Australian Government
The Treasury

Ministerial Submission

MS22-000942

FOR ACTION - Financial Services Royal Commission – ongoing implementation and next steps

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC: Treasurer - The Hon Dr Jim Chalmers MP

TIMING

Your response and signature by 29 June 2022 is required to support finalisation of the Bills ahead of introduction in the 2022 Spring sittings (MS22-000095 refers).

Recommendations

That you **agree** to finalise the response to the Financial Services Royal Commission (FSRC) by:

- Establishing the Compensation Scheme of Last Resort (CSLR) with the same key design specifications contained in legislation introduced into Parliament in October 2021, with targeted amendments to reflect required updates and recent stakeholder feedback;

Agreed / Not agreed

- Tasking Treasury to review the regulatory framework of Managed Investment Schemes, subject to a further brief on the scope, timing and nature of such a review, including resourcing required;

Agreed / Not agreed

- Establishing the Financial Accountability Regime (FAR) with the same key design specifications contained in legislation introduced into Parliament in October 2021;

Agreed / Not agreed

- **Signing** the letters to the Prime Minister and Minister for Finance to support the establishment of the CSLR and FAR as recommended, with a view to legislating them as a priority in the 2022 Spring sittings;

Signed / More information

- Treasury progressing an examination of the consumer credit licence Point-of-Sale (POS) exemption as part of a broader review of whether the scope of credit laws remain fit for purpose in light of evolving business practices and technologies, subject to a further brief on the scope, timing and nature of such a review, including resourcing required.

Agreed / Not agreed

s 47E(d)

Agreed / Not agreed

Signature	Date: / /2022

KEY POINTS

- The Financial Services Royal Commission (FSRC) made 54 recommendations to Government.
  - Of the recommendations made to Government, 43 have been implemented or completed. An outline of recommendations and their status is at Attachment I.

s 47E(d)

- We recommend that the Government finalise as a priority the response to the FSRC by establishing the CSLR and FAR. These are the two major outstanding legislative measures to be implemented.

Compensation Scheme of Last Resort (CSLR)

- We recommend that you establish a CSLR with the same key design specifications proposed by legislation introduced into the Parliament in October 2021, with targeted amendments to reflect required updates and recent stakeholder feedback.

- Failures of Managed Investment Schemes (MISs) have and will continue to be a significant category of unpaid claims. However, including MISs in the CSLR raises risks and broader design issues, and would not address broader issues regarding the regulatory framework for MISs.

- Accordingly, we recommend against including MISs within scope of the CSLR at this time and instead undertaking a review of the regulatory regime applying to MISs with a view to testing options to strengthen investor protections. Our reasons are set out at Attachment C.

    – If you are agreeable to such a review, we will brief you further, including scope, timing, consultation plans and resourcing requirements.

- The proposed design specifications, and related issues, of the CSLR are set out at Attachments D and E.

- If you decide to include MISs within the scope of the CSLR, we will provide you with further briefing by 8 July 2022 seeking your decision on related design specifications as part of finalising the overall design of the scheme. Your decision by 15 July 2022 will be required to ensure legislation can be drafted for introduction as a 2022 Spring T measure.

    – If policy decisions are unable to be settled by 15 July or further consultation is required on the inclusion of MISs, it is unlikely legislation could be prepared for introduction as a Spring T measure as recommended to the Treasurer in MB22-000095.

Financial Accountability Regime (FAR)

- We recommend you extend the current Banking Executive Accountability Regime (BEAR) by establishing the FAR with the same design specifications proposed by legislation introduced into the Parliament in October 2021.

s 47E(d)

Point-of-Sale (POS) exemption

s 47E(d)

- There are broader issues regarding whether the regulatory perimeter for credit laws remains fit for purpose, due to evolving business models and technologies. Most notably there are questions regarding the exceptions under which Buy Now Pay Later (BNPL) providers operate.

- Treasury recommends that further consideration of the POS exemption be done as part of a broader review of the scope of application of our credit laws. If you agree we will provide separate briefing on the scope, timing and nature of the review, including resourcing.

s 47E(d)

Next steps

- If you agree with our recommendations above, we recommend that you sign the letters to the Prime Minister at Attachment A and the Minister for Finance at Attachment B.

s 47E(d)

  - The letter to the Minister for Finance requests the CSLR related movement of funds.

Clearance Officer
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Financial System Division
22/06/2022

Contact Officer
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Director
Ph: s 22

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Director
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CONSULTATION

Law Division, Department of the Prime Minister and Cabinet, and Department of Finance

ATTACHMENTS

A: Letter to the Prime Minister
B: Letter to the Minister for Finance
C: Compensation Scheme of Last Resort: Managed Investment Schemes
D: Compensation Scheme of Last Resort: Proposed design specifications
E: Compensation Scheme of Last Resort: Design specifications departing from Ramsay Review recommendations
F: Financial Accountability Regime (FAR)
G: Point-of-Sale Exemption
s 47E(d)
I: The Financial Services Royal Commission

ATTACHMENT C – COMPENSATION SCHEME OF LAST RESORT: MANAGED INVESTMENT SCHEMES

- Retail clients hold approximately $130 billion in managed fund investments in Australia, the majority of which is held through products that are managed investment schemes (MISs).

- A MIS is a legal structure rather than a specific product. A MIS is any product where members contribute money that is pooled to make investments. In practice, MISs are generally structured as a trust and the trustee (known as a Responsible Entity (RE)) manages the funds for the benefit of the members.

    - There are a wide range of different kinds of investments that are MISs, which range from conservative funds (such as passive equity index funds) to high-risk funds (such as emerging market funds or complex property funds) or products such as timeshares.

- The RE is required to have an Australian Financial Services Licence (AFSL) and there are currently 450 REs in Australia, of which 402 deal with retail clients and are thus required to be members of AFCA and therefore would be subject to a CSLR levy.

- There have been a number of significant MIS failures where investors have lost their investments. Although these failures are sporadic, they are high profile and often involve significant amounts of money. While there is a lack of comprehensive data, we estimate that investments lost as part of MIS failures since 2009 are approximately $3.5 billion.

- As at 1 June 2022, the Australian Financial Complaints Authority (AFCA) had 334 complaints which relate to failed MISs. The total value of these complaints is estimated to be $34.5 million. If the scope of the CSLR was extended to include MISs (with a claims cap of $150,000), the expected compensation payments and associated AFCA fees for these complaints would be $29.0 million, and this amount (and ongoing claims) would need to be funded by the MIS sector and potentially other financial institutions.

    - The current design of the CSLR includes a levy on the top-10 financial firms to pay compensation costs and associated AFCA fees for unpaid claims accumulated between 1 November 2018 and the date the legislation is introduced. Including MISs would increase the costs to be funded by the top-10 firms from $35.6 million to $66.7 million.

    - We also expect that including MISs within scope of the scheme will result in more MIS-related complaints being lodged with AFCA, further increasing the costs for the scheme.

Managed Investment Schemes and the Compensation Scheme of Last Resort

- Under the proposed design of the CSLR, MIS investors would not be eligible to make a claim for compensation in relation to a failed MIS investment.

