Governance News

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

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ESG

Top Story | Step change in sustainability reporting: First two ISSB standards released

Why is the release of the first global sustainability standards such a big deal? Here's why the release of IFRS S1 and IFRS S2 marks a turning point for financial disclosure

Key Takeouts

- The release of the ISSB's first two global sustainability standards (the first of what is expected to be a suite of standards) is one key aspect of what ASIC Chair Joe Longo recently described as 'the biggest changes to financial reporting and disclosure standards in a generation' – part of an ESG driven 'seismic shift' in the conventional paradigm in finance, on par with the introduction of the GST
- The new standards are expected to form the core of emerging (and mandatory) sustainability-related financial disclosure requirements globally, including in Australia.
- The Australian government has launched a second round of consultation (summarised) on implementation of proposed new (mandatory) requirements. We expect the new Australian standards (once legislated) to be a floor, rather than a ceiling, when it comes to meeting market expectations in this space.

Following consultation, the International Sustainability Standards Board (ISSB) has launched its initial two global sustainability reporting standards in final form, together with accompanying guidance:

- General Requirements for Disclosure of Sustainability-related financial information (IFRS S1) sets out requirements for disclosure of 'information about all sustainability-related risks and opportunities that could reasonably be expected to affect the entity's cash flows, its access to finance or cost of capital over the short, medium or long term'
- Climate-related Disclosures (IFRS S2) sets requirements for disclosure of 'climate-related risks and opportunities that could reasonably be expected to affect the entity's cash flows, its access to finance or cost of capital over the short, medium or long term'.

While the IFRS are not binding on Australian reporting entities the new standards are, expected to form the core of emerging (and mandatory) sustainability-related financial disclosure requirements globally, including in Australia. As flagged, the government is currently conducting a second round of consultation on implementation of proposed mandatory standards (see: Introduction of mandatory climate reporting in Australia: Second round of consultation launched)

The standards have been developed with the aim of providing a common foundation for sustainability reporting with a focus on ensuring that the information reported is 'decision-useful for investors'.

What's in the new standards?

The new standards (which are similar to the consultation drafts) build on existing voluntary reporting frameworks, eg the Taskforce for Climate-related Financial Disclosure (TCFD) framework, but importantly go beyond existing requirements in both the scope of information required to be disclosed and the level of detail required.

For example, the proposed requirements are more prescriptive than the TCFD guidelines and will mean firms need to disclose (among other things):

- quantitative information about the current financial effects of sustainability and climate-related risks/opportunities on their financial position, financial performance and cash flows as well as quantitative information (in so far as is possible) on the 'anticipated financial effects' over the short, medium and long term.
- the quantitative impacts of their emissions reduction targets
- the extent of their reliance on carbon credits (offsets) to achieve their net greenhouse gas emissions targets
- industry based metrics relevant to their industry and activities

- their absolute gross Scope 1 and Scope 2 (operational) and Scope 3 (broader value chain) greenhouse gas emissions (though the ISSB has provided temporary relief from the requirement to disclose Scope 3 emissions for the first annual reporting period in which a company applies the IFRS S2 requirements)

Integrating sustainability reporting into the financial reporting cycle

Importantly, the standards have been designed with the intent to ensure timely disclosure of sustainability related information meaning that companies will need to provide sustainability related disclosure in the same 'reporting package'/alongside their existing financial reporting.

As such, they have been developed to be used in conjunction with existing accounting requirements.

Timing

- The new standards will begin applying for annual reporting periods beginning January 2024, with companies expected to issue disclosures against the standards in 2025.
- However, temporary relief is in place to enable companies to focus for on providing disclosure of their climate-related risks and opportunities in the first year of reporting.
- The ISSB has signalled its intention to work with jurisdictions and companies to support adoption in line with this timeline.
- In Australia Treasury has opened its second round of consultation on proposed mandatory disclosure requirements. It's envisioned that the new requirements will be phased in, commencing with the largest entities, from 2024/25. The due date for submissions is 21 July 2023.

[Sources: ISSB media release 26/06/2023; ISSB: Ten things to know about the first ISSB standards; IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information; IFRS S2 Climate-related Disclosures]

Top Story | Introduction of mandatory climate reporting in Australia: Second round of consultation launched

A second consultation paper has been released seeking feedback on the implementation of proposed, mandatory climate reporting standards. We break down the key points and provide some suggestions around the steps boards can take now to prepare

Australia is following many other jurisdictions in progressing the introduction of ISSB-aligned mandatory sustainability disclosure standards, with a focus initially on climate-related disclosure.

An initial round of consultation (summarised) on the proposed approach to developing the standards closed in February 2023. On 27 June, Treasury released a second consultation paper seeking feedback on a number of proposals around implementation. The due date for submissions is 21 July 2023.

Our key takeaways are below.

Who will need to report when?

The government proposes a three stage approach to implementation, starting with a certain large entities from 2024/25 and expanding to cover all other (proposed) groups from the 2027-28 reporting year onwards.

Essentially, it's proposed that all companies will (over time) fall within the scope of the new requirements – including private companies.

Larger companies (Group 1) would report from 2024/5 onwards

- It's proposed that all entities required to report under Chapter 2M of the Corporations Act 2001 (Cth) (Corporations Act) that meet two of the thresholds below, would be required to report against the new climate-disclosure requirements from 2024/25.
  - 'Has over 500 employees;
  - The value of consolidated gross assets at the end of the financial year of the company and any entities it controls is $1 billion or more;

  - The consolidated revenue for the financial year of the company and any entities it controls is $500 million or more'.
- In addition, it's proposed that all entities required to report under Chapter 2M of the Corporations Act that are registered as a 'Controlling Corporation' reporting under the National Greenhouse and Energy Reporting Act 2007 (Cth) (NGER Act) and that meet the NGER publication threshold, would also need to report against the new requirements from 2024/25.

Groups 2 and 3

- From 2026-27 onwards (Group 2), it's proposed the requirements would extend to entities required to report under Chapter 2M of the Corporations Act that fulfill two of the three thresholds below:
  - 'Has over 250 employees;
  - The value of consolidated gross assets at the end of the financial year of the company and any entities it controls is $500 million or more;
  - The consolidated revenue for the financial year of the company and any entities it controls is $200 million or more'.
- From 2027-28 onwards (Group 3), the requirements are proposed to extend to entities required to report under Chapter 2M of the Corporations Act that fulfill two of the three thresholds below:
  - 'Has over 100 employees;
  - The value of consolidated gross assets at the end of the financial year of the company and any entities it controls is $25 million or more;
  - The consolidated revenue for the financial year of the company and any entities it controls is $50 million or more'.
- In addition, this group is also proposed to include entities required to report under Chapter 2M that are a 'Controlling Corporation' under the NGER Act.

Proposed to be a part of the annual report

It's proposed that the new climate disclosure requirements would be published as part of, and at the same time as, companies' annual financial reports ie as part of both the directors' report and the financial report.

What information is likely to be required to be reported initially

The new requirements will closely align with the requirements in IFRS S2.

From **commencement**, the consultation paper suggests companies would need to disclose:

- 'material' climate-related risks and opportunities to their business, as well as how the entity identifies, assesses and manages risk and opportunities.

  [Note: In terms of what would be 'material' the consultation paper proposes, in line with existing definitions of financial materiality in the Australian and international standards, in in line with the approach in the ISSB standards that information would be considered material if:

  > 'omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial reports (existing and potential investors, lenders and other creditors) make on the basis of the reports'.]
- information about the 'governance processes, controls and procedures used to monitor and manage climate-related financial risks and opportunities'
- information about the company's climate strategy and decision making including disclosure of the company's transition plans. This would be expected to include information about use of offsets, target setting and mitigation strategies.
- climate resilience assessments against at least two possible future states, one of which would need to be consistent with the global temperature goal set out in the Climate Change Act 2022 (Cth) which is to contribute to 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.
- information about their climate-related targets (eg whether the target is 'science-based' or has been validated by a third party) and plan for achieving them (expected operational changes and use of offsets) and progress to date.
- Gross Scope 1 and 2 emissions

- Qualitative scenario analysis

Additional disclosures (likely) to be required over the following two years

Companies would have longer to comply with additional reporting requirements, in line with the proposed staged approach to implementation outlined above.

