Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments.

21 April 2021

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Boards and Directors

DIN update: New legislative instruments registered

Context: The Director Identification Number (DIN) regime

Overview of the DIN regime: The package of legislation that will introduce a new director identification number (DIN) requirement, and centralise and streamline access to business registers passed both houses on 12 June 2020. You can find a short overview of the changes here.

Proposed Transitional arrangements (testing needs to be completed before it will be necessary to apply for a DIN): In order to allow time to test the DIN regime 'before the full population of directors are onboarded into the system', and in order to ensure that directors are not disadvantaged/in breach of the requirement to have a DIN within the required timeframe, Treasury recently consulted (consultation closed on 16 April) on draft legislative instruments that propose to remove the need for directors to apply for a DIN during the early stages of regime. It's proposed that roll out of the new DIN requirements will be a staged process.

- Directors appointed under the Corporations Act 2001 (Cth) (both existing directors and those appointed during the testing stage) would need to apply for a DIN before 30 November 2022.
- The DIN will then be rolled out to directors of indigenous corporations which are governed by the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (the CATSI Act). CATSI Act directors would need to apply for a DIN before 30 November 2023.

The Governance Institute's submission to the consultation is supportive of these proposed timeframes (though the submission also suggests that the 28 day period for new directors to obtain a DIN should be a permanent feature of the regime and that the regime should be extended to include company secretaries. You can find the full text of the submission here.

Until testing of the regime is completed, directors will not be required to apply for a DIN. You can find out more about the current status of the roll-out on the Australian Securities and Investments Commission (ASIC) website here and the Australian Taxation Office website here.

New legislative instruments registered to facilitate the roll out of the DIN regime

Following earlier consultation, two legislative instruments have been registered which are intended to support the roll-out of the DIN regime. Broadly,

- Corporations Director Identification Number Data Standard 2021 sets out the information required to apply for a DIN as well as how the information will be collected, recorded, stored and used, how the information can be corrected and the circumstances in which an application can be made for review of a decision.
- Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, Courts and Tribunals) 2021 permits and authorises the disclosure of DIN information to entities that do not fall into the definition of 'government entities' but which are 'part of the workings of government' – ie entities to which the Public Governance, Performance and Accountability Act 2013 (PGPA Act) applies (PGPA bodies), courts and tribunals. PGPA bodies include for example: the Australian Securities and Investment Commission (ASIC); Australian Prudential Regulation Authority (APRA); Reserve Bank of Australia; Commonwealth Scientific and Industrial Research Organisation (CSIRO); Australian Institute of Health and Welfare (AIHW); Australian Postal Corporation; and Defence Housing Australia.

Details: Corporations Director Identification Number Data Standard 2021

Corporations Director Identification Number Data Standard 2021 sets out the information the Registrar will need in order to be able to give a Director Identification Number (DIN) to an individual who has applied under the Corporations Act 2001 (Cth) (Corporations Act).

Specifically the standard sets out:

- What information the Registrar may request/collect from DIN applicants (to verify their identity). This information could include an individual's names and former names, addresses and former addresses, contact details, and date and place of birth. The Registrar may also request other identity documents for the purposes of establishing an individual's identify including requesting that an individual provide their tax file number (though in this case the registrar cannot compel the individual to do so).
- How information will be collected
  - Providing proof of identity/making an application for a DIN will generally occur electronically. Individual applicants will need to verify their identity digitally using a digital identity credential.
  - Foreign directors or directors unable to obtain a digital identity credential will need to follow the existing ATO proof-of-identity process (which is largely paper-based).
  - If an individual is unable to apply electronically, the Registrar 'may consider accepting a paper or other form of application'.
- Application requirements
  - An application for a DIN must be made in the form approved by the Registrar. Generally this will be an electronic form, unless the applicant cannot use the electronic form.
  - The application will include a declaration confirming that: a) the applicant is the individual identified in the application; b) any information is true and correct; and c) that the applicants meets the DIN requirements.
  - DIN applicants are required to complete their DIN application themselves ie an agent/third party cannot apply for a director ID on behalf of a director unless the Registrar is satisfied that an exception applies. An exception could include for example, circumstances in which an applicant requires assistance to complete their application due to injury or disability.
- When individuals need to make an application
  - New directors: Transitional arrangements provide that during the first year of the DIN regime, an individual has 28 days from the date at which they are appointed as a director to apply for a DIN. Individuals are able to apply to the Registrar for this period to be extended.
  - After this period, individuals will be required to apply for a DIN prior to their appointment as a director.
  - Existing directors: A separate legislative instrument will specify the transitional application period for individuals that are already directors at the time the DIN regime commences. Until this instrument is made there is no requirement for these individuals to apply for a DIN.
- How information held by the Registrar can be corrected: The Registrar is able to correct DIN information if the Registrar 'reasonably believes' the information to be incorrect. An individual will also be able to request that their details be updated.

- **How the Registrar will communicate with persons who provide information/seek to access information held by the Registrar:** Generally, it's anticipated that communication will be conducted by electronic means unless an individual's circumstances make this unfeasible in which case an individual may be contacted by letter/phone. The explanatory memorandum states that this is justified because of the volume of applications expected – it's estimated that 'approximately 10% of Australia's population' will be required to have a DIN.

The instrument also sets out how the Registrar will use, record and store the information and when an individual may apply for review of a decision

The standard applies to directors applying under the Corporations Act only

- The standard applies to individuals applying for a DIN under the Corporations Act 2001 (Cth).
- A separate data standard will specify the requirements for an application for DIN for an applicant under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 that Act.

The explanatory statement accompanying the standard makes clear that 'If an individual already has applied for or received a director ID under one Act, that individual must not apply for a second director ID under the other Act'.

Date of effect

Corporations Director Identification Number Data Standard 2021 commences on the day on which Part 9.1A of the Corporations Act 2001 commences.

The explanatory statement clarifies that this means that the standard will apply from the day after the Registrar is 'appointed to perform functions and powers in connection with Part 9.1A of the Corporations Act'.

Details: Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, Courts and Tribunals) 2021

The Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, Courts and Tribunals) 2021 authorises the disclosure of DIN information to a government entity or PGPA bodies, courts and tribunals, in relation to the performance or exercise of its functions or powers.

The instrument also authorises disclosure of DIN information to multi-agency taskforces - 'any taskforce established by the government including Commonwealth, State and Territory agencies' - where the agencies included in that taskforce are a government entity, PGPA body, court or tribunal.

The explanatory statement notes that though the instrument authorises the disclosure of DIN information to PGPA bodies, courts and tribunals, 'nothing in the instrument requires or compels such a disclosure. That is, persons who are authorised to disclose director ID information under this instrument have discretion as to whether to make the disclosure and the extent of director ID information disclosed'.

Date of effect

The date of effect for Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, Courts and Tribunals) 2021 is the day on which section 1270K of the Corporations Act commences.

[Sources: Corporations Director Identification Number Data Standard 2021; Corporations (Director Identification Number) Disclosure Framework (PGPA Bodies, Courts and Tribunals) 2021]

Remuneration

Say on pay: Equilar's analysis suggests we may see a spike in pay revolts this year

Analysis of 'say on pay' votes conducted by Equilar over the ten years since the introduction of say on pay advisory votes in 2011 has identified that the measure appears not to have put the brakes on pay increases as envisaged. According to Equilar, median CEO pay has in fact steadily increased over the period and support for executive compensation plans remains consistently very high (90% approval is 'widely common').

Having said this, Equilar suggests that shareholder voting behaviour/attitudes may be shifting given approval rates over the last five years are trending (slightly) downwards.

Looking at the 2021 data so far, Equilar found that:

- the level of dissent appears to be spiking – for example, as at 24 March 2021, 19% of say on pay resolutions had received less than 70% support (up from 8.8% for 2020).
- two say on pay resolutions (resolutions at Starbucks and Walgreens Boots Alliance) received only 47% support.