- The Ramsay Review recommended that the CSLR should be established and be limited and carefully targeted at the areas of the financial sector with the greatest evidence of need. The Review recommended that the CSLR should initially be restricted to financial advice failures

but should also be designed to be scalable to cover other types of financial services, should significant problems with unpaid compensation arise in the future.

- The Ramsay Review was also clear that effective regulatory settings must exist to ensure that, to the maximum extent possible, financial firms can comply with a requirement to pay compensation owed to consumers.
    - In recommending that the CSLR initially be restricted to financial advice failures, the Ramsay Review noted that the inclusion of such failures within the CSLR was appropriate given the significant regulatory reform that had improved the quality of advice concerning more complex products.
- The subsectors proposed to be within scope of the CSLR (personal financial advice, credit provision, credit intermediation and securities dealing) have been subject to a number of reforms over the past decade which have significantly reduced the risk of misconduct and failure. In our view, there is a need to review the regulatory framework applying to MISs before the same can be said for the adequacy of regulatory settings for MISs.
    - For example, the UK banned issuers and distributors from marketing fund products with similar features to high risk MISs to retail investors from 2020.
    - In Australia, the design and distribution obligations (DDOs), which commenced on October 2021, was a key reform affecting the distribution of MISs. DDO requires MIS issuers to design products to meet the needs of investors and to distribute the products in a more targeted manner. If the DDO regime works as expected, high risk MISs should not be offered to retail investors. However, it is still too early to assess whether DDO is sufficient.

s 47E(d)

[redacted]

Application of Compensation Scheme of Last Resort costs to industry – design considerations

- The CSLR levy is currently designed to apply to entities in each in-scope subsector that provide financial services or products to retail clients. For example, financial advisers that only provide advice to wholesale clients would not be subject to the CSLR levy, and similarly credit providers that only provide business credit only are not subject to the levy.

s 47E(d)

[redacted]

s 47E(d)

- Within each subsector there are metrics to apportion levies across each sub-sector; for example, amount of credit provided during the period (in measuring size within the credit provision sub-sector), and number of advisers and the number of days they were authorised to act on behalf of a licensee (in measuring relative size within the advice sub-sector).

s 47E(d)

- Industry codes across insurance and mortgage broking as well as codes in the credit space heighten conduct obligations on participants to reduce risk of misconduct. Likewise, government has taken significant reforms to professionalise conduct in the financial advice sector.

Sustainability of the Compensation Scheme of Last Resort

- Historic data for failed MISs indicate a high degree of volatility in claims for failed MISs. Where large MIS failures have occurred they have been associated with a significant number of consumers that have suffered large losses.

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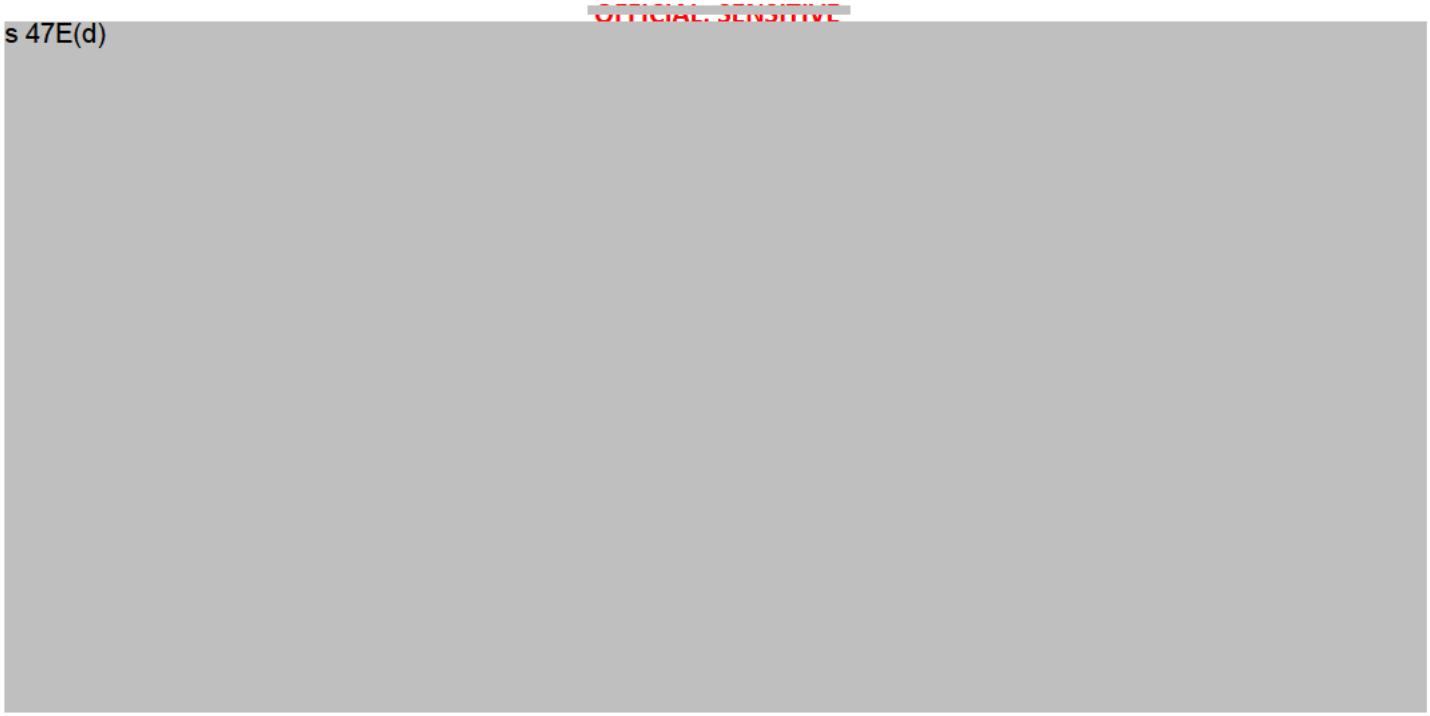
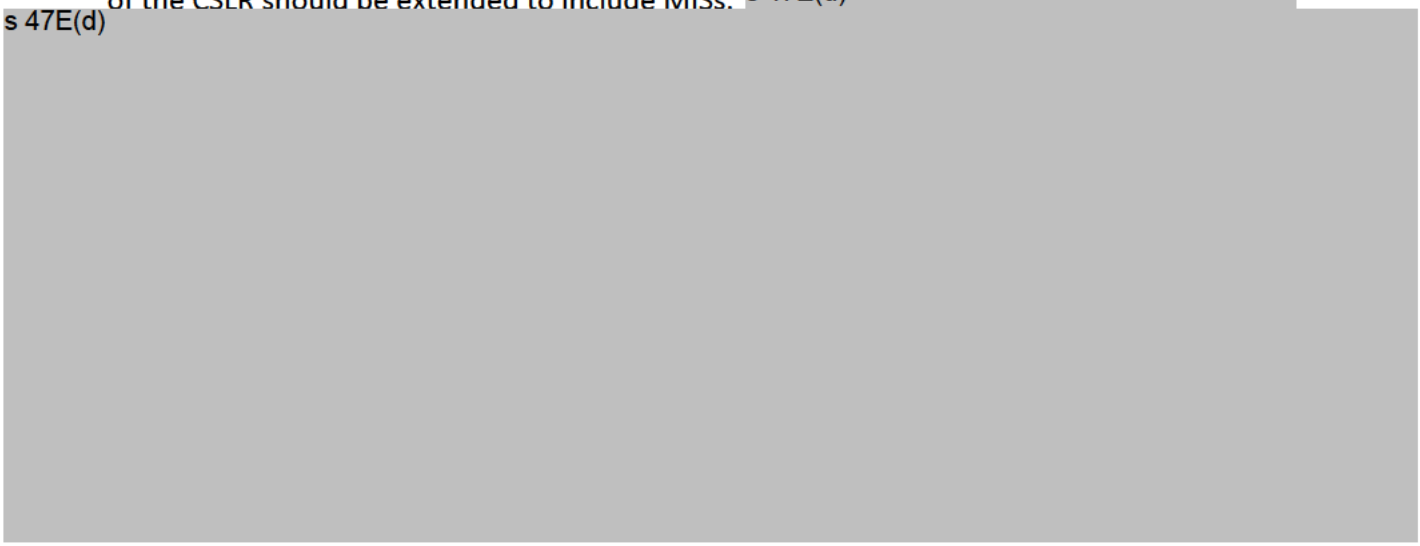


