Governance News

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

21 July 2021

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Financial Services

Financial Services Royal Commission developments

Top Story | Consultation on draft legislation to establish the Financial Accountability Regime

Key Takeouts

- **Draft Financial Accountability Regime Bill 2021 has been released for consultation:** Government has released for consultation an exposure draft of the legislation to establish the Financial Accountability Regime (FAR) (which will replace the Banking Executive Accountability Regime or BEAR). FAR proposes to extend strengthened, but BEAR-like accountability requirements, to other APRA-regulated entities and to the directors/senior executives of those entities in accordance with the government's response to several Hayne Commission recommendations.
- **Proposed timing:** The deadline for submissions on the proposal paper is 13 August 2021. If legislated in its current form, the new regime will apply to:
  - authorised deposit-taking institutions (ADIs) and their authorised non-operating holding companies (NOHCs) from the later of 1 July 2022 or six months after commencement of the legislation; and
  - insurers (and their registered or authorised NOHCs) and registrable superannuation entity (RSE) licensees from the later of 1 July 2023 or 18 months after the commencement of the legislation.
- **Similar (but not the same) as the BEAR?** Though the structure of the FAR is broadly similar to the BEAR, FAR is proposed to differ in a number of respects including (among others) that:
  - the regime will be jointly administered by APRA and ASIC (although there is some division of responsibilities);
  - FAR will incorporate end-to-end executive product responsibility requirements;
  - smaller entities will be exempt from requirements to provide accountability statements/maps to the regulators;
  - all FAR entities will be subject to the same deferred remuneration obligations, regardless of size or seniority of accountable person role; and
  - accountable persons will be subject to an additional accountability obligation (ie not included in existing BEAR obligations) in relation to ensuring the entity complies with specified financial services laws.

  The draft legislation does not introduce potential civil penalties for accountable persons, a key departure from the January 2020 FAR proposal paper.
- **Some details are yet to be finalised:** Some details of the regime (eg the definitive list of 'prescribed responsibilities' or positions of accountable persons, the threshold for determining which accountable entities fall into the 'enhanced compliance' category and details/regulatory guidance around the joint administration of the regime and regulatory expectations) are yet to be finalised.
- **Purpose of the FAR?** The aim is ultimately to strengthen and increase individual and entity level accountability across the financial services sector, including for non-financial conduct risk. The draft explanatory memorandum states: 'A key objective of the Financial Accountability Regime is to improve the operating culture of entities in the banking, insurance and superannuation sectors and to increase transparency and accountability across these sectors - both in relation to prudential matters and conduct related matters'.

Overview: The proposed new Financial Accountability Regime (FAR)

Following the release of a proposal paper in January 2020 (summarised in The proposed new Financial Accountability Regime: new minimum standards for entities, boards and senior management across the economy?), the government is consulting on draft legislation proposing to establish the long-awaited FAR. In broad terms, the proposed reforms are largely consistent with those contemplated in the January proposal paper.

The deadline for submissions to the consultation is 13 August 2021.

A high level overview of the key measures is below.

What is the FAR?

If legislated, the FAR (which will replace the BEAR) proposes to extend strengthened, but broadly BEAR-like accountability requirements to other APRA-regulated entities and to the directors/senior executives of those entities. This is in accordance with the government's response to several Hayne Commission recommendations.

Importantly, unlike the existing BEAR, the FAR will be administered jointly by the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC).

Why is the FAR being introduced?

The FAR will implement the government's response to the following Hayne recommendations.

- Recommendation 3.9 – the BEAR be extended to all RSE licensees
- Recommendation 4.12 – the BEAR be extended to all APRA regulated insurers
- Recommendation 6.6 – ASIC and APRA jointly administer the BEAR
- Recommendation 6.7 – the obligations be amended to make clear that an ADI and accountable persons must deal with APRA and ASIC in an open, constructive and co-operative way
- Recommendation 6.8 – the BEAR be extended to all APRA-regulated financial services institutions and that APRA and ASIC should jointly administer those new provisions.

In addition, the FAR will incorporate the government's response to Hayne recommendation 1.17. This recommended that APRA should determine a responsibility (under the BEAR) within each ADI for all steps in the design, delivery and maintenance of all products offered to customers, and any necessary remediation for customers in respect of any of those products (executive BEAR product responsibility).

The draft explanatory memorandum makes clear that the new individual and firm-level accountability framework that will be introduced by the FAR is intended to lift the standard of risk and governance culture across the financial sector, consistent with the spirit of the Hayne recommendations. The explanatory memorandum states:

> 'A key objective of the Financial Accountability Regime is to improve the operating culture of entities in the banking, insurance and superannuation sectors and to increase transparency and accountability across these sectors - both in relation to prudential matters and conduct related matters'.

Who will the FAR apply to?

Accountable entities

If legislated, the FAR will impose accountability obligations on 'accountable entities', ie. APRA-regulated entities authorised by the regulator to carry on a banking, insurance or superannuation business. This group includes:

- ADIs and their authorised NOHCs
- general insurers and their authorised NOHCs
- life insurers and their registered NOHCs
- private health insurers
- RSE licensees

These obligations will also apply to foreign accountable entities (in the banking or insurance sectors) but only to the operations of their Australian branch.

While the FAR will not impose direct legal obligations on the 'significant related entities' of accountable entities (see: s11 and s12 of the draft Bill), accountable entities will be required under the new regime to take 'reasonable steps' to ensure that their 'significant related entities' comply with certain FAR obligations.

Accountable persons

The board and certain senior executives within accountable entities, referred to in the draft Bill as 'accountable persons', will also be directly regulated by the FAR and face sanctions for non-compliance with their FAR obligations.

Accountable entities will need to determine who within their organisation is an 'accountable person' by reference to two considerations:

- whether the person holds a position (either within the accountable entity or within a significant related entity) that has 'executive responsibility for management or control of the accountable entity or a significant or substantial part or aspect of the operations of the accountable entity or the accountable entity and its group of significant related entities'; and
- whether the person holds one (or more) of the prescribed responsibilities or positions listed in rules to be made by the Minister. These rules will be finalised following a separate consultation which is expected to commence in September/October 2021. Attachment A at p6 of the policy proposal paper accompanying the draft legislation includes a full list of proposed prescribed responsibilities and positions.

Application to a much broader range of functions within FAR entities

The draft explanatory memorandum indicates that, in practice, the FAR is intended to apply to a fairly limited group – ie. to 'only include the directors and senior executives of an entity, such as the Chief Executive Officer and officers reporting directly to the Chief Executive Officer' rather than to lower level executives. However, the indicative list of prescribed responsibilities and positions is still much broader than under the BEAR.

The proposed FAR accountability framework

Similar to the BEAR, the FAR will impose:

- accountability obligations;
- key personnel obligations;
- notification obligations; and
- deferred remuneration obligations on APRA-regulated entities.

Accountability obligations

Accountable entities

Similar to the BEAR, the FAR would require accountable entities to take reasonable steps to:

- conduct their business with honesty and integrity, and with due skill, care and diligence;
- deal with APRA and ASIC in an 'open, constructive and cooperative way';
- in conducting its business, prevent matters from arising that would (or would be likely to) adversely affect the entity's prudential standing or reputation; and
- ensure all accountable persons and each of the entity's significant related entities meet their accountability obligations under the FAR.

Accountable persons

Similarly, accountable persons will be required to: a) act with honesty and integrity, and with due skill, care and diligence; b) deal with APRA and ASIC in an open, constructive and cooperative way; and c) take reasonable steps in conducting their responsibilities to prevent matters from arising that would (or would be likely to) adversely affect the entity's prudential standing or reputation.

New obligation: In addition to these obligations, the FAR would introduce a new obligation (ie. not included in existing BEAR obligations) requiring accountable persons to take reasonable steps in conducting their responsibilities as an accountable person to ensure the entity complies with specified laws governing the entity (see: s19(d) of the draft Bill).

Section 20 of the Draft Bill sets out a non-exhaustive list of what may constitute reasonable steps in meeting this and the other relevant accountability obligations listed above, being the following (the last two of which are additions from the equivalent list in the BEAR legislation):

- having appropriate governance, control and risk management;
- having safeguards against inappropriate delegations of responsibility;
- having appropriate procedures for identifying and remediating problems that arise or may arise;
- taking appropriate action to ensure compliance; and
- taking appropriate action in response to non compliance, or suspected non compliance.

End to end product responsibility

It's also proposed that individual end-to-end product responsibility will be 'subsumed' into the FAR by including it in the list of 'prescribed responsibilities and positions' for accountable persons, to be set by the Minister. This would implement the government's response to Hayne Recommendation 1.17.

Accordingly, Attachment A of the policy proposal paper includes the position of: 'Senior executive responsibility for management of the accountable entity's end-to-end product responsibility'. It's suggested that this is likely to be the CEO of a small accountable entity or the head of a business division in a more complex accountable entity.