Equilar comments that though the sample size is small, in light of the events of 2020, and in light of the sharper focus being applied to executive pay plans by proxy influential proxy advisers, 'it's not unreasonable' to predict that the trend towards higher levels of dissent may continue, despite the downward adjustments many companies have made to executive pay packages.

[Source: Equilar blog post 12/04/2021]

Say on pay: Semler Brossy's analysis finds that the levels of dissent are far higher than last year

- According to Semler Brossy's analysis as at 15 April 2021, 4.8% of Russell 3000 companies' say on pay resolutions have so far failed. For context, only 1.8% of say on pay resolutions had failed to carry at the same point last year.
- The proportion of companies that have received an 'Against' recommendation from ISS is already higher (at 15% of companies) than any full year 'Against' rate since 2011. The report suggests that this is an indicator that ISS is 'holding the line and evaluating companies critically with respect to its COVID-19 guidance'.
- Interestingly, Semler Brossy found that support for individual directors is (so far) trending slightly higher than last year. For example: so far 78.9% of directors have been elected/re-elected with 95% or more support (up from 73% in 2020).
- The report found that over the past five years, the average level of support for individual directors at companies that received a say on pay vote below 50% in the prior year is 5% lower than at companies that received above 70% support for their say on pay proposal.

[Source: Full text report: 2021 Say on Pay & Proxy Results]

Diversity

Targets missed: Singapore's largest 100 listed companies are yet to crack 20% female board representation (boards blame the pandemic)

2019 targets

In 2019, Singapore's Council for Board Diversity set the following interim targets as stepping stones to achieving board gender parity:

- 20% female board representation for Singapore's primary listed companies by the end of 2020, rising to 25% by the end of 2025 and 30% by the end of 2030.
- 30% representation of women on the boards of 'Institutions of a public character' (IPCs) and statutory boards as soon as possible.

Targets missed

According to the Council's latest progress update, though some improvement was made in 2020, these targets have not been met. As at 31 December 2020 women accounted for:

- 27.5% of statutory board positions
- 17.6% of board positions on the boards of Singapore's largest primary listed companies
- 28.8% of IPC board positions

Why the lack of progress?

The primary reason given by industry for the lack of progress was the need to prioritise the pandemic response. Industry also flagged the difficulty in finding female candidates with prior board experience as a challenge.

The Council comments that the lack of progress appears to 'be a local issue' given that the rate of female board appointments continued to accelerate over the same period in other jurisdictions eg the UK and Australia.

Increased diversity is imperative from an investor perspective, as well as making good business sense

CEO of the Singapore Stock Exchange and Chair of the Council Mr Loh Boon Chye commented that increased board diversity not only provides boards with an opportunity to put themselves in the best possible position in the context of the COVID-19 recovery, but is also increasingly important in terms of meeting investor expectations. He commented,

> 'Board diversity, a recognised hallmark of progressive boards even before Covid-19, is more critical now than before. Post-pandemic recovery offers opportunities for innovation and business repositioning. Having directors with a wider mix of gender, age, skills, experiences, and backgrounds allows boards the broad-based choices as they assess what is best for the future.
>
> Investors and customers also now expect companies to go beyond the financial bottom-line and incorporate ESG into company strategies and policies. Gender diversity is one of many factors considered in ESG discussions. Women directors are an obvious choice when considering board diversity and we have already started to see some institutional investors vote against boards without sufficient diversity.'

Focus areas for 2021-22

The statement outlines the actions the Council plans to take to promote increased board gender diversity. These include:

- Encouraging organisations to broaden their search for prospective board candidates by: a) engaging executive search firms and requiring a diverse slate of candidates; b) widening their selection criteria (including considering candidates without prior board experience); and c) integrating the need for/value of increased diversity into their strategic thinking/assessment of board capability.

- Engaging with nominating committee chairs and members to understand and assist in addressing any issues/barriers to increasing diversity
- Expanding the pipeline of 'board-ready women' by 'working with various partners and recommending suitable candidates with requisite skills or experience'.
- Encouraging organisations to prioritise meeting the 2019 interim diversity targets.
- Raising awareness/continuing to draw attention to the need for increased diversity.

[Source: Singapore Council for Board Diversity media release 12/04/2021]

How do America's largest employers measure up on racial equity? New report provides a snapshot of the actions/commitments being taken by America's largest 100 employers

Following the events of 2020, and in response to calls for increased and better quality disclosure of what companies are doing to increase diversity and address racial inequality, Just Capital have released what is planned to be the first iteration of the Corporate Racial Equity Tracker.

The Tracker provides a detailed snapshot of the commitments and actions being taken by America's largest 100 employers to improve racial equity. The Tracker assesses companies' commitments/actions across six elements of racial equity: anti-discrimination policies; pay equity; racial/ethnic diversity data; education and training programs; response to mass incarceration; and community investment.

High level trends to emerge from the data

Overall, Just Capital found that:

- Every employer assessed has in place an anti-discrimination policy
- Almost all (98% of employers assessed) have in place a training/education program
- Most (91%) also disclose some community investment
- 71% provide some disclosure of ethnic/diversity data
- However, less than a third of companies (31%) disclose actions/commitments on pay equity

Next steps

Over time, Just Capital intends to expand the Tracker to include more Russell 1000 companies as well as to track additional actions related to racial equity. .

[Source: Just Capital Racial Equity Tracker]

Meetings and Proxy Advisers

Joint updated guidance from the Governance Institute, the AICD, the AIRA and the Business Law Section of the Law Council of Australia on virtual AGMs and electronic execution released

The Governance Institute together with the Australian Institute of Company Directors, Australasian Investor Relations Association and the Business Law Section of the Law Council of Australia have released updated joint guidance on holding virtual AGMs and electronic execution.

The guidance includes: a) a summary of the current legislative/regulatory requirements for holding electronic AGMs/issuing notices of meeting; b) practical guidance for holding AGMs in the current environment; c) insights gleaned from the 2020 AGM season on how best to prepare for/mitigate risks; d) insights into how to engage shareholders when holding a meeting electronically; and e) compliance with execution requirements.

The full text of the guidance can be accessed here.

[Source: Governance Institute of Australia media release 20/04/2021; Full text guidance]

Not carried: Market Forces has welcomed the increased level of support for shareholder 'wind-down resolutions' at Santos and Woodside

Wind-up resolutions at Santos and Woodside

Both the Santos and Woodside Petroleum AGMs were held on 15 April. Activist Market Forces filed separate 'wind up' resolutions on behalf of shareholders at both companies, calling on each company to disclose plans for winding up their oil and gas production in line with the goals of the Paris Agreement.

The boards of both companies made an 'against' recommendation (see: Santos notice of meeting here, Woodside notice of meeting here).

Outcome?

[Note: In Australia shareholders' ability to bring a resolution is limited as shareholders are not permitted to propose either an advisory resolution or a shareholder vote to express an opinion.

As a result, shareholder resolutions on ESG issues tend to take the form of a special resolution to amend the constitution (which requires a 75% vote in favour to be passed) accompanied by a contingent ordinary resolution. As the threshold for the passage of a special resolution is so high, contingent resolutions rarely proceed to a formal vote.

You can find further discussion around trends in support for ESG resolutions in Australia over the past five years and insights into the reasons behind them at pages 13-14 of our five year AGM trends report at here.]

- Woodside Petroleum: The constitutional amendment received 5.17% support (and failed to pass). The contingent wind up resolution was therefore not put to the meeting. It received 19% proxy support ahead of the meeting.
- Santos: The constitutional amendment received 5.38% support (and failed to pass). Again, the contingent wind up resolution was not put to the meeting but received 13% proxy support ahead of the meeting.

[Note: Say on climate resolutions withdrawn ahead of the meetings: The ACCR filed 'say on climate' resolutions at both Santos and Woodside. Both resolutions were withdrawn ahead of the AGMs after both companies separately agreed to adopt the Say on Climate initiative and provide shareholders with a non-binding vote on their climate change reports at the 2022 AGMs. See: ACCR media releases here and here.]

