



Regulatory Wrap

March 2021

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HIGH COURT DECIDES PERSONAL ADVICE CASE

The High Court, for the first time, considered the legal requirements relating to general advice versus personal advice. In *Westpac Securities Administration Ltd & Anor v Australian Securities and Investments Commission* [2021] [HCA 3](#) the High Court unanimously found Westpac provided personal advice, not general advice, during its successful campaign to rollover superannuation monies into Westpac-owned super funds.

The Westpac campaign identified and targeted clients it knew or suspected could have common needs, objectives and characteristics and designed its telemarketing scripts and materials to take advantage of these objectives to maximise the success of its campaign. The campaign purported to provide general advice but also elicited objectives from the prospects and used ‘social proofing’ techniques (where, having elicited one or more common objectives, e.g. to save fees and to ease administration) to mollify prospects with comforting statements such as “saving fees and manageability are two main reasons our clients do like to bring their supers together.”

However, despite having provided a general advice disclaimer at the start of the telemarketing calls, the High Court determined that, having elicited personal needs and objectives from the prospects, a reasonable person would have expected Westpac to have considered one or more of those things in providing their advice to rollover super monies to their aligned accounts. As such, the advice went further than general advice and met the criteria for personal advice.

We think the case, while important, is likely to impact two types of businesses/advice scenarios mainly. i.e. Businesses that operate on a general advice model will need to revisit their marketing materials and approach to ensure they do not, even unwittingly, provide personal advice. Also, personal advice businesses will need to re-examine if, when and how they can provide occasional general advice to personal advice clients.

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LEGAL BRIEFS – MORE NEWS FROM THE COURTS



Privacy Commissioner Serves Up Tough Medicine For Breaches

As many of you will have already discerned, with the abundance of data these days privacy will be one of the big issues/risks of the future. A recent determination of the Acting Australian Information Commissioner and Privacy Commissioner against Australian Super is a timely reminder of the importance of complying with the Privacy Laws, including the Privacy Principles.

In this case, the complainant was awarded \$4,500 for loss and Australian Super was found to have breached privacy requirements when it disclosed personal information to the complainant's former lawyers after the complainant had already notified Australian Super that he had revoked authorities for those lawyers.

The super fund was found to have 'interfered' with the complainant's privacy by:

1. disclosing the complainant's personal information in breach of Australian Privacy Principle 6;
2. failing to take reasonable steps to ensure that it used accurate and up-to-date personal information of the complainant, having regard to the purposes of its use, in breach of Australian Privacy Principle 10.2;
3. failing to take reasonable steps to protect the complainant's personal information from unauthorised use and disclosure in breach of Australian Privacy Principle 11.1.

The determination also required Australian Super to apologise to the complainant in writing and engage an independent auditor to assess its procedures and training, among other things.

<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2020/64.html>

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Hot Tip: *Ensure your privacy policy and procedures are regularly reviewed and meet obligations. Ensure procedures properly capture and respond to client requests to disallow third party access.*

IN SUMMARY:



Hayne Changes Continue

More post-Financial Services Royal Commission changes passed parliament in December. New requirements affect: FDS and Opt-in Renewal Notices; Disclosure of 'lack of independence'; charging fees in super accounts; insurers' ability to avoid claims based on non-fraudulent misrepresentation have been limited

Changes re FDS/Renewal Notices, Disclosure re 'lack of independence' and restrictions re charging advice fees in super

The **Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020**, was passed on 25 February 2021, becoming an Act in the process. This Act covers new annual FDS and ongoing fee renewal arrangements, declaration of 'lack of independence' and restrictions on charging fees in super. The changes are stated to come into effect on 1 July 2021. To summarise, the new requirements are as follows:

FDS & Renewal

- FDSs must be provided each year (as per current annual requirements) but must describe the services and fees for the upcoming year, not just the past year. When fees/services cannot be ascertained, reasonable estimates, and the method for deriving them, must be used and disclosed;
- 2-yearly opt-in renewal notices are no longer required. Instead, the FDS will act as a renewal notice as well. Client consent must be received for all fees – it is likely ASIC will prescribe the consent requirements. Accurate, accessible records must be retained;
- For joint accounts, consent will be required from all account holders.