Key personnel obligations

If legislated, accountable entities will be required to ensure that:

- the responsibilities of their accountable persons (ie. the accountable persons of the accountable entity and its significant related entities) cover all aspects of their business;
- every accountable person is registered with the regulators before occupying an accountable person role (with certain exceptions, eg. where the person holds the position for 90 days or less); and
- accountable person applicants have not been disqualified by the regulators from holding an accountable person position.

Accountable entities will need to sign a declaration that a person seeking registration as an accountable person is suitable to hold the position.

To streamline this process, an information paper accompanying the draft legislation flags that registration of accountable persons will occur through a single portal. This portal will also function as a single point of contact for FAR-related requests, queries and data collection more generally, on an ongoing basis. Information submitted by accountable entities through the single portal would be made available to both APRA and ASIC, removing the need for entities to submit the same information to each regulator separately.

Registration of accountable persons – no veto power over new appointments

As recommended by the APRA Capability Review, the original proposal document released in January 2020 proposed to give APRA a new (reserve) 'veto' power over the appointment/reappointment of directors and senior executives 'where APRA holds existing relevant information regarding a particular person that conflicts with the obligations that would be placed on him or her as an accountable person'.

This has not been included in the draft Bill. Under the draft Bill, provided that an application to register a person as an accountable person: a) is complete and submitted in the approved form; b) includes a signed declaration that the accountable entity is satisfied the person is suitable to be an accountable person; c) is accompanied by an accountability statement for the person (where required); and d) is supplemented by any further information requested by the regulators in relation to the application, the regulators will register the person 21 days after the day the application is submitted. Where further information has been requested, the regulators will register the person 21 days after it is provided to the regulators (see: s38 of the Draft Bill).

Deferred remuneration obligations

Broadly, the FAR would require all accountable entities and their significant related entities to defer at least 40% of the variable remuneration for each of their accountable persons for a minimum of four years (except in limited circumstances), if the amount that would be deferred is AU$50,000 or more. Interestingly, proposed CPS 511 would require a higher deferral of 60% for CEO's of significant financial institutions (as defined).

The explanatory memorandum explains this four year deferral requirement has been drafted to align with the provisions of APRA's proposed prudential standard (CPS 511 Remuneration) (summarised in Take two: APRA consults on new less prescriptive remuneration requirements).

Variable remuneration means so much of a person's total remuneration (including cash and equity based remuneration) that is conditional on the achievement of objectives, such as performance metrics and service requirements according to the explanatory memorandum.

There would be no requirement to defer variable remuneration if variable remuneration is not a feature of a particular accountable person's remuneration structure (eg, if the accountable person receives only fixed pay (eg, salary and superannuation) or directors fees).

Under s23 of the Draft Bill, accountable entities will also need to ensure their remuneration policy 'requires' a reduction in the variable remuneration of accountable persons who fail to comply with their accountability obligations. The reduction must be proportionate to the failure (potentially to zero) and need not be limited to variable remuneration relating to a period in which the failure occurred.

Accountable entities will also be required to take reasonable steps to ensure that their significant related entities comply with these obligations.

The deferred remuneration obligations will not apply to an accountable person:

- while the person is filling a 'temporary or an unforeseen vacancy' (provided the person is not registered as an accountable person), for the first 90 days that they fill the position; or
- whose deferred variable remuneration for the financial year does not meet a minimum threshold. This will be $50,000 or more, unless the Minister makes an instrument specifying a different amount.

Notification obligations

If legislated, entities will not be classified as small, medium and large (as is the case under the BEAR) but instead split into two categories: 'core compliance entities' (which will not be required to submit accountability maps/statements to the regulators) and 'enhanced compliance entities' (which will have to do so).

Core compliance entities: All accountable entities will be required to provide the regulators with certain 'core' information about the entity and its accountable persons (set out in s29 of the draft Bill). This information includes: notifying the regulators if a person ceases to be an accountable person; notifying the regulators if the entity 'reasonably believes' that it has breached its key personnel or accountability obligations' (and/or when an accountable person has breached their accountability obligations) and/or when a 'material change' occurs to information included on the register of accountable persons about an accountable person.

Enhanced compliance entities: Entities that meet an 'enhanced notification threshold' will be required also to provide accountability statements and accountability maps to the regulators and to notify the regulators of material changes to these documents.

What is the threshold?

The threshold to determine which accountable entities will need to comply with the enhanced notification requirements will be specified in rules to be set by the Minister. A 'Questions and Answers' document accompanying the draft Bill indicates (consistent with the original proposal) that the enhanced notification requirements may apply to the following entities:

- ADIs with total assets > $10b
- RSE licensees with total assets > $10b (ie combined total assets of all RSEs under the trusteeship of a given RSE licensee.)
- General and private health insurers with total assets > $2b
- Life insurers with total assets > $4b

NOHCs?

The Question and Answer document also suggests that where an accountable entity within a corporate group meets the enhanced notification threshold, 'all other accountable entities within that corporation group including any licensed NOHCs would need to comply with the enhanced notification obligations irrespective of whether they meet the enhanced notification threshold'.

The same documents states that consultation on the threshold requirements is planned to occur in September/October 2021.

Compliance mechanisms

The draft Bill will give the regulators a variety of tools to administer/enforce compliance with FAR obligations. These include (among others):

- the power to direct an accountable entity to reallocate responsibilities of its accountable persons
- the power to require accountable entities, significant related entities and accountable persons to provide information or documents to them

- the power to conduct investigations (including examinations) into possible FAR contraventions
- the power to disqualify a person from being an accountable person for a period
- the power to accept enforceable undertakings
- the power to seek an injunction order from a Court
- the power to apply to a Court for an order to enforce a requirement made under the Act

Civil penalties

If legislated, an accountable entity that breaches its FAR obligations may also be subject to a civil penalty. It's proposed that the maximum penalties under the FAR will be the greater of the following: a) 50,000 penalty units; b) the benefit derived/detriment avoided by the entity because of the contravention, multiplied by three (where this can be determined by the court); or c) 10% of the annual turnover of the body corporate (capped at $525m or 2.5m penalty units).

The draft explanatory memorandum states that 'in practice, it is intended that courts would determine which method provides the greatest penalty, and then use discretion to impose an appropriate penalty up to that amount'.

The original proposal suggested that individual accountable persons might also face civil penalties under the FAR. However, this has not been included in the draft Bill.

Joint administration/enforcement of the FAR

Division of responsibilities

If legislated, ASIC will be limited to administering or enforcing the FAR in relation to 'an accountable entity that holds either an Australian financial services licence or an Australian credit licence, its significant related entities and accountable persons of these entities' (though this will not limit ASIC's powers to make legislative instruments under the Bill); and

APRA will enforce and administer the FAR in relation to all other entities, their significant related entities and the accountable persons of those entities (with the exception of the power to make a legislative instrument).

Collaborative approach

The draft Bill specifies a number of situations where the regulators would be required to form an agreement prior to making certain decisions or exercising certain powers eg the decision to disqualify an accountable person.

The draft Bill requires APRA and ASIC to enter into an arrangement outlining their general approach to administering and enforcing the FAR within six months of the commencement of the Bill, and before exercising certain powers/performing certain functions. If the regulators fail to reach an agreement, the Minister may determine an arrangement for this purpose.

An information paper accompanying the draft Bill provides more detail around how the joint administration of the FAR is expected to work, though this is 'subject to change depending on the finalisation of the FAR legislation' and may 'evolve as the regulators refine' their approach to joint administration of the regime.

The information paper flags that the regulators are expected to issue joint regulatory guidance prior to the commencement of the FAR, with any industry specific guidance released prior to the commencement of the FAR for each of the specific industries.

Proposed timing and plan for implementation of the FAR

- The deadline for submissions to the consultation is 13 August 2021. The FAR legislation is being prepared for introduction and passage in the 2021 Spring sittings of Parliament.
- Public consultation on the transitional and consequential provisions is expected to commence in August/September 2021.
- Public consultation on the Minister's rules in relation to the list of prescribed responsibilities and positions and the enhanced notification thresholds is expected to commence in September/October 2021.

If legislated in its current form:

- the FAR will apply to ADIs and their authorised NOHCs from the later of 1 July 2022 or six months after commencement of the legislation. At this point, the BEAR would be repealed; and

- the FAR would commence for insurers, their licensed NOHCs and RSE licensees from the later of 1 July 2023 or 18 months after the commencement of the FAR.

It's anticipated that the regulators will publish guidance to support implementation prior to the commencement of the changes. This guidance may include:

- guidance on preparation of accountability statements and maps which may involve the regulators
- publishing a suggested template and/or a list of key functions
- guidance on what constitutes material changes that trigger notification obligations
- industry specific guidance.