Market Forces viewsthe level of support as encouraging

In a statement Market Forces Asset Management Campaigner Will van de Pol suggested that the level of support for the resolutions is an indication of investors' increasing willingness to demand 'drastic and rapid action' to align companies' operations with the goals of the Paris Agreement. He commented,

> 'Today's record level of support for resolutions calling for the wind up of fossil fuel production demonstrates considerable investor opposition to Woodside and Santos' growth plans, which are in direct contradiction to the declines in these sectors that must occur in order to meet the Paris climate goals…With today's votes roughly doubling the previous record set for a fossil fuel wind up resolution, all coal, oil and gas producers must take note: investors are increasingly willing to demand the drastic and rapid action required to align with global climate goals.'

Mr van de Pol also expressed disappointment in the failure of large investors to support the resolution, especially in light of their previous voting behaviour. He commented,

> …'the majority of big investors who last year supported calls for Paris-aligned scope 3 emission reduction targets and capital expenditure plans have failed to recognise that these actions would require Woodside and Santos to manage down oil and gas production.'

Executive remuneration and director elections

- Santos:
  - Executive remuneration: The resolution to approve the remuneration report was carried with 98.34% of votes in favour. The resolution to approve the grant of share acquisition rights to CEO Kevin Gallagher was also carried with 98.39% support.
  - Director re-elections: Both directors standing for reelection – Keith Spence (Chair) and Vanessa Guthrie – were each re-elected with 98.03% and 99.31% support respectively.
- Woodside Petroleum:
  - Executive remuneration: The resolution to approve the remuneration report was carried with 95.8% of votes in favour. The resolution to approve the grant of performance rights to the CEO and Managing Director was carried with 98.32% of votes in support.
  - Director re-elections: All three directors standing for reelection were elected. Richard Goyder and Gene Tillbrook were each re-elected with 99.18% and 97.21% of votes in support respectively. Christopher Haynes was re-elected with 88.78% of votes in support (11.22% of votes against). Market Forces suggests that the vote against Dr Haynes is the result of shareholder dissatisfaction with the company's current emissions reduction targets/approach as well as with the company's plans to increase rather than decrease gas production.

[Sources: Santos ASX Announcements: Results of AGM 15/04/2021; AGM Addresses 15/04/2021; Market Forces media release 15/03/2021; ACCR media release 14/04/2021; Woodside ASX Announcements: CEO succession update 13/04/2021; Results of AGM 15/04/2021; AGM Addresses 15/04/2021; Market Forces media release 15/04/2021; ACCR media release 14/04/2021]

In Brief | Say on Climate: Nestle shareholders have voted to endorse the company's roadmap for achieving its net-zero emissions by 2050 target

[Sources: Nestle announcements: Results of AGM 15/04/2021; 15/04/2021]

Corporate Social Responsibility

Should UK directors be legally obligated to consider stakeholder (not just shareholder) interests in their decision-making? The Better Business Act Coalition is urging changes to s172 requirements

A coalition of 400+ businesses is pushing for the introduction of a new mandatory requirement for all UK companies to 'operate in a manner that benefits their stakeholders, including workers, customers, communities and the environment, while seeking to deliver profits to stakeholders'. The full list of coalition supporters is here.

The coalition proposes that this should be achieved through amending section 172 of the Companies Act 2006 (through the Better Business Act).

Rationale for the proposed change

The group's position is that though directors already have some latitude under 172(1) to consider the interests of stakeholders in their decision making, their ability to do so is ultimately limited because: a) directors are only able to consider the interests of stakeholders in the context of pursuing the success of the company for the benefit of shareholders; and b) should any conflict arise between the interests of shareholders and the those of stakeholders, directors are legally obliged to put the interests of their shareholders first.

The group argues that recent events have underscored that tackling both the climate emergency and social inequality requires a different approach. They suggest that introducing a positive duty on every company to consider stakeholder interests will facilitate a fundamental shift in thinking, and set a new standard for company behaviour.

CEO of innocent and Co-Chair of the coalition Douglas Lamont commented,

> 'Through the Better Business Act campaign, we are aiming to change UK law to make sure every single company in the UK, whether big or small, puts balancing people, profit and planet at the heart of their purpose and the responsibilities of their directors.'

Details: What is being proposed?

The proposed amendment to s172 – the Better Business Act – proposes to replace the existing section with a new section which would:

- introduce a requirement for 'directors to advance the interests of their shareholders alongside those of wider society and the environment. In situations where a director has to choose between the company's intention to create positive social or environmental impacts and the interests of shareholders, the directors would no longer be compelled to default to prioritising shareholders'.
- introduce a new requirement (for large companies only) to report each financial year on 'how the company has advanced its stated purpose and in consideration of its key stakeholders , community and the environment'.

Importantly, the group makes clear that they are not proposing that the amendments would enable stakeholders to sue directors.

> 'Under company law, the directors owe their duties only to the company, and only the company, or a shareholder(s) acting on behalf of the company, can take action against a director for a breach of their duty under Section 172; the BBA would not change this position in law. The BBA amendments to the law would not create new rights for other stakeholders'.

The group have published an example of the proposed form of the amendments here.

[Sources: Better Business Act Coalition FAQs and resources; Better Business Act Coalition supporters; Example amendment to s172 Companies Act; Institute of Directors Governance Perspective 18/03/2021; Institute of Directors Briefing April 2021]

Regulators

Top Story | Keeping up the pressure (despite COVID-19): ASIC's latest enforcement report released

Key Takeouts

- ASIC's latest enforcement activity report for the second half of 2020 highlights the regulator's continued focus on pursuing and securing court-based outcomes
- The number of civil penalty proceedings recorded has increased significantly and a record $159.8 million in civil penalties was imposed by the courts
- The report includes a brief status update on the progress of ASIC's Hayne-Commission related enforcement work. ASIC reports that as at 31 December 2020 the courts had imposed a total of $77.65 million in penalties

Overview

The Australian Securities and Investments Commission (ASIC) has released its latest enforcement activity Report - ASIC Report 688 ASIC enforcement update July to December 2020 (REP 688) - outlining its key enforcement actions during H2 2020. The headline message is that the regulator's focus on securing enforcement outcomes (and in particular, securing court-based outcomes) as a means of deterring misconduct continued in the second half of 2020, despite the pandemic. For example during the reporting period:

- the courts imposed a total of $159.8 million in civil penalties (up from $12 million in H1 2020), including ASIC's two largest ever civil penalty outcomes.
- there was a 164% increase in civil penalty proceedings, a 27% increase in the number of briefs referred to the Commonwealth Director of Public Prosecutions, and a 36% increase in criminal proceedings (as compared with the 2018 and 2020 calendar years).

Financial Services

In H2 2020, ASIC recorded 37 financial services-related enforcement results, 43% of which were civil enforcement outcomes. Of the 37 enforcement outcomes recorded 35% (13) concerned financial advice misconduct and 30% involved credit misconduct.

Looking more closely:

- ASIC reports that there were 16 civil enforcement outcomes recorded across a range of areas including: investment management misconduct (5); credit misconduct (3); financial advice misconduct (3); insurance misconduct (2); superannuation misconduct (2); and 'other financial services misconduct (1).
- There were twelve administrative enforcement outcomes recorded across a similarly wide range of areas including: financial advice misconduct (7); credit misconduct (3); investment management misconduct (1); and 'other credit misconduct' (1)
- There were 7 criminal enforcement outcomes recorded in the areas of: credit misconduct (3); financial advice misconduct (3); and superannuation misconduct (1)
- There were two court enforceable undertakings recorded, both relating to credit misconduct.

As at 1 January 2021, ASIC reports that 16 criminal and 61 civil actions across a wide range of areas were still before the courts, that he majority relating to credit or financial advice misconduct.

Markets

In H2 2020, ASIC recorded 12 market-related enforcement results:

- 4 criminal enforcement outcomes: 1 in the area of insider trading and 3 in the area of 'other market misconduct';

- 4 civil enforcement outcomes: 3 in the area of continuous disclosure and 1 in the area of 'other market misconduct'
- 4 administrative outcomes: 2 in the area of continuous disclosure; 1 in the area of emerging market misconduct and 1 in the area of 'other market misconduct'.
- There were no court enforceable undertakings recorded.