Review of regulatory framework for MISs

- Taking these issues into account, we recommend deferring a decision about whether the scope of the CSLR should be extended to include MISs. s 47E(d)

s 47E(d)



Sterling Group collapse

- A total of 566 people entered into investments with the Sterling Group. Some of these investments related to the Sterling Group MIS, while other investors invested in preference shares issued by two Sterling Group companies.

- 101 of these investors also entered into a 'Sterling New Life Lease Arrangement'. When the Sterling Group collapsed these retiree investors lost their investment and the house that they were living in under long-term leases connected with the Lease Arrangement.

s 47E(d)

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ATTACHMENT D – COMPENSATION SCHEME OF LAST RESORT: PROPOSED DESIGN SPECIFICATIONS

Design Specification	As introduced 28 October 2021	Treasury Proposal for re-introduction	Rationale	Agreed (Yes/No)
Scope	The CSLR will consider claims for unpaid AFCA determinations from 1 November 2018 for unpaid AFCA determinations from 1 November 2018 relating to the following activities: • personal advice on relevant (tier 1) financial products to retail clients • credit intermediation (e.g. mortgage broking, debt management firms) • securities dealing to retail clients • credit provision		The scope of the CSLR would be carefully targeted at the areas of the financial sector with the greatest evidence of need, consistent with the recommendation of the 2017 *Review of the financial system external dispute resolution and complaints framework* (Ramsay Review) and the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (FSRC), with the exception of highly speculative and risky financial products and services to mitigate the risk of moral hazard. The CSLR will be scalable over time. Consideration of the inclusion or exclusion of financial products and services in the CSLR would occur in the context of the intended periodic reviews of the scheme and require changes of legislation to ensure an appropriate consideration by parliament.	**YES / NO**
Consumer eligibility	• Claimant has 12 months to notify AFCA of unpaid claim • Liable firm must be assessed as being unlikely to pay (but will not need to be insolvent) • Claim is not covered by another statutory compensation scheme (e.g. National Guarantee Scheme)		Eligibility for compensation under the CSLR would be broadly consistent with the recommendations of the Ramsay Review.	**YES / NO**
Merit review of eligibility decisions	• AFCA determinations are not reviewable under the CSLR • Claimant has no right of merit review for CSLR-related decisions		Eligibility is tightly prescribed in the CSLR legislation and there is very little scope for scheme operator discretion. As a result, merit review is not considered necessary.	**YES / NO**

Design Specification	As introduced 28 October 2021	Treasury Proposal for re-introduction	Rationale	Agreed (Yes/No)
Compensation cap	$150,000 per AFCA determination. No interest payable on compensation.		The compensation cap is broadly equivalent to the £85,000 cap that applies to the UK Financial Services Compensation Scheme. Increasing the compensation cap would require a corresponding increase to the industry levy and would result in additional fiscal impact.	**YES / NO**
Scheme cap	$250 million		The scheme cap provides a mechanism to balance the interests of consumers and industry. On the one hand, the scheme cap provides scope for the CSLR to respond to a range of circumstances, including a potentially significant volume of claims from a large financial failure. On the other hand, the scheme cap provides a degree of certainty to industry by specifying the maximum potential levies payable by industry in any one levy year.	**YES / NO**
Subsector caps	$10 million	$20 million	Treasury recommends raito accommodate the anticipated projections of the demand on the scheme in ordinary circumstances. **s 47E(d)** [redacted] A higher subsector cap would reduce the likelihood of the need for Ministerial involvement in the CSLR in ordinary circumstances.	**YES / NO**
Capital reserve	$5 million, cumulatively built over the scheme's first 3 levy period. From the fourth year of the scheme's operation, the CSLR operator would have the discretion to collect an amount of levies in each claim period as		The purpose of the capital reserve is to cater for circumstances where expected or actual	**YES / NO**

Design Specification	As introduced 28 October 2021	Treasury Proposal for re-introduction	Rationale	Agreed (Yes/No)
	appropriate to replenish the capital reserve to its prescribed $5 million level. The Commonwealth would fund the capital reserve contribution in the first levy period (2023-24).		subsector outlays exceed the amount collected through the annual levy.	
Establishment costs	The Government would provide grant funding to AFCA to establish CSLR operator. Funding of $500,000 in the 2019-20 Budget and $2.192 million in the 2021-22 MYEFO has been appropriated to Treasury for the purpose of providing a Grant to AFCA to establish the CSLR operator. In recognition of work AFCA has already done on CSLR design, $500,000 of the establishment costs have already been paid to AFCA. ASIC would absorb the costs incurred with establishing its IT solution as part of issuing and collecting the industry levy, and costs incurred as part of administering the one-off levy to the top-10 largest financial services firms to address the backlog of accumulated claims.		Industry has expressed broad concern that the costs of the CSLR would be significant. Government funding of the CSLR operator establishment costs would reduce some of the cost burden on industry.	**YES / NO**
One-off levy to be imposed onto the top-10 largest banks and insurers	The backlog of claims relating to complaints made to AFCA between 1 November 2018 and the day the CSLR legislation is introduced into the House of Representative would be funded by Australia's ten largest banking and insurance groups (excluding health insurers) as measured by 'total income' in the ATO Report of Tax Entity Information, **2018-19**.	The backlog of claims relating to complaints made to AFCA between 1 November 2018 and the day the CSLR legislation is introduced into the House of Representative would be funded by Australia's ten largest banking and insurance groups (excluding health insurers) as measured by 'total income' in the ATO Report of Tax Entity Information, **2019-20**.	Treasury recommends updating the legislation to reflect the most up-to-date public ATO *Report of Tax Entity Information*.	**YES / NO**