- Scope 3 emissions: Disclosure of material Scope 3 emissions is proposed to be required for all reporting entities from their second reporting year onwards.
- Quantitative scenario analysis: Companies would be expected to move to quantitative scenario analysis by 2027-28.
- Industry based metrics: Companies would be 'required to have regard to disclosing industry-based metrics, where there are well-established and understood metrics available for the reporting entity' by 2027/28.

New assurance requirements

It's proposed that new assurance requirements would also be phased in, commencing with the largest entities. Assurance would need to be provided by a provider that is independent from the entity being audited.

Proposed phased approach

- Group 1 entities:
  - From 2024: It's proposed that 'limited assurance' of Scope 1 and 2 emissions and 'reasonable assurance' over governance disclosures would be required
  - From 2025-26: It's proposed that 'limited assurance' of Scope 3 emissions, scenario analysis and transition plans would be required
  - From 2026-27: It's proposed that 'limited assurance of scope 3 emissions, scenario analysis and transition plans (full quantitative assurance)' would be required
  - From 2027-28: 'Reasonable assurance' over all climate disclosures is proposed to be required.
- Group 2 entities: It's proposed that no assurance over climate-related disclosure would be required until 2026-27 for this group when 'limited assurance' of Scope 1 and 2 emissions and 'reasonable assurance' over governance disclosures would commence. Additional requirements would then be phased in, moving toward the expectation of 'reasonable assurance over all climate disclosures' by 2029-30
- Group 3 entities: It's proposed assurance requirements over climate-related disclosure would not commence for this group until 2026-27 and would be phased in, moving toward 'reasonable assurance over all climate disclosures by 2030/2031.
  - The consultation paper includes a more detailed proposed timeline for the roll out of assurance requirements at page 25.

    [Note: The consultation paper notes that the International Auditing and Assurance Standards Board (IAASB) is currently developing an overarching standard for assurance on sustainability reporting, which is expected to address both limited and reasonable assurance. An exposure draft is expected to be released in July/August 2023 with a view to finalising the standard by late 2024.]

Liability: Proposed 'interim modified liability framework'

- In response to stakeholder concerns around the need for additional protections from liability for companies/company officers, especially around forward-looking statements, the consultation paper proposes what it terms an 'interim modified liability framework'. For clarity, this is not the same as a 'safe harbour'.
- The consultation paper proposes that:
- Climate-related financial disclosure requirements would be drafted as civil penalty provisions in the Corporations Act.
- The application of misleading and deceptive conduct provisions to Scope 3 reporting and forward looking statements (eg scenario analysis and transition planning) would be limited to regulator only actions for the first three years. That is, companies and officers would be temporarily shielded from misleading or deceptive conduct claims brought by private litigants for the first three years.
- It's not proposed that any changes would be made to existing continuous disclosure requirements.
- The proposed approach is aimed at countering the risk that

- 'entities would provide overly cautious disclosures that do not meet the needs and expectations of the market or investors' without additional protection.

A step change in reporting

Even without the introduction of legislated (mandatory) requirements, companies are already under considerable pressure to manage and disclose how they are managing their climate-related financial risk and increasingly their broader sustainability-related risks. The release of the ISSB's newly-minted initial sustainability standards (the first of what is expected to be a suite of standards) will reinforce, particularise and extend the existing requirements.

We expect the new Australian standards (once legislated) to be a floor, rather than a ceiling, when it comes to meeting market expectations in this space.

There are a number of steps all boards can take now to prepare for the introduction of new ISSB-aligned requirements. These include:

- reviewing existing governance structures to identify responsibility and accountability
- reviewing existing strategy, transition plans, and sustainability disclosures to identify gaps in alignment with the expectations in the new ISSB standards/Treasury consultation paper
- understanding from management what the gaps are between current and future resourcing, data and disclosure needs
- formulating a time-bound plan to address these gaps (including assigning responsibility for delivery/oversight)

[Source: Treasury Consultation: Climate-related financial disclosure: Second consultation 27 June 2023 - 21 July 2023]

In Brief | The Nature Repair Market Bill 2023 (Cth) and Nature Repair Market (Consequential Amendments) Bill 2023 (Cth) which together would establish a framework for a voluntary national biodiversity market passed the House of Representatives on 21 June 2023. The Nature Repair Market Bill 2023 passed with 23 cross bench amendments. The Senate Committee report into the Bills is due to report on 1 August 2023

[Note: MinterEllison has released an article providing context for the legislation and breaking down the key points. You can access the full text here: Australia's biodiversity agenda: Nature Repair Market - Insight - MinterEllison]

[Sources: Nature Repair Market Bill 2023; Nature Repair Market (Consequential Amendments) Bill 2023]

In Brief | BlackRock's globally Q1 2023 stewardship report indicates it supported 28% of shareholder proposals overall, though it did not support any shareholder environmental proposals

[Source: BlackRock Investment Stewardship 1Q 2023 statistics]

In Brief | Less influential than expected? FRC report finds recommendations and ratings from proxy advisers and ESG rating agencies is 'less clearcut' than companies may believe

[Sources: FRC media release 15/06/2023; Full text report]

Regulators

'Enforcement is at the heart of what we do': ASIC Chair Joe Longo rejects criticisms in Senate Committee interim report

On 20 June 2023, the Liberal Chaired Senate Committee Inquiry into the Australian Securities and Investments Commission's (ASIC) investigation and enforcement and released an interim report accusing the regulator of 'hinder[ing] the committee's work by refusing to answer questions on notice' and recommending that the Senate 'order the provision of the information sought'. You can find more detail in Governance News 21/06/2023 at p21.

Response from ASIC Chair

In his 23 June 2023 opening statement to the Committee ASIC Chair Joe Longo:

- **rejected the findings of the Committee's interim report** and in particular, any assertion that ASIC is 'obfuscating or obstructing the work of the committee' stating that there is 'absolutely no evidence to support' these assertions. Mr Longo maintained that ASIC is 'taking an open, constructive and cooperative approach' to cooperating with the Inquiry. Mr Longo pointed to ASIC's record of answering questions on notice from the Committee in illustration - Mr Longo said that ASIC has answered 104 of 109 questions on notice. Mr Longo also rejected criticism of ASIC's approach to answering questions about closed matters (raised in the interim report). Mr Longo submitted that disclosure around closed investigations 'can still prejudice ASIC's related and future investigations' and underlined that as a law enforcement agency, ASIC is necessarily limited in the information it is able to provide – 'we need to raise objections to requests for evidence where it is necessary to do so to protect the rule of law and ASIC's future effectiveness as a law enforcement agency' Mr Longo said.
- **maintained that ASIC has a 'strong record on insider trading prosecutions'** and that any assertion to the contrary is incorrect. Mr Longo pointed to ASIC's enforcement record on the issue in support. According to Mr Longo, over the past three years ASIC has commenced 33 insider trading investigations which resulted in six criminal convictions in relation to this conduct.
- **maintained that ASIC's enforcement record more generally is strong.** Mr Longo maintained that ASIC 'have been, and continue to be an active and effective litigator'. Again, Mr Longo pointed to ASIC's enforcement record over the last three years in support. Among other examples, Mr Longo observed that over this period ASIC has commenced over 125 criminal actions resulting in 192 criminal convictions and 39 custodial sentences.