As at 1 January 2021, 10 criminal and 1 civil action across a range of areas were still before the courts.

Corporate Governance

- In H2 2020, ASIC recorded only one corporate governance related enforcement result, a civil enforcement action in the area of directors' duties and governance failures.
- As at 1 January 20201, a further 12 criminal and three civil actions (all in the area of directors' duties and governance failures) were still before the courts.
- In contrast, in the previous reporting period (1 January and 30 June 2020), ASIC recorded 23 corporate governance–related results and reported that 17 criminal and 11 civil corporate governance–related matters were still before the courts as at 1 July 2020. See: ASIC Report 666 ASIC Enforcement Update January to June 2020 (or view our key takeaways from that report here.)

Small Business

- In H2 2020, ASIC recorded 129 small business–related results: 98 criminal actions and 31 administrative actions.
- As at 1 January 2021, ASIC had 149 small business–related criminal matters still before the courts

Status update: Hayne-related investigations

Of a total 45 Hayne-commission related investigations, as at 31 December 2020:

- 7 have resulted in court proceedings which are now completed. In total, the courts imposed $77.65 million in penalties in connection with these proceedings
- 11 have resulted in litigation that was still on foot
- 11 investigations are continuing
- ASIC reports that the remaining 16 cases require no further action.

ASIC is in the process of developing new priorities for the 2021-22 financial year

ASIC states that it will continue to both 'continue to act against misconduct that threatens the integrity of Australia's financial system and markets' including taking action to address any exploitation/attempted exploitation of the pandemic environment or misconduct that hinders the COVID-19 recovery.

ASIC encourages entities/individuals to cooperate with ASIC investigations

From an engagement perspective, ASIC states that it will continue to 'encourage entities and individuals who are under investigation to cooperate with ASIC as fully and quickly as reasonably possible' to ensure that 'only factual and legal issues that are genuinely in dispute will become the subject of prospective proceedings'. ASIC comments that this may have benefits for the parties in the form of reductions in costs/delays.

ASIC Deputy Chair Karen Chester communicated a similar message in her recent address to the AFR Business Summit 2021: Regulation for recovery: when pilots become enduring practice (you can access a short overview here).

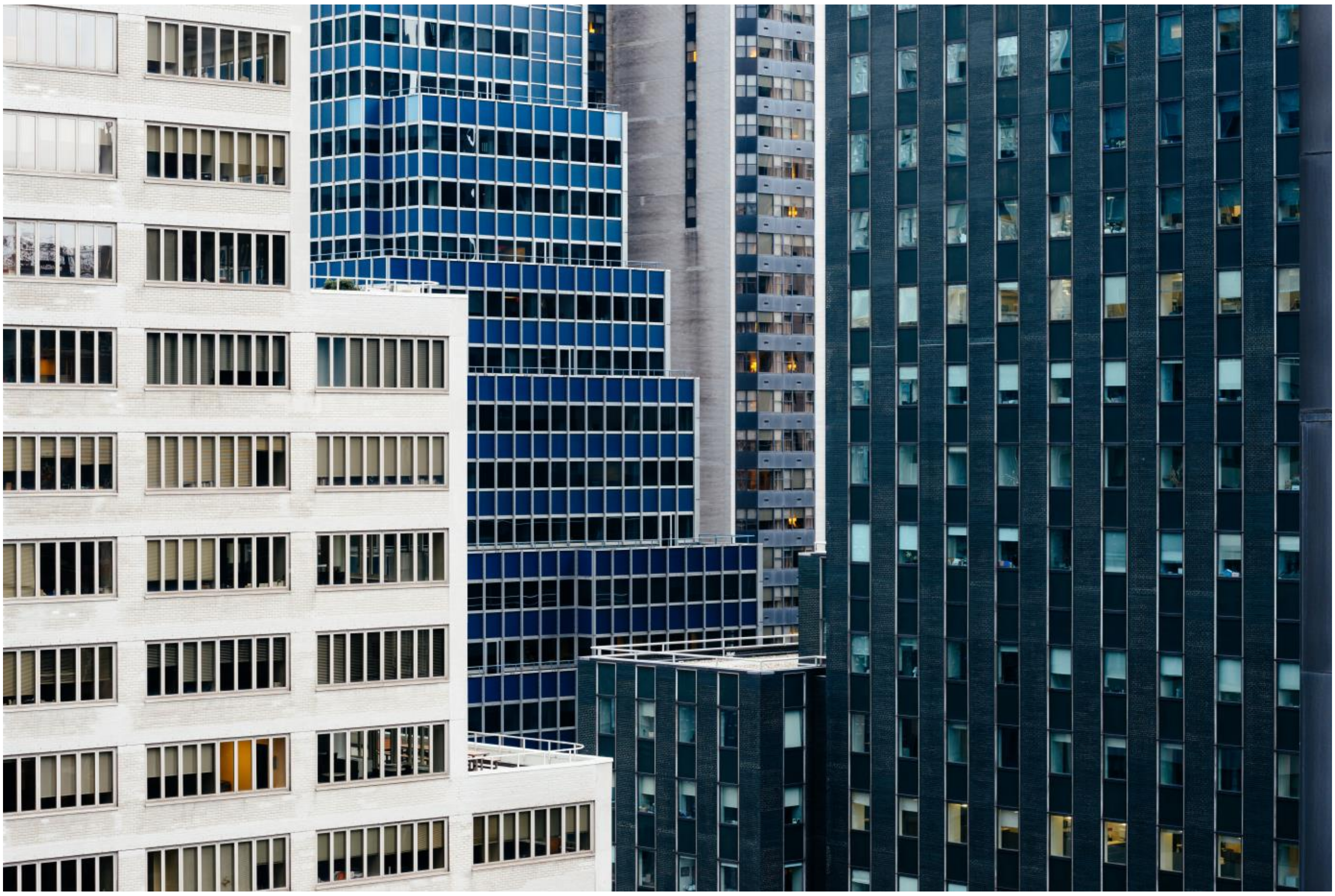
[Sources: Report - ASIC Report 688 ASIC enforcement update July to December 2020 (REP 688); ASIC media release 16/04/2021]

In Brief | The ACCC, the UK's Competition and Markets Authority and Germany's Bundeskartellamt have issued a 'landmark' joint statement highlighting the importance of rigorous and effective merger enforcement from a competition perspective and as a means of safeguarding the interests of consumers

[Sources: ACCC media release 20/04/2021 Joint statement]

Financial Services

Implementation of Hayne recommendation 2.10: Draft legislation to establish a new disciplinary system for financial advisers has been released for consultation



On 19 April Treasury released draft legislation for consultation - Financial Sector Reform (Hayne Royal Commission Response - A New Disciplinary System for Financial Advisers) Bill 2021 – that proposes to implement the government's response to Hayne recommendation 2010.

Hayne Commission recommendation 2.10 recommended the establishment of a new disciplinary system for financial advisers including: a) the introduction of a requirement for all financial advisers who provide personal financial advice to retail clients to be registered; b) establishing a single, central disciplinary body; c) requiring Australian Financial Services Licence (AFSL) holders to report 'serious compliance concerns' to the new disciplinary body; and d) allowing clients and other stakeholders to report information about the conduct of financial advisers to the disciplinary body.

The deadline for submissions is 14 May 2021.

Overview of the proposed changes

Establish a single disciplinary body

- The draft Bill proposes to expand the role of the Financial Services and Credit Panel (FSCP) within the Australian Securities and Investments Commission (ASIC) to operate as the single disciplinary body for financial advisers.
- If legislated, this would mean that from 1 January 2022, ASIC would be required to convene an FSCP to decide whether to take action against a financial adviser where initial investigation has led the regulator to form a reasonable belief (that is more than 'mere suspicion') that:
  - a financial adviser has failed to comply with their obligations the Corporations Act 2001 (Cth) (and where ASIC does not consider a banning order to be appropriate)

- that a specified circumstance exists/has occurred, which would affect the adviser's ability to provide financial advice and ASIC does not make/propose to make, a banning order. These specified circumstances could include (among other examples) that the adviser has become insolvent or has been convicted of fraud or where the FSCP forms a reasonable belief that the adviser is 'not a fit and proper person to provide financial advice'.

