Governance News

COVID-19 Special Edition

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Contents

Remuneration

Top Story | Take two: APRA consults (further) on new less prescriptive remuneration requirements

Key Takeouts

- In response to feedback on the initial draft of its new cross industry standard on remuneration, The Australian Prudential Regulation Authority (APRA) is conducting a second round of consultation on further proposed revisions to draft prudential standard CPS 511 Remuneration.
- A lighter touch: A key change in the revised draft is an overall shift away from a prescriptive approach to an expressly principles-based and more proportionate approach with heavier obligations for larger and more complex entities (SFIs) and lighter obligations for smaller entities. APRA maintains that this more flexible approach is not intended to water down the requirements, or to dilute the focus on management of non-financial risk, but to allow entities more flexibility while still lifting overall standards.
- One example of this shift in approach is the replacement in the revised draft standard of the hard 50% cap on the use of financial metrics in variable remuneration with proposed new requirements for: a) financial measures to be given 'material weight' in both short term incentive plans and long term incentive plans; and b) a process to be in place to enable variable remuneration to be reduced to zero where individuals are found to be responsible for 'risk and conduct incidents'. It's proposed that these requirements will only apply to SFIs.
- APRA plans to issue guidance on compliance with the new requirements including - use of non-financial metrics, implementation of the deferral obligations, annual compliance review requirements and board reporting – in Q1 2020. The guidance will also include 'better practice examples' to support compliance.
- Timing: Consultation on the proposed changes closes on 12 February 2021. APRA plans to release a final version of CPS 511 in Q2 2021. Phased implementation of CPS 511 will commence from 1 January 2023.
- Consultation on enhanced disclosure requirements: APRA plans to introduce new requirements that will require entities to disclose publicly how they are complying with key principles in the revised standard. APRA plans to consult on proposed new requirements in 2021.

Context

In July 2019, the Australian Prudential Regulation Authority (APRA) released a discussion paper and a new draft Prudential Standard (CPS 511) for consultation, proposing stronger and more prescriptive prudential requirements for remuneration across all APRA-regulated entities in the banking, insurance and superannuation sectors. The proposed changes were intended to lift industry standards and to implement APRA's response to certain Hayne commission recommendations.

Among other changes, the initial draft standard proposed to: a) cap financial metrics for variable pay at 50%; b) impose minimum deferral periods for variable remuneration of up to 7 years for senior executives in larger, more complex entities and increase the scope for boards to recover remuneration for up to 4 years after it has vested; and c) require boards to approve and actively oversee remuneration policies for all employees and regularly confirm they are being applied in practice to ensure individual and collective accountability.

Consultation closed in October 2019. You can find our summary here.

Revised, less prescriptive standard released for consultation

On 12 November APRA released a response paper outlining the key themes to emerge from feedback on the initial draft standard and APRA's response and a revised draft standard for consultation.

A principles-based, rather than a prescriptive approach

A key change overall in the revised draft is the shift away from the prescriptive approach in the initial proposal to an expressly 'principles based' approach which is intended, APRA states, to allow boards more flexibility to implement the new requirements in a manner that is appropriate and proportionate to their particular business while still raising industry standards in line with the Hayne recommendations.

A proportionate approach

The revised draft standard proposes to apply a proportionate approach where requirements are based on the size and complexity of entities rather than the industry sector in which they operate. The revised standard proposes to impose heavier obligations on significant financial institutions (SFIs) including heavier obligations around remuneration design, minimum deferral periods and clawback, while lightening the compliance burden on smaller entities.

Smaller entities (Non-SFIs) will not be subject to new requirements impacting variable remuneration, minimum deferral periods, clawback, or requirements to conduct annual compliance checks or tri-annual effectiveness reviews of their remuneration frameworks. The proposed requirements for non-SFIs are at p18-20 of the revised draft standard here.

APRA plans to 'determine' and notify entities that are SFIs in Q3 2021 – ahead of the proposed phased commencement of the changes.

Commenting on the shift in approach, APRA Deputy Chair John Lonsdale said that it strikes the appropriate balance between raising standards and ensuring that the new requirements both proportionate and sufficiently flexible. He said,

> 'APRA's revised standard on remuneration is deliberately principles-based to provide boards with flexibility to tailor remuneration frameworks to their entities. However, with this flexibility comes an obligation that boards actively oversee remuneration policies for employees and ensure that there are appropriate consequences when people fail to meet expectations. The standard is designed to promote effective risk management that aligns the interests of customers, shareholders and the broader community, to deliver high performance in a sustainable manner. Once implemented, we expect the standard to deliver stronger incentives for individuals to manage non-financial risk, appropriate financial consequences where material risk incidents occur and increased transparency to drive stronger board accountability for remuneration outcomes'.

Requirements for SFIs – Some key changes

Non-financial metrics must be given 'material weight'

The proposed 50% cap on the use of financial metrics put forward in the initial draft CPS 511 has been replaced in the revised version with:

- a formal requirement for financial measures to be given 'material weight' in both short term incentive plans and long term incentive plans. That is, under revised CPS 511, SFIs will be required to give material weight to non-financial considerations for each component of an individual's variable remuneration.
- a formal requirement to have a process in place to enable variable remuneration to be reduced to zero where individuals are found to be responsible for 'risk and conduct incidents'. APRA comments that complying with this new requirement will require existing practices to be 'tightened to ensure effective and consistent application'.

Commenting on the shift in approach APRA maintains that though less prescriptive, 'APRA has maintained its focus on non-financial risks, by requiring entities to give material weight to these measures in remuneration design, rather than a prescriptive hard limit'.

Shorter deferral periods

APRA initially proposed that where variable remuneration is over $50,000 entities be required to defer:

- 60% of a CEO's total variable remuneration for seven years (with pro-rata vesting after four years)
- 40% of senior manager, executive director and highly-paid material risk takers (HPMRT) total variable remuneration for at least six years (with pro-rata vesting in the last two years).

The proportions to be deferred for each of these groups in the revised standard are unchanged. However, in response to industry concerns about the impact of longer deferral periods on staff recruitment and retention, the proposed deferral periods in the revised draft have been shortened.

Under the revised standard proposed deferral periods are:

- 60% of a CEO's total variable remuneration for at six years (with vesting after four years on a pro rata basis). APRA comments that this change more closely aligns with the usual term of Australian CEOs and that the pro-rata vesting from year four aligns with the Banking Executive Accountability Regime (BEAR) requirements which sets a four year deferral period as well as with Financial Stability Board (FSB) principles.

- 40% of senior manager and executive director variable remuneration for five years (with pro-rata vesting after four years). APRA comments that the proposal for pro-rata vesting from the fourth year aligns with BEAR requirements and is consistent with FSB principles. APRA explains that the proposed deferral period for senior managers is shorter than that proposed for CEOs to reflect the fact that 'a senior manager has a comparatively lower impact on the entity's risk profile and accountability'.
- 40% of HPMRT total variable remuneration for at least four years (with pro-rata vesting in the last two years). APRA comments that the proposed shorter deferral period is intended to reduce the various 'undue impacts' raised in submissions on staff recruitment and retention, while still requiring entities to strengthen existing accountability practices.

To address concerns about the potential for misalignment of timing between the payment of tax (at termination) and the receipt of earnings (at end of deferral), revised CPS 511 also proposes to allow partial vesting of the tax amount at termination.

Clawback

The revised standard proposes various adjustments to the drafting of clawback requirements to clarify that 'clawback would only be considered for exceptional circumstances'. Changes include:

- removing the requirement to extend the clawback period for another two years for those under investigation though APRA states that this would be 'considered better practice.
- clarifying that clawback would only be used in exceptional circumstances and 'after other adjustment tools have been exhausted'.
- revising the clawback criteria, which have been extended and aligned to the malus criteria. Amendments include adding a materiality threshold to reflect that it is a tool that would only be utilised in exceptional circumstances and clarifying the focus on conduct and adding material error or misstatement as grounds for clawback.

Enhanced board oversight

APRA comments that the revised standard has 'removed some prescription and sharpened its focus on overarching principles' to ensure that boards and the remuneration committee bring sufficient rigour and challenge to the oversight of the remuneration framework within their organisation.

Amendments in the revised standard are also intended to clarify the responsibilities between management, the board and board remuneration committee, without unnecessary prescription.

Board approval of remuneration outcomes

The revised standard will still require boards to approve remuneration outcomes, following committee recommendations in the interests of strengthening board engagement, oversight and accountability. However, in response to feedback, APRA has adjusted requirements around approval of highly-paid material risk takers (HPMRT) pay to allow 'cohort reviews' and narrowed the definition of HPMRTs. APRA plans to outline better practice examples for cohort reviews in forthcoming guidance.

Explaining the change, APRA states that it

> …'does not consider it an effective use of a board's time to understand every employee's individual remuneration arrangement or individually approve the remuneration outcome of each person in a specified role, other than the CEO, senior managers and executive directors'.

Service providers

The initial draft CPS 511 proposed to strengthen an entity's oversight and risk assessment of remuneration arrangements with third-party service providers in a number of respects to ensure entities 'make prudent assessments of how the service provider's remuneration arrangements may result in actions or risks that could adversely impact an entity's risk profile, sustainable performance, beneficiaries or customers'.

In response to feedback, the revised standard makes clear that entities are required to make an overall assessment of a service provider's remuneration arrangements. That is,

> 'They are not required to influence the remuneration arrangements of third-party service provider employees or contractors. The revised proposal requires a risk assessment and provides entity discretion on the process. Revised CPS 511 also enables an entity to determine its own actions to mitigate risks.'

Forthcoming guidance will include better practice examples.

APRA has retained the annual review requirement

The revised standard retains the annual compliance review requirement (which is expected to be conducted internally and to take the form of a self assessment) on the basis that 'a routine appraisal of the remuneration framework against the standard will strengthen its operating effectiveness'.

In addition, APRA notes that the scope of triennial reviews has been 'sharpened' to 'ensure a deeper dive into the entity's remuneration framework is undertaken, which leverages the experience of an operationally independent, appropriately experienced reviewer'.

Board reporting

On the issue of board reporting, APRA has retained the original drafting in CPS 511. In APRA's view, it is the responsibility of the board remuneration committee to guide management about appropriate reporting of information, as part of its role to provide oversight of the remuneration framework. APRA's intent is that entities focus on insightful, rather than voluminous, information and analysis that validates remuneration decisions. APRA plans to outline examples of better practice in CPG 511,

Enhanced disclosure requirements

To reinforce accountability, APRA plans to introduce new requirements that will require entities to publicly disclose how they are complying with key principles in the revised standard. APRA plans to consult on proposed new requirements in 2021.

Timing and next steps

- Consultation on the proposed changes closes on 12 February 2021. APRA plans to release a final version of CPS 511 in Q2 2021. Phased implementation of CPS 511 will commence from 2023.
- APRA intends to release draft guidance (CPG 511) for consultation in Q1 2021 with the aim of releasing finalised guidance in Q4 2021.
- APRA intends to consult on new reporting and disclosure requirements from Q4 2021 to Q1 2022, with a view to releasing finalised requirements in Q4 2022.