Preparing for the FAR

Given that the introduction of the FAR has been anticipated for some time, many financial services firms have already taken steps to review their existing governance structure and frameworks in anticipation.

In light of the detail now available in the draft Bill, and in light of the impact that the COVID-19 pandemic has had on working arrangements and the flow-on effects for supervision and oversight, entities may wish to revisit these reviews, as part of their broader FAR planning processes.

Accountable entities should expect to engage with the regulators

The information paper states that the regulators will engage with accountable entities ahead of formal implementation of the regime to support them in their preparations. It's suggested that in addition to taking the opportunity to 'properly examine and strengthen existing governance frameworks where appropriate' accountable entities should be prepared to engage with the regulators on the following issues:

- for ADIs, the regulators may seek to understand how they intend to transition from the BEAR to the FAR including how they intend to meet their new and expanded obligations;
- for 'enhanced compliance entities' the regulators will request draft accountability maps and statements to be provided for review and comment as part of the pre-implementation process; and
- for 'core compliance entities' the regulators will request information about their preparations eg a draft list of accountable persons.

Broader implications: a new minimum governance standard across the financial services sector?

Financial Accountability Regime – July 2021 | Treasury.gov.au2020, stakeholder expectations around executive accountability for non-financial risk (including accountability for cultural failings) have risen dramatically in Australia and internationally. The new accountability framework that will be introduced by the FAR is arguably very much in alignment with these increased expectations.

Over time, we expect that the FAR is likely represent a new minimum standard for boards and senior management across the economy.

[Source: Treasury Consultation: Financial Accountability Regime – July 2021]

Top Story | Status update: Tracking progress against each of the Hayne Commission's 76 recommendations

The Financial Services Royal Commission's final report was publicly released on 4 February 2019. In the two (plus) years since its release a number of actions have been implemented in response – though in many cases, the changes have not yet been fully implemented or have been deferred due to COVID-19.

We have prepared a table briefly outlining the actions taken to date and/or the planned actions to be taken in response to each of the Commission's 76 recommendations.

We will be updating the table regularly. The table (which you can access here) was last updated on **21 July 2021.**

Hayne implementation: Consultation on the government's proposed approach to establishing a Compensation Scheme of Last Resort

Key Takeouts

- Hayne recommendation 7.1 recommended that the government establish a compensation scheme of last resort (CSLR) as recommended in the Supplementary Final Report to Ramsay Review.
- On 16 July 2021, the government released a package of draft legislation and a proposal paper for consultation outlining the government's proposed approach to implementing this recommendation through the establishment of an industry-funded, forward-looking CSLR for consumer and small business complaints. It's proposed that the scheme will be part of AFCA.
- Though otherwise forward looking, it's proposed that the CSLR will fund unpaid determinations made by AFCA that have been made since 1 November 2018 (the date of the commencement of the AFCA scheme) where the determination is in relation to a financial product or service within the scope of the scheme.
- Products proposed to be scope: It is proposed that five financial products and services will be within the scope of the proposed CSLR: 1) personal advice on relevant financial products to retail clients; 2) credit intermediation; 3) securities dealing; 4) credit provision; and 5) insurance product distribution.
- The deadline for submissions on the draft legislation and the proposals included in the proposal paper is **13 August 2021.** The government intends that the regulations and the legislation to enact the scheme will be legislated by Q4 2021-Q1 2022.

Overview

The government has released a package of draft legislation for consultation proposing to establish a compensation scheme of last resort (CSLR) in in line with the government's response to Hayne recommendation 7.1.

The draft legislation proposes to implement 'key features of the scheme' including the ability to authorise an operator of the scheme (CSLR operator) and the industry levying framework that the government proposes will fund the scheme.

The government has also released a proposal paper, seeking views on the government's proposed approach to various other important aspects of scheme. These include: the scope of the regime, payment and funding arrangements, governance of the scheme and 'mechanisms to maintain the integrity of the scheme'.

The deadline for submissions on the draft legislation and the proposals included in the proposal paper is **13 August 2021.**

Overview of key measures

Purpose of the scheme

The CSLR is intended to provide a mechanism for consumers who have received a determination for compensation from the Australian Financial Complaints Authority (AFCA) but who have not received payment from the financial services firm in accordance with the AFCA determination, to be able to secure compensation.

How is the scheme proposed to work?

- Broadly, it's proposed that the CSLR will create a pool of funds from which compensation up to a cap of $150,000 may be paid to eligible claimants (though this amount may be changed by Ministerial determination) upon application to the CSLR operator.

  That is, it's proposed that eligible claimants will be able to apply to the operator of the scheme to receive the compensation (up to the capped amount) that they would have received, had the financial services firm paid it to them in accordance with AFCA's determination.
- It's proposed that the CSLR operator will be a company that meets certain mandatory requirements and is authorised by the Minister by notifiable instrument.
- It's proposed that the CSLR operator's decision to award or deny a claim would be based on whether the application meets certain eligibility criteria under the scheme. The proposal paper makes clear that the government does not propose that the CSLR operator will have the ability to reassess the merits of the AFCA

determination, (including the amount compensation awarded) that is the subject of a CSLR application. It's envisaged that the CSLR operator's decision to award/deny compensation to an applicant will not be reviewable.

- It's proposed that the CSLR operator will be regulated by ASIC.
- To avoid a circumstance arising where a consumer would receive payment via the CSLR as well as another remedy (eg through a liquidation process), it's proposed that the CSLR operator will have a right of subrogation. The draft explanatory materials state that 'this will also allow the CSLR operator to pursue payment from a financial firm, without delaying the payment of compensation to the applicant'.
- Importantly, it's proposed that where a compensation payment is awarded under the scheme, the CSLR operator would be required to notify ASIC of the details of the financial firm that was the subject of the relevant AFCA determination and the circumstances surrounding its failure to pay the amount determined by AFCA. The purpose of this is to enable ASIC to determine whether to take action eg suspending or cancelling relevant licences.

Who may be eligible to make a claim under the scheme?

- It's proposed that applicants will not be eligible to make an application under the CSLR unless they have received a relevant AFCA determination in their favour, and meet any other requirements to be prescribed by regulations (which have not yet been released).
- The draft explanatory materials suggest that these 'other' requirements may include: a) an assessment of the likelihood of the applicant getting their payment from the financial firm; and b) a requirement prohibiting the applicant from recovering compensation under any other statutory scheme for matters that pertain to their AFCA determination.
- The proposal paper further suggests that for an applicant to be eligible to receive compensation: a) the AFCA determination will need to be in scope of the scheme; b) AFCA must have been notified within 12 months that the financial services firm has not complied with the AFCA determination (to enable AFCA to take reasonable steps to secure payment); c) the financial services firm must be unable to pay the compensation owed; and d) there must not be any other statutory compensation scheme available.

Proposed powers of the CSLR operator

- It's proposed that the CSLR operator will have the power to obtain information that is relevant to the operation of the scheme. Penalties will apply for failure to comply with a notice from the CSLR operator to provide information (without reasonable excuse).
- If a financial firm does not comply, it's proposed that the CSLR operator would be required to notify both ASIC and AFCA (which enable the regulators to take appropriate action).

Proposed scope of the scheme?

- It's proposed that the CSLR will fund unpaid determinations made by AFCA that have been made since 1 November 2018 (the date of the commencement of the AFCA scheme) where the determination is in relation to a financial product or service within scope of the scheme.
- The proposal paper outlines the financial products and services that the government plans will be in scope, as well as some possible exclusions.
- In scope? Broadly, it's proposed that the scheme will cover five financial products and services that are authorised to be provided by AFSL and ACL holders who are required by legislation to be AFCA members. They are:
  - personal advice on relevant financial products to retail clients
  - credit intermediation
  - securities dealing
  - credit provision
  - insurance product distribution.

Table A1 in Appendix A of the proposal paper provides a detailed definition of these five products/services.

- Exclusions?
  - It's proposed that financial products/services that are provided by firms that are not required by legislation to be members of AFCA (in respect of the provision of that product/service) will not be within scope for the CSLR.
  - It's proposed that Court and tribunal decisions will be out of scope of the CSLR at the commencement of the scheme.

- The proposal paper suggests that consideration of the inclusion/exclusion of financial services/products should occur as part of the period review of the scheme.

It's proposed that the scheme will be funded through an industry levy framework

Broadly, it's proposed that the industry levy framework will have two key components:

- annual levies (which will be the primary funding mechanism); and
- (if required) a secondary funding mechanism will come into play.

It's proposed that the total amount of annual levy payable will be determined by the CSLR operator by legislative instrument. Amounts payable by individual firms would be calculated in accordance with a method to be prescribed in regulations. The draft explanatory materials state that this would be informed by 'concepts in place for the similar calculations in ASIC's industry funding model' (though the CSLR levy framework would be separate to the ASIC industry funding framework).