  [Note: Treasury has released a flowchart summarising the proposed new disciplinary process and the roles of ASIC and the FSCP within it. You can access this here.]

- In addition to being required to convene an FSCP in certain circumstances, ASIC would also be able to convene an FSCP if it delegates the power to make a banning order under section 920A of the Corporations Act or section 80 of the National Consumer Credit Protection Act 2009 to the FSCP.
- The FSCP would be chaired by an ASIC staff member and include in addition to that person, 'at least two industry participants'. These industry participants would be selected by ASIC from a list of eligible persons (as nominated by the Minister). The draft explanatory statement suggests that to be appointed to the list, the Minister would need to be satisfied that the person had knowledge/experience in at least one of the following areas: a) business; b) administration of companies; c) financial markets; d) financial products and financial services; e) law; f) economics; g) accounting; or h) taxation.

Sanctions

- It's proposed that where a financial adviser contravenes a restricted civil penalty provision, the FSCP could impose an administrative sanction and/or issue an infringement notice or make a recommendation that ASIC apply to the Court for a civil penalty.
- It's proposed that where a specified circumstance exists or has occurred, the FSCP could make an instrument imposing one or more administrative sanctions against the adviser including: warnings or reprimands; directions to undertake specified training, counselling, supervision or reporting certain matters to ASIC; and orders suspending or prohibiting a financial adviser's registration.
- Before issuing an infringement notice or imposing administrative sanctions, the FSCP would be required to give the financial adviser a notice setting out the relevant circumstances, the proposed sanction and the adviser's right to request a hearing or make a submission to the FSCP.
- The draft explanatory statement makes clear that an FSCP's power to impose sanctions is intended to apply to financial advisers only. Accordingly, the FSCP would only have power to take action against either financial services licensees or authorised representatives of financial services licensees in limited circumstances. The draft explanatory memorandum states,

  'The Financial Services and Credit Panel will not have the power to take action against financial services licensees or authorised representatives of financial services licensees. If a financial services licensee or authorised representative is also a financial adviser, the Financial Services and Credit Panel will have the power to take action against the individual if the relevant conduct occurs in the course of that person performing their duties as a financial adviser, not in the course of performing their duties as a financial services licensee or authorised representative. Disciplinary action involving financial services licensees and authorised representatives of financial services licensees will continue to be administered by ASIC, using ASIC's existing powers under the Corporations legislation, which include the power to make a banning order and commence criminal or civil proceedings. This outcome reflects the focus of recommendation 2.10 of the Financial Services Royal Commission Final Report on improving the accountability of financial advisers, rather than financial services licensees or authorised representatives'.

Merits Review

It's proposed that:

- Decisions by an FSCP to impose an administrative sanction would be reviewable ie advisers would be the able to apply to the AAT for a merits review. It would also be open to advisers to make an application to ASIC for the FSCP to vary or revoke a direction or order (though it would be open to ASIC to decide not to make a request to the FSCP). ASIC's decision would also be subject to merits review.
- A decision by an FSCP to issue an infringement notice for (an alleged) contravention of a restricted civil penalty provision would not be a reviewable decision. The draft explanatory statement states that this is because

  'Merits review of the decision to issue or withdraw an infringement notice is considered inappropriate because there is no obligation on the financial adviser to comply with the notice and non-compliance with the notice leaves ASIC with the decision whether or not to initiate court proceedings to enforce the restricted civil penalty provision. However, if the Financial Services and Credit Panel decides to direct ASIC to include the details of the infringement notice on the Register of Relevant Providers (Financial Advisers Register), the financial adviser does have the right to apply to the AAT for a review of this decision.'

- However, within 28 days of being given an infringement notice, a financial adviser would also have the option to make a request (via ASIC) for an FSCP to withdraw the infringement notice. ASIC would also have the option to initiate a request for the FSCP to withdraw an infringement notice where it is satisfied that there 'there has been a change in a circumstance, which formed the basis of the original decision to issue the infringement notice.'
- The decision of an FSCP not to withdraw an infringement notice would not be reviewable.

Introduce new annual registration requirements for financial advisers

- It's proposed financial advisers will need to apply to ASIC to be registered on the Register of Relevant Provider (Financial Advisers Register) in order to be able to provide personal advice to retail clients in relation to relevant financial products. The register will record: whether a financial adviser's registration is in force; the date at which registration/renewal will expire; and whether the financial adviser provides tax (financial) advice services.
- ASIC would be required to register a financial adviser, unless one or more grounds for refusal apply. For example, ASIC would be required to refuse to register an adviser if the adviser is banned/disqualified.
- Advisers would need to renew their registration annually.
- It's proposed that initial applications would be submitted to ASIC in the approved form and include the following information:
  - a written declaration by the financial adviser that they are a fit and proper person to provide financial advice
  - a written declaration by the financial services licensee on whether the licensee is aware of any reason why the financial adviser might not be a fit and proper person to provide financial advice (though would not be required if the adviser is also the financial services licensee)
  - a written declaration by the financial services licensee that the financial adviser has met the education and training standards prescribed in the Corporations Act
  - (if the financial adviser provides tax (financial) advice services)) a written declaration by the financial services licensee that the adviser has met the additional education and training standard for the provision of tax (financial) advice services.
- Applications for renewal would include the same fitness and propriety and education and training declarations as the initial registration.
- It's proposed that a fee would be payable upon lodgement of initial and renewal applications (with the amount to be prescribed by regulations).
- It's proposed that the new registration system for financial advisers would commences from 1 January 2022. However, it would not become an offence to provide financial advice while unregistered until 1 January 2023 ie from 1 January 2023, providing personal advice to retail clients in relation to relevant financial products while unregistered will constitute a contravention of a restricted civil penalty provision.

Wind up FASEA and transfer its functions to ASIC and the Minister

- The draft bill proposes that FASEA will be wound up on 1 January 2022, and its functions will be transferred to the Minister responsible for administering the Corporations Act and to ASIC.
- It's proposed that the Minister will be responsible for making education and training standards and for the Code of Ethics while ASIC will be responsible for approving foreign qualifications broadly consistent with the domestic qualifications approved by the Minister and for administering the financial adviser examination approved by the Minister.

Streamline registration requirements for advisers who provide fax (financial) advice services

- The Draft Bill also proposes to implement the government's response to recommendation 7.1 of the Tax Practitioners Board Review by introducing a single registration and disciplinary system under the Corporations Act for financial advisers who provide tax (financial) advice services and removing duplicate regulation.

- Specifically, the draft Bill proposes that from 1 January 2022, financial advisers who meet the education and training standard to provide tax (financial) advice services will be able to do so without being registered under the Tax Agent Services Act 2009.
- The draft explanatory materials make clear that 'A person or entity who provides tax agent services or BAS services will still need to be a registered tax agent or registered BAS agent under the Tax Agent Services Act 2009'.

  [Sources: Treasury Consultation: Single Disciplinary Body for Financial Advisers; Exposure draft legislation; Exposure draft explanatory materials; Flowchart of disciplinary process; Questions and Answers; Ready Reckoner; Minister for Superannuation, Financial Services and the digital economy Jane Hume media release 19/04/2021]

Suggestions to improve the accessibility and affordability of advice: The Financial Services Council is consulting on preliminary financial advice proposals

Key Takeouts

- The Financial Services Council (FSC) is seeking stakeholder feedback on preliminary proposals aimed at improving access to financial advice and reducing the regulatory burden on advisers ahead of finalising its final policy position.
- Among others, the paper includes three key proposals: a) permanently removing the requirement to provide a statement of advice; b) replacing existing advice categories/definitions with simpler categories/definitions; and c) abolishing the 'safe harbour' steps used to comply with the best interested duty.
- The release of the green paper follows ASIC's recent consultation (CP 332) which sought views on the impediments to the delivery of good-quality affordable personal advice. You can find our short overview of CP 332 in Governance News 18 November 2020 at p25)

Tackling the affordability issue: The FSC seeks feedback on preliminary proposals

The Financial Services Council (FSC) has released a green paper for consultation – Affordable and Accessible Advice – which puts forward a number of preliminary proposals intended to both improve the accessibility and affordability of financial advice and reduce the regulatory burden on advisers. The deadline for submissions is 1 July 2021. Feedback received will help inform the FSC's final policy position.