Proposed three stage phased roll out of the new requirements starting with the most complex entities

- 1 January 2023: ADIs that are SFIs and groups headed by these SFIs
- 1 July 2023: Insurers and RSE licensees that are SFIs and groups headed by these SFIs
- 1 January 2024: All other entities (non-SFIs)

[Sources: APRA media release 12/11/2020; Consultation on remuneration requirements for all APRA-regulated entities; Response paper: Strengthening prudential requirements for remuneration; Revised draft prudential standard: CPS 511 Remuneration]

Meetings and Proxy Advisers

COVID-19: ASIC says a further extension on the 'no action' position on holding of AGMs is unlikely at this stage (though it will continue to monitor conditions)

One month extension on deadlines for lodgement of financial reports

The Australian Securities and Investments Commission (ASIC) has said it will give:

- Unlisted entities an additional month to lodge financial reports for year ends from 31 December 2019 to 7 January 2021
- Listed entities an additional month to report for full year and half-year financial reports for 21 February 2020 to 7 January 2021 balance dates. Listed entities are required to inform the market if they rely on the extended period for lodgement. ASIC suggest that 'entities may also find it desirable to explain the reasons for relying on the extended deadlines'.

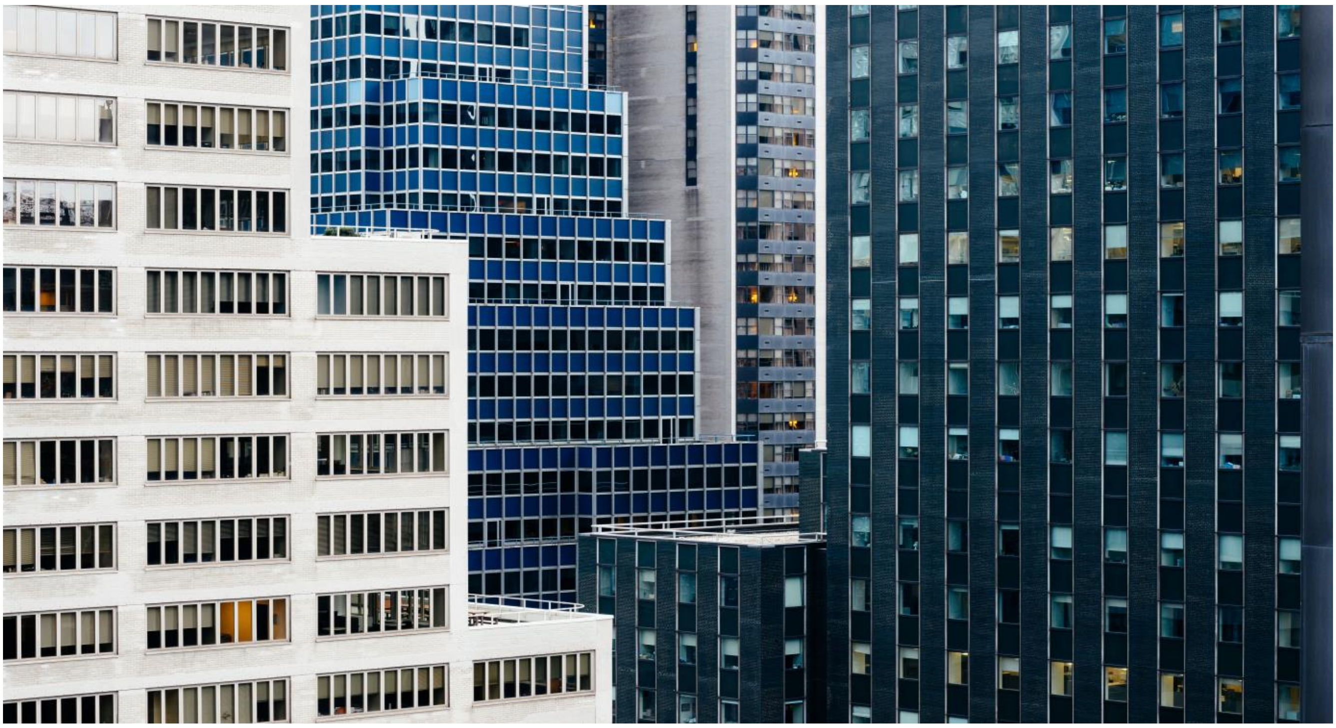
'No action' position on holding of Annual General Meetings – further extension unlikely

Reporting periods ending after 7 January 2021: ASIC has said it will continue to monitor how market conditions and COVID-19 developments are impacting financial reporting/AGM obligations for balance dates after 7 January but comments that at this stage 'there is no indication that further extensions of time will be necessary'.

[Source: ASIC media release 11/11/2020]

In Brief | Why not make voting more transparent? Writing in The AFR, Ownership Matters Director Dean Paatsch has called tighter regulation of vote counting at AGMs and expressed support for the government's proposal for all votes be conducted by poll

[Source: [registration required] The AFR 12/11/2020]



Disclosure and Reporting

In Brief | The FRC has released its annual end of year letter outlining reporting expectations for 2020/21. Disclosure of climate risk, Brexit-related risks, COVID-19 risk and reporting on workplace engagement are among the topics covered

[Sources: FRC media release 12/11/2020; End of year letter]

Institutional Investors and Stewardship

France: Investors are pushing SBF 120 companies to meet a 30% female representation target by 2025

The 30% club France investor group has launched in France with six management companies representing nearly $3 trillion euros of assets under management as members: Amundi, AXA Investment Managers (AXA IM), La Banque Postale Asset Management (LBP AM), Sycomore Asset Management, Mirova and Ostrum Asset Management.

The group is pushing for SBF 120 companies to increase the representation of women within their management structures to reach a 30% target by 2025.

The group has said it will engage with companies to understand how gender diversity is factored into their recruitment and promotion processes, the gender goals companies have set and what plans have been put in place to achieve them.

Investors will use their voting rights 'to encourage companies to act' where they consider measures to be insufficient.

The group is also calling on other investors/asset managers to join the initiative.

[Source: 30% Club media release 11/11/2020]

In Brief | Modern slavery: Investor group - Investors against slavery and trafficking – is reportedly pushing ASX 100 companies to prioritise and take concrete actions towards tackling the risk of labour exploitation in their supply chains

[Sources: Reuters 12/11/2020; Financial Standard 13/11/2020; Investor Daily 12/11/2020

Markets and Exchanges

ASIC is 'actively assessing ASX's compliance with its market licence obligations and is considering further actions' in the wake of the November 16 ASX outage and subsequent data issues impacting the ASX Centre Point matching system

Context

The ASX cash equity market trading platform failed to reopen for trading on 16 November after an outage that occurred during the opening auction. In a statement, ASX said that the outage was linked to the launch of the new ASX Trade System which live the same day. The 'root cause' of the issue was stated to be 'a software issue limited to the trading of multiple securities in a single order (combination trading) created inaccurate market data'.

The statement said that a 'resolution path' to enable trade to resume as usual on 17 November is in place.

The ASX apologised for the disruption and accepted responsibility, while noting that 'extensive testing and dress rehearsals' were conducted prior to the launch of the system. ASX CEO and Managing Director Dominic Stevens said,

> 'ASX is very disappointed with today's outage and sorry for the disruption caused to investors, customers and other market users. The outage falls short of the high standards we set ourselves and the standards others expect of us. Notwithstanding the extensive testing and rehearsals, and the involvement of our technology provider, ASX accepts responsibility. The obligation to get this right and provide a reliable and resilient trading system for the market rests with us.'

Mr Stevens went on to reiterate the importance of continuing to upgrade ASX technology saying,

> 'While I am disappointed with today's outage, we are determined to continue our program of contemporising ASX's technology stack from top to bottom. This initiative is critical to ASX building an exchange for the future and ensuring we best serve the needs of our customers and the Australian market'

Statements from ASIC

Statement on initial outage: On 16 November the Australian Securities and Investments Commission (ASIC) issued a short statement expressing 'significant concern' about the possible impact of the outage and confirming that ASIC is focused on ensuring the ASX is able to reopen 'in an orderly manner' on 17 November.

ASIC has said that it will also 'monitor for any impacts resulting from the failure of ASX Trade to open for most of the day'.

ASIC comments,

> 'Well-functioning financial market infrastructure is critical to the integrity and reputation of the Australian equity market and the trust and confidence investors have in it. As the primary equities market in Australia, ASX performs a vital role…Market licensees are required to operate a market that, to the extent reasonably practicable, is fair, orderly and transparent, and to have sufficient resources (financial, technological and human) to operate the market, including for any outsourced services. Following the reopening of the market, ASIC will determine whether ASX followed the relevant regulatory requirements under the Corporations Act and met its obligations under its Australian Market Licence. In addition to ASIC's expectations that this outage will be resolved as soon as is possible in a safe manner, ASX will be required to provide a full incident report to ASIC'.

ASIC further comments that the Chi-X market remained open, as well as Chi-X quoted ETFs and TraCRs.

Subsequent statement: On 17 November, ASIC issued a second statement noting that data issues with the ASX Centre Point matching system (an anonymous mid-point trade matching system) had led to the ASX advising at 11:17am that '[u]ntil further notice ASX Centre Point execution prices will be based on the ASX-lit best bid and offer only.'

ASIC states that,

> 'By not considering Chi-X bids and offers, transactions conducted on Centre Point may no longer constitute a Trade with Price Improvement under Rule 6.2.3 of the ASIC Market Integrity Rules (Securities Markets) 2017 (Rules). As a result, orders may no longer fall within the exceptions to the requirement to enter into transactions by matching on a Pre-Trade Transparent Order Book (Rule 6.1.1).'

ASIC goes on to say that in interests of ensuring the markets remained orderly it did not either instruct ASX to suspend operation of Centre Point or instruct market participants not to use it. However, ASIC expects market participants who have not already done so, to 'take reasonable steps to remove their reliance on Centre Point swiftly and safely'.

ASIC states that it is 'actively assessing ASX's compliance with its market licence obligations and is considering further actions to ensure the adequacy of ASX's human, financial and technological resources to operate its markets in an orderly manner'.

[Sources: ASX media release 16/11/2020; ASIC media releases 16/11/2020; 17/11/2020]

Regulators

COVID-19 recovery | Treasurer says that financial regulators need to 'pursue their mandates in a manner that is consistent with the will of the Parliament'

Writing in the AFR Treasurer Josh Frydenberg has outlined the role important role that recent financial reforms have played in allowing the economy to weather the pandemic and the role that further reforms will play in supporting the COVID-19 recovery (which he said should now be the key focus).

