Financial regulator reform (no. 2) bill 2019

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

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| Abbreviation | Definition |
| Financial Services Royal Commission | Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry |
| APRA | Australian Prudential Regulation Authority |
| ASIC | Australian Securities and Investment Commission |
| APRA Act | *Australian Prudential and Regulation* *Authority Act 1998* |
| ASIC Act | *Australian Securities and Investments* *Commission Act 2001* |

1. Implementing Recommendations 6.9 and 6.11 of the Financial Services Royal Commission

## Outline of chapter

* 1. Parts 1 and 2 of Schedule 1 to the Bill implements recommendation 6.9 of the Financial Services Royal Commission to remove barriers to efficient cooperation and information sharing between APRA and ASIC, including requiring the regulators to notify each other when they reasonably believe there may be material breaches of each other’s legislation.
	2. Part 3 of Schedule 1 to the Bill implements recommendation 6.11 of the Financial Services Royal Commission to formalise ASIC meeting procedures.

## Context of amendments

### The establishment of the Royal Commissions into Misconduct in the Banking, Superannuation and Financial Services Industry

* 1. On 14 December 2017 the Governor-General of the Commonwealth of Australia established the Financial Services Royal Commission.
	2. The Financial Services Royal Commission was established to consider whether any conduct by financial services entities amounted to misconduct or did not meet community standards and expectations.
	3. In the case of superannuation, the Financial Services Royal Commission considered whether the use of members’ retirement savings was not in the best interests of those members.
	4. The Final Report of the Financial Services Royal Commission made 76 recommendations. Of those, 54 were directed to the Government, 12 to financial services regulators and 10 to industry.

### Government’s response to the recommendations

* 1. On 4 February 2019, the Government released its response to the Financial Services Royal Commission – *Restoring trust in Australia’s financial system*. The Government committed to take action on all 76 of the recommendations and made 18 further commitments.
	2. The Government’s response includes a package of reforms to:
* Strengthen and expand protections for consumers, small businesses and those in rural and remote communities;
* Ensure the regulators have the necessary tools for strong and effective regulation;
* Enhance the accountability of financial firms, their senior executives and boards; and
* Further improve remediation and redress for consumers and small businesses harmed by misconduct.

### Recommendation 6.9 – Statutory obligation to co-operate

* 1. The Final Report of the Financial Services Royal Commission considered the historical and current relationship between APRA and ASIC and made recommendations about how the regulators cooperate, share information and notify each other of breaches of the laws administered by the other regulator.
	2. Recommendation 6.9 of the Final Report of the Financial Services Royal Commission recommended that APRA and ASIC:
* cooperate with the other;
* share information to the maximum extent practicable; and
* notify the other whenever it forms the belief that a breach in respect of which the other has enforcement responsibility has occurred.
	1. The Government’s response to the Financial Services Royal Commission committed the Government to removing barriers to information sharing between APRA and ASIC and requiring them to co‑operate, share information and notify each other of relevant breaches or suspected breaches, as appropriate.
	2. Parts 1 and 2 of Schedule 1 to this Bill gives effect to the Government’s response to Recommendation 6.9.

### Recommendation 6.11 – Formalising ASIC meeting procedure

* 1. Recommendation 6.11 of the Financial Services Royal Commission recommended that further requirements for ASIC’s meeting procedures be formalised and that those requirements be substantially similar to the existing APRA meeting procedures as contained in the APRA Act. This is on the basis that the formalisation of these requirements will serve to reinforce the centrality of collective decision‑making in ASIC.
	2. The ASIC Act requires ASIC to consist of not fewer than three and no more than eight members. The Governor-General appoints members on the nomination of the Minister.
	3. The ASIC Act provides for the convening of meetings of ASIC members as the Chairperson thinks necessary for the efficient performance of ASIC’s functions or where requested by two or more of the members and contains some limited procedural requirements as to how the meetings are held and who is to preside.
	4. Part 3 of Schedule 1 to this Bill gives effect to the Government’s commitment to implement recommendation 6.11 of the Financial Services Royal Commission to amend the ASIC Act to include provisions dealing with the places of Commissioner meetings, the quorum required, who is to preside, how voting is to occur and the passing of resolutions without meetings.
1. Recommendation 6.9 – Statutory obligation to cooperate