Below is a short overview of some of the key proposals included in the paper.

Rethinking existing advice categories

The FSC argues that the existing definitions/classifications of advice do not reflect consumer expectations or serve customer needs and operate in practice, as a barrier to accessing advice.

To address this, the FSC suggests rethinking the existing model to make it 'simpler and clearer for both the consumer and advice providers' by reclassifying advice (through legislation) into: 'general information' and 'personal advice'. The personal advice category would include: 'simple personal advice', 'complex personal advice' and 'specialised advice'.

The FSC suggests that this could best be implemented through amending the Corporations Act 2001 (Cth) to include a new legal test to determine which category advice falls into. The suggested test is as follows:

> '1. Has the entity provided a statement or opinion intended to support the consumer in making a decision in relation to a particular financial product or class of financial product which statement or opinion takes into account the consumer's objectives, situation or needs?
>
> a. If yes, then Personal Advice
>
> b. If no, then General Information
>
> 2. Is the personal advice limited only to those areas outlined in a legislative instrument?
>
> a. If yes, then simple personal advice
>
> b. If no, then complex personal advice'

It's also suggested that ASIC regulatory guide 175 would be amended to reflect the change. Pages 15-16 of the green paper provide a summary of the proposed changes to advice model.

The FSC seeks views on whether the proposed model would be an improvement on the current regime; how the definitions of advice should be defined/by who; what products/services would be best suited to the proposed model; and whether the proposed model could be improved to further reduce the costs of providing advice.

No statement of advice

The FSC argues that existing statement of advice and other documentation requirements are expensive to comply with and out of step with consumer expectations. To address this (and assuming the proposed new categories/definitions of advice outlined above are accepted) the FSC suggests that the statement of advice be abolished and replaced with the following requirements.

- For Complex Personal Advice and Simple Personal Advice : Advisers would be required to provide a 'fact find' and letter of advice. Ultimately, the FSC's view is that content requirements for the letter of advice should be 'whatever the consumer needs in order to make an informed decision about whether or not to follow the advice. Unnecessary disclosure that does not add value for a consumer should be removed.' The FSC recommends that the letter of advice should include (as a minimum): the advice sought, relevant circumstances, recommendation and rationale. The FSC suggests that the Letter of Advice might take a similar format to the Working Papers used by accounting bodies.
- For General information: The FSC suggests that the provision of general information to consumers 'should carry with it obligations to provide Financial Services Guides and Product Disclosure Statements in certain instances with exemptions to this requirements set by the Regulator'.

Retention of the Best Interests Duty (and the proposed avolition of the 'safe harbour steps)

The FSC recommends that the best interests duty be retained, but that the 'safe harbour steps' for meeting this duty be abolished in the interests of promoting a customer-focussed approach and reducing complexity/uncertainty. The FSC proposes that instead, the Code of Ethics should be the 'primary instrument and 'single source of truth' for determining compliance with the best interests duty'.

This approach, the FSC considers, would be consistent with comments made by Commissioner Kenenth Hayne.

Other proposals

Other preliminary proposals included in the green paper include (among others):

- Removal of the definition of 'financial product advice' from the Corporations Act: It's suggested that the definition of financial product advice in s766B of the Corporations Act be removed. Instead, the definition of advice would be 'linked to consumer goals and objectives and areas of advice' with no need for a separate category. The FSC suggests that the effect of this would be that advice that 'evaluates, compares, or recommends one or more financial products or services' would be included under the proposed definitions of personal advice. The FSC suggests that advice about products should be classified as either simple personal advice (with restrictions) or complex personal advice.
- Education requirements: The FSC proposes that the existing education requirements and professional standards regime for providing advice remain in place, but that consideration should be given to 'lighter touch' requirements for those providing only 'general information' (ie factual information and 'the old aspects of "general advice" that do not take personal circumstances into account'.
- Shift to a principles-based approach to regulation: To reduce unnecessary regulatory complexity, the FSC proposes that the regulation of advice by guided by certain 'core principles' – eg simplicity, affordability, consistency, accessibility, quality - which would be set out in a single set of industry standards and maintained by the single disciplinary regime. These principles would be supported by legislated definitions of advice. The FSC considers that this approach would have a number of advantages including (among others) enabling a more flexible approach to regulation. The FSC seeks views on whether this approach would be effective in helping to address existing regulatory complexity, promoting confidence and stability and reducing cost, views on the principles/whether other principles should be added, and whether the principles should be codified in law.
- Licensing model for financial advice: The FSC's preliminary position is that 'placing compliance responsibilities totally on the individual, in other words self licensing' could have a number of unintended consequences including increasing the cost of advice and posing challenges from a monitoring/oversight perspective. To address this, the FSC suggests a new model (summarised at p62 of the green paper) aimed at retaining the 'benefits of the existing AFSL regime' by rationalising' responsibilities between advisers and licensees. Under the proposed model, it's proposed that individual advisers could still operate as a 'member of a licensee (akin to a lawyer holding a practising certificate, but working for a legal practice'. That is, advisers would still derive their authority from AFSL holders.

However, the FSC proposes that individual advisers would also need to be registered with the new Financial Services and Credit Panel (FSCP) as well. Licensees would not be responsible for the advice provided (responsibility and accountability for this would rest with the individual advisers) but would still be obligated to supervise the adviser and to take action by reporting misconduct to the Financial Services and Credit Panel (FSCP) (once established).

[Sources: Affordable and Accessible Advice FSC Green Paper on Financial Advice; FSC Media release 19/04/2021]

Financial advice: ASIC extends record of advice relief measure to 15 October 2021

The Australian Securities and Investments Commission (ASIC) extended aspects of the temporary relief in ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355 (which expired on 15 April) to 15 October 2021. The relief enables financial advisers to provide existing clients with a record of advice rather than a statement of advice.

The relief is set out in a new legislative instrument: ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2021/268.

ASIC has indicated that it will continue to monitor the need for the relief and 'if appropriate' may either end it early or extend it. In either case, ASIC has said it 'will give sufficient notice to industry before any early repeal or extension is implemented'.

No extension for other measures

The measure above is one of three temporary measures implemented to assist the financial advice industry to provide consumers with timely and affordable advice during the pandemic.

The other two measures set out in ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355 will not be extended.

ASIC explains that this is because:

- the 'early release of superannuation' measure is no longer needed because the scheme concluded on 31 December 2020.
- the 'urgent advice measure' has not been extended because industry advised the relief was no longer necessary.

[Sources: ASIC media release 15/04/2021; ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2021/268]

BCCC report into compliance with the Banking Code released

Key Takeouts

- The report identifies that the number of self-reported breaches of has significantly increased, but that this may be a reflection of improved risk culture, monitoring, identification and reporting practice rather than an indication that compliance standards are slipping
- 3.5 million customers were impacted by the incidents reported during the January to June 2020 reporting period, with a total financial impact of more than $123 million
- For the 12 months from July 2019 to June 2020, the four major banks reported almost 90% of all breaches
- The leading reported cause of breaches is human error
- The report identified that banks largely rely on staff/training and feedback to prevent recurrence of breaches.
- Banks report that most breaches are identified through complaints, queries or feedback

The Banking Code Compliance Committee (BCCC) has released a report summarising banks' self-reported breach data for period January to June 2020 and providing an overview of how this information compares with the reported data from previous reporting periods.