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Hot Tip: *you'll need to amend the content of your FDSs to cover both the past and upcoming services and fees and review your procedures to ensure all requirements are met and 'opt-in renewal notices' are not sent after the new FDS requirements take effect. You'll need to pay particular attention to your procedures for getting consent from all joint accountholders.*

Disclosure of 'lack of independence'

If you are restricted from using certain words under current sec 923A (e.g. you are not able to use the word 'independent' to describe your business or services) you will now have to include in your FSG a statement that you are not able to use the restricted words and the reasons why.

It is possible that ASIC will prescribe the required wording.



Hot Tip: *you'll need to include new disclosures in your FSG. But wait until you know whether ASIC has prescribed the required wording/form.*

Advice Fees in Superannuation

Trustees will not be able to charge advice fees via superannuation accounts unless they have evidence the fee is charged in line with the terms of the fee arrangement entered with the advice client (i.e. super member) and, where the fee is an ongoing fee, all prescribed requirements, including client consent, have been met.

Also, ongoing fees will not be able to be deducted from MySuper products. If advice fees are to be charged via these products they will need to be one-off non-ongoing fees.

These changes are introduced into the Superannuation Industry (Supervision) Act 1993.

New insurer obligations re non-fraudulent misrepresentation; new anti-hawking requirements; claims handling requires an AFSL; new reference checking protocols; new breach reporting and remediation requirements

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Also, the (**Financial Sector Reform (Hayne Royal Commission Response) Bill 2020**) was passed by both Houses of Parliament. For advice businesses, the main changes were:

- **Limitations on insurers' ability to avoid paying claims where there has been non-fraudulent misrepresentation.** The consumer duty of disclosure has also changed from the previous onerous duty of disclosure to a 'duty to take reasonable care not to make a misrepresentation'. This is good news for clients who may inadvertently provide incorrect information. For insurers, you may only avoid a claim on a consumer life insurance contract on the basis of a non-fraudulent failure by an insured if the insurer would not have been prepared to enter into a life insurance contract on ANY terms with the insured had the relevant failure not occurred. Insurers can only avoid a contract of insurance based on non-fraudulent misrepresentation within three years of entering it, as per the current requirements.



Hot Tip: *you may need to change the wording you use in your advice documents to accurately describe the new duty of disclosure requirements.*

- **Anti-hawking rules changed.**

The current messy, incomplete and inconsistent laws will change so that it will be a strict liability offence to hawk any financial products to retail clients. Naturally, there are some exceptions. And the rules should not prohibit an adviser contacting, for example, a prospective client who was referred to them.

- **Claims handling and settling services.**

Providing claims handling and settling services are now prescribed financial services and require authorisation under an AFSL to provide them. Despite widespread conjecture at the time this Bill was introduced, it has been made clear that these new requirements are not intended to cover most financial advisers who help their clients through the claims process.

Insurance brokers and financial advisers are only required to have claims handling authorisations under their AFSL if they provide claims handling services 'on behalf of the insurer'. As most financial advisers act on behalf of the client, not insurers, this means most advisers will not need to be licensed for claims handling.

- **Reference checking and information sharing protocol.**

Licensees (financial services and credit) will be required to undertake prescribed reference checks and share certain information when taking on new representatives. These obligations start on 1 October 21. Broadly, the requirements are to:

- comply with mandatory reference checking and information sharing protocols.
ASIC may prescribe the actual requirements regarding the information licensees

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must gather, the steps and methods you are required to undertake to contact referees; and record keeping requirements.

Information can be sought about a representative for the prior five years. Representatives are required to consent to the sharing of the mandatory information. In turn, licensees are protected by qualified privilege against defamation and breach of confidence actions that could otherwise arise out of providing personal and confidential mandated information.

Similarly, if a representative currently or used to work under your licence, you will be required to provide certain information to the prospective new licensee. Also, note that if you do not comply with the new reference checking and information sharing protocols, licensees may be subject to civil penalties.

▪ **Breach reporting and remediation.**

While the time for reporting breaches has been increased (to 30 calendar days), the ambit of what has to be reported has also been substantially increased. The changes are due to come into force on 1 October 2021. In addition to breaches that meet the current definition of 'significant', other breaches will also need to be reported. These include:

- Any breaches of 'civil penalty' provisions. Note that this includes breaches of best interests obligations, FSG and FDS obligations among others.
- Any 'potential breach' where your investigation goes for more than 30 days.
- Dishonest, illegal, deceptive and/or fraudulent misconduct.
- Any misconduct that, if proven, would likely result in instant termination.
- Where there has been deliberate non-compliance with financial services laws.
- Instances of gross incompetence or gross negligence.
- Serious compliance concerns about financial advisers engaged by another licensee. Reporting needs be provided to both ASIC and the other licensee.