## Summary of new law

* 1. Parts 1 and 2 of Schedule 1 to the Bill amends both the APRA Act and the ASIC Act to require:
* APRA and ASIC to cooperate with each other;
* APRA and ASIC to share information with each other on request; and
* each regulator to notify the other when it forms the reasonable belief that a material breach may or has occurred, in respect of a law which the other regulator administers.

Comparison of key features of new law and current law

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| New law | Current law |
| APRA and ASIC are required to cooperate with each other in the performance of their functions and powers, so far as is practicable.  | There are specific provisions in laws which set out how APRA and ASIC must cooperate with each other in certain circumstances.  |
| In addition to having the discretion to share information, APRA and ASIC are required to comply with a request in writing for information from each other unless they formally refuse in writing from the Chair or Chairperson as the case may be. | APRA and ASIC have a discretion to share information and documents with each other subject to restrictions in the secrecy and confidentiality provisions in the APRA Act and ASIC Act respectively. |
| APRA and ASIC are required to notify each other of material breaches in respect of which the other regulator has enforcement responsibilities. | APRA and ASIC have a discretion to notify each other of breaches in respect of which the other regulator has enforcement responsibilities. |

## Detailed explanation of new law

### Cooperation obligation

* 1. While cooperation is an ongoing part of the current operations of both regulators, in line with recommendation 6.9, Part 1 of Schedule 1 to the Bill amends the ASIC Act and APRA Act to mandate that the regulators cooperate with each other as far as practicable.
	2. The purpose of these new provisions is that the regulators support each other in discharging their regulatory functions and powers effectively. [Schedule 1, items 1 and 2, subsection 9AA(1) of the APRA Act and subsection 12AA(1) of the ASIC Act]
	3. The new cooperation requirements will operate alongside existing cooperation and coordination provisions which often relate to specific circumstances or areas of regulatory responsibility. [Schedule 1, items 1 and 2, subsection 9AA(5) of the APRA Act and subsection 12AA(5) of the ASIC Act]
	4. A failure to cooperate will not invalidate the exercise of a function or power by either regulator, nor give rise to any private right of action. [Schedule 1, items 1 and 2, subsections 9AA(3) and 9AA(4) of the APRA Act and subsections 12AA(3) and 12AA(4) of the ASIC Act]
	5. The extent to which the regulators comply with the obligation to co-operate will be overseen by the Financial Regulator Oversight Authority as part of that authority’s mandate to assess and report on APRA and ASIC’s effectiveness.

### Information sharing between regulators

* 1. Part 2 of Schedule 1 to the Bill amends both the APRA Act and ASIC Act to introduce a mandatory information sharing scheme between APRA and ASIC. Under the mandatory information sharing scheme, if either regulator requests information or documents from the other regulator, the other regulator must comply with the request and provide the information or documents. [Schedule 1, items 3 and 8, sections 55A and 55B of the APRA Act and sections 122B and 122C of the ASIC Act]
	2. The existing information sharing arrangements at section 56 of the APRA Act and section 127 of the ASIC Act continue to operate to govern the sharing of information outside of the new mandatory information sharing scheme.
	3. The documents and information that are subject to the mandatory scheme are documents or information that have been given to a regulator in writing. The documents or information must be relevant to the exercise or performance of the requesting regulator’s functions and powers. [Schedule 1, items 3 and 8, section 55C of the APRA Act and section 122D of the ASIC Act]
	4. For example, the types of information that would be included are:
* audit documents prepared for a company and disclosed to a regulator;
* information that has been compulsorily collected from a regulated entity;
* information that has been voluntarily provided to either regulator about the types of financial products a person or company is offering to consumers; and
* mandatory reports or filings provided by a company to a regulator.