160% uptick in volume of reported breaches year on year

- For the 12 months from July 2019 to June 2020, the 19 banks that subscribe to the Code self-reported 40,629 Code breaches (a 160% uptick on the 15,597 self-reported breaches for the 2018-2019 period).
- Banks reported 19,766 Code breaches for the six-month period. Combined with the 20,863 breaches for the previous reporting period, this amounts to over 40,000 breaches of the Code for the year – July 2019 to June 2020. This represents a 160% increase in the number of breaches reported when compared to 15,597 for the 2018–19 period.
- Not indicative of a slip in compliance standards, but rather than indication of better reporting practice? Banks attributed the increase to:
  - improved risk culture, employee training and awareness as well as increased monitoring activity which has led to improved breach detection/identification
  - additional resources to ensure breaches are identified, recorded and appropriately reported to the BCCC
  - increased focus on identifying breaches of the 'fair, reasonable and ethical behaviour' obligations
  - increased focus on identifying and reporting more than one Code breach per incident where appropriate (which the report comments reflects better reporting, rather than an increase in the number of incidents)
  - the inclusion of new breach obligations in the Code
- The BCCC comments that another factor impacting the number of reported breaches is the approach banks take to assessing and reporting systemic breaches. That is, whether a bank opts to report issues as multiple separate incidents, or as a single systemic issue. The report flags that improving consistency in the away in which such incidents are assessed is 'likely' to be an ongoing area of focus.

Most of the breaches were reported by the major banks

- For the 12 months from July 2019 to June 2020, the four major banks reported almost 90% of all breaches
- One major bank reported 40% of the total breaches for the period

Most breached parts of the Code?

- 48% of reported breaches in the period July 2019 to June 2020 related to Part 2 (Your banking Relationship)
- 19% of reported breaches related to Part 9 'When things go wrong'. The Committee comments that an uptick in the number of breaches Part 9 (When things go wrong (debt recovery and financial difficulty)) and Part 10 (Resolving your complaint) might have been expected in the second half of 2020, given the pandemic, but that 'overall this was not the case' with the number of reported breaches in these areas broadly consistent in these areas over H1 and H2 2020.
- The report highlights that there was a 'significant increase' (227% jump) in the number of reported breaches of Part 4 of the Code (Inclusive and accessible banking) during the January to June 2020 period with the number of reported breaches increasing to 504 – up from 154 in the previous six month period). According to the report, most of these breaches concern breaches under Chapter 14 – 'taking extra care with customers who may be vulnerable'.

Breaches for January to June 2020

The report includes a summary of the additional information provided by the banks, about the 2,555 reported incidents, and the 7,507 self-reported breaches that occurred in the January to June 2020 period.

Causes of the reported breaches – the majority are attributed to human error

Banks reported that:

- 70% of reported incidents were caused by human error alone (and a further 5% were caused by human error in additional to another factor). The BCCC comments that based on its own analysis of the data provided, some of these breaches 'could and should have been avoided, had better systems and processes been in place'. The BCC has said it will provide feedback to individual banks to help them improve their compliance in future.
- 11% involved a control, training or resourcing failure
- 10% involved system error
- 0.5% of reported incidents (or 13 incidents in total) were attributed by banks to business disruption due to COVID-19

The impact of the breaches

3.5 million customers were impacted by the incidents reported during the reporting period, with a total financial impact of more than $123 million

How the breaches were corrected: banks largely rely on staff training and feedback

- The most common actions taken by banks to prevent recurrence of breaches were one or more of the following actions: a) provision of staff training, coaching or feedback (60% of incidents); b) review/improvement of existing processes (15% of incidents); c) review staff performance or taken disciplinary action (8% of incidents); d) implementation of a 'system fix' (7% of incidents) and d) the implementation of enhanced monitoring/controls (5%).
- Bank's actions to prevent recurrence were still under review at the time of reporting for 8% of incidents.
- Banks did not provide details of efforts to prevent recurrence for 7% of incidents.
- Banks reported that they did not take actions to prevent recurrence or no action was required for approximately 1% of incidents.

Actions taken to address individual customer impacts

- Banks reported that they had undertaken one or more of the following actions to address individual customer impacts: a) corrected the individual issue, including updating details, and requests for information be destroyed, deleted or returned (30% of incidents); b) provided financial remediation (eg refund) (23% of incidents); c) communicated or corresponded with the customer (16%); d) apologised to the customer (10%); e) logged, managed or resolved a complaint (3%), and f) referred customers for financial difficulty assistance (<1%).
- Banks reported there was no customer remediation provided or customer remediation was not required for 9% of incidents.
- For 13% of incidents, the matter was still under investigation at the time of reporting and banks had yet to complete customer remediation.
- Banks did not provide details of remediation activities for 5% of incidents or confirm that these breaches were still under investigation. The BCCC states that it will continue to provide feedback to the banks involved to ensure that complete information is provided in future reporting.

Most breaches are identified through complaints, queries or feedback

- 31% of incidents were identified as a result of customer complaints, queries or feedback.
- The other most prominent methods of breach identification were self-identification by staff members (26%) followed by identification by line 1, through quality assurance activities (eg call monitoring/system monitoring) (25%).
- 9% of incidents were identified by line 2 or internal reviews,
- 4% of incidents were identified by external parties or events
- 3% from Australian Financial Complaints Authority (AFCA) decisions.

Commenting on the findings, The BCCC Independent Chair, Ian Govey said,

> 'The BCCC commends banks' efforts to identify and fix Code breaches. However, we expect banks to do more to prevent breaches occurring in the first place, especially in areas where they have reported breaches in large numbers for many years. The BCCC's recommendations in its Building Organisational Capability Report are intended to guide banks as they improve their root-cause analysis of breaches and explore effective preventative measures. Banks put too much emphasis on human error as the cause of most breaches and on training as the solution, where in many cases improved systems can reduce the risk of staff mistakes.'
>
> [Sources: Banks' compliance with the Banking Code of Practice January – June 2020; BCCC media release 20/04/2021]

Insurance claims handling: Regulations confirm the list of persons excluded from the new requirements

Context: Implementation of Hayne recommendation 4.8

- Hayne recommendation 4.8 recommended that insurance claims handling/settlement should be regulated as a 'financial service' under the Corporations Act 2001 (Cth).
- Schedule 7 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 gives effect to the government's response to recommendations 4.8 by making the handling and settling of insurance claims a financial service under the Corporations Act. The amendments in Schedule 7 are supported by regulations: Financial Sector Reform (Hayne Royal Commission Response) (2021 Measures No 1) Regulations 2021. Schedule 2 of the regulations repeal regulation 7.1.33 of the Corporations Regulations 2001 which excludes claims handling from being a financial service. These changes mean that certain specified persons who provide insurance claims handling/settling services will be required to comply with the same obligations as those which apply to people providing financial services, including the requirement to hold an Australian Financial Services licence (AFSL) authorisation (or become an authorised representative) in order to do so/continue to do so.
- ASIC has recently provided an information sheet and issued a reminder to insurance claims handling firms of the need to submit their complete application as soon as possible (see: Governance News 14 2021 at p20-21).

New regulations released confirming exclusions from new requirements for 'claimant intermediaries'

- Treasury consulted earlier in the year on draft regulations setting out a proposed list of persons who would be excluded from the requirements applying to a 'claimant intermediary' (eg the requirement to hold an AFSL when handling claims) under the Corporations Act 2001 (Cth).
- Following this, new regulations – The Financial Sector Reform (Hayne Royal Commission Response) (Claimant Intermediaries) Regulations 2021- have been registered confirming that the following people are excluded:
  - mortgage brokers and mortgage intermediaries
  - insurance brokers
  - qualified accountants
  - veterinarians
  - travel agents
  - financial advisers
  - financial counsellors
  - property managers
  - estate managers
  - public trustees

The explanatory statement comments that the people included on the list have been excluded because 'handling claims is typically not their core business and they often do so for no monetary benefits'. The exclusion is intended to 'avoid the unnecessary regulatory burden of requiring these parties to obtain an Australian Financial Services Licence.'