  [Source: ASIC Chair Joe Longo's opening statement tot eh Senate Economics Reference Committee Inquiry into Australian Securities and Investments Commission investigation and enforcement 23/06/2023]

APRA's latest stakeholder survey shows regulated entities are supportive overall of APRA's approach

- The Australian Prudential Regulation Authority (APRA) has released the findings of its 2023 Stakeholder Survey. The survey of APRA-regulated entities has been conducted every two years since 2009.
- Broadly, there was strong support for APRA's ongoing supervisory role. For example, according to the survey:
  - 90% of respondents consider APRA's supervision enhances the strength of their entity
  - 92% of respondents believed APRA had a positive impact on their entity's risk management practices, and 88% said it had a positive impact on their risk culture;
  - 94% of respondents consider APRA helps protect the community
  - 98% of respondents consider APRA benefits their industry
- Consistent with previous years, the level of support for the cost and burden of complying with APRA's regulatory requirements was lower.
- Superannuation entities were generally less positive than entities other sectors. APRA attributes this to 'several years of heightened scrutiny' of the superannuation sector, and 'tougher requirements aimed at boosting member outcomes'.
- APRA Chair Jon Lonsdale welcomed the generally strong support for APRA's approach. Mr Lonsdale also acknowledged 'industry would like us to better balance the positive impact of supervision with the cost and burden of regulation'. Mr Lonsdale said that APRA will 'reflect on all the survey findings as we shape our future policy and supervision agenda'.

[Sources: APRA media release 23/06/2023; 2023 APRA Stakeholder Survey]

ASIC industry funding model review: Final report concludes that the ASIC industry funding model remains appropriate and 'substantial changes' should not be made

On 26 June 2023, the government released the Final Report on the Review of the ASIC Industry Funding Model and agreed to the Review's recommendations.

Broadly, the review found that:

> 'the settings of the ASIC IFM [ie ASIC industry funding model] remain broadly appropriate but that refinements can be made within the existing framework to improve the way regulatory costs are recovered and to communicate IFM settings to industry more effectively'.

The government has indicated its intention to 'work with ASIC, industry, and other stakeholders to implement' the six recommendations directed to the government and support ASIC in implementing the four recommendations directed to the regulator.

The Review makes the following ten recommendations.

Recommendations for government:

- Recommendation 1: 'Spread the recovery of regulatory costs relating to unlicensed activity across the relevant sector/s based on ASIC's total regulatory effort for each sub sector (within the relevant sector)'.
- Recommendation 2: 'Spread the recovery of regulatory costs relating to emerging sectors outside the existing regulatory framework across ASIC's entire regulated population based on ASIC's total regulatory effort for each sub sector'.
- Recommendation 3: 'The Government should consider (at the time of approving a new policy proposal) whether to prescribe capital expenditure costs to be recovered over time either based on the useful life of the asset or another time period'.
- Recommendation 4: 'Following public consultation, changes should be made to certain sub sector definitions, entity metrics and levy formulas set out in Regulations to ensure they remain fit for purpose'.
- Recommendation 5: 'The Government should reaffirm its commitment that regulatory fees should be charged at a level which enables full cost recovery. In line with this, the Government should adjust regulatory fee amounts to a level which facilitates full cost recovery of ASIC's cost in providing these services, unless the Government has made a decision that no fee or a partial fee should be charged'.
- Recommendation 6: 'The Government should delegate to ASIC the power to set and adjust fee amounts in subordinate legislation, with fee amounts to be reviewed every three years to reflect full cost recovery'.

Recommendations for ASIC

- Recommendation 7: 'ASIC should remove the consultation component from the CRIS [ie Cost Recovery Income Statement] process so that the CRIS is a transparency and budgeting tool for ASIC stakeholders. ASIC and Treasury to establish an alternative consultation process with industry stakeholders on a five yearly basis to examine the policy settings of the ASIC IFM'.
- Recommendation 8: 'ASIC should cease the release of a draft CRIS for consultation and only release a final CRIS'.
- Recommendation 9: 'ASIC should pilot and consider ways to:
  - consolidate information regarding ASIC's industry funding arrangement
  - provide more simple explanations regarding ASIC's cost recovery methodology and the operation of the IFM, including addressing any key gaps in information
  - enhance and streamline the structure of the CRIS to reduce complexity for stakeholders'.
- Recommendation 10: 'ASIC should release the CRIS in June each year to enable more accurate estimated levies and a more consistent CRIS timeframe each year'.

The government also confirmed that the temporary levy relief for personal financial advice licensees that was in place for 2020-21 and 2021-22 will not be extended further.

[Source: Treasury report: Review of the ASIC Industry Funding Model - Final Report 26/06/2023]

Financial Services

Top Story | ASIC calls on general insurers to sharpen their focus on nonfinancial risk in light of ongoing 'systemic pricing failures'

ASIC REP 765 reiterates calls on all general insurers to be proactive in their approach to nonfinancial risk and in particular, to sharpen their focus on 'good product governance' in light of ongoing failures by industry to deliver on pricing promises to customers.

Key Takeouts

- ASIC has announced that 11 general insurers are set to pay an estimated $815 million in remediation to 5.6 million customers over broken 'pricing promises'. For context, a 'pricing promise' encompasses:

  > 'a representation by an insurer to provide a price-related offer (eg a discount), a benefit (eg gift card, loyalty scheme points or cashback offer), or a reward, including a statement that consumers will save money by taking certain action. This includes multi-policy discounts, no claims discounts and loyalty discounts'.

- ASIC Report 765 When the price is not right: Making good on insurance pricing promises (REP 765) highlights the scale and ongoing nature of what ASIC describes as 'systemic pricing failures' across these 11 insurers (collectively representing around 68% of the general insurance market in Australia) and what ASIC considers to be the underlying causes of these issues.
- The report underlines ASIC's expectation that the boards of all general insurers prioritise 'good product governance' including ensuring they have the systems/processes in place to enable effective and ongoing oversight and monitoring of pricing promises.
- Lack of focus/investment in internal systems and processes (including 'poor' data management) is identified in the report as key to lifting standards.
- Addressing failure by general insurers to deliver on their pricing promises is one of ASIC's enforcement priorities for 2023.

At ASIC's direction in 2021, 11 general insurers completed reviews to '"find, fix, report and repay" for pricing failures'. As a result of the issues identified, insurers are now set to pay an estimated $815 million in remediation to 5.6 million customers.

The Australian Securities and Investments Commission has released a report - ASIC Report 765 When the price is not right: Making good on insurance pricing promises (REP 765) – on the outcomes of these 2021 reviews.

The report highlights:

- examples of the ongoing 'systemic failure by [general] insurers to deliver on their pricing promises' including failing to ensure that promised price discounts, benefits or loyalty promises were delivered/or were capable of being delivered in full to consumers
- the underlying causes and ongoing nature of these issues
- ASIC's expectations around how they should be addressed and the steps already being implemented by the 11 insurers who participated in the reviews.

Announcing the release of the report, ASIC Deputy Chair Karen Chester expressed disappointment that the issues raised in it have gone so long unaddressed, noting that insurers have been on notice of the risks of pricing misconduct and resulting consumer harm for a decade.

Ms Chester also emphasised that ASIC considers acting on these issues should now be a board priority stating:

> 'It's now up to the Boards of general insurers to ensure the prompt and full repayment of the $815 million owed to their 5.6 million customers, implement the fixes needed and rebuild consumer trust.'

Below is a short overview of the key concerns identified in the report and ASIC's expectations around how these should be addressed.

A sharper focus on 'strong product governance' is required

The report highlights that many insurers are unable to follow through on their pricing promises as a result of product governance weaknesses. Generally, ASIC found that

> 'there was an absence of effective detective and preventative controls to identify pricing failures and stop them from reoccurring'.

Examples of this include the following.

No centralised record keeping

ASIC found that a number of insurers were unable to keep track of the high volume of pricing promises being made to consumers across different channels with the result that they could not readily identify what had been promised, whether it had been delivered and/or delivered in full. ASIC also considers that lack of a centralised repository of pricing policies led to inconsistency or inaccuracy in messaging to consumers and/or inconsistency in the delivery of the discounts promised.

ASIC's expectation is that general insurers:

> 'properly define a pricing promise and track all pricing promises to delivery through a centralised repository of past and present pricing promises. The repository could store eligibility details, internal approvals, and marketing materials for each pricing promise. While promises may have been tracked through information sharing between business units, this was open to errors. Centralised record keeping within the insurer is also necessary where pricing promises are delivered by third-party distributors.'