- **Consumer credit reform:** Mr Frydenberg retierated the government's rationale for the proposed roll back of responsible lending obligations, arguing that the current approach has become needlessly overly prescriptive and has led to lenders becoming more 'risk averse and conservative for fear of falling foul of the guidance'. This he said, has also led to approvals processes becoming longer and 'more intrusive'. Mr Frydenberg said that the government's proposal to remove responsible lending obligations (except for small amount credit contracts and consumer leases) will address these issues and support the flow of credit. He noted that regulators (the Reserve Bank, the Australian Prudential Regulation Authority (APRA) the Australian Seucurities and Investments Commission (ASIC)) and Treasuery all agree that the proposed changes will 'support the supply of credit'.
- **Superannuation reform (Your Future, Your Super reform package):** Mr Frydenberg briefly outlined the benefits of the the Your Future, Your Super reform package which he said will both address fund underperformance and put downward pressure on fees through preventing the creation of unintended multiple superannuation accounts; establishing a 'trusted, reliable source of information' ranking superannuation products in terms of fees and returns and increasing transparency around fund expenditure.
- **Regulators:** Mr Frydenberg said that in the past few years and through implementation of the Hayne reforms, the regulators now have the powers and funding required for them to 'deliver on their mandate without needing to come to government with more requests'. However, the government's expectation is that they operate in a manner that is 'consistent with the will of parliament'. Mr Frydenberg said that,

  > 'The public rightly expects that regulators pursue theirenforcement activities according to the law and independent of government. However, regulators do not carry out their mandates in a vacuum. They must pursue their mandates in a manner that is consistentwith the will of the Parliament. It is the Parliament who determines who and what should beregulated. It's the role of regulators to deliver on that intent, not tosupplement, circumvent or frustrate it. In the context of the COVID-19 recovery, it's critical that ourregulators are conscious of the environment they are operating inand have the flexibility to respond in a way that simultaneously fulfils their mandate and enhances consumer outcomes.
  >
  > [Source: The AFR 18/11/2020]

ASIC's current priorities and upcoming reforms: ASIC Commissioner Sean Hughes outlines ASIC's focus areas

Key Takeouts

- **Design and distribution obligations:** Australian Securities and Investments Commission (ASIC) Commissioner Sean Hughes reiterated that ASIC expects full compliance with design and distribution obligations (set to commence on 5 October 2021) 'from day one'. He called on industry to 'invest in their systems now and ensure that they are properly able to monitor the outcomes of their products come 5 October next year'. ASIC expects to release its final DDO guidance 'soon'.
- **Underinvestment in poor data technology systems and processes:** Mr Hughes identified poor technology systems and processes as a 'key root cause' of poor practice in ASIC supervised entities including in the context of identifying and responding to customer complaints and called on industry to invest to improve systems, processes. 'Given the year that we have had, I do not say this lightly: investment in getting data and systems right is essential. And it is overdue' he said.

In his speech to the Australian Retail Credit Association Conference, Australian Securities and Investments Commission (ASIC) Commissioner Sean Hughes recapped some of the actions ASIC has taken in response to the

COVID-19 pandemic and reiterated the regulator's immediate priorities; recapped ASIC's progress on the 13 matters referred by the Hayne Commission and touched briefly on upcoming reforms and ASIC's expectations of industry.

- ASIC remains focused on its purpose (despite disruptions): Despite the recent 'internal disruption and leadership change' at the regulator, Treasury's review into the regulator and the disruption caused by the COVID-19 pandemic, Mr Hughes said that ASIC remains focused on its core purpose. 'We're here to ensure confidence in a financial system that – even under stress – can remain fair, strong and efficient.'
- ASIC's response to the pandemic: Mr Hughes recapped some of the actions ASIC has implemented in response to the pandemic and reiterated the regulator's updated priorities, noting that some work was deferred back in light of the pandemic.
- The ePayments Code review: Mr Hughes said that work on the ePayments Code review which was deferred due to the pandemic, has now recommenced. ASIC plans to publish its second consultation paper on the Code, seeking feedback on proposed Code changes, 'around, or not long after, the end of 2020'. ASIC plans to issue an updated ePayments Code by the middle of 2021. Ahead of this, ASIC plans to engage further with stakeholders on the issue.

Upcoming reforms

- Mortgage broker best interests duty: Mr Hughes reminded mortgage brokers that from 1 January 2021, they will will be required to act in the best interests of consumers and to prioritise consumers' interests when providing credit assistance. He referred brokers to ASIC's guidance RG 273 Mortgage brokers: Best interests duty which he said outlines 'ASIC's interpretative views on how mortgage brokers may comply with their best interests obligations at key stages of the credit assistance process'. Commenting briefly on packaged products, Mr Hughes said that the reforms 'apply to each distinct product in the package. That is – there much be a reason why recommending each product is in the best interests of the consumer'.
- Consultation on RG 78 Breach reporting by AFS licensees in 'early 2021': Mr Hughes also flagged the introduction of breach reporting obligations for credit licensees including requirements for third-party licensees to report breaches by individual mortgage brokers and financial adviser representatives of other licensees. Mr Hughes said that ASIC plans to consult on updates to RG 78 early next year. ASIC also plans to consult on information sheet for new requirements for financial advisers and mortgage brokers to investigate misconduct, and notify and remediate affected clients.
- Reference checking and information sharing protocol: Mr Hughes said that once legislation is finalised to implement the Hayne Commission's recommendation that credit licensees and AFS licensees be required to comply with a reference checking and information sharing protocol for mortgage brokers and financial advisers, ASIC will consult with industry on the proposed requirements for licensees under the ASIC protocol. ASIC intends to finalise the protocol in the first half of 2021.

  [Note: Schedule 10 of the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 proposes to introduce a new reference checking and information sharing obligation on Australian financial services licensees and Australian credit licensees, in respect of mortgage brokers and financial advisers. Subject to the passage of the legislation, Schedule 10 will come into effect on 1 October 2021.]

Royal Commission referrals

Of the 13 referrals to ASIC made by the Hayne Commission, five are currently in litigation, one concluded with $57.5 million in civil penalties, and the remainder are under investigation. ASIC to date has either commenced or finalised action in a further 10 Royal Commission case studies.

Current priorities

- Financial hardship: ASIC continues to closely monitor how lenders are assisting consumers experiencing financial difficulties due to the pandemic. Currently, ASIC is focused on the way in which lenders are managing the end of loan deferral periods – Mr Hughes reiterated ASIC's expectation that lenders 'make all reasonable efforts to work with consumers to keep them in their homes if that is in the consumers' best interests'. Mr Hughes said that 'hardship will be an ongoing area of focus for ASIC into 2021, where the fair treatment of consumers will remain fundamental to reaching good outcomes.
- Predatory lending is another area of ASIC focus – Mr Hughes flagged that ASIC is 'mindful of the potential for unregulated fringe lenders who are using the pandemic to prey on vulnerable people' eg people who are desperate to stay in their homes. Mr Hughes said that 'ASIC has zero tolerance for this kind or predatory

behaviour, particularly lenders who are offering refinancing options that are nothing more than equity stripping. If you or your clients see examples of this behaviour, we urge you to come forward and report it to ASIC. We welcome the Government's reforms to enhance financial inclusion and ensure Australian consumers accessing these products are better protected'.

- Small amount lending: Mr Hughes said that ASIC is taking action to protect consumers from being sold high-cost unregulated credit including through use of its product intervention power, as well as through litigation.
- Debt management (or credit repair) firms: Another area of focus for ASIC is the debt management or 'credit repair' sector. Mr Hughes welcomed the package of reforms announced by the Treasurer on 25 September that will require debt management firms to hold an Australian Credit Licence when they are paid to represent consumers in disputes with financial firms from 1 April 2021. Mr Hughes said that ASIC is working closely with Treasury to implement the changes.

Regulatory agenda for 2021

Responsible lending

Commenting briefly on the consultation on proposed changes to responsible lending laws Mr Hughes said that 'this is very much an ongoing process and entirely a matter for government to give effect to its policy. We're working closely and collaboratively with Treasury and APRA to progress the credit reforms'.

> [Note: Consultation on proposed changes to consumer credit laws closes on 20 November. You can access our summary of the key changes being proposed here.]

Design and distribution obligations: ASIC expects full compliance from the outset

Mr Hughes said that ASIC expects full compliance with design and distribution obligations (set to commence on 5 October 2021) 'from day one'. Mr Hughes said that firms are expected to go beyond 'tick a box' compliance, and instead be expected to improve outcomes for consumers. In order for this to occur, he said, industry needs to 'invest in their systems now and ensure that they are properly able to monitor the outcomes of their products come 5 October next year'.

Mr Hughes said that ASIC expects to release its final DDO guidance 'soon'.

Underinvestment in poor data technology systems and processes

Mr Hughes identified poor technology systems and processes as a 'key root cause' of poor practice in ASIC supervised entities including in the context of identifying and responding to customer complaints.

Mr Hughes said that a review of breach report samples lodged with ASIC, indicates that 'underinvestment in technology systems as a root cause of the reported breaches in a significant number of cases – ranging in estimates of around 40% in some areas (including bank overcharging) to around 70% in others (including insurance overcharging)'.

Mr Hughes said that the combination of 'poor systems and poor governance' is resulting in delays in identifying problems and ultimately results in 'lengthy and costly remediation programs'. Mr Hughes called on industry to invest to improve systems, processes.

> 'Given the year that we have had, I do not say this lightly: investment in getting data and systems right is essential. And it is overdue.'

Mr Hughes observed that upgrading systems and processes has been shown to have benefits for institutions for example, lenders with 'better data and technology capability' were able to respond more quickly to borrowers impacted by COVID-19 needing additional support. Likewise, customers are increasingly expecting 'seamless digital interactions with their lenders' he said.

> [Source: Speech by ASIC Commissioner Sean Hughes at the Australian Retail Credit Association Conference, 2020 in review and COVID-19 recovery 13/11/2020]

Financial Services

Top Story | Legislating Hayne reforms: Hayne omnibus Bill introduced

Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 proposes to implement the government's response to a raft of Hayne recommendations.

Key Takeouts

- The Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Hayne omnibus Bill) which proposes to legislate the government's response to 20 Hayne recommendations (and one additional commitment) was introduced into the House of Representatives on 12 November 2020.
- Key measures include: a) banning the hawking of financial products; b) introducing a deferred sales model for add on insurance products; c) making the handling and settlement of insurance claims a financial service under the Corporations Act; d) restricting the use of the terms insurance and insurer; e) enabling provisions in financial services industry codes to be enforceable and introducing a framework for establishing government-instituted mandatory codes of conduct for the financial services industry; f) prohibiting RSE licensees from having a duty to act in the interests of another person; and g) legislating ASIC and APRA coregulation arrangements in superannuation.
- Many of the measures in the Bill are set to commence from 1 January 2021 (proposed commencement dates are set out below).
- The Bill does not include a some other measures (mostly relating to financial advice) planned to be introduced by the end of the year. Super Consumers Australia has raised concerns about this delay.

Overview

The Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Hayne omnibus Bill) which proposes to legislate the government's response to 20 Hayne recommendations (and one additional commitment) was introduced into the House of Representatives on 12 November 2020.

Announcing the introduction of the Bill, Treasurer Josh Frydenberg said that it is another 'major step forward in completing the implementation of the Hayne Royal Commission'.

A high level overview of some of the key measures (and proposed commencement dates) is below.

Schedule 1: Enforceable Code Provisions

Schedule 1 proposes to legislate the government's response to Hayne recommendation 1.15 (enforceable industry code provisions).

Broadly, Schedule 1 proposes to:

- 'build on' the existing codes framework contained in the Corporations Act 2001 (Cth) (Corporations Act) and the National Consumer Credit Protection Act 2009 (NCCP Act) to allow ASIC to designate enforceable code provisions in approving voluntary financial sector industry codes.
- ASIC will be able to take enforcement action where enforceable provisions are breached. Breach of an enforceable code provision in an ASIC approved industry Code could attract civil penalties (including pecuniary penalties of up to 300 penalty units) and/or other administrative enforcement action by ASIC.
- Schedule 1 also proposes to introduce a framework for establishing government-instituted mandatory codes of conduct for the financial services industry through regulations.
- Government-mandated industry Codes would be enforceable by ASIC. Breach of any mandatory code of conduct provision could attract enforcement action by the regulator and breach of any designated civil penalty provision could attract civil penalties (including pecuniary penalties of up to 1,000 penalty units) and/or other ASIC enforcement action.