In addition, breaches will have to be submitted in the prescribed form via ASIC's portal. It is not clear what information ASIC will prescribe.

We think these new breach reporting requirements will result in a lot more work for licensees and ultimately lead to ASIC receiving vast volumes of breaches, many of which are likely to be technical in nature. For example, it is likely that if an advice assurance review finds an adviser did not meet one or more of the best interests safe harbour requirements, this may have to be reported to ASIC. Our experience is that there is

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widespread non-compliance with some of these technical advice-related requirements, even if the consequences to clients or the licensee are nil or minimal.

- **Investigating and remediating misconduct.**

In addition to the new breach reporting requirements above, licensees will be required, as a condition of their licence, to make whatever inquiries are reasonably necessary to determine the nature and full extent of the misconduct. Licensees will be required to investigate potential and actual misconduct engaged in by financial advisers and mortgage brokers, and to pro-actively inform and remediate affected clients.



Hot Tip: *There are a lot of tricky details with each of the above changes. If you need any help working out what your requirements are, please get in touch.*

AFCA Gets Tripped Up By Its Own Rules

DH Flinders Pty Ltd v Australian Financial Complaints Authority Limited was a rare case where the courts (the NSW Supreme Court in this case) got to decide on an AFCA matter. It didn't turn out well for AFCA as the Court decided they had no authority to deal with the particular complaint. In obiter (that is, opinions of the judge that were not essential to the decision and therefore not legally binding), the judge also made it clear that he thought AFCA had denied procedural fairness to DH Flinders.

The background was that DH Flinders engaged a corporate authorised representative ('CAR') on limited authorisations. The CAR engaged in activities beyond its authorisation, in relation to a product of which its licensee had no knowledge.

Under the Corporations Act, a licensee can be liable for the actions of its representatives even when the representative acts without actual, apparent or ostensible authority.

AFCA relied on these provisions in determining that it had authority to hear the relevant complaints (it had received many in relation to the CAR). However, Justice Stevenson stated that AFCA's authority and powers are governed by its own rules.

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In this case, AFCA's rules narrowed its ambit. Its rules provide that it can only hear complaints regarding 'financial firms' where that entity is acting with "actual, ostensible, apparent or usual authority to act on behalf of the Financial Firm". As the CAR was acting without any authority from the licensee, DH Flinders, it followed that AFCA did not have authority to hear the complaints.

Also of interest was the judge's comments around AFCA's role in suggesting to the complainants that they seek to lodge a complaint against DH Flinders as they had previously authorised the CAR (the complainants had previously lodged the complaint against the entity that was Flinders' CAR entity). AFCA suggested to the complainants that they should join DH Flinders to the complaint and actively aided this outcome. The judge said AFCA had authority only to hear complaints and not to 'enter the fray' by suggesting potential licensees to join as parties. The judge found that, without AFCA's intervention on this point DH Flinders would not have been joined as a party in the first place. In addressing AFCA's role in this regard he concluded that he felt AFCA denied DH Flinders procedural fairness.



Hot Tip: *While AFCA has broad powers, if you are called as a licensee to defend a claim, it is always worth checking that AFCA has authority to hear the matter.*

*Our second tip was to keep an eye out for any proposed changes to AFCA's rules to allow it to hear claims against people acting without authority in providing financial services. *After writing this article, AFCA announced it had changed its rules so it can now hear complaints where the actions are outside a representative's authority from its licensee.*

AFCA Increases Monetary Limits

AFCA has increased its monetary limits for complaints, as set out in the AFCA rules. The changes came into effect on 1 January 2021 and apply to all complaints received from that date. You can access the new limits [here](#).

New Product Design & Distribution Obligations Start on 5 October 2021

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The long-touted new rules (the rules were passed by Parliament back in 2019) are slated to start on 5 October. Both product issuers and 'distributors' (such as financial advisers) will have new obligations under the regime.

Financial products will need to have a 'target market determination' ('TMD') to be distributed. A TMD must describe the class of consumers that comprise the target market for a financial product and include other matters relevant to the product's distribution and review.