Design Specification	As introduced 28 October 2021	Treasury Proposal for re-introduction	Rationale	Agreed (Yes/No)
Ongoing costs in first claim year	The Government would provide funding to the CSLR operator to address the costs of the scheme in the first claim year. These costs would include: • consumer compensation payments and associated AFCA fees; • capital reserve contribution; and • CSLR Co. operating costs. Funding was appropriated in the 2021-22 MYEFO for the purpose of meeting these costs. A movement of funds will be sought to account for the delay to the passage of the CSLR Bills.		Government funding in the first claim year would provide for transitional arrangement that would ensure the CSLR could commence from 1 July 2023. Without it, the ability to begin paying compensation would be significantly delayed. Additionally, in this circumstance, industry (other than the top 10 banks and insurers) would receive two separate levies during the first levy period, the first issued as early as possible within 2033-24 to cover claims in the 2023-24 year and the second issued in January 2024 to cover claims in the 2024-25 year.	**YES / NO**
Ongoing levy	The ongoing industry levy would fund: • consumer compensation payments made under the CSLR plus associated AFCA fees; • capital reserve contributions; • CSLR Co. operating costs; and • ASIC administration costs.		Ongoing industry funding is a critical feature of the CSLR which is consistent with the recommendations of the Ramsay Review and the Financial Services Royal Commission. There is broad concern among industry that the costs of the scheme would be significant, particularly operating and administration costs.	**YES / NO**
Levy period	Definition of the levy period in the Bills means a financial year starting on or after **1 July 2022**.	Definition of the levy period in the Bills means a financial year starting on or after **1 July 2023**.	Updated to reflect the passage of time.	**YES / NO**
Minimum levy threshold	The Proposals Paper taken to consultation contained a minimum levy threshold of $1,000 – to be prescribed in regulations.	Treasury recommends removing the $1,000 minimum levy threshold and instead levying all in-scope licensees a minimum levy of $100.	Feedback from stakeholders during consultation suggested that a minimum levy threshold would be inequitable and ineffective at shielding smaller firms. Many small firms operate as authorised representatives of a larger licensee,	**YES / NO**

Design Specification	As introduced 28 October 2021	Treasury Proposal for re-introduction	Rationale	Agreed (Yes/No)
			who would pass on the cost of the levy to their authorised representative network. The revised approach would make the levy simpler and more equitable and would be broadly supported by industry stakeholders.	
Governance	**Administrator:** Scheme operator is a subsidiary of AFCA Ltd (CSLR Co.). The Minister would be required to authorise CSLR Co. to administer scheme. **Regulator:** ASIC ensures administration in accordance with law. Where CSLR has paid compensation on behalf of a firm, ASIC will be required to cancel the firm's licence(s), will have the ability to ban directors where compensation is paid out on behalf of a financial firm, and deregister a company for non-payment of scheme levy, late payment penalty or shortfall penalty. **Ministerial direction:** Minister can make a determination when notified by scheme operator (e.g. handling large claims by directing CSLR Co. to levy out-of-scope subsectors). **Periodic Review:** There would be an intention that the scheme be reviewed every five years. The Minister would determine the terms of reference for each review. Matters to be considered could include the scope of the scheme, caps, inclusion of court and tribunal decisions etc.		Governance arrangements for the CSLR are broadly consistent with the recommendations of the Ramsay Review.	**YES / NO**
Administrative Decisions (Judicial Review) Act	Applications may be made under the Administrative Decisions (Judicial Review) Act (AD(JR) Act) for decisions made under the scheme operator.		The operation of the AD(JR) Act provides an avenue of judicial review and accountability in relation to the CSLR operator's decision making.	**YES / NO**
Ministerial intervention	CSLR Co. must notify the Minister when any subsector cap would be exceeded by updated claims, AFCA fees and proportion of administration costs (e.g. where a large failure occurs). The Minister may determine to:		These mechanisms will assist the Minister to balance the interests of claimants and scheme sustainability for those financial firms that are not responsible for the misconduct giving rise to	**YES / NO**

Design Specification	As introduced 28 October 2021	Treasury Proposal for re-introduction	Rationale	Agreed (Yes/No)
	• levy more funds from the subsector in excess of the subsector cap; • levy more funds from any of the other 21 subsectors, including from prudentially regulated activities; or • require payments be made over multiple years. The Minister cannot direct levies to be issued above a scheme cap of $250 million per year.		the CSLR claims but are nonetheless being required to fund it.	
CSLR Co. Board	3 members: • Independent Chair (appointed by Minister) • AFCA Ltd **Chair** • Actuary with at least 5 years' actuarial experience	3 members: • Independent Chair (appointed by Minister) • AFCA Ltd **Board Member** • Actuary with at least 5 years' actuarial experience	CSLR Co., as scheme operator, will perform a targeted function with little discretion. CSLR Co. will be a public company which must have a minimum 3 person board. To provide confidence in the scheme operator's activities, the Minister would appoint the Chair. AFCA would appoint the remaining two board members, that is, a qualified actuary to ensure the scheme has technical skill and an ordinary board member of AFCA Limited to ensure effective working arrangements with AFCA. AFCA's preference is to have two places on the CSLR Co. Board, such that AFCA would appoint one industry and one consumer Director from the AFCA Board onto the CSLR Co. Board. Treasury's view is that the operational limitations imposed on the CSLR by the legislation do not warraE than 3 board members.	**YES / NO**

ATTACHMENT E – COMPENSATION SCHEME OF LAST RESORT: DESIGN SPECIFICATIONS DEPARTING FROM RAMSAY REVIEW RECOMMENDATIONS

Scope – exclusion of court or tribunal decisions

The Ramsay Review recommended that consumers and small businesses that have an unpaid EDR determination, court judgment or tribunal award should be eligible to make a claim to a CSLR.

The CSLR has been designed to exclude court or tribunal decisions as a basis for eligibility for compensation under the One factor underlying this design feature is the lack of data to inform a sufficient understanding of the magnitude of costs associated with court and tribunal decisions. This cost uncertainty has the potential to expose the Commonwealth and industry to costs significantly higher than current estimates. The eligibility of court and tribunal decisions for compensation under the scheme can be considered as part of the first periodic review to be undertaken five years followings its commencement.

Scope – not targeted to greatest area of need

The Ramsay Review recommended that a CSLR should be carefully targeted at the areas of the financial sector with the greatest evidence of need. The Ramsay Review further stated that a CSLR should initially be restricted to financial advice failures.

s 47E(d)

For further detail on the exclusion of MISs at this time refer to Attachment C.

AFCA determinations to be eligible under the CSLR whether made before and after establishment

The Ramsay Review recommended that a CSLR should only apply to unpaid determinations made after a CSLR is established.

The CSLR is designed such that a relevant AFCA determination made from the commencement of the AFCA scheme on 1 November 2018 would be eligible for compensation under the scheme. This ensures that eligible consumers who have an AFCA determination would have access to redress through the scheme, irrespective of whether that determination was made before or after the establishment of the scheme.

