

COVID-19 | Your Regulatory Roadmap

(7 October 2020 – 18 December 2020)

Disclaimer: This communication is intended to provide commentary and general information only. It is not intended to be a comprehensive review of all aspects of the matter referred to. It should not be relied upon as legal advice as to specific issues or transactions.

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What you need to know about the changing regulatory environment

Peak Financial Regulatory Bodies

ASIC

- ASIC has updated its information sheets (INFO 210 and 211) on unfair contract term protections for consumers and small businesses ([Link](#)). The protections will be extended to insurance contracts from 5 April 2021 following the government's enactment of the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020. In preparation for the unfair contract term protections applying to insurance contracts, ASIC is also undertaking targeted supervisory work with industry. The focus of ASIC's supervisory work is on:
 - terms that allow an insurer to cash settle a claim based on the cost of repair to the insurer
 - terms that are an unnecessary barrier to a consumer lodging a claim
 - terms that reduce the cover offered where compliance with the preconditions is unfeasible; and
 - terms that use an outdated, and therefore inaccurate or restrictive, medical definition.

- ASIC has made a product intervention order imposing conditions on the issue and distribution of contracts for difference (CFDs) to retail clients ([Link](#)). From 29 March 2021, ASIC's order will strengthen consumer protections by reducing CFD leverage available to retail clients and by targeting CFD product features and sales practices that amplify retail clients' CFD losses and by bringing Australian practice into line with protections in force in comparable markets elsewhere.
- ASIC is seeking further feedback on its proposed use of the product intervention powers to address significant detriment in relation to continuing credit contracts ([Link](#)). This development follows ASIC's earlier consultation through *Consultation Paper 330 Using the product intervention power: Continuing credit contracts*. In response to submissions received to CP 330, ASIC has made changes to the proposed product intervention order. These changes involve providing certain exclusions for Buy Now Pay Later arrangements, and for fees charged by licensed providers of non-cash payment facilities that are associated with continuing credit providers. Feedback on these changes is due by 24 November 2020.

- ASIC's *Licensing and professional registration activities: 2020 update (Report 671)* has been released ([Link](#)). ASIC's licensing report is released annually to increase transparency and to provide guidance to licensees, registrants and prospective applicants about ASIC's licensing and professional registration decision making, what ASIC considers when receiving an application, why certain information is required, and what may increase the time taken to assess the application.
- ASIC has published a new report on the buy now pay later industry which has grown substantially since ASIC's initial review ([Link](#)). ASIC's research shows that one in five consumers are missing payments, which leads to poor outcomes for these consumers in terms of missed payment fee. ASIC reiterated that there are regulatory changes coming that will impact the industry, with the design and distribution obligations coming into effect in October 2021. The industry is also developing a code of conduct. ASIC expects the industry to work collectively to develop a code that provides good consumer outcomes across the diverse range of business models operating in the industry.

- ASIC has issued *Consultation Paper 332 Promoting access to affordable advice for consumers (CP 332)* ([Link](#)). CP 332 seeks input from industry participants to help ASIC understand:
 - the issues and impediments relating to the supply of good quality affordable personal advice; and
 - the practical steps that can be taken by ASIC and industry to improve consumer access to good quality affordable advice.

This consultation is part of a broader piece of work by ASIC to understand how to improve access to personal advice for consumers. A particular focus of this paper is on promoting access to quality 'limited advice'. All personal advice can be scaled up and down to cover all areas relevant to the client, or one or some of the areas relevant to the client. 'Limited advice' is personal advice that does not cover all areas that are relevant to the client. It is also known as 'scaled', 'piece-by-piece', 'single issue', 'modular' or 'episodic' advice. Submissions to CP 332 are due by 18 January 2021. ASIC will also hold industry roundtables in the first quarter of 2021 to discuss the issues raised in the submissions.