Of course, in the advice world, product issuers do not know the end users of their products well so they will rely on the distributors (i.e. mainly advisers) to 'take reasonable steps' to ensure the products are only distributed to people that meet the criteria in the TMD.

While financial advisers will have some additional reporting and record keeping under the new rules, luckily the laws were changed from their initial drafts where advisers would have had a much greater role to play and would have been subject to all manner of questioning and intrusion by product providers (See our article from early 2018 on earlier drafts of the proposed laws [here](#). Prime among our concerns were the additional obligations on advisers to help issuers meet their obligations and the likelihood that issuers could use their obligations as an excuse to obtain detailed personal information and data about its end users (i.e. the clients of advisers).

The new requirements, while being easier to comply with than initially signalled, still require policies and procedures to ensure you comply. If you need advice or other assistance please let us know.

You can see ASIC's [RG 274](#) for information on how the regulatory is approaching the requirements.

Countdown To New Complaints Obligations Is On

New Internal Dispute Resolution ('IDR') requirements are due to start on 5 October 2021. ASIC's new complaints guide, RG 271 will effectively be law as ASIC plans to prescribe the guidance in that RG under new legislative instruments.

While not all requirements will start on 5 October, it is necessary to be ready for all the changes anyway. Some of the bigger changes are the requirement to record ALL complaints received, ascribe a unique identifier to each complaint, and collect & report prescribed complaints data to ASIC.

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Reduced IDR timeframes are also proposed, i.e. 30 days for advice and other licensees, and 45 days for superannuation/trustee complaints.

N.B. the definition of complaint will be very broad, as per the definition in AS/NZS 10002:2014, i.e. “[An expression] of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required”

Current proposals by ASIC suggest that as the complaints definition includes complaints made ‘about’ an organisation, its products, services or staff this could include complaints made on social media. While we see no reason why complaints made ‘to’ an organisation on that organisation’s own social media channel shouldn’t be covered by the new requirements, we think it is a step too far for the regime to also cover complaints made ‘about’ an organisation if such complaints are not also made ‘to’ the organisation. To effectively meet your obligations to capture all complaints made about your organisation would effectively require firms to proactively scout the internet and all social media channels to identify any and all ‘complaints’. We think this is far too onerous an obligation.

ASIC has also proposed a minimum of 23 data categories to be captured. In our view, this is overkill especially for smaller businesses and/or minor expressions of dissatisfaction.

You can view the issues in ASIC’s Consultation Paper, [CP 311](#).



Hot Tip: *Start, if you haven’t already, designing policies, procedures and relevant tools (or seek external suppliers) that will help you meet the new obligations. For licensees that operate using external AR’s you will have a lot of decisions to make around whether your systems will be more effective by having a centralised licensee system or requiring your AR’s to collate their own data in a form authorised by you and report regularly to you, as licensee.*

We will provide a more in-depth summary of the new requirements once they are settled. We will also have some tools available to help licensees comply closer to the start time.

New Remediation Guidance Proposed

ASIC issued [Consultation Paper 335](#) proposing numerous changes to its current remediation regulatory guide, RG 256. Submissions were open until 26 February 2021. If you wanted to make a submission. More information is available [here](#) regarding the proposed guidance and the consultation process.

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Among the proposed changes are: greater application of remediation programs (i.e. not just when a systemic issue arises); ensuring pro-active and timely identification and compensation of clients if potential loss is identified



Hot Tip: Give us a call if you need more information or advice on any of the above changes. There are a lot of changes and we can't cover them all in this newsletter.

Is That Really A Cash Fund?

In late September 2020, ASIC released the results of a surveillance it undertook to assess whether managed funds are true to label – i.e. that the product name aligns with the underlying assets.

Some issues were found particularly with products that call themselves 'cash' or 'cash enhanced'. For example, some cash funds held assets more akin to a bond or diversified fund and some 'cash plus' funds had more than 50% of their assets invested in assets other than cash or cash equivalents such as fixed-income securities and mortgages.

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-218mr-asic-tells-fund-managers-to-be-true-to-label/>



Hot Tip: For issuers, check that there is nothing misleading or deceptive in how your product is described when taking into account how it invests. For advisers, ensure you know and understand the product and the assets it invests into to ensure it aligns with descriptions and client expectations.