Time limits for making claims

The Ramsay Review recommended that applications must be lodged with a CSLR by a consumer within 12 months of the consumer having completed specified reasonable steps to obtain compensation.

The CSLR has been designed such that to be eligible for compensation under the scheme consumers must notify AFCA within 12 months of the date of the determination that they remain unpaid, and, where appropriate, AFCA has taken steps to require the firm to pay. This design appropriately imposes an obligation on consumers to notify AFCA that their determination remains unpaid, while placing the obligation to require the firm to pay onto AFCA as the maker of the determination.

Compensation cap

The Ramsay Review recommended that a cap should apply to the level of compensation that a CSLR is able to provide, and that the cap should be aligned with that which applies under the AFCA scheme. AFCA may make determinations for compensation up to $542,500 relating to financial products and services that would be eligible for compensation under the CSLR.

The compensation cap seeks to balance the interests of consumers with the sustainability of the scheme by limiting the cost on industry for funding the scheme on an ongoing basis. An increase to the compensation cap would result in an increase to the top-10 levy, Government costs and the ongoing industry levy.

Governance – board composition

The Ramsay Review recommended that a CSLR should be governed by an independent board with an independent chair and equal numbers of directors with industry and consumer backgrounds, consistent with the AFCA scheme.

The CSLR governance arrangements have been designed to provide the Minister with an ongoing role in appointing the independent Chair of the Board of the authorised operator of the scheme. A member of the AFCA Board and a qualified actuary who has at least 5 years' experience in actuarial analysis would also be appointed to the Board of the authorised operator.

AFCA's preference is to have two places on the CSLR Co. Board, such that AFCA would appoint one industry and one consumer Director from the AFCA Board onto the CSLR Co. Board. Treasury's view is that the operational limitations imposed on the CSLR by the let proportion of their capital in investment funds.

ATTACHMENT F – FINANCIAL ACCOUNTABILITY REGIME (FAR)

Key points

- The FSRC recommended extending the Banking Executive Accountability Regime (BEAR) to all APRA-regulated industries and having APRA and ASIC jointly administer the regime.

s 47E(d)

- FAR would include deferred remuneration obligations that require an accountable entity to defer payment of at least 40 per cent of each accountable person's variable remuneration for a minimum period of four years. Loss of deferred remuneration is designed to be a penalty for misconduct within the regime, however, it is the accountable entity that determines the amount of reduction when an accountable person fails to comply with their obligations. The accountable person may not have any variable remuneration left after the reduction.
  - While deferred remuneration is consequential in the banking sector, the lack of variable remuneration in the superannuation and insurance sectors is likely to limit their deterrent effect in these sectors.
- Individual civil penalties were not a recommendation of the FSRC and are not a feature of the BEAR. s 47E(d)

s 47E(d)

- On balance, we recommend establishing the FAR with the same specifications proposed by legislation introduced into the Parliament in October 2021.

- The FAR provides for the Minister to make rules, known as Minister rules, prescribing matters under the FAR. The Minister rules are intended to operationalise the FAR legislation and are only required if the FAR Bill is passed. The Minister rules would outline the particular responsibilities and/or positions that would be captured by the FAR for each industry, and what the enhanced notification thresholds would be for submitting accountability statements and maps to the regulators.

    - If you agree to the reintroduction of the FAR Bill as is, we will provide further briefing on the Minister rules and requesting your approval to undertake consultation. We recommend the Minister rules consultation takes place concurrently with introduction into Parliament in the Spring.

Background

Financial Accountability Regime

- The FSRC made several recommendations relating to extending the BEAR:

    - The BEAR should be extended to the APRA-regulated superannuation industry, insurance industry, and financial services institutions (Recommendations 3.9, 4.12 and 6.8).

    - ASIC and APRA should jointly administer the BEAR (Recommendation 6.6).

    - An authorised deposit-taking institution (ADI) and accountable person must deal with APRA and ASIC (as the case may be) in an open, constructive and co-operative way (Recommendation 6.7).

    - A recommendation directed at APRA to add end-to end product responsibilities to the list of prescribed responsibilities for the BEAR (Recommendation 1.17).

- The previous government also made an additional commitment in its response to the FSRC to extend the regime beyond prudentially regulated sectors. However, in the consultation process for the FAR, it announced that any such extension would be considered after the implementation to prudentially regulated sectors.

- The FAR was previously introduced through the Financial Accountability Regime Bill 2021 (the FAR Bill), and the associated Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021. Both Bills lapsed at the prorogation of the previous Parliament.

- The FAR Bill was referred to the Senate Economics Legislation Committee (Senate Committee), which recommended the Bill be passed.

- The FAR would impose:

  - accountability obligations – requiring entities, their directors and their most senior and influential executives to conduct their business in a certain manner (that is, honesty and with care, skill and diligence);

  - key personnel obligations – requiring entities to nominate senior and influential executives to be responsible for all areas of their business operations;

    : FAR requires the list of prescribed responsibilities to be expanded from BEAR to ensure that all components of the product value chain are captured. Entities are to ensure there is no gap in accountability so that there is end-to-end product coverage.

  - deferred remuneration obligations – requiring entities to defer at least 40 per cent of the variable remuneration (for example, bonuses and incentive payments) of their directors and most senior and influential executives for a minimum of 4 years, and to reduce their variable remuneration for non-compliance with their accountability obligations; and

  - notification obligations – requiring entities to meet the core notification obligations by providing the regulators with certain information about their business, directors and most senior and influential executives; and secondly, for entities above a certain threshold, which would be determined by the Minister, to meet enhanced notification obligations by preparing and submitting accountability statements and accountability maps.

- The FAR would apply to the following classes of financial institution (referred to as accountable entities): ADIs; authorised non-operating holding companies (NOHCs) of ADIs; general insurers; authorised NOHCs of general insurers; life companies; registered NOHCs of life companies; private health insurers; and registrable superannuation entity licensees (or RSE licensees).

- The FAR would also apply to the directors and most senior and influential executives of these entities (referred to as accountable persons) who:

  - have actual or effective senior executive responsibility for management or control of the accountable entity or its relevant group; or

  - hold particular responsibilities and/or positions prescribed in the rules made by the Minister

ATTACHMENT G – CONSUMER CREDIT LICENCING POINT OF SALE EXEMPTION

Key Points

- The FSRC recommended that the exemption of retail dealers from the operation of the National Consumer Credit Protection Act 2009 (Cth) should be abolished (recommendation 1.7) due to concerns around the inappropriate provision of credit

- Retailers are exempt from having to hold a credit licence under the *National Consumer Credit* Protection *Act 2009* (Credit Act) when engaging in credit activities on behalf of a licenced credit provider wholly or predominantly in relation to their supply of goods or services.

  – For example, staff at Harvey Norman can assist customers to apply for loans from Latitude Finance Australia to purchase white goods, without Harvey Norman holding a credit licence or being an authorised credit representative of Latitude.