Commencement: (Subject to the passage of the legislation), Schedule 1 will commence on 1 January 2021 or the day after Royal Assent (if later).

Schedule 2: Insurer avoidance of life insurance contracts, and duty to take reasonable care not to make a misrepresentation

Schedule 2 proposes to legislate the government's response to Hayne Recommendations 4.5 (duty to take reasonable care not to make a misrepresentation to an insurer) and 4.6 (avoidance of life insurance contracts).

Broadly,

- Part 1 of Schedule 2 proposes to implement the government's response to Hayne recommendation 4.6 by amending the Insurance Contracts Act 1984 (ICA) to limit the circumstances in which an insurer can avoid a contract of life insurance because of a non-fraudulent misrepresentation or non-fraudulent failure to comply with the duty of disclosure by the insured to the insurer.
- Part 2 of Schedule 2 proposes to implement the government's response to Hayne recommendation 4.5 by introducing a duty for insureds to take reasonable care not to make a misrepresentation to the insurer on entering into, varying, extending or renewing a consumer insurance. This new duty will replace the existing duty of disclosure.

Commencement: (Subject to the passage of the legislation), the changes is Part 1 will apply to any life insurance contracts that are entered into from 1 January 2021 or the day after Royal Assent (if later). The changes in Part 2 will apply to consumer insurance contracts that are entered into on or after 5 October 2021.

Schedule 3: Deferred sales model for add on insurance

Schedule 3 proposes to legislate the government's response to Hayne recommendation 4.3 (deferred sales model for add-on insurance).

Broadly, Schedule 3 proposes to:

- amend the ASIC Act to implement an industry wide deferred sales model for the sale of add-on insurance products (ie insurance products that are sold alongside, or in relation to, the offer or sale of a principal good or service). The explanatory memorandum includes a diagram summarising this deferred sales model at p65.
- The deferred sales model will not apply to: a) products that are the subject of an ASIC product intervention order which imposes a deferred sales period; b) comprehensive car insurance; c) products exempted by regulations; d) persons that ASIC exempts by notifiable instrument; and e) products recommended by financial advisers.
- It's also proposed to make failure to comply with various aspects of the proposed new requirements an offence.
- The Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020 (also introduced on 12 November) proposes to amend the Corporations (Fees) Act 2001 to allow ASIC to charge a fee for an application by an entity to be exempted from the deferred sales model.

Commencement: (If enacted) the changes in Schedule 3 will commence 'immediately after the commencement of Schedule 5) ie 5 October 2021, or the day after Royal Assent (if later).

Schedule 4: Caps on motor vehicle add-on insurance commissions

Schedule 4 proposes to legislate the government's response to Hayne recommendation 4.4 (cap on add-on insurance commissions).

Broadly Schedule 4 proposes to impose a cap on the amount of add-on insurance commissions that may be paid to vehicle dealers in relation to add-on risk products such as tyre and rim insurance, mechanical breakdown insurance and consumer credit insurance (for the credit facility) supplied in connection with the sale or long-term lease of a motor vehicle.

Commencement: (Subject to the passage of the legislation), the proposed changes in Schedule 4 will apply from 1 January 2021 or the day after Royal Assent (if later).

Schedule 5: Banning the hawking of financial products

Schedule 5 of the Bill proposes to legislate the government's response to Hayne recommendations 3.4 (banning hawking of superannuation products) and 4.1 (banning the hawking of insurance products).

Broadly Schedule 5 proposes to 'strengthen the existing hawking prohibition' in the Corporations Act 2001 (Cth) by replacing the three separate prohibitions for the hawking of financial products, securities, and interests in managed investment schemes with one general prohibition on 'offers to sell or issue financial products to a retail client in the course of, or because of, unsolicited contact'.

The amendments in Schedule 5 also give consumers the power to specify how they can be contacted and the power to withdraw or vary consent to be contacted at any time.

Contravention of the prohibition will remain an offence of strict liability.

Unsolicited contact

- Currently 'unsolicited contact' is undefined in the legislation. The Bill clarifies that 'unsolicited contact' as 'contact to which the consumer did not consent which is made by telephone call, face to face meetings, or any other real-time interaction in the nature of a discussion or conversation'.
- Prior consent: The explanatory memorandum states that 'a person can only offer to sell or issue a financial product to a consumer if the consumer has specifically consented to being contacted for the purpose of making the offer for that product, or where the offer was reasonably within the scope of the consumer's consent'. In order for consent to be valid, the consumer must give it before the contact occurs.

Application

- The prohibition applies to 'offers to sell or issue financial products to a retail client in the course of, or because of, unsolicited contact'. The explanatory memorandum makes clear that offers/requests/invitations for products that are not financial products such as roadside assistance, are not covered.
- The hawking rules will apply to the person (including a body corporate) who undertakes the prohibited activity ie it is not limited to the provider of a financial service product.
- The changes will also strengthen the existing prohibitions on offers of financial products, securities and interests in managed investment schemes made during the course of/because of, unsolicited contact with a consumer.

Exceptions

- The explanatory memorandum states that the hawking rules will not prevent a person from contacting an existing client about a financial product that has already been purchased or that is provided under a contract which is still in force.
- In the superannuation context, superannuation trustees will be 'permitted to contact existing fund members about their benefits, including in relation to changes to their insurance held through superannuation' but will not be able to make unsolicited contact with their members to offer/request/invite them to apply for the issue of a new superannuation product.
- The explanatory memorandum flags that 'a further exception is expected to be introduced' through the regulations to allow product issuers to contact customers about renewals of contracts that involve the creation of a new financial product, including the renewal of an expired contract. This exception will not apply to contact that occurs more than 30 days after the contract expires.

Commencement: (Subject to the passage of the legislation) the changes in Schedule 5 will commence from 5 October 2021 or the day after Royal Assent (if later).

Schedule 6: Restricting the use of the terms insurance and insurer

Schedule 6 proposes to legislate an 'additional commitment' made by the government in response to Hayne recommendation 4.2 (restrict the ability of firms to use terms such as 'insurer' and 'insurance').

Broadly, Schedule 6 proposes to restrict the ability of firms to use the terms 'insurer' and 'insurance' to only those firms that have a 'legitimate interest' in using terminology and to introduce penalties for non-compliance.

Commencement: (Subject to the passage of the legislation) the changes in Schedule 6 will commence from 1 January 2021 or the day after Royal Assent (if later).

Schedule 7: Removing the claims handling exemption for insurance

Schedule 7 proposes to legislate the government's response to Hayne Recommendation 4.8 (Removal of claims handling exemption for insurance).

Schedule 7 proposes to make the handling and settling of insurance claims a financial service under the Corporations Act. This means that:

- people who provide claims handling services (insures, certain tradespeople, insurance claims managers, certain insurance brokers and certain financial advisers) will be required to hold an Australian financial services licence covering claims handling or be authorised by another person with an Australian financial services licence covering claims handling.
- Australian financial services licensees with licences covering claims handling must comply with the general obligations in section 912A of the Corporations Act.
- people representing a consumer to pursue a claim must hold an Australian financial services licence covering claims handling if they obtain a benefit for that service. If the consumer is a retail client, the licensee must have a compliant internal dispute resolution system, be a member of AFCA and give a Financial Services Guide to the consumer.
- Australian financial services licensees who offer to settle a general insurance claim using a cash payment must provide the consumer with a Cash Settlement Fact Sheet if the consumer is a retail client.

Commencement: (Subject to the passage of the legislation) the changes in Schedule 7 will commence on 1 January 2021 or the day after Royal Asset (if later).

Schedule 8: Trustees of registrable superannuation entities should have no other duty

Schedule 8 proposes to legislate the government's response to Hayne recommendation 3.1 (trustee of a superannuation fund should be prohibited from having any obligations other than those arising from or in the course of its performance of its duties as trustee of a superannuation fund).

Schedule 8 proposes to impose an additional condition on RSE licences held by a body corporate trustee. The condition would prohibit the RSE licensee from having a duty to act in the interests of another person, except in the course of: a) performing the RSE licensee's duties and exercising the RSE licensee's powers as a trustee of a registrable superannuation fund; or b) providing personal advice.

Commencement: (Subject to the passage of the legislation), the changes in Schedule 7 will apply from 1 July 2021 or the day after Royal Assent (if later).

Schedule 9: ASIC and APRA coregulation arrangements in superannuation

Schedule 9 proposes to legislate the government's response to Hayne recommendations 3.8 (adjustment of APRA and ASIC's roles); 6.3 (general principles of co-regulation); 6.4 (ASIC as conduct regulator); and 6.5 (APRA to retain functions).

Broadly, Schedule 9 proposes to:

- expand ASIC's role in superannuation to make ASIC 'generally responsible for consumer protection, market integrity, disclosure and record keeping'
- extend the AFSL regime to cover a broader range of activities undertaken by APRA-regulated superannuation trustees (through the creation of a new type of financial service: providing a superannuation trustee service)
- extend the existing indemnification provisions in the Superannuation Industry (Supervision) Act 1993 (SIS Act) to prevent trustees and directors from using trust assets to pay a criminal, civil or administrative penalty incurred through contravention of a provision of the Corporations Act or ASIC Act.

Commencement: (Subject to the passage of the legislation) the changes in Schedule 9 will commence on 1 January 2021 or the day after Royal Assent (If later).

Schedule 10: Reference checking and information sharing protocol

Schedule 10 proposes to implement the government's response to Hayne recommendations 1.6 (misconduct by mortgage brokers) (partial response) and 2.7 (reference checking and information sharing).

Schedule 10 proposes to introduce a new reference checking and information sharing obligation on Australian financial services licensees and Australian credit licensees, in respect of mortgage brokers and financial advisers. Broadly the changes in Schedule 10:

- require Australian financial services licensees and Australian credit licensees, as an obligation under their licence, to comply with new reference checking, information sharing and record keeping protocols to be made by ASIC in the form of legislative instruments under the Corporations Act and the Credit Act
- create a civil penalty for non-compliance with the obligation.

Commencement: (Subject to the passage of the legislation) the changes will apply from 1 October 2021.

Schedule 11: Breach reporting and remediation

Schedule 11 proposes to implement the government's response to Hayne recommendations 1.6 (misconduct by mortgage brokers) (partial response); 2.8 (reporting compliance concerns); 2.9 (misconduct by financial advisers); and 7.2 (implementation of the ASIC Enforcement Review recommendations) (partial response).

Broadly, Schedule 11 proposes to introduce a new breach reporting regime for Australian Financial Service Licensees and Australian Credit Licensees.