ASIC notes that all 11 general insurers have implemented or are in the process of implementing a centralised pricing promise repository, 'to support a more effective control environment'.

Poorly designed/administered processes

Insurers also reported deficiencies in the design of their product governance processes including:

- lack of clearly assigned responsibilities to business units
- inadequate documentation of procedures eg procedures for approving marketing materials for a pricing promise
- lack of compliance with the processes in place/lack of evidence that processes had been complied with

The report highlights that these issues were particularly evident in the case of pricing promises administered by third party distributors.

ASIC's expectation is that

> 'Promise design should be supported by robust testing before the business process or marketing campaign is implemented, to ensure it works effectively and pricing promises can be delivered consistently'.

More specifically ASIC expects insurers to have in place:

- 'a process for assigning responsibilities to internal business units, with clearly defined reporting lines and decision makers'
- '"user acceptance testing" and post-implementation reviews'
- 'clear sign-off processes to ensure pricing changes are aligned with promises made in marketing and disclosure materials'

'Siloed decision making'

The report also points to siloed decision making and/or inadequate communication around pricing decisions as an issue. ASIC comments that:

> 'Siloed decision making and inadequate communication increases the risk of pricing promises not being delivered to consumers. A lack of coordination between business units means decisions are not fully informed and issues are less likely to be detected in a timely manner'.

ASIC expects insurers to ensure that there is 'regular information sharing between business units and centralised record keeping to track pricing promises'.

Inadequate product and pricing reviews

ASIC also raises concerns that product and pricing reviews and incident investigations carried out by insurers prior to the 2021 reviews were not sufficiently robust/comprehensive to detect ongoing pricing issues. For example, ASIC observes that prior reviews of product disclosure statements by insurers did not always identify references to discounts that the insurer never intended to provide.

Weaknesses in ongoing monitoring and oversight

ASIC found that:

> 'To varying degrees across different general insurers, there was an absence of effective detective and preventative controls to identify pricing failures and stop them from reoccurring'.

In particular, the report points to a lack of adequate oversight/monitoring of promises made by third party distributors.

ASIC comments:

> 'Third-party distributors sometimes had a high degree of control over pricing promises. Some had discretion to make decisions and approve prices and promotional offers. During the reviews, some insurers relied on third-party distributors to verify the delivery of pricing promises, investigate findings and remediate consumers. We also noted breakdowns in data sharing between insurers and third-party distributors'.

Strong product governance is key

Ultimately, ASIC considers that a lack of focus on ensuring effective product governance and lack of effective monitoring and oversight has led to significant delays in identifying/addressing longstanding product pricing issues and has resulted in considerable (and ultimately avoidable) cost. ASIC comments:

> 'The significant amount of time taken for general insurers to identify pricing failures, and to investigate and identify the "root cause" of the failure, highlights significant concerns with the insurers' ability to manage their non-financial risks.

If general insurers had identified the pricing failures much earlier, and investigated and identified the root cause in a thorough and timely manner, ASIC's intervention may not have been required and consumer harm and remediation costs would not have exceeded $815 million and extended to millions of consumers'.

ASIC's expectation is that

> 'insurers should take a proactive approach to risk, including thoroughly investigating reportable situations to identify the 'root cause' and other areas of concern highlighted across the industry'.

Design and delivery of pricing promises

In addition to these issues broader issues, the report also identifies flawed product design and delivery as a key barrier to insurers being able to follow through on their pricing promises. Examples of this include that insurers:

- 'offer many different pricing promises with little consistency across the design of the promises'
- 'use complex pricing practices with greater potential for error' including (among other issues) the 'misapplication' of pricing floors'
- 'do not use existing data to identify eligible consumers'
- 'rely on systems requiring manual overrides by staff to fulfill promises' (due to system and data limitations)

Of these issues, ASIC highlights 'misapplication' of pricing flaws as relatively widespread. According to the report, six of the 11 general insurers identified misapplication of price floors as an issue within their business. Remediation connected with the issue is estimated at more than $379 million (or close to half of the overall total amount expected to be paid by insurers in connection with pricing failures).

(Mis)application of pricing floors

The report identifies two issues with the way in which (some) insurers applied pricing floors:

- insurers did not disclose to consumers that a discount could be limited by the imposition of a price floor; and

- pricing algorithms (in some cases) were structured so that promised discounts were applied before the price floor was applied with the result that once the price floor was 'triggered', the consumer did not (always) receive the full discount promised.

ASIC underlines that

> 'the use of opaque disclaimers such as "minimum premiums may apply", which are often hidden at the bottom of a web page or in a lengthy PDS, does not solve these issues'.

ASIC's expectation is that general insurers should:

- 'regularly examine their promotional material and disclosure documents to ensure that the disclosure on price floors is clearly understood by consumers and that any representations made are consistent with how the consumer's premium is calculated'.
- 'consider how disclosure of the existence of price floors can influence consumers' behaviour, and improve transparency and engagement accordingly'.
- 'regularly review their pricing algorithms to ensure that they are operating as expected and not contravening the law'. That is, ASIC's expectation is that pricing algorithms are structured so that the promised discount is applied after the price floor has been applied (not before this has occurred)

In making these points, the report emphasises the role of stronger product governance in guarding against these issues noting that:

> 'These are relatively straightforward risks that general insurers should have been able to identify through good product governance'.

Loyalty discounts

ASIC observes that loyalty discounts are a 'key component of profitability for most lines of personal insurance' because they may operate to discourage consumers from switching providers. This is because these discounts:

- 'tend to offer more generous benefits the longer the consumer stays with the insurer
- typically are not transferrable to another insurer, and
- capitalise on existing inertia for consumers to stay with their existing insurer rather than shop around'.

However, the report flags that the promises made to consumers are not always 'objectively true' or being applied in the way consumers are entitled (from insurers' communication) to expect. For example:

- loyalty discount promises are sometimes affected by other issues highlighted in the report including the application of pricing floors (that are not disclosed to consumers)
- 'some general insurers may be making positive representations about rewarding loyal consumers (eg for years of tenure) that could be inconsistent with how the pricing engine is calculating the premium for the consumer'. For example, by applying (unknown to the consumer) a 'loyalty tax'.

ASIC also raises concerns that:

> 'as insurers develop their use of price optimisation and big data to set premiums for consumers, there is a need to consider whether these techniques may be incompatible with loyalty promises. For example, insurers may make a promise to reward loyal consumers but at the same time use big data to identify price inelastic consumers and allocate larger price increases to those consumers. This would not meet community expectations as consumers who are more "loyal" or do not shop around may receive larger price increases that are inconsistent with the loyalty promise'.

ASIC's expectation is that insurers:

> 'ensure representations made in renewal communications are not false or misleading. Consumers should not be promised they are being rewarded for loyalty unless this is objectively true. General insurers must ensure any statement or representation that offers consumers a competitive price is not false or misleading'.

'In kind promises'

The report highlights that

> 'all the risks and findings that applied to traditional pricing promises also applied to in-kind promises, particularly those involving third-party distributors'.

ASIC emphasises that:

> 'In-kind promises must be treated like any other kind of pricing promise—as one that must be capable of full, complete and verifiable delivery to consumers as promised'.

Deficiencies in systems, processes and data

The report makes clear that the issues highlighted have been exacerbated by a lack of adequate systems and processes, including poor data management.

ASIC considers lifting standards necessarily requires addressing these deficiencies. ASIC comments:

> 'These problems primarily involved system and data limitations, poor data practices, and inadequate tools for insurers to calculate prices and premiums. General insurers have been challenged by both ASIC and APRA to invest more in systems (including IT systems), processes and data for a number of years as part of uplifting their risk management practices. ASIC considers that a lack of data and other forms of management information, together with the consolidation of brands in the industry across multiple legacy systems, have contributed to the scale and longevity of the issues that were uncovered in the reviews'.