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- ASIC has released a consultation paper *Implementing the Royal Commission recommendations: Reference checking and information sharing* (CP 333) on a new reference checking and information sharing protocol for financial advisers and mortgage brokers. Mandatory reference checking of financial advisers and mortgage brokers was a recommendation of the Financial Services Royal Commission ([Link](#)). Feedback is due by 29 January 2021.
- ASIC has released a draft information sheet on insurance claims handling and settling ([Link](#)). The new Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 will require persons providing claims handling and settling services to be covered by an AFSL so that the general conduct obligations will apply to those types of activities. Feedback is due by 29 January 2021.
- ASIC has released a consultation paper on proposed updates to Regulatory Guide 256: Client review and remediation conducted by advice licensees ([Link](#)). *Consultation Paper 335 Consumer Remediation: Update to RG 256 (CP 335)* includes clarification of RG 256's application to all financial services licensees, credit licensees and superannuation trustees. Feedback is due by 26 February 2021.

- ASIC has released technical updates to *Regulatory Guide 246 Conflicted and other banned remuneration (RG 246)* to reflect recent changes to the law ([Link](#)), such as:
 - the end of the grandfathering of conflicted remuneration for financial product advice from 1 January 2021; and
 - the extension of the ban on conflicted remuneration to stamping fees paid in relation to listed investment companies and listed investment trusts (excluding real estate investment trusts) that took effect on 1 July 2020.
- ASIC has released a new *regulatory guide on the product design and distribution obligations (RG 274)* ([Link](#)). RG 274 addresses demand from industry for ASIC guidance as they prepare for the obligations to take effect on 5 October 2021. This follows a two year transition period and a six month deferral of commencement provided by ASIC due to the impacts of COVID-19. RG 274 sets out:
 - the financial products to which the design and distribution obligations apply
 - ASIC's interpretation of the obligations, and
 - ASIC's administration of the obligations
- APRA and ASIC have also issued a letter to RSE licensees in relation to Member Outcomes (MO) obligations and DDO, to assist in better understanding the interaction of their requirements ([Link](#)).

- ASIC has released its review of school banking programs (Report 676) ([Link](#)).
- ASIC is seeking further feedback on proposed requirements for internal dispute resolution data reporting ([Link](#)). Comments are due by 12 February 2021.

APRA

- APRA has released for consultation a revised remuneration prudential standard designed to strengthen market practice, underpin sound remuneration practices and enhance accountability in the institutions it regulates ([Link](#)). The draft standard has moved to a more principles-based approach that is designed to be risk based and proportionate, with more comprehensive requirements for larger, more complex regulated entities (Significant Financial Institutions (SFIs)). The remuneration requirements for smaller (non-SFI) entities have been streamlined to minimise regulatory burden.



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- APRA has released an information paper detailing the findings from its review of the implementation of the Banking Executive Accountability Regime (BEAR) by three of Australia's largest ADIs ([Link](#)). APRA completed its implementation review of the BEAR at ANZ, CBA and NAB in February 2020. Westpac was not included due to an ongoing investigation into potential breaches of the Banking Act 1959. APRA's review found that the BEAR frameworks to be adequate frameworks and to help deliver:
 - greater clarity and transparency of individual accountabilities at ADIs;
 - sharpened challenge by boards on actions taken by accountable persons to meet their obligations; and
 - more targeted engagement between APRA and ADIs to deliver prudential outcomes.As at February 2020, APRA considered that CBA had the most developed approach to implement the BEAR, but that all of the ADIs had further work to achieve clearer and more transparent accountability practices. All of the ADIs have taken actions and made commitments to address the feedback received.

ACCC

- The ACCC has compiled a series of frequently asked questions and answers (FAQs) about becoming accredited to participate in the CDR ecosystem ([Link](#)). These FAQs provide guidance to government, industry and consumers. The FAQs may be amended from time to time to address new developments as CDR is implemented in banking. The ACCC has also published a support package and accreditation checklist for businesses who intend to apply for accreditation. The Accredited data recipient support package is designed to provide potential applicants with links to documents that help guide them through the different stages in the Consumer Data Right accreditation and on-boarding processes. The Accreditation checklist sets out the activities that applicants should undertake before beginning an accreditation application and documentation required to progress the application itself.