[Schedule 1, items 3 and 8, section 55C of the APRA Act and section 122D of the ASIC Act]

* 1. There are exclusions to the information and documents which may be requested. [Schedule 1, items 3 and 8, section 55C of the APRA Act and section 122D of the ASIC Act]
	2. Information or documents that relate to the internal or administrative functions of a regulator are out of scope. This would include material going to the day-to-day operation of an agency, such as leases, procurement or tender agreements, staff employment agreements or contracts for services. [Schedule 1, item 3 and item 8, paragraph 55C(2)(a) of the APRA Act and paragraph 122D(2)(a) of the ASIC Act]
	3. Also out of scope is information or documents that disclose a matter in respect of which the regulator or another person has claimed legal professional privilege. [Schedule 1, items 3 and 8, paragraph 55C(2)(b) of the APRA Act and paragraph 122D(2)(b) of the ASIC Act]
	4. Regulations may also be made which exempt classes or types of information or documents from being within scope. [Schedule 1, items 3 and 8, subsection 55C(3) of the APRA Act and subsection 122D(3) of the ASIC Act]
	5. The Chair of APRA or the Chairperson of ASIC may also determine that a request will not be actioned as it would compromise the functioning of the respective regulator. [Schedule 1, items 3 and 8, subsection 55B(4) of the APRA Act and subsection 122C(4) of the ASIC Act]
	6. This power is intended to be used only in limited circumstances. While the Bill does not include criteria beyond considering that it would compromise the proper functioning of the regulator, there is a level of scrutiny and oversight:
* neither the Chair or Chairperson can delegate this function; [Schedule 1, items 3 and 8, subsection 55B(5) of the APRA Act and subsection 122C(5) of the ASIC Act]
* the Chair or Chairperson must set down their reasons in writing for not complying with the request for information or documents and give this to the Financial Regulator Oversight Authority; and [Schedule 1, items 3 and 8, subsection 55B(6) of the APRA Act and subsection 122C(6) of the ASIC Act]
* the requesting regulator must be notified.
	1. To provide ASIC and APRA with the necessary operational flexibility, the Bill does not prescribe the form or method in which the information or documents must be shared or a timeframe in which the request must be actioned, other than as soon as practicable. This provides the regulators with the opportunity to discuss the nature of the request and the best way to meet the request.
	2. Part 2 of Schedule 1 to the Bill provides that a request may be amended or withdrawn. [Schedule 1, items 3 and 8, subsection 55A(3) of the APRA Act and subsection 122B(3) of the ASIC Act]
	3. A consequential amendment has been made to section 56 of the APRA Act to make clear that it is not an offence if an APRA officer gives information or documents to ASIC in response to a request under the mandatory information sharing scheme. [Schedule 1, item 5, subsection 56(5AB) of the APRA Act]
	4. Once information is shared under the mandatory information sharing regime, section 56 of the APRA Act and section 127 of the ASIC Act provide protections and govern how information can be used and shared by the receiving regulator.
	5. ASIC will be able to use and disclose information it has received from APRA under the mandatory information sharing scheme for the performance of ASIC’s functions and powers. This provides consistency in comparison to how ASIC can use information it receives from APRA under existing section 56 of the APRA Act. [Schedule 1, item 5, subsection 56(5AC) of the APRA Act]
	6. The protections provided by section 56 of the APRA Act will apply to information provided to APRA by ASIC under the mandatory sharing regime. [Schedule 1, item 7, section 56A of the APRA Act]
	7. Unlike the existing discretionary sharing regime, APRA is unable to place conditions on the information it shares with ASIC under the mandatory information sharing scheme.
	8. There are other more specific limitations that exist on the use of certain information that may be shared through the mandatory information sharing scheme. For example, where a party has enlivened their privilege against self-incrimination with one regulator, this would apply to the information or documents in the hand of the next regulator.
	9. There are also a number of protections and limitations on use and disclosure of information that apply under existing Commonwealth legislative provisions or the general law. Some examples of this are:
* privacy legislation.
* equitable duties of confidence.
* whistle-blower protections.
	1. These protections and limitations will continue to apply to any document or information that has been shared between the regulators in compliance with a request. This will only limit how each regulator is able to use a document or information after receiving it under a request.
	2. As previously noted, information that is subject to a claim of legal professional privilege is out of scope of the mandatory information sharing regime. [Schedule 1, items 3 and 8, paragraph 55C(2)(b) of the APRA Act and paragraph 122D(2)(b) of the ASIC Act]