Continued monitoring of the 'fixes' required

- The insurers who participated in the reviews have undertaken to implement various actions to address the issues identified in the report.
- ASIC also required each of the 11 insurers to allocate oversight of their pricing review to a senior executive and for that executive to provide ASIC with written confirmation that they considered the review had been completed 'in a satisfactory manner'. ASIC expects these executives to continue their oversight of the remaining program of work until completion. They are also required to provide a further attestation to confirm to ASIC that 'the fix, repay and report phases have been satisfactorily completed'.
- ASIC further expects the boards of general insurers to satisfy themselves that each phase is completed satisfactorily.
- More broadly, ASIC expects insurers to adopt a 'proactive approach' to managing nonfinancial risk including

> 'responding…in real time' where issues are identified at peer organisations to ensure similar issues are not occurring their own business.

Pricing promises are an enforcement priority for ASIC

Addressing failure by general insurers to deliver on their pricing promises is one of ASIC's enforcement priorities for 2023.

In line with this, ASIC has already commenced civil penalty proceedings against two insurers and cautions that it has 'further investigations underway'.

Reminder that nonfinancial risk cannot be allowed to slip down the priority list

The message for boards in REP 765 is not new. As ASIC stated in 2019:

> 'non-financial risks have very real financial implications for companies, their investors and their customers…Boards cannot afford to ignore the oversight of non-financial risks. We have seen first-hand the damage that can result when it is not made a priority…Boards must recognise that they are accountable for mitigating all risks - financial and non-financial - facing a company'.
>
> …The board should ensure processes and practices are implemented so that the organisation operates within the board's strategic goals and stated risk appetite. Officers should give their boards all information they have that is material to the board's decision making. Equally, the board needs to ensure it is receiving adequate information to make informed decisions.'

Rather, REP 765 underlines the need for continued and sharper board focus on management of nonfinancial risk, the more so in light of the regulatory spotlight on other 'product governance' issues including DDO compliance and greenwashing.

From a practical perspective, we suggest that boards ensure that a review is undertaken to find, fix and remediate any pricing failures in their businesses, and having regard to the following questions.

- do we have a clear picture of the pricing promises we have made?

- what would our customers understand our pricing promises to mean?
- are our pricing promises being met? Do we have the full picture? If not, why not?
- how are our product governance processes designed, documented and administered?
- how is compliance with our product governance processes overseen, monitored and enforced?
- how effective are our product governance processes at ensuring our pricing promises are met or identifying any deficiencies? How quickly are any deficiencies identified, escalated and resolved?
- what third party arrangements are relevant and how are they monitored and compliance ensured?
- who is accountable within the business?
- what information does the board receive about this risk in our business and how it is being managed? What information should the board receive?
- does our approach to making and meeting pricing promises align with our broader risk framework?

[Sources: ASIC media release 23/06/2023; ASIC Report 765 When the price is not right: Making good on insurance pricing promises]

Top Story | FAR status update: FAR Bills delayed (again)

- We have prepared a brief status update on the progress of the legislation to establish the long-awaited Financial Accountability Regime (FAR) - the Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023. You can access the full text here.
- The key points are that:
  - The Bills have passed the House of Representatives without amendment and are currently before the Senate having failed to pass in the June sittings.
  - The Senate is now not due to sit again until 31 July 2023 (though it is not certain that the Bills will necessarily be considered/passed during the July/August sittings)
  - If the Bills are passed during the 31 July -10 August sittings (and receive Assent in August), the earliest possible date from which the FAR would apply (for the banking sector) is February 2024 (and February 2025 for the insurance and superannuation sectors).

Legislation to establish CSLR has passed both Houses

The three Bills – Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023, Financial Services, Compensation Scheme of Last Resort Levy Bill 2023, and Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023 - to establish the Compensation Scheme of Last Resort (CSLR) and supporting levy framework passed both houses without amendment on 22 June 2023.

What is the CSLR?

Hayne Recommendation 7.1 (and before that, the Ramsay Review) recommended the establishment of a CSLR.

Broadly, the CSLR will provide compensation of up to $150,000 to eligible consumers where:

- a determination in their favour has been made by the Australian Financial Complaints Authority (AFCA) but has not been paid by the relevant financial firm; and
- the determination relates to a financial product or service within the scope of the CSLR scheme; and
- AFCA has already taken 'appropriate steps' to require the firm to pay the relevant amount; and
- the consumer has notified AFCA within 12 months of the determination that they haven't been compensated and applied to the operator of the CSLR for compensation.

The CSLR will be operated by a subsidiary of the Australian Financial Complaints Authority (AFCA), operating on a not for profit basis.

The CSLR operator will be managed by a board consisting of an independent Chair appointed by the Minister for Financial Services, a member of the AFCA board and an actuary with at least five years actuarial experience.

Funding

The Commonwealth will fund the establishment of the scheme and part of its initial operation. A levy will then be imposed on certain parts of the financial services industry to fund the scheme's ongoing operation.

The ten largest banking and insurance groups (excluding health insurers and superannuation groups) will also be required to pay a one-off levy to fund the backlog of accumulated unpaid claims (and AFCA's unpaid fees relating to those claims) relating to complaints made to AFCA between 1 November 2018 and 7 September 2022.

Minimal changes from what was previously proposed

The CSLR proposed to be established by the new Bills – Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023; Financial Services Compensation Scheme of Last Resort Levy Bill 2023; and Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023 (together the 2023 CSLR Bills) – is similar to the scheme put forward previously.

Announcing the (re)introduction of the legislation, Assistant Treasurer Stephen Jones commented that the 2023 Bills:

> 'reflect the same intent and are substantively the same as the legislation considered by parliament last year. Minor and targeted amendments to reflect the passage of time and further stakeholder feedback have been made'.

Importantly, and consistent with the previous Bills, the proposed CSLR does not include managed investment schemes (MISs) and (as flagged above) the $150,000 cap on individual claims is also unchanged.

> [Note: The government has launched a review of the managed investment scheme framework. A consultation paper is expected to be released 'mid-year', with findings due to be reported to the government by 'early 2024']

Why was it necessary to reintroduce the Bills?

- On 8 September 2022, the government introduced a package of legislation to establish the proposed Financial Compensation Scheme of Last Resort (CSLR). The: Financial Sector Reform Bill 2022; Financial Services Compensation Scheme of Last Resort Levy Bill 2022; and the Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2022 (together, the 2022 CSLR Bills).
- The Financial Sector Reform Bill 2022 which also contained reforms intended to strengthen the consumer protection framework for consumers of small amount credit contracts and consumer leases, received Assent on 12 December 2022. Importantly, the Bill was amended in the Senate to remove both amendments to support the proposed Financial Accountability Regime (FAR) and to establish the proposed CSLR. The government indicated at the time (here and here) that the policy intent behind the removal of the FAR and CSLR related amendments was to enable more time for consultation on the implementation of both schemes without holding up the consumer credit reforms included in Schedule 4 of the Financial Sector Reform Bill 2022.
- The other 2022 CSLR Bills - Financial Services Compensation Scheme of Last Resort Levy Bill 2022; and the Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2022 – had progressed to second reading stage in the Senate, the Senate Committee having recommended (summary of the Senate Committee Report) their passage.
- On 8 March 2023 the government introduced the 2023 CSLR Bills to establish and fund the proposed CSLR. These Bills replace the 2022 CSLR Bills. As flagged, Mr Jones said that the reintroduction of the Bills was necessary in order to include 'targeted amendments'. These include:

> 'Measures have been added to reduce the incentive for financial firms to rely on the CSLR, and to facilitate better compliance with AFCA determinations. For example, ASIC must cancel an AFCA member's Australian financial service licence and/or Australian credit licence if the CSLR provides compensation as a result of that member's misconduct'.