It's proposed ASIC, on behalf of the Commonwealth, would be responsible for issuing levy notices and collecting all levies imposed under the CSLR scheme.

Annual levies

It's proposed that the annual levy would include:

- amounts payable to applicants under scheme
- the CSLR operator's expected administrative costs for the upcoming levy period
- amounts to build a capital reserve (for the first three levy periods), to establish capital reserve for the scheme with an option for the CSLR operator to continue to include capital reserve contributions in the annual levy to maintain the capital reserve
- ASIC's administrative costs
- reconciliation for earlier levy periods
- the costs expected to be incurred by the CSLR operator in its establishment (for the first levy period only)

In addition, to enable recovery of AFCA's complaint handling fees, it's proposed the levy framework will include payment of unfair AFCA fees on an annual basis

Tables 2 and 3 in the proposal paper sets out estimated ongoing levies.

It's envisaged that the CSLR operator would have flexibility to revise the amount of annual levies in certain circumstances.

Secondary funding mechanism

It's also proposed that the Minister will have discretion to increase the pool of funds available by imposing a secondary industry levy (by Ministerial determination) in certain circumstances.

It's proposed that the Minister will also have discretion to:

- reduce the maximum amount (the maximum compensation cap) of compensation payable for a class of applicants
- require that particular compensation payments be paid over a number of periods, rather than in a lump sum.

Proposed timing and next steps

- The due date for submissions to the consultation is 13 August 2021.
- The government plans to release draft regulations for consultation by Q4 2021.
- The government intends that the regulations and the legislation to enact the scheme will be legislated by Q4 2021-Q1 2022.

It remains unclear when the scheme might commence receiving applications

- If legislated in its current form, draft Financial Services Compensation Scheme of Last Resort Levy Bill 2021 (Levy Bill) would commence on the later of 1 January 2022 (or the day after the Bill receives Assent). The remaining draft Bills (if legislated in their current form) would commence at the same time and would not commence at all if the Levy Bill failed to pass.

- The proposal paper gives no indication of when the CSLR operator will be authorised or when the first payments are expected to be awarded under the scheme.

  [Source: Consultation: Financial Services Royal Commission – Compensation Scheme of Last Resort 20/07/2021]

Hayne implementation: The government has released ASIC's report into industry's efforts to end payment of grandfathered conflicted remuneration

Context

- Hayne recommendation 2.4 recommended an end to the grandfathering of conflicted remuneration (GCR) paid to financial advisers as soon as practicable.
- The Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019 ended GCR arrangements from 1 January 2021.
- On 21 February 2019, the Australian Securities and Investments Commission (ASIC) was directed to investigate the steps taken by industry participants from 1 July 2019 to 31 December 2020 (review period) to: a) end the payment of grandfathered conflicted remuneration (GCR) ahead of the commencement of the legal requirement to do so; and b) to pass previously grandfathered benefits on to product holders.
- The government has now publicly released ASIC's report.

Key takeaways from ASIC's report

- The report found that financial advisers took steps to change the way they charged clients over the review period (1 July 2019 to December 2020) by moving clients to other fee arrangements eg charging an ongoing fee, an hourly rate, a fixed price or an asset-based fee.
- By the end of the review period, product issuers ended 96% of GCR arrangements (1,227 products).
- As at 1 January 2021, only eight product issuers had arrangements in place requiring them to rebate previously grandfathered benefits on 46 products (ie customer rebates were still to occur).
- These eight product issuers estimate that they will rebate $24.4 million to product holders in the 2021 calendar year. In most (67%) cases rebates will occur through fee reductions.
- All eight product issuers indicated to ASIC that they 'plan to rebate to product holders an amount equal in value to the amount of GCR that would have otherwise been paid to AFS licensees'.

Next steps

- The report flags that ASIC would contact these eight product issuers to ensure that: a) rebates are provided within the required timeframe; and b) rebates provided 'are just and equitable in the circumstances'.
- ASIC commented that if product issuers are not 'properly complying with their legal obligations, we will consider taking enforcement action'.

  [Source: ASIC report: Ending grandfathered conflicted remuneration (publicly released 13/07/2021)]

Hayne implementation: Consultation on draft regulations proposing to implement deferred sales model class exemptions

Context

- Hayne Recommendation 4.3 recommended the introduction of a deferred sales model for the sale of any add on insurance products (except policies of comprehensive motor insurance). Commissioner Hayne said that this should be 'implemented as soon as is reasonably practicable'.
- Schedule 3 of Financial Sector Reform (Hayne Royal Commission Response) Act 2020, which is due to commence on 5 October 2021, implements an industry wide deferred sales model for the sale of add-on insurance products. The legislation provides for regulations to exempt a class of add-on insurance products where it would not be appropriate that they be captured by the deferred sales model.
- On 8 July 2021, The Treasurer announced that the government would exempt certain classes of insurance products from the deferred sales model for add-on insurance.

Draft regulations released for consultation

- Consistent with the Treasurer's 8 July announcement, draft regulations – [exposure draft] Australian Securities and Investments Commission Amendment (Deferred Sales Model Exemptions) Regulations 2021 - have now been released for consultation.
- Under the draft regulations, it's proposed that the following classes of insurance will be exempt from the deferred sales model for add-on insurance for a period of five years from 5 October 2021 (or the day after the instrument is registered, whichever is the later):
  - add-on comprehensive motor vehicle or vessel insurance products;
  - add-on compulsory third party motor vehicle insurance products;
  - add-on home and contents insurance products;
  - add-on home building insurance products;
  - add-on landlord insurance products;
  - add-on limited motor vehicle insurance products;
  - add-on transport and delivery insurance products;
  - add-on travel insurance products;
  - business-related add-on insurance products; and
  - superannuation-related add-on insurance products
- The deadline for submissions to the consultation is 6 August 2021.

[Source: Treasury consultation: Regulation - Deferred Sales Model Exemptions 19/07/2021]

Hayne implementation: ASIC releases reference checking and information sharing protocol

Context

- New reference checking/information sharing requirements to commence on 1 October 2021: Schedules 10 and 11 of the Financial Sector Reform (Hayne Commission Response) Act 2020 implement the government's response to recommendations 1.6 (misconduct by mortgage brokers); 2.7 (reference checking and information sharing); 2.8 (reporting compliance concerns); 2.9 (misconduct by financial advisers); and 7.2 (implementation of the ASIC Enforcement Review recommendations). Schedules 10 and 11 will commence on 1 October 2021.

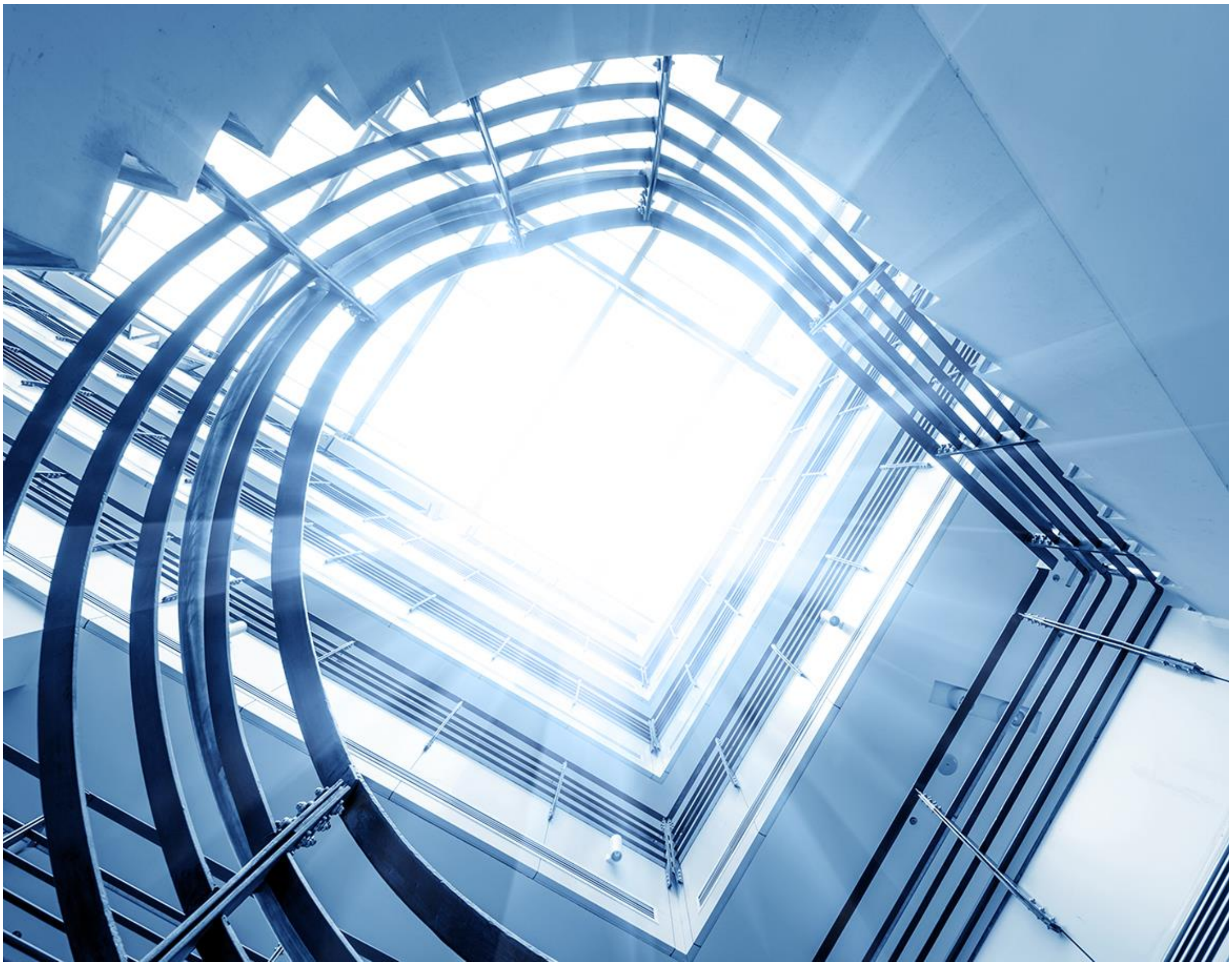
Supporting implementation of the new requirements