- Consequentially, retailers operating under the point of sale exemption are also exempt from a range of obligations that apply to licensees, such as disclosure obligations and membership of dispute resolution schemes.

  – However, the ultimate credit provider still remains subject to all of these Credit Act obligations, and responsible lending obligations, and can be found liable for breaches (including any committed by the retailer acting on their behalf). Consumers can seek remedies through AFCA.

s 47E(d)

- There are broader issues regarding whether the regulatory perimeter for credit laws remains fit for purpose due to evolving business models and technologies. Most notably there are questions regarding whether exceptions under which Buy Now Pay Later (BNPL) providers operate remain appropriate (both for BNPL and other products).

  – Treasury recommends that further consideration of the point of sale exemption should occur as part of a broader consideration of the scope of application of our credit laws. This could commence in 2023 as part of an examination of the regulation of BNPL.

Background

- The FSRC found instances where retailers (in order to obtain sales) did not provide accurate information about the borrower's financial situation to the credit provider, resulting in the inappropriate provision of credit.

- It recommended the removal of the exemption as a means of enabling enforcement directly against the retailer for breaches in addition to against the credit provider.
- The Royal Commission cited concerns that:
  - retailers are not subject to entry or conduct standards;
    : However, a licensee's obligations include ensuring that retailers acting on their behalf comply with the law, and are competent and adequately trained.
  - ASIC has no power to exclude from the market any who engage in conduct that is dishonest or incompetent;
    : ASIC did have limited banning powers. These have been substantially expanded since that time (see below).
  - retailers have no responsible lending obligations;
    : However, the licensee does have responsible lending obligations and the removal of the exemption would not extend those obligations to retailers.
  - consumers may be unable to obtain remedies for their conduct.
    : However, consumers do have rights against the licensee for action by the retailer on their behalf.
- In January 2020, Treasury held roundtable meetings with industry associations, seeking views as to the implications of removing the exemption.

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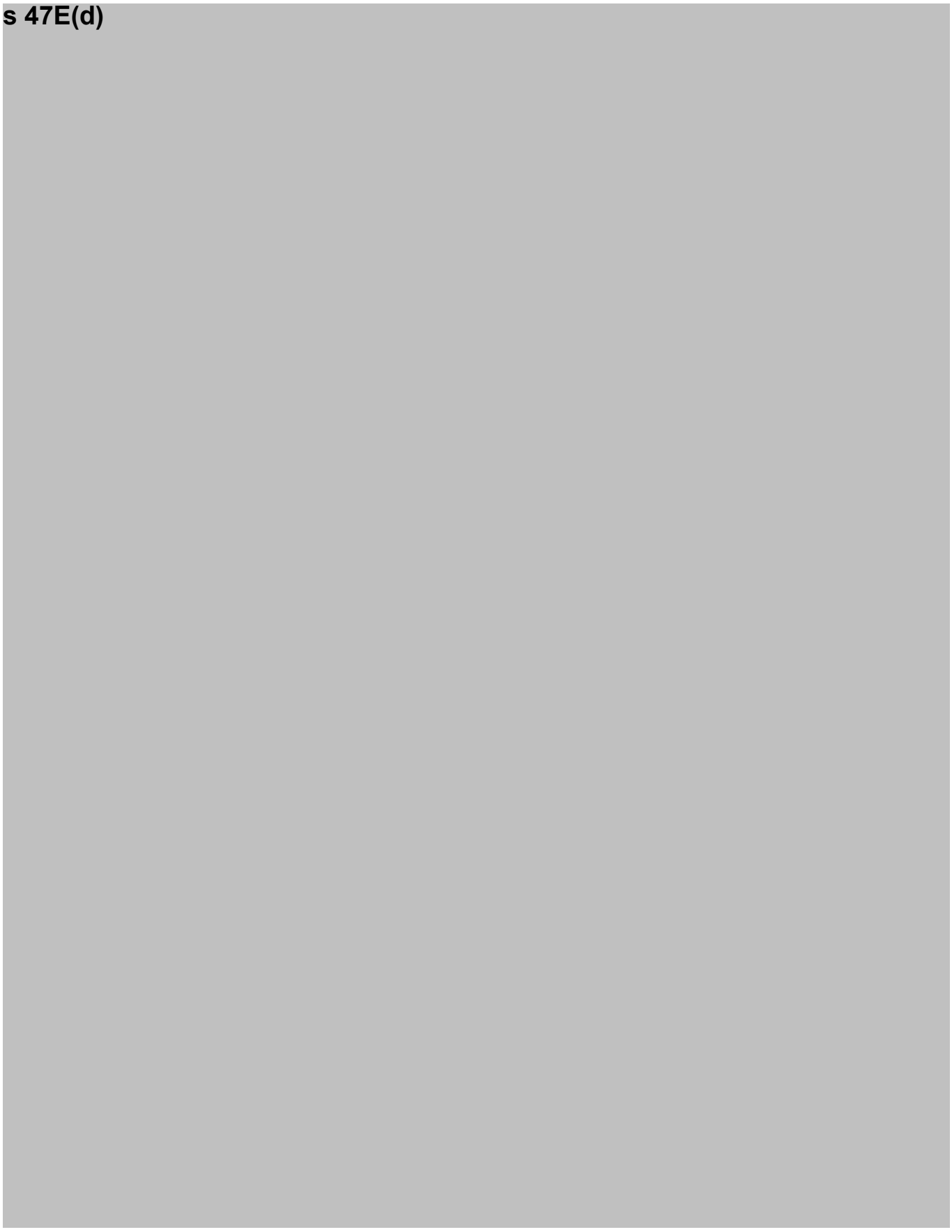
- Subsequent to the FSRC, the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators) Act 2020* implemented ASIC Enforcement Review Taskforce's recommendations which:
  - introduce broad criminal and civil penalties in the Credit Act for false or misleading documentation that apply to all credit activities (including those under the point of sale exemption by retailers or their employees); and
  - broadened ASIC's power to ban persons (including persons operating under the exemption) engaging in credit activities if they have or are likely to contravene a credit law, been convicted of fraud, are not fit and proper, not adequately trained or competent, or for other prescribed reasons.