AUSTRAC

- AUSTRAC has released a new financial crime guide to help businesses to combat Australia's illegal wildlife trafficking trade by identifying, targeting and reporting suspicious financial activity ([Link](#)). The financial crime guide - developed by AUSTRAC's public-private partnership the Fintel Alliance together with the Department of Agriculture, Water and Environment – draws on intelligence collected from known instances of wildlife trafficking operations. The guide aims to educate the businesses AUSTRAC regulates on how illegal wildlife trafficking operates, the ways it can be detected by suspicious financial activity and when they should report to AUSTRAC.
- AUSTRAC has released its money laundering and terrorism financing risk assessment of the junket tour operations (JTOs) sector ([Link](#)). AUSTRAC assesses that the JTO sector faces multiple criminal threats and the overall ML/TF risk is high.

Productivity Commission

- The Productivity Commission has released an information paper on Regulatory Technology that deals with opportunities to improve regulatory administration and compliance through technology in Australia ([Link](#)). The paper highlighted four key areas where regtech solutions may be particularly beneficial:
 - where regulatory environments are particularly complex to navigate and monitor
 - where there is scope to improve risk-based regulatory approaches, thereby targeting the compliance burden and regulator efforts
 - where technology can enable better monitoring, including by overcoming constraints related to physical presence
 - where technology can safely unlock more uses of data for regulatory compliance.Creating and maintaining a regulatory environment that supports the realisation of regtech benefits should be a priority for the government according to the Productivity Commission.



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- The Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 has been signed into law and will commence on 1 January 2021 ([Link](#)). The Bill introduces a number of new processes suitable for small businesses including:
 - a formal debt restructuring process for eligible companies;
 - extended temporary relief for eligible companies intending to undertake a formal debt restructuring process;
 - a simplified liquidation process for eligible companies in a creditors' voluntary winding up;
 - refinements to the requirements for registration as a liquidator; and
 - the greater use of electronic documents and electronic signatures in an external administration;
- Treasury has released a Regulation Impact Statement for enhancements to the unfair contract term protections ([Link](#)). Commonwealth, State and Territory consumer affairs ministers agreed to strengthen the existing unfair contract term protections in Australia. Key reforms include:
 - making unfair contract terms unlawful and giving courts the power to impose a civil penalty
 - increasing eligibility for the protections by expanding the definition of small business and removing the requirement for a contract to be below a certain threshold
 - improving clarity on when the protections apply, including on what is a 'standard form contract'.These reforms will help reduce the prevalence of unfair contract terms in standard form contracts, and improve consumer and small business confidence when entering into contracts. As a next step, Treasury will develop exposure draft legislation, which will provide a further opportunity for stakeholders to comment on the detail of the reforms.
- The government will review the regulatory architecture of the Australian payments system as part of the Digital Business Package announced in the 2020-21 Budget ([Link](#)). The purpose of the review is to ensure the payments system remains fit for purpose and is capable of supporting continued innovation for the benefit of both businesses and consumers. The review will be led by Mr Scott Farrell and supported by a secretariat located within Treasury. The review commenced in October 2020 and will report to the Treasurer by April 2021. The review will draw upon expertise from the private sector by consulting broadly with industry, consumer and privacy advocates, and other interested parties in developing the report and recommendations. An issue paper has also been released ([Link](#)).