- The Australian Securities and Investments Commission's (ASIC's) consultation on a new protocol and info sheet to support the implementation of recommendations 1.6 and 2.7 ended on 21 January 2020.
- Following this, ASIC has made a new protocol - ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429 - outlining licensees' obligations to undertake a reference check and share information on an individual seeking to be employed or authorised as a financial adviser or mortgage broker. The new protocol will commence on 1 October 2021 (to align with the commencement of the new reference checking obligations).
- To support compliance with the new reference checking requirements, ASIC has also released guidance documents - Information Sheet 257 ASIC reference checking and information sharing protocol (INFO 257) and example references for a financial adviser and mortgage broker).
- ASIC has also released Report 694:Response to submissions on CP 333 Implementing the Royal Commission recommendations: Reference checking and information sharing (RP 694) which highlights the key issues to arise during the consultation on the new protocol and the info sheet and ASIC's responses to those issues.

[Source: ASIC media release 20/07/2021]

In Brief | ASIC is consulting on draft guidance to support the implementation of the anti-hawking reforms in Hayne recommendations 3.4 and 4.1 . The due date for submissions is 17 August 2021. ASIC plans to release final guidance in September 2021 ahead of the commencement of the reforms on 5 October 2021.

[Source: ASIC media release 21/07/2021]



Other Developments

Top Story | Why remediation should be purpose-led – and how you can make it happen

The MinterEllison team has published an article providing practical insights into how organisations can embed their own purpose and values into their remediation program and outlining the advantages of this approach.

You can access the full text here.

APRA has launched a review of insurers' risk management frameworks

Insurers asked to undertake a self-assessment of their risk management frameworks

- The Australian Prudential Regulation Authority (APRA) has requested a number of insurers to undertake a self-assessment of their risk management frameworks and has released guidance material to support insurers in undertaking this exercise.

- The self-assessments are due to be completed and submitted to APRA by 30 November 2021.
- The regulator has also 'urged' other insurers 'to consider whether a similar self-assessment would enhance their own risk management practices'.

What prompted this action by the regulator?

- The review was prompted by the recent uptick in the number Business Interruption (BI) insurance claims arising from the restrictions associated with the COVID-19 pandemic. APRA is concerned that many insurers have left themselves 'exposed through policy wordings that had not kept up to date with changing legislation' to significant financial exposure. The aim of the review is to prevent the issue occurring again in future.
- APRA states that the review will also focus on cyber risk though APRA's expectation is that insurers ensure that their 'risk management frameworks are robust across all product areas and potential exposures'.

Announcing the review APRA Deputy Chair Helen Rowell provided some further insight into the scope of the review and how the information provided will be used:

> 'As well as examining the root causes of the BI problems, we are keen to identify whether similar hidden issues exist in other insurance products. The growing threat posed by cyber adversaries makes this a prudent place to probe. Where the self-assessments identify material concerns, APRA will consider whether further supervisory action is warranted. The consolidated findings will also be published to send clear messages to all insurers around observed weaknesses, better practice, and the importance of maintaining robust insurance risk management frameworks'.

Next steps

- The self-assessments are due to be submitted to APRA by 30 November 2021.
- APRA intends to provide entity feedback 'in early 2022' and 'will determine follow-up supervisory activities as appropriate' at that point.
- APRA will publish the results of the exercise in 'consolidated' form. Individual results will not be released publicly.

[Sources: APRA media release 19/07/2021]

Retirement Income Covenant position paper released for consultation

The government has released a position paper on the retirement income covenant for public consultation.

What is a retirement income covenant?

If legislated, the proposed retirement income covenant would introduce a new requirement for funds to have a formal plan/strategy in place to service the needs of their members in retirement. That is, it would 'codify the requirements and obligations for superannuation trustees to improve retirement outcomes for individuals, while enabling choice and competition in the retirement phase'.

In practice, this would mean that (if eventually legislated in line with the proposals put forward in the position paper), all trustees including trustees of self managed superannuation funds (SMSFs) and small APRA funds (SAFs), will be obligated to 'formulate, review regularly and give effect to a retirement income strategy' which would:

- identify the retirement income needs of the members of the fund (either as a whole, or for individual cohorts)
- include a plan to build the fund’s capacity and capability to service the needs identified.

Box 1 at p6 of the position paper outlines the government's expectations around this.

It's further proposed that:

- APRA will publish guidance on how trustees can meet the retirement income strategy requirement. consistent with the approach taken to guidance for other strategies required by the Superannuation Industry (Supervision) Act 1993 (Cth)
- The retirement income strategy will made publicly available to members (eg by being published on funds' websites)

Why is it being proposed?

The introduction of the covenant is intended to address a key finding of the Retirement Income Review, which identified an opportunity to lift retirees' standards of living by improving their use of superannuation assets in retirement.

Announcing the consultation, Minister for Superannuation, Financial Services and the Digital Economy Jane Hume said that the proposed changes, once legislated, will also build on 'substantial reforms' already implemented through the Your Future, Your Super reform package and the planned reforms announced in the 2021-22 Budget.

Proposed timing and next steps

- The due date for submissions to the consultation is **6 August 2021**.
- The government plans to release exposure draft legislation 'later' in 2021, with a view to the covenant coming into effect (subject to the passage of the legislation) from **1 July 2021.**

[Source: Treasury Consultation: Retirement Income Covenant 19/07/2021; Minister for Superannuation, Financial Services and the Digital Economy Jane Hume media release 19/07/2021]

IDR reporting: ASIC releases pilot documents ahead of the commencement of RG 271

- **Context:** On 30 July 2020 ASIC published new internal dispute resolution (IDR) standards and requirements in Regulatory Guide 271 Internal dispute resolution (RG 271). RG 271 will commence on 5 October 2021. For clarity, Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165) will continue to apply to all complaints received before 5 October 2021.
- **Pilot documents released:** On 19 July 2021, ASIC released 'pilot' versions of new internal dispute resolution documents:
  - a data dictionary setting out the information that financial firms will be required to collect and report to ASIC; and
  - a data glossary which provides explanations of the key terms in the data dictionary
- These new documents will tested in a pilot involving financial firms from across industry subsectors in 'late 2021'.
- The pilot documents have gone through two rounds of industry consultation which resulted in the simplification of both. For example: free text fields and the mandatory reporting of demographic information have been removed. Firms will also be able to include multiple products/services and issues under the same complaint.
- The pilot documents have been designed to align as closely as possible with the Australian Financial Complaints Authority's (AFCA's) reporting approach, 'so as to develop an end-to-end picture of financial system complaints'.

Next steps

- ASIC states that the final versions of the data dictionary and glossary 'may differ from the pilot versions if technical issues are identified during the pilot' but that 'any such changes will be kept to a minimum'.
- ASIC has called on financial firms to 'consider how to map their own complaints systems to the data dictionary'.

[Source: ASIC media release 19/07/2021]

COVID-19: APRA will grant temporary relief to banks for deferred loans

In acknowledgement of the fact that many banks have announced COVID-19 support packages for customers impacted by recent COVID-19 restrictions, including offering borrower the option to temporarily defer loan repayments, the Australian Prudential Regulation Authority (APRA) has announced that it will effectively reinstate the temporary relief measures implemented to assist ADIs in March 2020.