- Reportable situations: The kinds of situations that will need to be reported to ASIC will be expanded to include: a) investigations into whether a significant breach has occurred or will occur if the investigation continues for more than 30 days and the outcomes of those investigations; b) conduct that constitutes gross negligence or serious fraud; c) conduct that amounts to misleading or deceptive conduct under the financial services law; and d) serious compliance concerns about individual financial advisers operating under another licence. Currently licensees are required to report breaches and likely breaches that are significant but are not required to report investigations.
- To clarify the matters that should be reported the existing test for when a breach or likely breach is significant with two separate tests:
  - a 'deemed significance' test which deems that a breach of a 'core obligation' is taken to be significant if certain circumstances apply
  - a test based on the existing significance test, which determines whether a breach is significant based on consideration of: a) the number or frequency of similar breaches; b) the impact of the breach or likely breach on the licensee's ability to provide financial services covered by the licence; c) the extent to which the breach or likely breach indicates that the licensee's arrangements to ensure compliance with those obligations are inadequate; and d) any other matters prescribed by regulations.
- Licensees (Australian credit licensees and Australian Financial Services Licensees) will also be required to lodge a report with ASIC if the licensee has reasonable grounds to believe that a reportable situation, other than a reportable situation about an investigation, has arisen in relation to financial advisers and mortgage brokers respectively.
- Licensees will be required to lodge breach reports with ASIC in the prescribed form, within 30 calendar days 'after the licensee first knows that, or is reckless with respect to whether there are reasonable grounds to believe, a reportable situation has arisen'.
- Failing to lodge a report with ASIC will constitute an offence with a maximum penalty of two years imprisonment. A fine may also be imposed. The explanatory memorandum states that 'applying strict liability in this case is appropriate as requiring proof of fault would undermine deterrence'.
- ASIC will be required to publish data about breach reports on its website.
- Schedule 11 also imposes a new obligation on Australian financial services licensees and Australian credit licensees who are mortgage brokers to investigate misconduct and promptly remediate affected clients.

Commencement: (Subject to the passage of the legislation) the changes will take effect from 1 October 2021.

Schedule 12: Statutory obligation for ASIC/APRA to cooperate

Schedule 12 proposes to implement the government's response to Hayne recommendations 6.9 (Statutory obligation for APRA and ASIC to co-operate and share information) and 6.11 (formalise ASIC meeting procedures).

Parts 1 and 2 of Schedule 12 include measures to remove barriers to efficient co-operation and information sharing between the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA). Under the changes:

- APRA and ASIC are required to cooperate with each other in the performance of their functions and powers, so far as is practicable.
- APRA and ASIC are required to comply with a request in writing for information and documents from each other (with some limitations). The Chair of APRA or ASIC are able make a determination in writing that a request will not be complied with if it would 'compromise the functioning of the respective regulator'. The explanatory memorandum states that this power 'is intended to be used only in limited circumstances'.
- APRA and ASIC are required to notify each other when they reasonably believe there may be material breaches of each other's legislation.
- Part 3 of Schedule 12 formalises ASIC meeting procedures. The proposed changes are 'substantially similar' to the requirements set out in the APRA Act dealing with the times and places of meetings, how voting is to occur and the passing of resolutions without meetings.

Commencement: (Subject to the passage of the legislation) the changes will take effect from 1 January 2021 or the day after Royal Assent (if later).

Response to the introduction of the Bill

In a statement welcoming the introduction of the Bill, the Australian Banking Association (ABA) CEO Anna Bligh said that 'Australian banks have already been acting on the findings of Commissioner Hayne and remain fully engaged for this next phase'. Ms Bligh said that banks will 'continue to work with the Government and regulators on the next round of changes and will be ready for their implementation from next year'.

Consumer groups have welcomed the introduction of the Bill, but have also raised concerns

Consumer Groups (The Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre, Financial Counselling Australia) welcomed the release of the Bill and in particular the ban on hawking of financial products but have reiterated their concerns about the proposed roll back of responsible lending obligations. However, the groups also raised concerns about the 'potential exemption for travel insurance from some of the insurance reforms' on the basis that it will leave consumers without sufficient protection from 'unscrupulous sales tactics'. Gerard Brody CEO of Consumer Action Law Centre also reiterated the groups' concern about the proposed roll-back of responsible lending laws. Mr Brody said,

> 'Unfortunately, we have seen the Government backflipping on some of their Banking Royal Commission commitments already. In particular, the proposed scrapping of responsible lending protections would directly contravene the very first recommendation by Commissioner Hayne. Reducing consumer protection in lending makes no sense ethically, morally, or economically. It will risk explosive debt and more suffering among our most vulnerable'.

Similarly, Super Consumers Australia welcomed the introduction of the Bill and in particular the introduction of anti-hawking measures which it considers will provide important protections for superannuation members and will 'ultimately boost retirement savings of Australians'. Xavier O'Halloran, Director of Super Consumers Australia said,

> 'The cost of being sold into a poor quality super fund can mean the difference between a comfortable retirement or struggling to pay the heating bill. We're especially pleased that the new legislation makes it crystal clear that it's illegal to hawk a member of a MySuper product into a choice product offered by the same fund. The complementary reforms announced in the Federal Budget to end the creation of duplicate accounts make it even more important that people end up in a single quality fund and are not sold a lemon'.

Super Consumers Australia also welcomed the measures to strengthen 'the arm of the regulator and allow them to protect individual members who have had their retirement savings jeopardised by the misconduct of superannuation funds'.

However, the group called on the government to take action to implement Hayne recommendations on financial advice.

> 'We note that the government is still to act on Hayne's recommendations on financial advice, in particular the charging of ongoing advice from superannuation. As the Royal Commission found, in many cases this advice was of little to no value and had a serious impact on eroding people's retirement savings. We look forward to the government introducing this legislation as soon as possible to support the advice market in transitioning to provide higher quality, more affordable assistance to Australians'.

[Sources: Financial Sector Reform (Hayne Royal Commission Response) Bill 2020; Explanatory memorandum; Minister' Second reading speech; Treasurer's announcement 12/11/2020; ABA media release 12/11/2020; Consumer Action Law Centre media release 12/11/2020; Super Consumers Australia media release 12/11/2020]

[Sources: Financial Sector Reform (Hayne Royal Commission Response) Bill 2020; Explanatory memorandum; Minister' Second reading speech; Treasurer's announcement 12/11/2020; ABA media release 12/11/2020; Consumer Action Law Centre media release 12/11/2020; Super Consumers Australia media release 12/11/2020]

Still outstanding? Hayne measures planned to be introduced by December 2020

On the 8 May 2020, Treasurer Josh Frydenberg announced that the government's decision to push back its planned Financial Services Royal Commission (FSRC) implementation timetable by six months to 'enable the financial services industry to focus their efforts on planning for the recovery and supporting their customers and their staff during this unprecedented time'.

Based on that announcement several further measures are planned to be introduced by the end of 2020. These are briefly summarised in the table below.

Measures planned to be introduced by December 2020.(but still outstanding)

DRAFT LEGISLATION TITLE [DRAFT LEGISLATION CAN BE ACCESSED HERE]	HAYNE RECOMMENDATIONS	KEY CHANGES	PROPOSED COMMENCEMENT DATE
▪ [Exposure draft] Financial Regulator Assessment Authority Bill 2020 (Assessment Authority Bill) ▪ [Exposure draft] Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2020 Measures)) Bill 2020: FSRC rec 6.14 (Financial Regulator Assessment Authority) (Stronger Regulations Bill)	▪ 6.14 (new independent oversight authority for APRA and ASIC).	The draft legislation proposes to establish a new oversight body — the Financial Regulator Assessment Authority — to oversee the effectiveness of APRA and ASIC. The draft legislation specifies the funds and powers of the proposed new Authority.	1 January 2021
▪ [Exposure draft] Financial Sector Reform (Hayne Royal Commission Response — Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 2.1 (ongoing free arrangements) ▪ [Exposure draft] Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Ongoing Fee Arrangements)	▪ 2.1 (ongoing fee arrangements: annual renewal and payment).	The draft Bill proposes to target the issue of fee for no service conduct by requiring financial services providers that receive fees to: a) seek annual renewal from clients for all ongoing fee arrangements (ie new and existing ongoing fee arrangements will need to be renewed annually); b) require fee recipients to disclose in writing the total fees that will be charged; c) set out the services that will be provided during the following 12 month period; and d) obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account.	1 January 2021

DRAFT LEGISLATION TITLE [DRAFT LEGISLATION CAN BE ACCESSED HERE]	HAYNE RECOMMENDATIONS	KEY CHANGES	PROPOSED COMMENCEMENT DATE
Regulations 2020: FSRC rec 2.1		The draft regulations outline the record keeping compliance requirements for fee recipients to support the operation of the draft Bill.	
▪ [Exposure draft] Financial Sector Reform (Hayne Royal Commission response — Protecting Consumers (2020 Measures)) Bill 2020: FSRC Rec 2.2 (disclosure of lack of independence)	▪ 2.2 (disclosure of lack of independence).	The draft Bill proposes to introduce a new requirement for providing entities (ie a financial services licensee or authorised representative) to disclose in writing to their (retail) client it they are not independent and why that is the case.	1 January 2021
▪ [Exposure draft Bill] Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: fees (FSRC Rec 3.2 and 3.3)	▪ 3.2 (no deducting advice fees from MySuper Accounts); ▪ 3.3 (limitations on deducting advice fees from choice accounts).	The draft Bill proposes to remove a superannuation trustee's capacity to charge advice fees from MySuper products and remove the capacity of a superannuation trustee to charge advice fees to a member (other than fees for intra-fund advice) unless certain conditions are satisfied.	1 January 2021
▪ [Exposure draft] Financial Sector Reform (Hayne Royal Commission Response — Stronger Regulators (2020 Measures)) Bill 2020: FSRC Rec 7.2 (ASIC Directions)	▪ (Additional Commitment) 7.2 (implementation of the ASIC Enforcement Review recommendations) (partial response).	The draft Bill proposes to implement part of the government's response to recommendation 7.2 by providing ASIC with powers to give directions to financial services licensees and credit licensees in order to prevent or address suspected breaches of financial services law or credit legislation.	The day after the legislation receives Royal Assent.

[Sources: Treasurer Josh Frydenberg media release 08/05/20; Implementation roadmap]

BNPL Review released: ASIC does not recommend regulatory change, but does flag its willingness to act if industry fails to address consumer harm

ASIC's second Buy Now Pay Later report: ASIC Report 672: Buy now pay later report was released on 16 November. Our key takeaways are below.

Key Takeouts

- Following the release of the 2018 initial report into the buy now pay later (BNPL) sector (ASIC report 600), the Australian Securities and Investments Commission (ASIC) has released a second report (ASIC report 672) outlining the growth in the BNPL industry, the experiences of consumers using BNPL services and touching on regulatory developments legislated since the release of the initial report.
- Rapid uptake of BNPL service: The report found that that uptake of BNPL products has continued since the release of the initial report with the total amount of credit extended under BNPL arrangements almost doubling between FY 2017–18 and RY 2019-2019. The report suggests that this trend looks set to continue.

- The report found that though BNPL services are 'working for the majority of users', some consumers using BNPL services are experiencing negative consequences eg missing payments, paying missed payment fees, struggling to meet other financial commitments.
- The report includes no recommendations for regulatory reform. ASIC states that 'policy and regulation of the buy now pay later industry remain a matter for Government and, ultimately, the Parliament'.
- ASIC does suggest that the combination of ASIC's product intervention power, the (forthcoming) design and distribution obligations (which will apply from October 2021) and the industry code of conduct are an 'opportunity for the industry to address consumer harm'.
- Response to the release of the report: The report appears to have generally been welcomed by industry. The Consumer Action Law Centre (CALC) questions whether existing arrangements are sufficient to address the consumer harms identified and has reiterated calls for responsible lending obligations to be extended to the BNPL sector.