- Treasury has released exposure drafts for the NCCP (Supporting Economic Recovery) Bill 2020, the NCCP (A new regulatory framework for the provision of consumer credit) Regulations 2020 and the National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020 ([Link](#)). Schedule 1 to the Bill 2020 will amend Chapter 3 of the Credit Act so that responsible lending obligations apply only to SACCs, SACC-equivalent loans by ADIs and consumer leases. To ensure appropriate consumer protections remain in place, the best interests obligations already legislated for mortgage brokers are extended to all credit assistance providers to resolve any conflicts of interest in the consumer's favour. The Amending Regulations also make consequential changes as a result of the introduction of the framework for non-ADI credit standards. The Determination requires licensees to implement adequate systems, policies and processes relating to non-ADI credit conduct, rather than impose individual conduct-level obligations. This enables credit assessment to move away from a prescriptive framework for lenders and borrowers, and will support risk-based lending that is attuned to the needs and circumstances of the borrower and credit product. A licensee will contravene the Act if the licensee repeatedly fails to give effect to the systems, policies and processes. A licensee will be required by the Standard to give a copy of an assessment conducted to the consumer upon request up to seven years after the credit contract was entered into or the credit limit was increased. A licensee will contravene the Act if the licensee fails to do so. Public consultation on the exposure draft and explanatory material will close on 20 November 2020. The Bill has been introduced into parliament ([Link](#)). The measures will commence on 1 March 2021.
- The government has introduced legislation to implement further recommendations of the Banking, Royal Commission ([Link](#)). The package of legislation addresses 20 recommendations and one additional commitment from Royal Commission. The reforms being introduced will further strengthen protections for consumers by:
 - strengthening the unsolicited selling (anti-hawking) provisions, including for superannuation and insurance products, to prevent pressure selling to consumers;
 - introducing a deferred sales model for add-on insurance products, to promote informed purchasing decisions and prevent inappropriate sales of add-on insurance;
 - making the handling and settlement of insurance claims a 'financial service', which will require insurers to behave honestly, efficiently and fairly and comply with other licensing obligations, to improve claims handling practices;



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Government

- prohibiting the trustee of a superannuation fund from having a duty to act in the interests of another person, other than those arising from their duties as trustee of a superannuation fund; and
- allowing provisions in financial services industry codes to be enforceable, with breaches attracting civil penalties, ensuring better adherence by industry and certainty for consumers.

These changes will be complemented by providing further clarity regarding the role of the regulators and enhancing the requirements of financial institutions reporting breaches of the law which will ensure significant misconduct is reported and investigated sooner. With the introduction of these recommendations, the Government is now focussed on completing implementation of the remaining recommendations of the Hayne Royal Commission consistent with the updated implementation roadmap issued following the onset of COVID-19.

- The Attorney-General announced that the government would conduct a review of the Privacy Act 1988 to ensure privacy settings empower consumers, protect their data and best serve the Australian economy ([Link](#)). The government has released the terms of reference for the review as well as a timeline and Issues Paper. The deadline for submissions for the issues paper is 29 November 2020.
- The Currency (Restrictions on the Use of Cash) Bill 2019 will not be proceeding due to insufficient support in the senate ([Link](#)).
- The Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020 was introduced into the Parliament ([Link](#)). The Bill addresses four recommendations from the Banking Royal Commission relating to financial advice. These reforms:
 - Strengthen and simplify the ongoing fee arrangement framework in the Corporations Act 2001 to minimise the risk that these types of arrangements give rise to fee for no service conduct (rec. 2.1);
 - Amend disclosure requirements to ensure that financial advisers disclose whether they are independent (rec. 2.2); and
 - Ensure that only fees for one-off financial advice can be deducted out of MySuper accounts (rec.s 3.2 and 3.3).The bill will commence on 1 July 2021.
- The Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 was assented to today ([Link](#)), with most of the changes slated to go into effect on 1 January 2021.

- The Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 has been signed into law ([Link](#)). The Bill will amend the AML/CTF Act to:
 - update provisions relating to reporting entities' customer due diligence obligations, including by expanding the circumstances under which they may rely on procedures undertaken by third parties;
 - place stricter controls around correspondent banking relationships
 - update and simplify the 'tipping off' offence (the offence is intended to prevent information about a suspicious matter report made by a reporting entity from reaching the person to whom the report related);
 - update secrecy offences and provisions regulating access to Australian Transaction Reports and Analysis Centre (AUSTRAC) information; and
 - consolidate currently separate reporting requirements for cross-border movements of physical currency and bearer negotiable instruments.

The changes to identification procedures, correspondent banking, the tipping-off offence, and secrecy and access (Parts 1–4 of Schedule 1) will commence on a day or days to be fixed by proclamation or six months after Royal Assent, whichever occurs first. The changes to reports about cross-border movements of monetary instruments (Part 5 of Schedule 1) will commence on proclamation or 18 months after Royal Assent, whichever occurs first. Money laundering offences in the Criminal Code (Parts 6 and 7) will commence the day after Royal Assent



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