This means that, for loans that are granted a repayment deferral of up to three months before the end of August 2021, banks will not need to treat the period of loan deferral as a period of arrears or a loan restructuring regardless of whether the borrower has previously been granted a repayment deferral due to the pandemic.

APRA will require ADIs to publicly disclose and report the nature and terms of any repayment deferrals and the volume of loans to which they are applied. ADIs will also need to continue to provision for these loans under relevant accounting standards.

Next steps:

Consistent with the approach taken in 2020, APRA plans to formalise this temporary measure as part of APRA's prudential standards through Attachment E (COVID-19 Adjustments) to Prudential Standard APS 220 Credit Quality (APS 220) and Reporting Standard ARS 923.2 Repayment Deferrals. This is planned to occur in July 2021.

[Source: APRA media release 19/07/2021]

Consumer Credit – Cigno appeal: ASIC is seeking judicial clarification from the Full Federal Court on the operation of key obligations under the credit legislation

Recap

- In Australian Securities and Investments Commission v BHF Solutions Pty Ltd [2021] FCA 684 the Federal Court held that the lending model operated by payday lenders BHF Solutions Pty Ltd and Cigno Pty Ltd did not contravene the National Consumer Credit Protection Act 2009 (Cth) as ASIC had alleged, and accordingly declined to make orders restraining Cigno or BHFS from engaging in credit activities as requested by the regulator.
- The key takeaway from the decision was the Court's acceptance [150] that: 1) 'the fees charged by Cigno were in exchange for, or the quid pro quo for, providing the services pursuant to the Morrow Services Agreement [ie for provision of 'application, management and collection services'], not for the provision of credit' ; and 2) 'it is not possible to ignore the terms of the Morrow Services Agreement and the reality that Cigno provided services pursuant to that agreement, and the reality that the fees paid to Cigno were fees for providing those services'.
- In reaching this conclusion, Justice Halley commented [160] that

> 'On one view, given the beneficial and protective purpose and object of the Code, it might be thought that this produces a result that could not have been intended, but as the High Court stated in Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia (1981) 147 CLR 297; [1981] HCA 26 at 305 (Gibbs CJ), when construing a provision "it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust"'.

ASIC has lodged an appeal

On 20 July 2021, ASIC confirmed that it has appealed the court's decision. ASIC Commissioner Sean Hughes said that:

> 'We have appealed this decision because we are concerned its effect will be to limit the application of the credit legislation, potentially denying vulnerable consumers the protections afforded by the National Credit Act and National Credit Code'.

Financial Counselling Australia and the Consumer Action Law Centre had expressed the hope that ASIC would take this course, following the Court's decision in June.

[Source: ASIC media release 20/07/2021]

Ceres outlines five recommendations to strengthen US financial regulators' collective approach to climate risk

Appearing at a hearing of the House Financial Services Subcommittee on Consumer Protection and Financial Institutions, Ceres Managing Director Steven Rothstein recommended five steps for US regulators/government to take, to 'protect our banks, insurance companies and financial institutions – and our society – against growing climate risks'.

RECOMMENDATION	DETAIL
Unequivocally and 'immediately' confirm that climate risk is a systemic risk to the stability of the financial system:	Ceres suggests that this should take the form of a formal statement from the Agency Chair/formal report from the Agency
Integrate climate risk into the prudential supervision of regulated financial firms	Consistent with US regulators' existing mandate, regulators should integrate climate change into their prudential supervision of banks, insurance companies and other regulated financial entities. Ceres suggests that the Federal Reserve should:

RECOMMENDATION	DETAIL
	▪ mandate scenario analyses by the banks and other financial institutions it supervises ▪ 'outline plans for conducting pilot climate stress tests on its supervised institutions to measure the impact of climate-related shocks, and consider enhancing capital and liquidity requirements to integrate climate risk' ▪ consider 'enhancing capital and liquidity requirements to integrate climate risk' Lift regulator internal capabilities: Ceres further suggests that the Federal Reserve the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency and the National Credit Union Administration 'expand their examiner training programs and manuals to ensure staff fully understand the climate risk faced by the financial institutions they monitor'.
'Support the Securities and Exchange Commission's work on mandatory climate disclosure'	Ceres strongly welcomed the SEC's consultation and expressed hope that it would result in the issuing of 'bold rules later this year mandating corporate climate disclosure'.
'Address how climate risks further exacerbate systemic racism, particularly reflected in financial institutions'	Ceres called on financial regulators to 'develop strategies to address systemic climate risks and structural racism in an integrated way'.
National and international coordination with other financial regulators/lifting internal capability within US regulators	Ceres called on US financial regulators to coordinate their response to climate risk with other US financial regulators, and with global peers organisations.

[Source: Ceres blog post 14/07/2021]

In Brief | COVID-19: ASIC has released an example record of advice to assist financial advisers when providing advice under the temporary COVID-19 relief measure: ASIC Corporations (COVID-19 - Advice-related Relief) Instrument 2021/268

[Source: ASIC Attachment to Media Release 21-072MR 14/07/2021]

In Brief | Eight major insurers and reinsurers have pledged to eliminate greenhouse gas emissions from their underwriting portfolios by 2050 as part of a new Net Zero Insurance Alliance

[Source: Net Zero Insurance Alliance media release 11/07/2021]

Remuneration

Say on pay: Approval of say on pay resolutions dips to a five year low

Analysis of 'say on pay' data from Equilar has identified that so far at Russell 3000 companies in 2021:

- The median level of support for say on pay resolutions has fallen to 94.4%, the lowest level in five years, continuing a gradual downward trend.
- At the same time, Equilar found that the failure rate for 'say on pay' resolutions has increased: 3.1% of say on pay resolutions have failed to be carried in 2021 (ie received less than 50% of votes in support), up from 2.2% in 2020

Coupled with this, Equilar has identified a correlation between low levels of support for say on pay resolutions and high CEO pay.

For example, Equilar found that the median CEO pay at companies where resolutions failed to carry was $17 million. This is very nearly double the median CEO pay at companies that received between 50 and 70% approval ($8.9-9 million) and over three times the level at companies that received 90% or more approval.

Looking ahead to the rest of 2021, Equilar suggests that the failure rate will provide a clear indication of shareholders' assessment of the measures companies have implemented to curb executive remuneration.

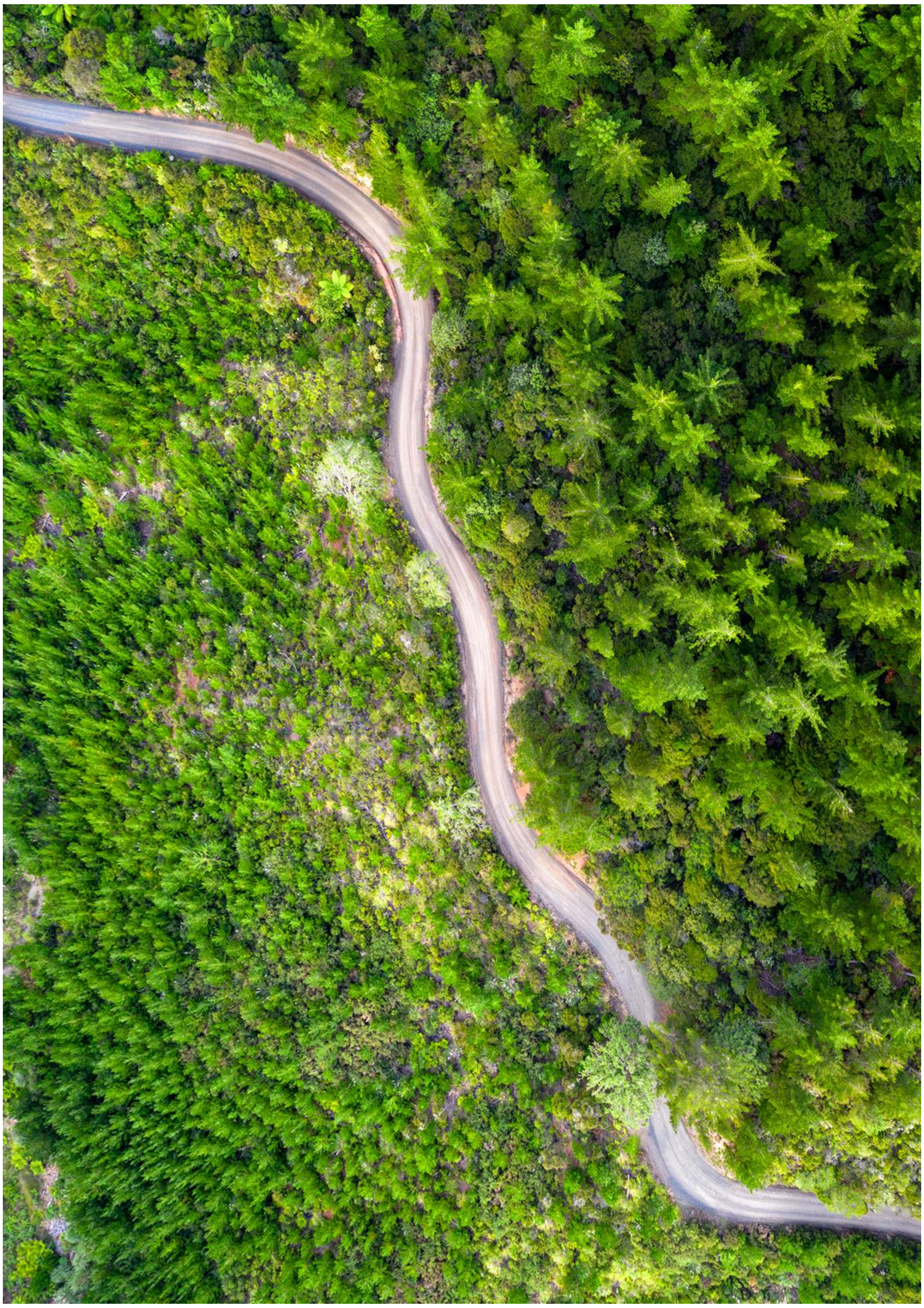
Looking further ahead, Equilar suggests this 'year will unveil if a period of great uncertainty can change shareholders' level of acceptance and affect real change in historically high levels of C-suite compensation'.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 13/07/2021]