The Australian Securities and Investments Commission (ASIC) has released a report – ASIC Report 672: Buy now pay later: An industry update – into the growth of the buy now pay later sector, presenting ASIC's observations about consumers' experience using buy now pay later (BNPL) services and regulatory developments legislated since the release of the ASIC's initial report.

The BNPL sector continues to grow, demand for BNPL services is outstripping demand for credit card services

The BNPL sector is growing rapidly:

- As at June 2019, the six buy now pay later providers included in the review (Afterpay, BrightePay, Humm, Openpay, Payright, Zip Pay) had approved 6.1 million accounts, 3.7 million of which were approved in FY 2018-19.
- The volume of transactions increased 75% between June 2018 (1.9 million transactions) and June 2019 (from 3.4 million transactions).
- The total value of all transactions increased by 79%, from $3.1 billion in the 2017–18 financial year to $5.6 billion in the 2018–19 financial year.
- The sector continues to grow in 2020: The volume of transactions made and the total value of transactions each increased 43% in the year to June 2019. The total number of BNPL users also increased by 25% over the same period.
- In contrast, while demand for BNPL services has continued to grow and the value and volume of transactions is trending upwards, the value of credit card services has plateaued. In FY 2016-17 the value of personal credit card transactions increased by 3.6%, dropping to 0.3% in 2018-19.

Consumer experience

The report found that though BNPL services are 'working for the majority of users', some consumers using BNPL services are experiencing negative consequence. These include the following.

Incurring missed payment fees

- Though the BNPL providers included in the review do not charge interest, the majority charge missed payment fees. ASIC found that 21% of the BNPL consumers overall (47% of whom fall into the 18 to 29 age bracket) missed a payment in the last 12 months.
- ASIC comments that although the percentage of transactions incurring missed payment fees remained 'relatively stable' (fluctuating between 9% and 15% each month), the growing user base means that the number of missed payment fees continues to grow. In FY 2018-19, missed payment fee revenue for all six providers included in the review totalled over $43 million (up 38% on the previous financial year).
- In FY 2018–19, 45% of all transactions (or 1.1 million+ transactions) incurred multiple missed payment fees.

Experiencing financial stress and difficulty meeting other financial commitments

- According to the report over the last 12 months:
  - 20% of consumers surveyed said they cut back on/have gone without essentials such as meals. Of this group 39% fell into the 18-29 year old age bracket.

  - 15% of consumers surveyed said that they have taken out an additional loan in order to make BNPL payments on time. Again, most (50%) are 18-29 years old.
  - One in five consumers surveyed said that they were late paying other bills (eg household bills (44%) credit card payments (32%)) in order to make their BNPL payments on time. 50% of this group were aged between 18 to 29.
- These issues were more prevalent among consumers who used more than one BNPL service provider.

A risk that consumers may be paying inflated prices for some goods/serves when using BNPL arrangements through hidden surcharges?

ASIC comments that though BNPL providers generally contractually prohibit merchants from charging consumers a 'surcharge' for using BNPL services, it is 'still possible for surcharging to occur and for consumers to be charged more for using a buy now pay later arrangement' as surcharges may be hidden.

The report states that ASIC and the Australian Competition and Consumer Commission (ACCC) wrote to over 5,000 merchants partnered with BNPL providers in industries that ASIC considered to be 'more likely than others to engage in surcharging' reminding them that it is illegal to mislead/deceive consumers about goods and services (including the price) under the Australian Consumer Law and the cost of using credit arrangements, including BNPL arrangements, under the ASIC Act.

Having flagged the risk, the report makes clear however that ASIC considers that it is 'not likely' that surcharging is occurring across the whole BNPL sector as 'it is difficult for merchants to surcharge where there is transparent and standardised pricing of goods and services'.

The report notes that the Reserve Bank of Australia's periodic review of retail payments regulation, which will consider stakeholder views on the 'no-surcharge' rules that are typically imposed by BNPL providers on merchants, is expected completed in 2021 (having been temporarily put on hold because of the COVID-19 pandemic.)

Impact of recent regulatory developments

Product Intervention Powers and (forthcoming) Design and Distribution Obligations

The report highlights that BNPL arrangements are subject to both ASIC's new product intervention power and the forthcoming design and distribution obligations (which will apply from October 2021), both of which are expected to 'play an important role in promoting good consumer outcomes'.

For example, ASIC expects that where providers offer retail consumers BNPL arrangements that are 'designed and marketed as offering cost-free, or low-cost, access to deferred payment, this should form a central consideration for the provider in terms of their design and distribution obligations'.

As such, if the BNPL provider's data shows that consumers are repeatedly paying missed payment fees and/or these fees 'represent a significant proportion of the amount borrowed' ASIC expects the provider to consider the reasons why (to consider whether the arrangement is being inappropriately distributed) and how the issue can be addressed.

Self-regulation through the BNPL Code of Conduct

ASIC also considers that self-regulation through the Australian Finance Industry Association (AFIA) industry Code of Practice which is set to be published and become effective from 1 March 2021, 'with broad industry support and commitment' will also help to ensure good consumer outcomes going forward.

Hints on ensuring the Code is effective

ASIC comments that formulating obligations that operate effectively across the diverse range of business models operating in the sector is likely to be a key challenge in developing the Code. ASIC suggests that where the BNPL Code sets different standards/obligations at different thresholds, the data/evidence supporting why these are appropriate should be clear. In addition, ASIC suggests that thresholds be reviewed periodically to ensure they remain fit for purpose.

Referencing a new consumer code for retailers of 'new energy tech' (NET) products recently authorised by the Australian Competition Tribunal as a good example of a targeted/effective Code, ASIC also called on industry and

Australian Finance Industry Association (AFIA) to ensure that the BNPL Code includes 'targeted solutions in response to each of the specific harms identified in REP 600 and further outlined in this report'.

For example: ASIC comments that the initial report into the BNPL sector (REP 600) identified two safeguards that could assist in reducing consumer harm where consumers become overcommitted: a) capping the amount of missed/late payment fees a consumer can be charged, and b) cutting consumers off from making further purchases once they have missed a payment

As yet, ASIC states that only four providers have started capping or limiting these fees and not all providers have measures in place to prevent consumers from making further purchases where they have missed a payment for an existing purchase.

[Sources: ASIC media release 16/11/2020; ASIC Report 672: Buy now pay later: An industry update]

BNPL providers have welcomed the release of the report

In separate statements, Afterpay, Zip Co Ltd and Flexigroup each welcomed the release of the report, acknowledged the report findings and pointing to elements in their respective business models designed to ensure against adverse consumer outcomes.

Both Flexigroup and Zip Co also emphasised the important role that the industry Code will play in promoting good consumer outcomes going forward.

[Sources: Afterpay ASX announcement 16/11/2020; Zip Co Ltd ASX announcement 16/11/2020; Flexigroup Ltd ASX Announcement 16/11/2020]

Call for responsible lending protections to be extended to the sector

Commenting on the findings, Consumer Action Law Centre CEO Gerard Brody reiterated calls for responsible lending obligations to be extended to the BNPL sector, and questioned whether self-regulation is the right approach. Mr Brody said,

> 'The draft BNPL industry code only covers eight businesses, while we are seeing new providers pop up every week…It's alarming if people are prioritising buy now pay later debts over essentials, or paying off other interest-charging loans. The best way to address this and limit the harm is to apply responsible lending obligations and other credit laws to the buy now pay later sector'.

[Source: Consumer Action Law Centre media release 16/11/2020]

ASIC is seeking feedback on how access to affordable 'limited' financial advice can be improved

Key takeaways: ASIC Consultation Paper 332: Promoting access to affordable advice for consumers (CP 332)

The Australian Securities and Investments Commission (ASIC) has released a consultation paper - Consultation Paper 332 Promoting access to affordable advice for consumers (CP 332) - seeking feedback from financial advice industry participants and other stakeholders on the barriers to the delivery of 'good-quality', 'affordable' personal financial advice and what steps can be taken to improve consumer access.

The consultation is part of a broader ASIC project – the Unmet Advice Needs project – which is aimed at helping ASIC to understand what it can do, and what industry can do, to better promote access to affordable, quality advice.

Broadly, ASIC seeks feedback on the following issues.

Barriers to providing limited advice

- The challenges and practical issues industry faces when providing limited advice: ASIC writes that despite ASIC's guidance on the issue, many financial advisers and advice licensees are uncertain about how they can provide compliant limited advice. In some cases, this uncertainty has led to licensees opting to restrict their financial advisers from providing limited advice to consumers. Accordingly ASIC seeks further feedback on these and other barriers to the provision of limited advice.

The usefulness of ASIC's guidance and examples

- **The usefulness of guidance in RG 244:** ASIC is seeking feedback on the usefulness of the guidance on 'scaled advice' in RG 244 including the limited advice scenarios in the guidance. More particularly ASIC seeks feedback on: whether additional guidance would be helpful, which format would be most useful, and whether the examples should be expanded.
- **Use of terminology in ASIC guidance:** Currently RG 244 refers to limited or single-issue advice as 'scaled advice'. ASIC seeks feedback on whether using a different term eg limited advice, narrow scope advice, transaction advice etc would be more readily understandable.
- **The usefulness of ASIC's guidance on and examples of Statements of Advice (SOA):** RG 90 is currently under review and ASIC is seeking feedback on whether the example SOA for limited advice included in it is useful and how it could be improved. ASIC also seeks feedback on the example SOAs in the appendix to RG 244.

The appendix to the guidance at page 27 of the consultation paper reproduces Table 2 from RG 244 which outlines some guidance intended to assist advice providers to provide advice that is compliant with their obligations. It provides a summary of some issues ASIC considers to be important for advice providers to consider when they are giving limited advice.

Improving the accessibility and affordability of advice

- **Cost of advice:** ASIC states that the actual cost of advice is generally higher than many consumers can afford and/or are willing to pay. ASIC is looking to better understand the drivers behind the cost of personal advice and the options being explored by industry to reduce them. ASIC seeks feedback on what changes could be implemented to reduce the cost of personal advice eg whether technology could be used to reduce the cost. ASIC is also seeking feedback on industry's experience using Record of Advices (as opposed to SOAs) and views on whether ROAs should be 'more readily available for financial advisers to use as an alternative to an SOA'.
- **Strategic advice and digital personal advice:** ASIC seeks feedback on industry's experience in providing strategic advice and separately industry's views/experience in providing digital personal advice. ASIC seeks feedback on the usefulness of ASIC's guidance on digital advice in RG 255, and ASIC's guidance on strategic advice in RG 244.

Timing and next steps

The deadline for submissions is 18 January 2021. Following the consultation, ASIC plans to hold a series of stakeholder roundtables in 'early in 2021' to discuss issues raised in submissions to the consultation.

Following this process ASIC will provide an update on its findings, outline the actions it will take and work with industry to address any issues and 'pass feedback on to the government' where relevant (eg if feedback suggests that law reform is required).

[Sources: ASIC media release 17/11/2020; Consultation Paper 332 Promoting access to affordable advice for consumers (CP 332)]

Top Story | Judgment or not, superannuation trustees must not ignore climate risk

MinterEllison's team provide their expert take on the implications, for superannuation trustees and for the financial sector more generally, of the landmark litigation brought by superannuation fund member Mark McVeigh against the trustee of REST Super

The full text of the article can be accessed on our website here.

