:dreckenberq@qmvnsolutions.com)



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