Shareholder Activism

General Electric sets net-zero by 2050 'ambition' following majority climate vote

Majority support for shareholder climate resolution



- At the 4 May 2021 AGM, 98% of General Electric (GE) shareholders voted in support of a shareholder resolution calling on GE to report on 'how the company has met the criteria of the Net Zero Indicator, or whether it intends to revise its policies to be fully responsive to such Indicator' (full text of the resolution here). The resolution had the endorsement of the GE board.

Net zero ambition

- Following this, GE has stated that its 'ambition' is to be a net zero company by 2050. Importantly, this in 'ambition' extends not only to GE's operations but also to the Scope 3 emissions from the use of its products.

GE has said it intends to communicate details of more specific interim emissions reduction targets (including interim scope 3 emissions reductions targets), though no timeframe is given for doing so.

Continued engagement

- In a statement, As You Sow, welcomed GE's net zero announcement stating that marks 'an important shift in GE's business plans as a major manufacturer of fossil fuel power general technologies.' As You Sow has also said it will engage with GE on interim targets in 'coming months'.

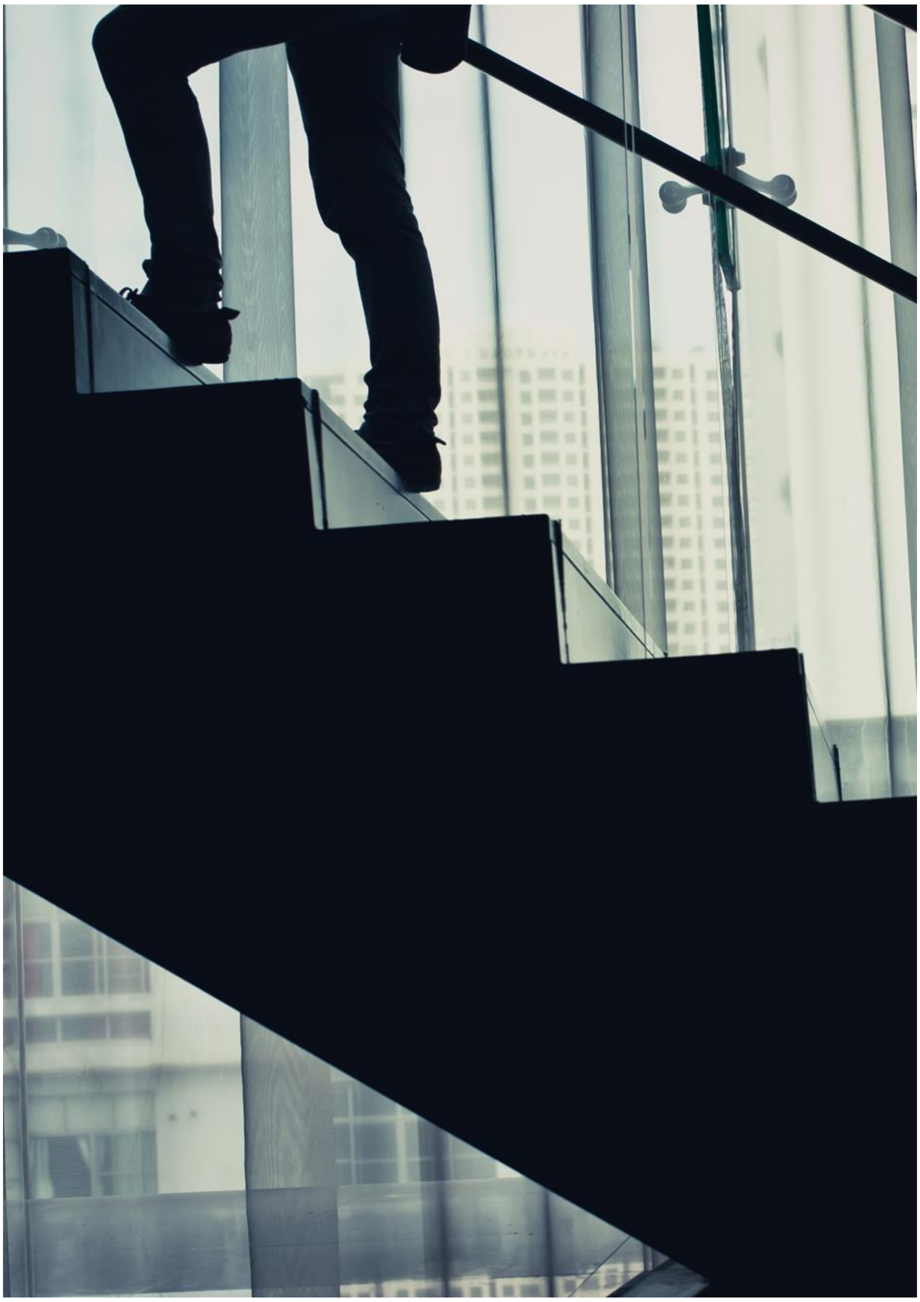
[Source: As You Sow media release 15/07/2021]

Institutional Investors and Stewardship

In Brief | BlackRock's voting record for the 12 months to 30 June shows it supported more than twice the number of shareholder proposals than it did in the previous year

[Source: BlackRock report: Pursuing long-term value for our clients, BlackRock Investment Stewardship A look into the 2020-2021 proxy voting year]

Walking the talk on climate action? New York State Common Retirement Fund outlines its 'unprecedent support for climate actions' during the 2021 proxy season



The New York State Common Retirement Fund which the third largest public pension fund in the United States, has provided a brief update on its support for action on climate over the course of the 2021 proxy season.

Highlights include:

- Successful engagement: The fund was able to reach agreement with all seven companies at which it filed climate-related shareholder proposals, after the companies made concessions.
  - Four companies - Domino's Pizza Inc, McKesson Corp, Realty Income Corp and Advance Auto Parts Inc - agreed to adopt the standards of the Science Based Targets initiative (SBTi). McKesson agreed to set the SBTs in line with a 1.5-degree scenario outlined in the Paris Agreement.
  - Cleveland-Cliffs Inc set GHG targets and committed to co-funding an environmentally friendly hydrogen project
  - Albemarle Corp committed to adopting GHG targets
  - Pentair Plc agreed to set GHG and clean energy targets.

- Voting action against directors: The fund voted against 387 individual directors at 72 companies over climate concerns in line with its 2020 proxy guidelines.
- Support for activist nominees at Exxon: The Fund voted for a slate of candidates put forward by activist investment firm Engine No 1, who won seats on ExxonMobil's Board of Directors with the goal of to better position the energy company for the low-carbon future.

[Source: Office of the New York State Comptroller media release 13/07/2021]

Why Blackrock didn't support the shareholder climate proposal at MUFG

Context

- In March 2021, Kiko Network, together with Market Forces, Rainforest Action Network, and 350.org Japan, submitted a shareholder resolution requesting that Mitsubishi UFJ Financial Group, Inc (MUFG) add a clause to the company's articles of incorporation stating that: 'the company shall adopt and disclose in its annual reporting a plan outlining its business strategy, including metrics and short, medium and long term targets, to align its financing and investments with the goals of the Paris Agreement.'
- The MUFG board recommended voting against the proposal.
- At the MUFG AGM on 29 June 2021, the resolution received 22.71% of votes in favour (and failed to be carried).

Why Blackrock did not support the resolution

In a vote bulletin, Blackrock gives two justifications for its decision not to support the resolution (despite supporting the 'general intent' behind it).