Your Future Your Super package: Senator Jane confirms that the government 'will be legislating to compel superannuation trustees to act in the best financial interests of their members'

Senator Jane Hume's speech to the Australian Shareholders Association Investor Conference focused on explaining the rationale underpinning the government' planned Your Future, Your Super superannuation reform package which was announced in the Federal Budget. Ms Hume spelt out the benefits of each of the four elements of the proposed reforms.

Increased accountability: Legislating an explicit requirement for funds to act in the best financial interests of members

Ms Hume said that the government will strengthen the duty owed by trustees to their members by legislating to 'compel superannuation trustees to act in the best financial interests of their members'.

Ms Hume explained the rationale for the change as follows,

> 'Superfunds invest in bridges and roads that members can drive over, but the role of a super fund is not to make members' commuting lives easier. Super funds invest in airports, but the purpose of super funds is not to give members a place to fly from on holidays. Superfunds invest in wind farms, pipelines and power grids, but the job of superfunds is not to help members turn their lights on. These all may be good things. But they're not the purpose of super. They're simply welcome and happy by-products of the best interests duty. Australians entrust super funds with their savings to make a return on them; to maximise their risk-adjusted returns on their retirement savings. That's it. Nothing more. And certainly nothing less'.

Consistent with this, Ms Hume said that the measure is aimed at putting beyond doubt what it means for a trustee to act in a members' best interests – trustees will be expressly required to 'act in the best financial interests of members'.

The onus will be on trustees to establish that there is a reasonable basis to support their actions, consistent with members' best financial interests 'even where other interests are present'.

New disclosure requirements

To increase transparency around fund expenditure, and to make it clearer to members how funds are managing members' savings, funds will be required to provide members with 'better information' in advance of annual members' meetings.

Funds will also be required to disclose:

- the remuneration of their key executives and' highly paid investment managers', as ASX listed companies are required to do
- their donations to political parties, peak bodies and 'affiliates' eg employer organisations and unions.
- marketing expenditures, sporting sponsorships and external entertainments

Stapling superannuation accounts to members

Ms Hume said that without this measure, 850,000 new duplicate accounts are created every year, significantly impacting individual member retirement savings - multiple accounts cost members around $450 million per year in unnecessary fees. Ms Hume said that this was recognised as a structural issue by both the Productivity Commission and the Financial Services Royal Commission and the government agrees with this view.

> 'By preventing the creation of unintended multiple accounts, the Morrison Government will protect the retirement savings of millions of Australians from being eroded by unnecessary fees and insurance premiums, resulting in a benefit of $2.8 billion over 10 years' Ms Hume said.

Giving members the information they need to choose a high-performing fund

Ms Hume said that the complexity system and the 'lack of simple and clear independent information' is preventing members from identifying the superannuation product that best suits their needs. This issue has been compounded by the exiting default arrangements which has led to the proliferation of 'dozens' of MySuper products, a lack of competition between funds and to higher fees and lower returns for members.

Ms Hume said that the YourSuper comparison tool (which will be in place by July 2021) will help address these issues by enabling members to more easily compare fund performance and pick a well-performing MySuper product. Ms Hume reiterated that the comparison tool will: a) present a table of MySuper products ranked by fees and investment returns, with underperforming products clearly identified; b) include a link to each fund's website; c) show a member's existing superannuation accounts that can be selected to receive new employer contributions, and d) prompt members with multiple accounts to consider consolidating their savings. Ms Hume said that this is expected to result in a benefit to members of $3.3 billion over 10 years.

Underperforming funds

Ms Hume said that the introduction of the annual performance test from 1 July 2021 for MySuper products will also make it clear to members in underperforming funds, that their fund is underperforming. After the first test, underperformers will be required to both notify members of their underperformance by 1 October 2021 and to inform them of the YourSuper comparison tool to enable them to choose a better product. Underperforming funds will also be highlighted in the comparison tool to prevent people from inadvertently joining underperforming products. Funds that continue to underperform and fail two consecutive annual tests will not be permitted to accept new members until their performance improves.

From 1 July 2022 annual performance tests will be extended to 'trustee-directed products' outside MySuper.

[Source: Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume, Address to the Australian Shareholders Association – Investor Conference, Investing in the Future of Superannuation13/11/2020]

ASIC priorities in the super sector for 2020-21: Ensuring delivery of strong member/consumer outcomes is the regulator's key focus

Australian Securities and Investments Commission (ASIC) Superannuation Senior Executive Leader, Jane Eccleston, has released article outlining the regulator's priorities for the superannuation sector heading into 2021.

The key message is that the focus of ASIC's work, in synergy with the Australian Prudential Regulation Authority (APRA), is on ensuring delivery of strong member outcomes/consumer outcomes and that this should also be top of mind for trustees.

ASIC's focus areas include the following.

- **Twin priorities – COVID-19 response and longer-term regulatory objectives:** Alongside ASIC's work to respond to the COVID-19 pandemic, the regulator also progressing its longer term regulatory work priorities, including working toward implementing the Hayne Recommendations. For example, ASIC recently updated Regulatory Guide 97 Disclosing Fees and Costs in PDSs and Periodic Statements (RG 97) to both adjust the transitional timeframes in response to COVID-19 and provide clarity on the obligations of superannuation and managed investment scheme product issuers, following feedback from industry.
- **Behaviour of trustees to improve consumer outcomes:** Ms Eccleston said that ensuring trustees are acting in the best interests of members is a priority for the regulator with ASIC stepping up supervision/surveillance of trustees to ensure that they are acting in members' best interest. ASIC is also working with the Australian Prudential Regulation Authority (APRA).
- **Insurance in superannuation:** ASIC's work on the review into industry's efforts to improve insurance outcomes for members, especially in the default insurance space is continuing. Addressing the issue of erosion of members' retirement savings as a result of 'inappropriate and poorly communicated insurance' is a key priority. ASIC is aiming to 'encourage new behavioural norms among trustees in the communication, design and claims processes for insurance to improve the benefits of insurance in super for members'.
- **Product design and distribution obligations:** Ms Eccleston observed that the design and distribution obligations regime (DDO regime) which comes into force for financial product issuers (including superannuation trustees) on 5 October 2021 has 'strong synergies' with APRA's member Outcomes regime and that in light of this, trustees should consider engaging with the DDO regime 'simultaneously to make the most of the synergies between them'. Commenting briefly on MySuper products, Ms Eccleston said that though they are not subject to DDO 'there is still significant work to be undertaken by trustees' for example, she said that 'over-reliance on disclosure has inadvertently permitted and arguably enabled poor market conduct and business decisions that have led to poor consumer outcomes'.
- **Internal dispute resolution:** Improving the effectiveness of internal dispute resolution (IDR) governance and processes is also a priority for ASIC. ASIC expects that funds are making preparations to meet the new

requirements in Regulatory Guide 271 Internal Dispute Resolution (RG 271) ahead of 5 October 2021. Ms Eccleston commented,

> 'Specifically, the new IDR framework emphasises having the right governance arrangements and systems throughout the organisation and at all stages of IDR. For example, staff are enabled to escalate possible systemic issues identified from complaints, complaint data sets are regularly analysed to detect issues, and potential issues are promptly escalated to appropriate areas for investigation. Boards must set clear accountabilities for IDR functions (including thresholds for and processes around identifying and reporting systemic issues), and senior management and board reports must include metrics and analysis of consumer complaints'.

- Retirement income calculators and projections: ASIC is in the process of updating its instruments to enable trustees to provide retirement projections and calculations. ASIC will consult publicly in 2021 on proposed changes to legislative relief and guidance with a view to removing ambiguity for trustees, and update the tools to give members consistent, clear and reliable information.

[Source: ASIC Superannuation Senior Executive Leader, Jane Eccleston, Working with industry to drive better performance and deliver for members10/11/2020]

COVID-19: So far funds have paid out $35 billion under the government's early release of superannuation scheme

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the early release of superannuation scheme for applications received during the period 20 April (inception of the scheme) to 8 November 2020.

- Total payments made since the inception of the scheme have taken an average of 3.3 business days to process, with 95% of payments made within five business days.
- Over the week to 8 November, superannuation funds received 25,000 applications (slightly up from the 24,000 applications received in the week to 1 November).
- Of the applications received in the week to 8 November, 16,000 were initial applications bringing the total number of initial applications received to date to 3.3 million since inception of the scheme.
- 8,000 applications were repeat applications, bringing the total number of repeat applications to 1.4 million since the inception of the scheme.
- Over the week to 8 November, superannuation funds made payments to 22,000 worth $160 million (down from $166 million worth of payments to 23,000 members in the week to 1 November).
- Funds have made approximately 4.6 million payments since the inception of the scheme worth a total of $35.0 billion.

[Source: APRA media release 16/11/2020]

ASIC says insurers should be planning now for AASB 17 Insurance Contracts

The Australian Securities and Investments Commission (ASIC) has called on insures to plan now for the impacts of Accounting Standard AASB 17 Insurance Contracts (AASB 17), reminding them that they are required to disclose the impacts of the new standard in 31 December 2020 financial reports.

ASIC Commissioner Cathie Armour said,

> 'The new standard can significantly affect the reported financial results of many insurers and that insurers should be determining the extent of any impact now. Directors and management of insurers need to plan for the new standard and inform investors and other financial report users of the impact on reported results', she said.

Implementation plans – factors that should be considered

ASIC flags a number of matters that should be factored into implementation plans including: a) identifying changes to accounting treatments; b) 'required system changes'; c) 'business impacts'; d) 'impacts on compliance with financial requirements'; e) 'disclosures required in financial reports prior to the effective dates of the standards'; f) 'possible continuous disclosure obligations'; and g) 'the impact on any fundraising or other transaction documents'.

The attachment to the media release (here) provides further detail.

[Source: ASIC media release 17/11/2020]

AFCA data shows a 14% uptick in complaints in between 1 July 2019 and 30 June 2020

The Australian Financial Complaints Authority (AFCA) has released its 2019-20 Annual Review. The report outlines: a) the number of complaints received and closed; b) the amount awarded to consumers in compensation and refunds; and c) AFCA's approach to the COVID-19 pandemic.

Some key statistics

Complaints

- There was a 14% uptick in the number of complaints received as compared with the last financial year: AFCA received 80,546 complaints over the period.
- 81% of AFCA licensee members had zero complaints raised against them during the period.
- 60% of complaints were resolved within 60 days, despite the uptick in volume. The report attributes this in part to AFCA's efforts to assist members to improve their rates of early dispute resolution.
- 71% of complaints were resolved in favour of complainants.
- Over $258.6 million in compensation and refunds was paid to consumers through AFCA's dispute resolution work.
- The majority of complaints (58%) lodged with AFCA related to banking and finance, followed by general insurance (24%), superannuation (9%), investments and advice (6%) and life insurance (2%).
- The top four most complained about products were: 1) credit cards (11,628 complaints); 2) home loans (7,608); 3) personal loans (5,722); and 4) motor vehicle comprehensive insurance (4,104).

Systemic issues

AFCA's systemic issues team conducted 218 systemic issue investigations into financial firms, resulting in 92 systemic issues being reported to regulators, and more than $179 million in refunds being provided to consumers.

Legacy complaints

As at 30 June 2020, only 24 of 10,228 legacy complaints inherited predecessor schemes were still outstanding. All of this group are described as being at 'advanced stages in our process'.