[Source: The Financial Sector Reform (Hayne Royal Commission Response) (Claimant Intermediaries) Regulations 2021]

Clearer rules needed: FinTech Inquiry Chair says there is an urgent need to resolve the existing policy/regulatory uncertainty around digital assets

Senator Andrew Bragg has given a speech outlining the current status of the Senate Select Committee on Financial and Regulatory Technology and reasons behind extending the reporting date and flagging the urgent need to address the current policy/regulatory uncertainty around the treatment/status of digital assets .

Key Takeouts

Committee renamed, scope and length extended

- The scope of the Senate Select Committee on Financial Technology and Regulatory Technology has been broadened and the Committee renamed the Select Committee on Australia as a Technology and Financial Centre.
- The reporting deadline has been extended from 16 April 2021 to the end of October.

- The additional time will be used to 'explore new opportunities for Australia as a technology and finance centre arising from the COVID-19 pandemic'. In particular, Senator Bragg (who Chairs the Committee) flagged crypto currency and digital assets and a key area of focus.
- In addition, Senator Bragg said that the Committee will also consider: neobanking; whether 'instances of corporate law' are a barrier to investment; and replacement options for the offshore banking unit, as critical areas of focus during this time.
- Though he gave no release date, Senator Bragg said that the final report of the FinTech Inquiry 'very shortly'.

Blockchain could deliver significant economic benefits

Senator Bragg said that digital asset technology poses 'tremendous and expansive opportunities' (for example, if it were applied to the Personal Property Securities Registers, land titles, notices of incorporation etc) and has the potential to deliver significant economic benefits. Senator Bragg observed that work is already underway on a number of projects.

Barrier to unlocking potential: Lack of clear policy framework in Australia

- Senator Bragg said that currently the there is no clear policy framework and that formulating an appropriate one poses a challenge for lawmakers because blockchain does not fit neatly into existing frameworks. He observed,

  > 'A driver of the problem is that blockchain is a new form of property right. It is not, of itself, a security, a share, a bond, personal property, or a contract. It may include these aspects, it may draw upon these frameworks, but to pigeonhole it into these arenas is an ultimately futile exercise. In the absence of a set of regulations which recognises the distinct character of blockchain, that is what regulators are being forced to do'.

- Senator Bragg observed that the current guidance from the Australian Securities and Investments Commission (ASIC) indicates that where a blockchain product 'fits' into the existing taxonomy of schemes and products, then it will be subject to the appropriate laws and regulations'. However, he sees this a problematic because there is no clarity from a regulatory perspective, or from the perspective of a commercial operator, around when/whether blockchain products 'fit' into the existing taxonomy.
- This uncertainty has a number of negative impacts including:
  - digital asset businesses and FinTech businesses are being 'de-banked'
  - Australian banks (in some cases) opting to avoid dealing with crypto assets and there is generally, 'an immense reticence among financial institutions' to deal with these products
  - Regulators such as AUSTRAC not having clear guidance around distinguishing between the legitimate and illegitimate uses of these products
- Ultimately, Senator Bragg comments that the current policy/regulatory uncertainty is cutting Australia off from the opportunities represented by blockchain technology and risks start ups opting to go elsewhere. In addition, the uncertainty is making it harder to identify instances where digital assets are being used unlawfully. 'A sector-wide "chill" means that law enforcement is flying blind when it comes to distinguishing legitimate from illegitimate uses' he said.

Governments in all major economies are acting decisively to remedy this gap

- Senator Bragg observed that: a) the European Commission issued a consultation draft proposing a comprehensive securities law for Crypto-Assets (MiCA) last year; b) the European Central Bank is considering proposals for a digital Euro; c) the UK Financial Conduct Authority has established a crypto-assets taskforce and issued interim guidance on the regulation of these assets; and d) Canada is also developing a comprehensive framework for the regulation, taxation and exchange of digital assets.
- Closer to home, he observed that Singapore already has in place the 'most comprehensive framework for the regulation of digital assets' in place and is the second most popular country globally for Initial Coin Offerings.
- Senator Bragg observed that the current regulatory uncertainty in Australia is 'forcing crypto entrepreneurs to other jurisdictions' including Singapore, Germany and Britain

A plan to address the lack of regulatory certainty

- Senator Bragg said that the Committee is preparing to develop a digital asset plan aimed at addressing the current 'regulatory haziness and the lack of guidance from ASIC and the ATO on how digital assets will be treated'.
- The purpose is to provide the necessary policy/regulatory certainty to enable 'crypto entrepreneurs' to remain in Australia (keeping high-paying tech jobs and investment in Australia). 'As a forward-looking country we don't want Australia to be a backwater, we want innovation here' Senator Bragg said.

Putting in place a clear regulatory framework could entail significant legislative change

Senator Bragg said that a 'proper and comprehensive regulatory framework will require more than simply adjusting regulatory practices' and may instead require significant legislative change. Senator Bragg suggested that the lack of policy/regulatory certainty,

> …'may not be remedied merely by regulators shifting their practices and internal guidance, or even by ministers issuing delegated legislation under existing acts. If we want to recognise the distinct nature and status of the assets, it could require changes which are more fundamental'.
>
> [Source: Senator Andrew Bragg speech: Blockchain Australia Week 20/04/2021]

Risk Management

Top Story | Liability Risk and Adaption Finance

MinterEllison has partnered with the United Nations Environment Programme Finance Initiative (UNEPFI) on a paper - Liability Risk and Adaption Finance – discussing the legal implications of adaptation (or a lack thereof) to climate change-related impacts.

The paper provides insights into how climate change litigation (and other legal action) or the credible threat of legal action, can act both as a driver of adaption to physical climate-related risks and as a consequence of failure to adapt.

The paper also includes discussion of the potential for litigation (or the risk/spectre of liability) to help overcome some of the barriers to scaling adaption finance.

The full text of the paper is available here.

Businesses representing $3 trillion in annual revenue have called on the Biden administration to reducing GHG emissions by 50% by 2030

310 businesses and investors that collectively represent over $3 trillion in annual revenue have signed an open letter, coordinated by Ceres and We Mean Business, expressing their support for the Biden administration's commitment to climate action.

Specifically, the letter calls on the administration to set an interim target to cut commit to cutting greenhouse gas emissions by at least 50% below 2005 levels by 2030, in pursuit of reaching net-zero emissions by 2050. This, the letter states, would be an important step in supporting the efforts of the private sector.

The letter states,

> 'If you raise the bar on our national ambition, we [the business community] will raise our own ambition to move the US forward on this journey. While an effective national climate strategy will require all of us, you alone can set the course by swiftly establishing a bold US 2030 target'.

The full text of the letter and full list of business signatories is here.

[Source: Ceres media release 13/04/2021]

McDonalds has released new global standards to stamp out harassment and discrimination in its workplaces

McDonald's Corporation has announced the roll-out of new Global Brand Standards across all 39,000 McDonald's restaurants, aimed at promoting a strong and inclusive workplace culture, and preventing violence, harassment and discrimination against employees and customers.

Specifically, the new standards prioritise actions in four areas: 1) harassment, discrimination and retaliation prevention; 2) workplace violence prevention; 3) restaurant employee feedback; and 4) health and safety.

The implementation of the new standards will be supported by a 'suite of policies, tools, trainings and reporting mechanisms'. McDonald's states that it will continue to work in partnership with independent and third party experts in the US and globally to provide expertise, training and tools that support the implementation of the standards for franchisees.

Restaurants are expected to have implemented the new standards by the end of the year and from January 2022, will be 'assessed and held accountable' for meeting them.

[Source: McDonalds media release 14/04/2021]

In Brief | Call to mandate the disclosure of emissions: Apple has urged the SEC to issue rules requiring companies to publicly disclose 'third party audited' emissions information covering all aspects of emissions

[Sources: Apple announcement: https://twitter.com/lisapjackson/status/1381972723765682180]

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