- **The proposals was not considered 'reasonable':** The proposal would have amended the company's articles of incorporation. In the first place, Blackrock observes that it is 'generally considered inappropriate to include a clause aimed at defining matters related to a company's execution of its business' in articles of incorporation. In the second place, Blackrock had concerns about the 'potential consequences that could result from the legally binding nature' of the proposal ie that the change would mean that directors could be held personally liable for damages arising from a breach of the obligation.
- **BlackRock did not consider it necessary that MUFG act with greater urgency on the issue:** Blackrock considers that MUFG has 'demonstrated reasonable progress in disclosing and addressing climate-related risks and opportunities, measured against both its local and global peers'. For example MUFG is reporting in line with the TCFD framework. Blackrock's expectation is that MUFG's 'climate initiatives, and…sustainability disclosures overall' will further improve. In particular, Blackrock flags that 'one specific area where MUFG can consider improvement is with regards to disclosing quantitative information to track progress on key sustainability initiatives'.

[Source: BlackRock vote bulletin MUFG]

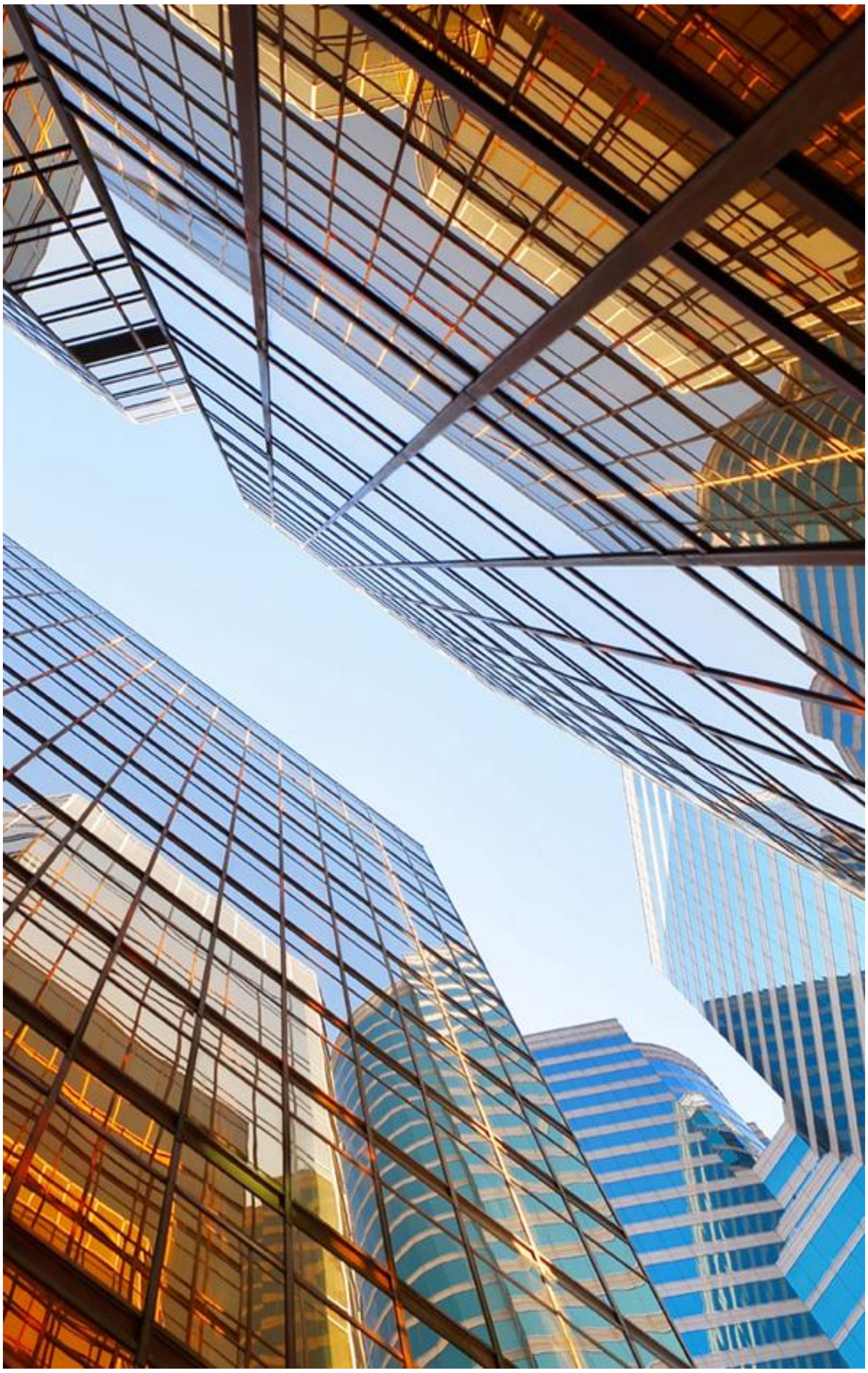
Accounting and Audit

FRC data shows challenger audit firms are gaining a toehold in the FTSE 250 audit market

A report from the UK Financial Reporting Council (FRC) has found that though the big four audit firms – Deloitte, EY, KPMG and PwC – continue to dominate the market for audits at FTSE 100 companies conducting 100% of FTSE 100 audits, challenger audit firms are beginning to increase their share of FTSE 250 audits.

According to the FRC:

- Last year, five largest firms outside the big four firms audited 4.8% (ten) of the FTSE 250 companies. This year the proportion has increased to 7.6% (19 FTSE 250 firm).
- One firm outside of this group also audited two FTSE 250 companies this year (up from only one last year).



Fees

- Audit fee income for audit firms outside of the big four increased by 20.3% from 2019 to 2020 compared with 2.2% from 2018 to 2019. In contrast, audit fee income for big four firms increased 7.9% from 2019 to 2020.
- The FRC also found that firms outside the big four saw a 5.2% increase in non-audit fees over the 2019-2020 period. Big four fees for non-audit work fell 2.2% over the same period.
- Commenting on the findings FRC CEO, Jon Thompson said:

  'It is encouraging that the challenger firms have increased their share of the FTSE 350 audit market, albeit from a low base, however it is clear the Big Four continue to dominate the FTSE audit market.

  Improving competition across the audit market and ensuring audit firms focus, above all else, on delivering high-quality audit is essential to improving trust in audit and corporate governance and remains a key priority for the FRC as it transitions to becoming ARGA.'

  [Sources: FRC media release 14/07/2021; Full report: Key Facts and Trends in the Accountancy Profession]

Risk Management

In Brief | How to audit risk culture: The Institute of Internal Auditors Australia (IIA-Australia) has released a practical ten step practical guide for internal auditors on auditing risk culture

[Sources: Institute of Internal Auditors Australia media release 09/07/2021; Full text guide: Auditing risk culture – a practical guide]

Restructuring and Insolvency

ASIC has updated INFO 29 to reflect recent insolvency reforms

Following consultation with the Australian Restructuring Insolvency Turnaround Association (ARITA), The Australian Securities and Investments Commission (ASIC) has updated Information Sheet 29 External administration – controller appointments and schemes of arrangements - most commonly lodged forms (INFO 29) to reflect changes to corporate insolvency laws that came into effect on 1 January 2021. The changes are intended to assist external administrators, controllers and scheme administrators to comply with lodgement and publication requirements following the introduction of three new types of external administration, and to provide clarity to small companies and creditors.

The following three new flowcharts have been included in INFO 29:

- Flowchart 2A – Liquidator in a creditors' voluntary winding up (simplified liquidation process)
- Flowchart 14 – Restructuring practitioner of a company
- Flowchart 15 - Restructuring practitioner of a restructuring plan for a company.

[Source: ASIC media release 19/07/2021]

Other News

Australian Merger Control: Change in uncertain times

MinterEllison has released a report exploring current key themes in the Australian merger control landscape.

These include:

- Key trends and patterns in the ACCC's review of transactions over the past 24 months
- The approach to mergers in the digital economy
- The ACCC's attempt to leverage its poor track record in contested merger cases to prompt law reform
- International cooperation and steps to increase consistency in merger reviews
- Reforms to merger control in Australia that are likely to be on the cards
- Hardening attitudes toward the use of remedies and undertakings
- The significant engagement between the ACCC and Australia's Foreign Investment Review Board (FIRB).

You can access the full text of the report here.

COVID-19: Common employment issues following increased NSW restrictions

Following the NSW government's announcement over the weekend, MinterEllison's has prepared an article that answers some of the key questions about standing down impacted NSW employees.

You can find the full text here.

Update: All construction sites to pause in Greater Sydney until 30 July 2021

MinterEllison's team explains the impact of the new restrictions on Greater Sydney construction sites, including practical and legal ramifications for builders and standing down workers. You can find the full text here.

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