### Notification of breaches of the law

* 1. In addition to the information sharing scheme described in paragraphs 2.7-2.27, Schedule 1 to the Bill requires ASIC and APRA to notify each other where they have a reasonable belief of a material breach of the law for which the other regulator is responsible. [Schedule 1, items 3 and 8, section 55D of the APRA Act and section 122E of the ASIC Act]
	2. The aim of the provisions is to clarify the expectation that where one regulator possesses information about an obvious and significant breach of laws administered by the other, the regulator should pass that information on.
	3. The requirement for a regulator to have a reasonable belief sets the threshold higher than a mere suspicion. This is an objective test based on the facts and circumstances of each case. [Schedule 1, items 3 and 8, section 55D of the APRA Act and section 122E of the ASIC Act]
	4. The laws administered by each regulator are complex and wide-ranging, and it would not be reasonable to expect any staff member at a regulator – however expert – to have a full understanding of the laws administered by another regulator.
	5. It does not require any person to attempt to form a view as to whether specific provisions of the other’s law has in fact been breached. However, if it is sufficiently obvious that a significant breach of the other’s law may have occurred, then the other regulator must be notified.
	6. The Bill does not prescribe the form or timing of the required notification. This provides the regulators with the scope to establish the most efficient system for complying with the legislative requirement.

## Application and transitional provisions

* 1. The amendments apply from the day after Royal Assent.
1. Recommendation 6.11 – Formalising ASIC meeting procedures

## Summary of new law

* 1. Part 3 of Schedule 1 to the Bill amends the ASIC Act to include provisions substantially similar to those set out in sections 27-32 of the APRA Act to deal with the times and places of meetings, how voting is to occur and the passing of resolutions without meetings.

Comparison of key features of new law and current law

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| New law | Current law |
| ASIC must hold meetings that are necessary for the efficient performance and exercise of its functions and powers. | The chairperson must convene a meeting as he or she thinks necessary for the efficient performance of ASIC’s functions. |
| The person presiding at a meeting has a deliberative vote, and if necessary, also a casting vote. | The member presiding at a meeting has a deliberative vote but not a casting vote.  |
| If determined by ASIC, resolutions may be passed without a meeting where a majority of members indicate agreement in accordance with the method determined by ASIC and that majority would have constituted a quorum. | No equivalent.  |

## Detailed explanation of new law

* 1. ASIC must hold the meetings that are necessary for the efficient performance and exercise of its functions and powers. Meetings are to be held at the times and places that the chairperson determines and the chairperson must convene a meeting if requested in writing by 2 or more members. [Schedule 1, item 13, section 103 of the ASIC Act]
	2. A question arising at a meeting is to be determined by a majority of the votes of the members present and voting. The person presiding at the meeting has a deliberative vote and if necessary, also a casting vote. [Schedule 1, item 15, section 107 of the ASIC Act]
	3. ASIC may regulate proceedings at its meetings as it considers appropriate provided they are consistent with the other requirements in Division 4 of the ASIC Act. [Schedule 1, item 15, section 107A of the ASIC Act]
	4. Resolutions can be passed without a meeting provided ASIC has determined that resolutions may be passed in accordance with this section and the method to indicate agreement. The resolution is taken to be passed if a majority of members indicate agreement in accordance with the method determined and that majority would have constituted a quorum at a meeting. [Schedule 1, item 15, section 107B of the Act]

## Application and transitional provisions

* 1. The amendments apply from the day of Royal Assent.