In addition, the Assistant Treasurer said that:

> 'a back log of complaints that have been lodged with the Australian Financial Complaints Authority (AFCA) and that are expected to be eligible to claim on the CSLR will be funded through a one-off levy on Australia's 10 largest banking and insurance groups.
>
> Since the original bill was introduced by the previous government, a material event occurred in the market that significantly increased the amount that would need to be paid out of that one-off levy. That, combined

with the passage of time and the need to collect the levy based on the best available and most current data, led us to pause the bill, and now require minor amendments to it. Such amendments could not be moved in the Senate, on account of section 53 of the Constitution'.

Timing

- The 2023 CSLR Bills commence on the day after Assent. The commencement of the Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023 is contingent on the commencement of the Financial Services Compensation Scheme of Last Resort Levy Bill 2023.
- The CSLR operator will be able to begin to make compensation payments after the 'first levy period', the start date of which is to be determined by the Minister for Financial Services. Following the passage of the Bills, Assistant Treasurer Stephen Jones said that

  'Consumers will be able to lodge claims for compensation from April 2024, with the first compensation payments to follow shortly thereafter'.
- In a statement responding to the passage of the legislation, AFCA noted that since April 2020 AFCA has paused complaints against insolvent financial firms while awaiting detail of the scope and timing of a CSLR. Following the passage of the legislation, AFCA will now commence reviewing the status of these 4875 paused complaints.

An 'historic moment for consumer financial protection'

Consumer group CHOICE has welcomed the passage of the CLSR as an 'historic moment for consumer financial protection in Australia' which is expected to make a 'lasting improvement to the livelihood of people across the county'.

CHOICE adds that once in operation, the government 'should consider' the potential expansion of the scheme to managed investment schemes.

[Sources: Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023; Financial Services Compensation Scheme of Last Resort Levy Bill 2023; Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023]

Reframing Chapter 7 of the Corporations Act: ALRC releases third interim report early (to allow time for final round of consultation on proposed changes) ahead of the release of the final report

Australian Law Reform Commission (ALRC) has been tasked with conducting a three stage review of the legislative framework for corporations and financial services regulation.

The focus of the review is on three key areas: 1) the use and design of definitions in the Corporations Act 2001 (Cth) and Corporations Regulations; 2) the legislative design and hierarchy of the Corporations Act; and 3) restructuring/reframing Chapter 7 of the Corporations Act.

The final report is due 30 November 2023.

Call for feedback on potential options for reframing/structuring Chapter 7 of the Corporations Act

On 22 June, the ALRC's third (and final) Interim Report – Interim Report C - was tabled in Parliament by the Attorney-General. Interim Report C sets out four recommendations to make penalty provisions more transparent, and also puts forward a list of proposals and questions around the possible reframing of Chapter 7 of the Corporations Act ahead of the release of the final report.

A full list of proposals/questions is included at p15 of the report.

The due date for submissions on Interim Report C is 26 July 2023.

[Source: ALRC media release 22/06/2023; Interim Report C]

Simplifying and improving the navigability of Treasury portfolio laws: Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023 referred to Committee

On 14 June 2023, the Treasury Laws Amendment (2023 Law Improvement Package No 1) Bill 2023 (Cth) (Bill) was introduced into the House of Representatives.

Broadly, if enacted in its current form, the Bill would:

- implement a number of amendments to simplify and improve the navigability of existing Treasury portfolio laws in line with recommendations in interim reports A and B of the Australian Law Reform Commission (ALRC) Review of the Legislative Frameworks for Corporations and Financial Services Regulation.
- amend the enabling acts of certain legislative instruments regulating the insurance industry, to ensure sunsetting insurance instruments that are being remade are up to date (in line with the findings of a thematic review of Insurance Instruments that are due to sunset on 1 October 2023).
- transfer what the explanatory memorandum describes as 'longstanding and accepted matters' currently contained in three ASIC made legislative instruments to the Corporations Act and the National Consumer Credit Protection Act 2009 (Cth)
- make 'minor and technical' changes to various Treasury portfolio laws to 'correct drafting errors, repeal inoperative provisions, address unintended outcomes, and make other technical changes'.
- The Bill has been referred to the Senate Economics Legislation Committee for report by 28 July 2023. The closing date for the committee receiving submissions is 5 July 2023.

[Source: Treasury Laws Amendment (2023 Law Improvement Package No 1) Bill 2023 (Cth)]

NZ Commerce Commission to conduct a yearlong market inquiry into banking competition

- The NZ government has announced plans to task the Commerce Commission with undertaking a market study into competition in New Zealand's personal banking sector and making recommendations to address any issues identified.
- The terms of reference provide that the study will consider:
  - 'The structure of the industry and the nature of competition.
  - The conditions for entry by potential competitors and the conditions for expansion.
  - Any barriers to consumers comparing bank offers or switching banks, including the extent to which products or services may be tied or bundled.
  - Any impediments to new or innovative banking products or services comparative indicators of bank financial performance (including profitability)'
  - Other issues that the Commission considers 'are likely to provide special insight into competition for the supply and acquisition of personal banking services'.
- The primary focus of the study is expected to be on:
  - consumers switching banks
  - entry or expansion in the market
  - new/innovative products and services
- The move was prompted by concerns over 'indications that competition in the sector may not be working well for consumers' amid current cost of living pressures. These concerns include 'consistently high' bank profits over a number of years and the concentration of mortgage and other lending in the four major banks.
- Announcing the market inquiry, the government underlined that the focus of the inquiry is limited to consideration of competition issues and is 'not about bank conduct and culture' (as a 2018 investigation into cultural/conduct issues has already resulted in additional consumer protections)

Planned timing

- A preliminary issues paper is planned for release by the end of August 2023 describing the structure of the industry and providing early indications on the nature of competition.

- The study will be completed and the report made publicly available by 20 August 2024

Open banking

Separately the NZ government is currently consulting on a draft Bill to establish a consumer data right regime. The due date for submissions is 24 July 2023.

[Sources: Joint media release: market study to investigate banking competition 20/06/2023; Ministry of business innovation and employment 20/06/2023; Inquiry home page: Market study into personal banking services; Terms of reference; Consultation: Customer and product data Bill (consumer data right)]

Regional bank closures: ABA releases new bank branch closure protocol

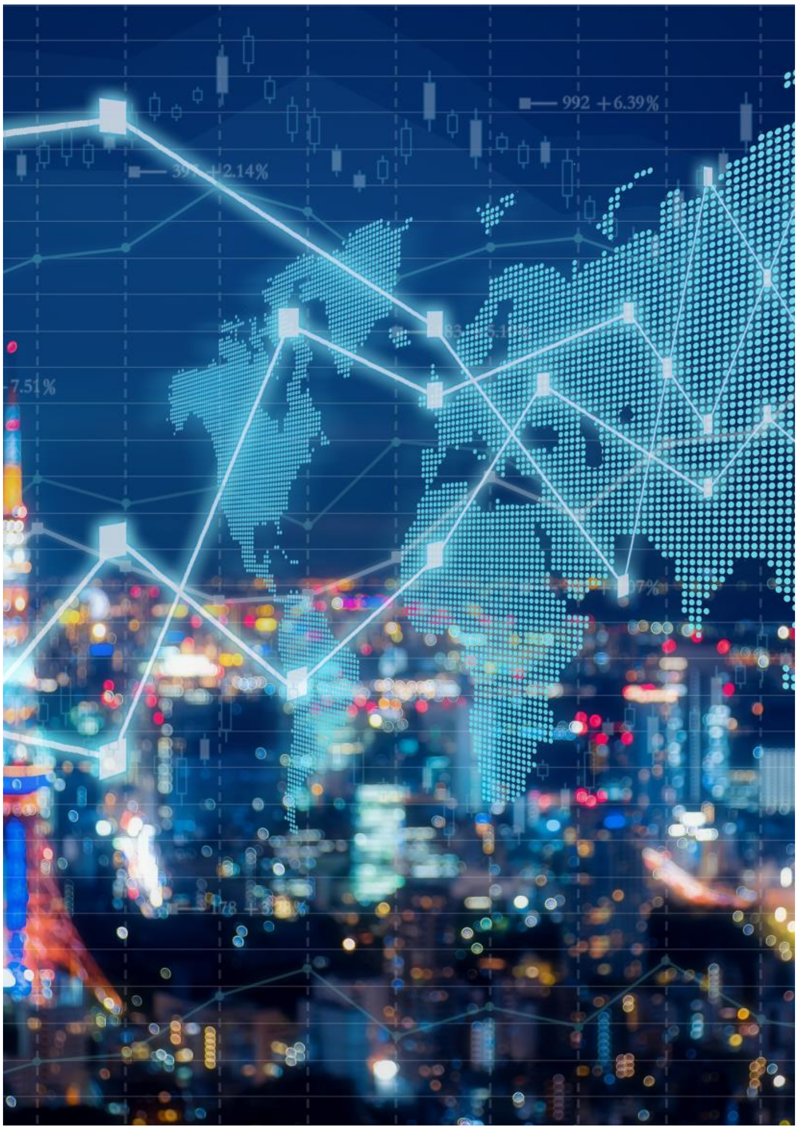
- The Australian Banking Association (ABA) has released a Bank Branch Closure Support Protocol setting out the minimum standards for customer support that banks should provide when closing a branch, in line with the ABA's response to several recommendations of the Regional Banking Taskforce Inquiry.
- For context, the Regional Banking Taskforce Inquiry into regional branch closures and their impact on communities initiated under the former government in October 2021, made seven recommendations to help improve access to banking services in regional Australia. These recommendations include:
  - Reviewing and strengthening the ABA's branch closure protocol (Recommendation 1)
  - Implementing branch closure impact assessments (Recommendation 2)
  - Promoting and supporting Bank@Post services (Recommendation 3)
  - Improving support for regional consumers experiencing vulnerability (Recommendation 5)