- Also subsequent to the Royal Commission, the Design and Distribution Obligation and the Product Intervention Power have been introduced – both of which apply to retailers operating under the point of sale exemption.

s 47E(d)



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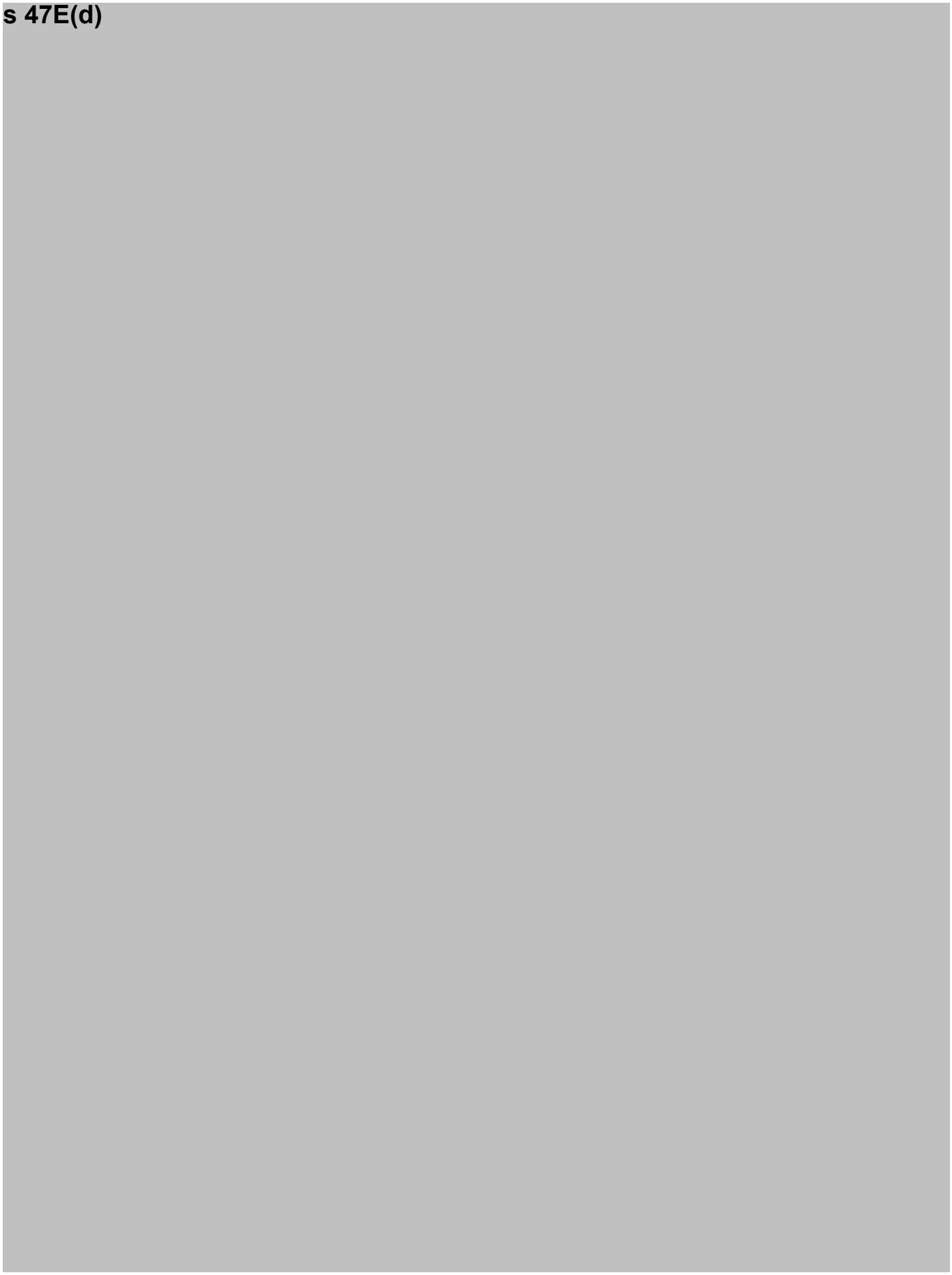

s 47E(d)

ATTACHMENT I – FINANCIAL SERVICES ROYAL COMMISSION

Financial Services Royal Commission – state of play

The Royal Commission made 76 recommendations for reform:

- 54 were directed to the Government;
- 12 to the regulators; and
- 10 to the industry.

- In addition to the 54 recommendations directed to the Government, a further 18 additional commitments were made based on observations in the Royal Commission's final report.

Status of the 54 recommendations directed to Government

FSRC recommendations completed or introduced

- 54 FSRC recommendation were to Government.
- 43 recommendations completed.

48 recommendations already implemented

Recommendation	Completed by	Legislation takes effect (industry required to comply)
1. Recommendation 1.1 — The National Consumer Credit Protection Act should not be amended to alter the obligation from assessing credit to be 'not unsuitable' to suitable.	Required no action	Not applicable
2. Recommendation 1.2 — Introduce a new best interest duty for mortgage brokers	Legislation passed Parliament on 6 February 2020.	1 January 2021
3. Recommendation 1.3 — Mortgage brokers' remuneration structures should be changed so that the borrower and not the lender, should pay the mortgage broker a fee for acting in connection with home lending.	Legislation passed Parliament on 6 February 2020. An alternative was implemented: requiring the value of upfront commissions to be linked to the amount drawn down instead of the loan amount; banning campaign and volume-based commissions and payments; and capping	1 January 2021

		soft dollar benefits and limiting claw back periods.	
4.	Recommendation 1.9 — the National Consumer Credit Protection Act should not be amended to extend its operation to lending to small businesses.	Required no action.	Not applicable
5.	Recommendation 2.1 — the law should be amended to provide that to provide that ongoing fee arrangements for financial advice must be renewed annually by the client; must record in writing each year the services that the client will be entitled to receive and the total of the fees that are to be charged; and may neither permit nor require payment of fees from any account held for or on behalf of the client except on the client's express written authority.	Legislation passed Parliament on 25 February 2021 An alternative was implemented: removing requirements for annual renewal of ongoing fee arrangements; and requiring fee disclosure statement to relate to the same period every year.	1 July 2021
6.	Recommendation 2.2 — the law should be amended to require financial advisers, before providing personal advice to a retail client, to give to the client a written statement explaining simply and concisely why the adviser is not independent, impartial and unbiased.	Legislation passed Parliament on 25 February 2021	1 July 2021
7.	Recommendation 2.4 — Grandfathering provisions for conflicted remuneration in financial advice should be repealed.	Legislation passed 14 October 2019	1 January 2021
8.	Recommendation 3.2 — Deduction of any advice fee (other than for intra fund advice) from a MySuper account should be prohibited.	Legislation passed Parliament on 25 February 2021 An alternative was implemented to enable one off advice fees to be able to be deducted from MySuper accounts.	1 July 2021, with a 12-month transitional period commencing 1 July 2021 for arrangements entered into before 1 July 2021.
9.	Recommendation 3.3 — Deduction of any advice fee (other than for intra fund advice) from superannuation accounts other than	Legislation passed Parliament on 25 February 2021	1 July 2021, with a 12-month transitional period commencing 1 July 2021 for