COVID-19 related complaints

By 30 June 2020, AFCA had received 4,769 complaints relating to COVID-19. AFCA CEO and Chief Ombudsman David Locke comments that this number could have been higher had industry not 'come together to help consumers and small businesses'. In particular, Mr Locke welcomed the early action taken by banks/others to implement loan deferrals. Mr Locke cautioned that care will need to be taken to ensure people are 'treated fairly' and hardship assistance is offered when appropriate, as these arrangements come to an end.

[Sources: AFCA media release 06/11/2020; AFCA Annual Review 2019–20]

In Brief | 'Through the worst'? ABA data indicates that the majority of deferred loans are now 'back on track' with the value of deferred loans by the seven largest banks now at $86 billion (down from a $250+ peak in June)

[Source: ABA media release 18/11/2020]

Accounting and Audit

Final report: The final report from the PJC Inquiry into the regulation of auditing in Australia stands by the ten recommendations in the interim report

Key Takeouts

- The final report 'stands by' the ten recommendations included in the interim report and adds no new recommendations. The final report does however suggest that the current economic environment should be factored into decisions on when certain recommendations should be implemented.
- Recommendation 7 of the report recommends the introduction of new mandatory tendering requirements. That is, that companies should be required to undertake a public tendering process every ten years or disclose to shareholder why they have not done so. The final report emphasises that this recommendation is not intended to be interpreted to mean that the Committee expects companies to change auditors every ten years, rather it's intended to ensure that boards do not adopt a 'set and forget approach'.

The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the regulation of auditing in Australia released an interim report in February 2020 which made ten 'substantive policy recommendations' to raise audit quality standards. You can find our summary here.

The Committee's final report, released on 11 November, makes no new recommendations but does suggest that the challenges of the current environment should inform the timing/manner of certain recommendations.

The table below sets out the recommendations (which can viewed in full here) and briefly outlines the Committee's final comments on each.

Final report: Ten Recommendations

RECOMMENDATIONS	FINAL COMMENTS ON THE RECOMMENDATIONS
Recommendation 1: The Australian Securities and Investments Commission (ASIC) to review its audit inspection program and reporting Recommendation 2: ASIC to publish individual inspection reports	The Committee comments that the inquiry has already led to increased transparency around audit practice/oversight and quality for example, ASIC audit inspection reports had not been publicly available have been published by EY, KPMG, PwC, Deloitte, Grant Thornton and BDO. In light of this, the Committee stands by the two recommendations which will enable the Australian Securities and Investments Commission (ASIC) to produce 'reports of greater sophistication and clarity that take into account the contested nature of some of the professional judgments made by both auditors and ASIC inspectors'. The Committee states that it will monitor ASIC's progress in implementing the recommendations and in particular, the regulator's progress towards publishing all future individual audit firm inspection reports on the ASIC website.
Recommendation 3: New fee disclosure requirements and a clear list of services audit firms cannot provide.	The Committee comments that recommendations 3-5 are aimed at ensuring auditor independence which it considers to be 'key determinant of a robust audit regulatory framework and crucial in

RECOMMENDATIONS	FINAL COMMENTS ON THE RECOMMENDATIONS
Recommendation 4: New requirement to declare that no prohibited non-audit service has been provided,	the process of building trust, confidence and stability in capital markets'. In terms of implementation, the Committee 'committee expects that progress is being made to implement these recommendations and, where appropriate, will monitor developments at future ASIC oversight hearings'.
Recommendation 5: Banning audit partners from receiving incentives for selling non-audit services to audit clients	
Recommendation 6: Disclosure of auditor tenure	On the issue of implementation of this recommendation, the Committee considers that it is 'a relatively simple and low-cost regulatory change that will have considerable benefits for stakeholder perceptions of Australia's audit market'.
Recommendation 7: Introduction of mandatory tendering requirements: companies be required to undertake a public tendering process every ten years or disclose to shareholder why they have not done so	The Committees view that the recommendation 'strikes the right balance between providing stakeholders with improved visibility of auditor-client relationships, without imposing significant regulatory burden or enforcing losses in client knowledge'. Having said this, the report also makes clear that 'this recommendation is not a statement from the committee that entities must change auditors every ten years' and that the exact period of time 'is less important than the faithful implementation of this recommendation'. The recommendation is intended to recognise that 'boards should not "set and forget" arrangements with their auditor nor should shareholders be left with the impression that they have done so'. In terms of implementation, the interim report recommended that this tender process be implemented by 2022 for any entity that has had the same auditor for a continuous period of ten years since 2012. The final report comments that this 'is not realistic in light of the time elapsed since the interim report and the changed economic circumstances'. Accordingly, the Committee recommends that the government 'consider an appropriate timeline for implementation, taking into consideration the economic climate' and possibly consider a phased approach to enable boards 'time to establish a strategic response to the recommendation and address concerns raised by the sector regarding current pressures and unintended consequences of a rapid implementation schedule'.
Recommendation 8: The Financial Reporting Council undertake a formal review of the adequacy of existing reporting requirements in relation to the prevention detection of fraud.	The Final Report acknowledges the 'expectation gap' around the role of auditors in preventing and detecting fraud and misconduct and assessing a company's economic viability as a going concern. The report states that the Committee will 'will monitor the FRC's progress on a formal review into these matters'.
Recommendation 9: New requirements for an internal control framework for financial reporting	In terms of implementation of this recommendation, the Committee considers that the government should factor in the changed economic circumstances when determining how/when this recommendation should be rolled out. The report states, 'To be clear, while the committee does not resile from the importance of this recommendation, it recognises that now

RECOMMENDATIONS	FINAL COMMENTS ON THE RECOMMENDATIONS
	may not be the time to impose additional transitional costs on businesses that are, and should be, primarily focussed on surviving the current arduous economic conditions'.
Recommendation 10: Digital financial reporting 'to become standard practice'	In light of benefits of digital over manual reporting, the committee considers that the government should 'undertake a review to identify and resolve any remaining barriers to the use of digital financial reports, with a view to making digital financial reporting standard practice in Australia in the near future'.

Dissenting report

The Greens consider that the recommendations in the final report will not be sufficient to address either the lack of auditor independence (and the associated issues with lack of independence) or the flaws in current oversight arrangements. Accordingly, the dissenting report makes the following recommendations.

1. 'That any firm that provides audit services for a significant proportion (for example, more than 5%) of companies capitalised or operating in Australia be prevented from providing non-audit services'.
2. 'That the regulatory regime for auditing be simplified, with a single body being responsible for accounting, auditing and assurance standards; and another body being responsible for enforcement, currently ASIC.

Cultural issues will remain a focus

Labor Committee members also raised concerns about 'ongoing reports of workplace cultural practices that dissuade internal or external whistleblowing'.

They state that culture within audit firms will remain a focus going forward for the Committee in their oversight of ASIC.

[Source: Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Regulation of Auditing in Australia: Final Report 11/11/2020]

In Brief | The AASB is seeking feedback from interested stakeholders to help inform its submission to the IFRS Foundation consultation on the development of international sustainability standards. Stakeholders are invited to share their response by 30 November

[Source: AASB weekly update 12/11/2020]

In Brief | The FRC's 2019/20 audit inspection of 130 audits (primarily covering audits with year-ends between July 2018 and June 2019) identified that 38% (49 audits) required either improvement or significant improvement. The most common area needing improvements was the 'sufficiency of challenge of management'

[Source: FRC media release 12/11/2020; Developments in Audit 2020]

Risk Management

CLIMATE RISK

Top Story | Navigating climate dynamics: three key matters for energy & resources

MinterEllison's team provide practical insights into how boards in the mining and resources sector can assess how well their organisations are positioned to take advantage of the opportunities, and to mitigate against the material risks associated with climate change.

You can access the full text of the article here.

Climate change Bills referred to House Committee for inquiry and report

Context

On 9 November Independent MP Zali Steggal introduced two climate change Bills into the House of Representatives:

- Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 which proposes to implement a national framework to drive Australia's response to climate change
- Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020: This Bill proposes a number of amendments to various Commonwealth laws to support the operation of the primary Bill.

Referred to Committee

On 11 November 2020 the House of Representatives referred the Bills to the House of Representatives Standing Committee on the Environment and Energy Committee for inquiry and report.

The Committee intends to hold public hearings, the details of which are yet to be announced. The Committee is accepting submissions until 27 November 2020.

Ms Steggal called on interested stakeholders to take the opportunity to make a submission.

> 'This will be the first parliamentary inquiry into why Australia should commit and legislate Net Zero by 2050. It will also examine why the legal framework proposed in the Climate Change Bill will assist every sector in assessing the risks, adaptation and resilience planning that is needed. I encourage all businesses, organisations and individuals to make a submission to the inquiry so that we can demonstrate to Government and Parliament the need to legislate Net Zero by 2050'.

Chair of the Committee Mr Ted O'Brien MP commented that the Bills propose a change in how Australia manages climate change and said that the Committee looks forward to considering all views on the subject. Mr O'Brien said that the Committee 'will assess the information presented with dispassionate independence before drawing conclusions'.

[Sources: House of Representatives Standing Committee on the Environment and Energy Committee media release 12/11/2020; Zali Steggal community newsletter 13/11/2020]

PRIVACY, SECURITY AND TECHNOLOGY

Top Story | OAIC releases its annual report for 2019-2020

The OAIC's 2019-2020 annual report was published on 15 October 2020, and provides a thorough review of the OAIC's functions over 2019-2020. MinterEllison's key takeaways from the report are here.

The DTA has launched a consultation on the design of draft legislation to implement an expanded Digital Identity system in Australia

The Digital Transformation Agency (DTA) is responsible for developing legislation to expand the Digital Identity system (a system to enable people to verify their identity online) to commonwealth, state and territory governments and the private sector, including establishing appropriate governance arrangements and privacy and consumer safeguards.

Ahead of the release of draft legislation, the DTA has released a consultation paper (and background paper on the system) seeking stakeholder views on key concepts and principles, which will be used to help inform the eventual design, scope and content of the draft legislation. The DTA then intends to conduct a further round of consultation on the draft legislation.

The deadline for submissions is 18 December 2020.

[Source: Digital Transformation Agency Consultation 16/11/2020]

Insolvency and Reconstruction

Small business insolvency reforms Bill introduced, consultation on subordinate legislation launched

Status update

- The Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 was introduced into the House of Representatives on 12 November. The Bill proposes to establish the framework for the insolvency the small business insolvency reforms announced by the government on 24 September 2020.
- Subject to the passage of the legislation, the measures will commence on 1 January 2021.
- You can find an expert summary of the key elements of the proposed reforms (as put forward in the exposure draft legislation) on our website here.
- The introduction of the legislation has been welcomed by The Australian Small Business and Family Enterprise Ombudsman as a 'game changer for small business, particularly those that have been heavily impacted by the COVID crisis' .

Draft subordinate legislation released for consultation

On 17 November, Treasury released draft subordinate legislation – draft regulations, draft rules and accompanying draft explanatory materials - detailing the operation of the new simplified processes in the primary Bill for a short consultation period. The due date for submissions is 24 November.

[Sources: Treasurer Scott Morrison media release 17/11/2020; Corporations Amendment (Corporate Insolvency Reforms) Bill 2020; ASBFEO media release 12/11/2020]

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