  You can find the ABA's response to each of the seven taskforce recommendations here.
- Under the new protocol, which comes into force from 1 July 2023 banks will need to:
  - prepare and publish Branch Closure Impact Assessments (where a decision is made to close a branch) to help customers and the community understand the reasons for the closure decision
  - meet new notification requirements around bank closures
  - meet minimum customer support requirements where they close a branch (and the distance to the next branch is 10km away, rather than the current threshold of 20km)
  - adhere to a new Customer Care Standard will mean banks need to:
    - make customers aware of other banking options when a branch closes
    - support customers to transition to Bank@Post services (for customers of participating banks) where the customer prefers face-to-face banking services
    - support customers (including older people, people with a disability, First Nations customers and those with limited English – who may require additional assistance to transition to other banking options (eg digital banking options)
- As flagged, the new protocol is in line with the former government's 'roadmap' to improve customer outcomes for regional customers.
- The new protocol has been released ahead of the completion of a separate senate inquiry into regional bank closures which is due to report by 1 December 2023. .

[Sources: ABA media release 23/06/2023; ABA Bank Branch Closure Support Protocol]

Markets and Exchanges

CHESS replacement program: ASIC Chair's update to the parliamentary committee



The focus of Australian Securities and Investments Commission (ASIC) Chair Joe Longo's 27 June 2023 opening statement to the Parliamentary Joint Committee on Corporations and Financial Services: Oversight of ASIC, the Takeovers Panel and the Corporations, was regulatory oversight of the CHESS replacement project.

Our key takeaways are below.

- The Committee heard that ASIC's current regulatory approach is

  > 'characterised by more intense proactive supervision and the use of all available regulatory powers' to ensure that ASX Group licensees (and in particular, ASX Clear and ASX Settlement) 'adhere to the regulators' expectations and comply with their CS facility licence obligations'.

- Mr Longo reiterated that ASIC's is focused on ensuring that 'ASX's program management framework is able to successfully deliver programs of change and upgrades to Australia's market infrastructure' before pushing forward with the new CHESS replacement solution.
- Mr Longo also briefly touched on ASIC's investigation into 'suspected contraventions of the ASIC Act 2001 and the Corporations Act 2001 in relation to the CHESS replacement program' by the ASX. The Committee heard that ASIC is 'investigating whether there were any breaches by ASX companies or their directors or officers in relation to oversight of the program, and statements and disclosures made as to the status of the program'. Mr Longo said that this investigation is ongoing.
- Mr Longo said that ASIC has considered evidence provided to the Committee around ASX's governance of the CHESS replacement project. In particular, Mr Longo said that ASIC is 'giving further consideration' to the establishment of a steering committee to provide additional oversight. However, Mr Longo observed that 'the establishment of such a properly constituted body will necessarily take time and has a risk of affecting the timeframe for the CHESS replacement further. Ultimately, all parties - including ASX - will need to be committed to genuine collaboration and consultation, and to the success of this advisory body'.
- Finally, Mr Longo welcomed the introduction of legislation on Competition in Clearing and Settlement (CiCS) and the progress of the Financial Market Infrastructure (FMI) reforms stating that the legislation would 'broaden the range of enforcement tools we, the RBA and the ACCC have available. If enacted, ASIC will work with Government and the Council of Financial Regulators to implement both reforms'.

  [Source: Opening statement by ASIC Chair Joe Longo at the Parliamentary Joint Committee on Corporations and Financial Services: Oversight of ASIC, the Takeovers Panel and the Corporations Legislation, 27/06/2023]

Risk Management

Top Story | The European Union's AI Act – a model Australia will follow?

On 14 June 2023, the European Parliament passed its version of the Artificial Intelligence Act (AI Act), a key step in the AI Act becoming law.

MinterEllison has released an article providing a brief overview of how the proposed AI Act will operate if passed into law and how this may impact the ongoing consideration of AI regulation in Australia being led by the Department of Industry, Science and Resources. You can access the full text here.

Top Story | 'BrAInwashing': It's a thing

MinterEllison has released an article discussing the application of the Australian Consumer Law to the promotion of products and services. The article opines that the use and promotion of AI in products/services raises similarly acute risks to those that Greenwashing raises for commercial corporations and financial corporations.

You can access the full text here.

APRA takes action against insurer over 2022 cyber incident, reiterates calls on banks, superfunds and insurers to 'uplift cybersecurity'

The Australian Prudential and Regulation Authority (APRA) has announced that following its review into a major cyber incident at an insurer in 2022, it has taken the following actions against the insurer.

- **Increased the insurer's capital adequacy requirement by $250 million**. The capital adjustment will be applied to the insurer's operational risk charge under the new Private Health Insurance (PHI) Capital Framework, effective from 1 July 2023. This will remain in place pending completion by the insurer of an agreed remediation plan to APRA's satisfaction.
- **APRA will also conduct a 'targeted technology review' of the insurer,** with 'a particular focus on governance and risk culture'

APRA also made clear that it expects the insurers to

> 'ensure there is appropriate accountability and consequence management, including impacts to executive remuneration where appropriate'.

APRA again calls on regulated entities to prioritise cyber

Announcing this, APRA Member Suzanne Smith reiterated APRA's expectation that all regulated entities prioritise strengthening their cyber security practices, including ensuring there is effective and ongoing oversight of cyber risk at management and board level is in place.

Ms Smith commented:

> 'This action demonstrates how seriously APRA takes entities' obligations in relation to cyber risk and that APRA will respond strongly to identified weaknesses in cyber security controls… Since launching the 2020-2024 Cyber Security Strategy APRA has repeatedly stressed the importance of an uplift in cyber security and continued vigilance to identify and address cyber exposures. Unfortunately, not all entities are heeding these messages as we continue to identify poor cyber security practices and inadequate oversight from boards and management.

Ms Smith also underlined that:

> 'Where appropriate, APRA will take further action to ensure entities address gaps and weakness in controls'.
>
> [Source: APRA media release 27/06/2023]

New National Cybersecurity Coordinator to start 3 July

- Building on the government's commitment to deliver a 2023-2030 Australian Cyber Security Strategy, the government has announced the appointment of Air Marshal Darren Goldie AM CSC as the inaugural National Cyber Security Coordinator.

Why will the national cyber security coordinator do?