Say Goodbye To Grandfathered Remuneration

While FOFA banned certain types of remuneration as conflicted remuneration, other arrangements that were established prior to 1 July 2013 could continue to be paid and received (e.g. commissions from managed funds). However, from 1 January 2021 these grandfathered arrangements should have all ceased.



Hot Tip: If you are an issuer, make sure you are no longer paying these benefits. If you are an adviser, make sure you are no longer receiving them.

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ASIC NAUGHTY CORNER



There is, unfortunately, a long list of current and former financial services participants who are subject to civil proceedings or have already been banned or paid massive compensation. Look through them carefully and you will find numerous salutary lessons.

- The Federal court has found CBA liable for overcharged interest in a case arising from a Royal Commission case study <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-025mr-cba-liable-for-overcharged-interest-royal-commission-case-study/>
- NAB sued for unconscionable conduct and misrepresentation re account fees <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-031mr-asic-sues-nab-for-unconscionable-conduct-and-misrepresentations-over-account-fees/>
- Former adviser charged with deception re early access to super scheme <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-032mr-former-victorian-financial-adviser-charged-with-deception/>

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- Freezing orders obtained against WA-based property developers. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-341mr-asic-obtains-freezing-orders-against-perth-based-property-developers/>
- An unregistered MIS has been wound up and the operator permanently banned from providing certain financial services: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-314mr-asic-succeeds-in-application-to-wind-up-chris-marco-s-unregistered-managed-investment-scheme/>
- The former director and responsible manager of Financial Circle was permanently banned from performing any credit activities other than as an employee of an APRA-approved ADI assisting borrowers obtain loans independently of any financial services. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-233mr-former-responsible-manager-banned-from-credit-activities-following-asic-investigation/>
- A former financial adviser was sentenced to eight years imprisonment after dishonestly accessing and using client funds. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-234mr-former-townsville-financial-adviser-sentenced-to-eight-years-imprisonment/>
- ASIC and VW Financial Services settle court proceedings with VWFS entering an EU to implement a remediation program estimated to redress approximately 1,800 consumers \$4.7m. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-239mr-asic-and-volkswagen-financial-services-australia-settle-federal-court-proceeding/>
- A finance broker was charged with knowingly making a false statement to ASIC in an annual compliance certificate. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-245mr-finance-broker-charged-with-making-a-false-statement-to-asic/>
- A former adviser was banned for 3 years for failing to provide financial advice in clients' best interests and not keeping proper records <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-007mr-asic-bans-former-sydney-adviser-for-three-years/>
- ASIC commenced legal proceedings against a fintech, alleging a brochure promoting property in super was misleading and deceptive <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-002mr-asic-commences-civil-penalty-proceedings-against-squirrel-superannuation-services/>
- ASIC banned a mortgage broker from engaging in credit services for 5 years after it found she allowed her father, who had been permanently banned, to provide credit services using her representative authority. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-001mr-mascot-mortgage-broker-banned/>
- Freezing order were obtained against a W.A.-based property developer for allegedly running an unregistered MIS <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-341mr-asic-obtains-freezing-orders-against-perth-based-property-developers/>

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- A former mortgage broker was convicted for falsifying loan applications <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-339mr-former-mortgage-broker-convicted-for-falsifying-loan-applications/>
- Sydney financial adviser permanently banned after dishonesty offences and falsifying books <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-024mr-asic-permanently-bans-former-sydney-financial-adviser/>
- Poor risk controls, monitoring and conflicts management lead to additional licence conditions <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-021mr-asic-imposes-additional-licence-conditions-on-poynter-hargraves-financial-consultants-pty-ltd/>
- Directors of AFS licensee suspended for failing to comply with legal requirements <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-018mr-asic-suspends-afs-licence-of-investors-exchange-limited/>
- AFSL and ACL cancelled for not having necessary competence and resources <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-017mr-asic-cancels-financial-services-and-credit-licences-of-mortgage-general-financial-services-pty-ltd/>
- A former mortgage broker company director pleaded guilty to making a false statement in an annual compliance certificate <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-014mr-former-mortgage-brokerage-company-director-pleads-guilty-to-making-a-false-statement-to-asic/>
- Responsible Entity taken to court over allegedly misleading and deceptive claims regarding one of its products <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-333mr-asic-commences-civil-penalty-proceedings-against-la-trobe-financial-asset-management-ltd/>