- Together with the National Office of Cyber Security, the National Cyber Security Coordinator will lead (in collaboration with the government's key policy, operational and security agencies):
  - national cyber security policy,
  - the coordination of responses to major cyber incidents,
  - whole of Government cyber incident preparedness efforts
- Mr Goldie will commence his term of the National Cyber Security Coordinator on 3 July 2023.

  [Source: Prime Minister Anthony Albanese media release 23/06/2023]

Combatting foreign bribery: New Bill introduced

The Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (Cth) was introduced into the House of Representatives on 22 June 2023 and referred to the Senate Legal and Constitutional Affairs Legislation Committee for report by 26 July 2023.

Attorney General Mark Dreyfus said that the Bill aims to:

> 'strengthen the legal framework for prosecuting foreign bribery. The measures in the Bill seek to address key challenges with investigating and prosecuting cases of foreign bribery in Australia'.

Mr Dreyfus noted that the measures in Schedule 1 to the Bill substantially replicate the measures included in two lapsed Bills introduced by the previous government (Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 and Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017).

Broadly, the proposed changes aim to improve the operation of, and further strengthen, Australia's implementation and enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) to which Australia is a signatory.

More specifically, the changes in Schedule 1 seek to 'overcome the limitations of the current foreign bribery offence which has proven to be overly prescriptive and difficult to use'. These changes include:

- expanding the foreign bribery offence to include the bribery of candidates for public office (not just current holders of public office);'
- expand the foreign bribery offence to include bribery conducted to obtain a personal advantage (as well as bribery to obtain/retain a business advantage)
- remove the existing requirement that the benefit or business advantage be 'not legitimately due' and replace it with the concept of 'improperly influencing' a foreign public official. Mr Dreyfus explained that this change is being proposed to address the difficulty presented where bribes are concealed as legitimate payments.
- remove the existing requirement that the foreign public official be influenced in the exercise of their official duties;
- clarify that 'the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else'.

The Bill will also introduce a new indictable corporate offence of failing to prevent foreign bribery. The explanatory memorandum states that this is intended to:

> 'overcome challenges in establishing criminal liability of businesses that engage in wilful blindness with respect to misconduct by their employees and other associates, and is intended to incentivise businesses to implement and maintain adequate procedures to prevent foreign bribery from occurring. The offence will be an incentive for companies to implement and maintain measures to prevent bribery'.
>
> [Sources: Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023; Attorney General Mark Dreyfus media release 22/06/2023]]

NSW Anti-Slavery Commissioner launches three year strategic plan combat the rise in modern slavery across NSW

NSW Anti-Slavery Commissioner: 2023-26 strategic plan

The NSW Anti-Slavery Commissioner has released the first three year strategic plan to combat the rise of modern slavery across NSW covering the period 1 July 2023 to 30 June 2026 as required under the Modern Slavery Act NSW (2018).

According to the Commissioner, the number of people in NSW who are victims of modern slavery is estimated to stand at 16.400 (though the scale of the issue is not widely known in the community). The issue imposes significant economic and social costs on the state. The financial cost is estimated to be at least $956 million (but could be as high as $9.6 billion).

The plan is structured around five key elements aimed at raising awareness of the problem, elevating the voice of modern slavery survivors in anti-slavery efforts, equipping frontline workers with the information/tools they need to identify and mitigate the risks, and making access to effective remedy easier for victims. The priorities under the plan were identified through extensive consultation.

The table below provides a brief overview.

FIVE KEY PRIORITIES	KEY ACTIONS IDENTIFIED
▪ 'Build prevention capacity' to ensure NSW government and non-government systems can identify vulnerability to modern slavery and prevent victimisation	▪ Supporting the development and delivery of information, education and training to 'frontline sectors' - eg healthcare, criminal justice, family services, settlement services, child protection – to enable them to identify vulnerability to modern slavery and take appropriate referral or preventive action ▪ Establish an effective support and referral hotline to provide advice and assistance to people, including children, who have experienced or are at risk of modern slavery ▪ The plan also states that the Commissioner intends to 'explore further opportunities' for action including (potentially) using reports to parliament to draw attention to particular forms of vulnerability/ institutional drivers of modern slavery eg labour market regulation, social media platform regulation, coercive control and family violence.
▪ 'Enable remedy': The aim is to improve access to 'effective remedy' such as 'essential services, justice, self-determination and empowerment'.	▪ Identifying and addressing barriers to access through collaboration with government, business, service providers, unions and criminal justice service providers ▪ 'Enabling improved information sharing, coordination and resourcing of essential services for people with lived experience'. ▪ Fostering survivor leadership in NSW anti-slavery efforts through incorporating lived experience into the design, delivery and governance of work under the Strategic plan the appointment of a Lived Experience Advisor in the Office of the Anti-slavery Commissioner
▪ Foster responsible business practices through demonstrating leadership in 'identifying and addressing 'modern slavery in supply chains/investment portfolios	▪ Removing the products of modern slavery from public procurement through 'supporting' NSW public buyers to identify/address modern slavery risks (including through developing information, education and training in line with the UN Guiding Principles on Business and Human Rights) and monitoring the effectiveness of these efforts ▪ Encouraging business to adopt good practice in addressing modern slavery including (potentially) through issuing Codes of Practice and improving access to advice on the steps that can be taken to identify and mitigate modern slavery risks and to remedy any resulting harms. ▪ In addition, the plan flags the Commissioner's intention to 'explore opportunities for harnessing data generated by our work on public procurement and private business practices, to foster commercial and financial innovation in NSW. This could, for example, include development of new financial instruments or products, such as sustainability-linked bonds, to increase funding available for anti-slavery oriented work'.

FIVE KEY PRIORITIES	KEY ACTIONS IDENTIFIED
▪ Making the case for anti-slavery in a 'convincing and empowering way'	▪ 'Build the economic, business and broader public policy cases for anti0slavery through research, analysis and advocacy' through undertaking empirical and policy research. ▪ Raising awareness of modern slavery through targeted engagement with rural and regional communities and linguistically diverse communities. ▪ The plan also flags a potential role for the Commissioner in 'fostering better understanding of the contemporary impacts of historical slavery and slavery-like practices in NSW'. Over the next three years, the Commission plans to 'explore ways to support such truth-telling efforts'.
▪ Develop 'a community of purpose' to foster collaboration among those 'fighting slavery in NSW'	▪ Actions under this priority include: – convening a twice yearly NSW Anti-Slavery Forum addressing the priorities in the strategic plan – securing adequate and sustainable resourcing arrangements for the Office of the anti-slavery Commissioner and other stakeholders contributing to the objectives in the strategic plan (eg procurement teams in NSW government departments) – establishing 'effective partnership, information sharing and data collection arrangements' ▪ In addition, the Commissioner will explore opportunities to strengthen existing data collection, sharing and analysis arrangements

Progress against the plan

The Commissioner will report on progress against the plan in an Annual Report to the NSW parliament and through regular discussion with the Advisory Panel and NSW Anti-slavery forum.

[Source: NSW Modern Slavery Commissioner media release 22/06/2023; NSW Anti-slavery Commissioner's Strategic plan 2023-26: Working together for real freedom]

In Brief | New guide outlines five steps that Australian SMEs can take to detect, manage and mitigate their risk of being involved in modern slavery

[Source: Global Compact Network Australia media release 24/06/2023; Full text guide: UN Global Compact Network Australia – Modern Slavery Risk Management: A playbook for Australian SMEs to identify, assess and mitigate modern slavery risks]

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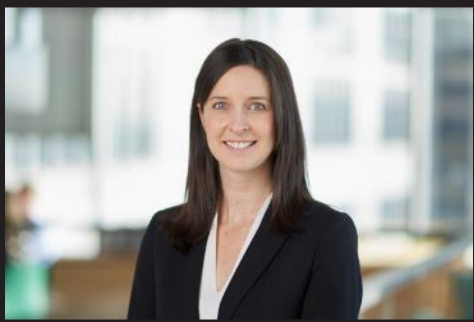

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