	MySuper accounts should be prohibited unless the requirements about annual renewal, prior written identification of service and provision of the client's express written authority set out in Recommendation 2.1 in connection with ongoing fee arrangements are met.		arrangements entered into before 1 July 2021.
10.	Recommendation 3.6 —The SIS Act should be amended to prohibit trustees of a regulated superannuation fund, and associates of a trustee, acting in a manner that may reasonably be understood by the recipient to objective of having the recipient nominate the fund as a default fund or having one or more employees of the recipient apply or agree to become members of the fund.	Legislation passed on 4 April 2019	6 April 2019
11.	Recommendation 3.7 —Breach of the trustee's covenants or the director's covenants set out in the SIS Act should be enforceable by action for civil penalty.	Legislation passed on 4 April 2019	6 April 2019
12.	Recommendation 4.2 —remove the exclusion of funeral expenses policies from the definition of 'financial product'; and put beyond doubt that the consumer protection provisions of the ASIC Act apply to funeral expenses policies.	Legislation passed on 6 February 2020	6 April 2019
13.	Recommendation 4.7 — The unfair contract terms provisions in the ASIC Act should apply to insurance contracts regulated by the Insurance Contracts Act.	Legislation passed on 6 February 2020	5 April 2021
14.	Recommendation 4.11 — the Corporations Act should be amended to require that AFSL holders take reasonable steps to co-operate with AFCA in its resolution of particular disputes, including, in particular, by making available to AFCA all relevant	Regulation made on 4 April 2019	6 April 2019

	documents and records relating to issues in dispute.		
15.	Recommendation 4.13 —Treasury, in consultation with industry, should determine the practicability, and likely pricing effects, of legislating universal key definitions, terms and exclusions for default MySuper group life policies.	Policy consultation concluded on 26 April 2019	Not applicable
16.	Recommendation 6.1 —The 'twin peaks' model of financial regulation should be retained (recommendation made in relation to suggestions that there should be a standalone superannuation regulator).	Required no action	Not applicable
17.	Recommendation 6.13 —APRA and ASIC should each be subject to at least quadrennial capability reviews. A capability review should be undertaken for APRA as soon as is reasonably practicable.	The then government's response to the APRA capability review was released 17 July 2019	Not applicable
18.	Recommendation 1.6 — Australian Credit Licence holders (ACL) should be bound by information-sharing and reporting obligations in respect of mortgage brokers (provide information to new employers) and make necessary inquiries to determine the nature and extent of a mortgage broker's misconduct and where there is sufficient information to suggest that a mortgage broker has engaged in misconduct, tell affected clients and remediate those clients promptly.	Legislation passed 10 December 2020.	1 October 2021
19.	Recommendation 1.15 — Establish an enforceable codes framework that enables ASIC to approve codes of conduct. Industry codes approved by ASIC to include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law; and a framework for the establishment and		Powers given to ASIC on Royal Assent

	imposition of mandatory financial services industry codes.		
20.	Recommendation 2.7 — all Australian Financial Services Licensees (AFSLs) should be required, as a condition of their licence, to give effect to reference checking and information-sharing protocols for financial advisers, as currently applies under the ABA's protocol		1 October 2021
21.	Recommendation 2.8 —All AFSL and ACL holders should be required, as a condition of their licence, to report 'serious compliance concerns' about individual financial advisers and mortgage brokers to ASIC on a quarterly basis.		1 October 2021
22.	Recommendation 2.9 — All AFSL holders should be required, when they detect that a financial adviser has engaged in misconduct in respect of financial advice given to a retail client, make whatever inquiries are reasonably necessary to determine the nature and full extent of the adviser's misconduct; and where there is sufficient information to suggest that an adviser has engaged in misconduct, tell affected clients and remediate those clients promptly.		1 October 2021
23.	Recommendation 3.1 — The trustee of an RSE should be prohibited from assuming any obligations other than those arising from or in the course of its performance of the duties of a trustee of a superannuation fund.		1 July 2021
24.	Recommendation 3.4 — Hawking of superannuation products should be prohibited. That is, the unsolicited offer or sale of superannuation should be prohibited except to those who are not retail clients and except for offers made under an eligible employee share scheme. The law should be amended to make clear that contact with a person		5 October 2021

	during which one kind of product is offered is unsolicited unless the person attended the meeting, made or received the telephone call, or initiated the contact for the express purpose of inquiring about, discussing or entering into negotiations in relation to the offer of that kind of product.		
25.	Recommendation 3.8 —The roles of APRA and ASIC with respect to superannuation should be adjusted, as referred to in Recommendation 6.3.		Generally 1 January 2021; however, AFSL requirement for non-public offer funds was 1 July 2021, and prohibition on indemnification of penalties was 1 January 2022.
26.	Recommendation 4.1 —Consistently with Recommendation 3.4, which prohibits the hawking of superannuation products, hawking of insurance products should be prohibited.		5 October 2021
27.	Recommendation 4.3 —A Treasury-led working group should develop an industry-wide deferred sales model for the sale of any add-on insurance products (except policies of comprehensive motor insurance). The model should be implemented as soon as is reasonably practicable.		5 October 2021
28.	Recommendation 4.4 —ASIC should impose a cap on the amount of commission that may be paid to vehicle dealers in relation to the sale of add-on insurance products.		1 January 2021
29.	Recommendation 4.5 —the Insurance Contracts Act should be amended, for consumer insurance contracts, to replace the duty of disclosure with a duty to take reasonable care not to make a misrepresentation to an insurer		5 October 2021
30.	Recommendation 4.6 – the Insurance Contracts Act should be		1 January 2021

	amended so that an insurer may only avoid a contract of life insurance on the basis of non-disclosure or misrepresentation if it can show that it would not have entered into a contract on any terms.		
31.	Recommendation 4.8 — The handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of 'financial service'.		Since 1 January 2021, claims handling and settling is a financial service which requires a licence by 1 January 2022. Applications for AFSL required to be lodged by 30 June 2021.
32.	Recommendation 6.3 — The roles of APRA and ASIC in relation to superannuation should be adjusted to accord with the general principles that, APRA, as the prudential regulator for superannuation, be responsible for ensuring that financial promises made by superannuation entities are met and ASIC to regulate the relationship between RSE licensees and individual consumers.		Generally 1 January 2021; however, AFSL requirement for non-public offer funds was 1 July 2021 and prohibition on indemnification of penalties was 1 January 2022.
33.	Recommendation 6.4 —Without limiting any powers APRA currently has under the SIS Act, ASIC should be given the power to enforce all provisions in the SIS Act that are, or will become, civil penalty provisions or otherwise give rise to a cause of action against an RSE licensee or director for conduct that may harm a consumer. There should be co-regulation by APRA and ASIC of these provisions.		
34.	Recommendation 6.5 —APRA should retain its current functions, including responsibility for the licensing and supervision of RSE licensees and the powers and functions that come with it, including any power to issue		

	directions that APRA presently has or is to be given.		
35.	Recommendation 6.9 — The law should be amended to oblige each of APRA and ASIC to co-operate 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 may have occurred.		Not applicable (requirements come into effect on Royal Assent)
36.	Recommendation 6.11 —The ASIC Act should be amended to align with requirements in the APRA Act for the times and places of Commissioner meetings, the quorum required, who is to preside, how voting is to occur and the passing of resolutions without meetings.		
37.	Recommendation 7.2 — implement the recommendations of the ASIC Enforcement Review Taskforce that relate to self-reporting of contraventions by financial services and credit licensees should be carried into effect (breach reporting).		1 October 2021
38.	Recommendation 3.5 – (superannuation) a person should have only one default account. To that end, machinery should be developed for 'stapling' a person to a single default account.	Legislation passed 17 June 2021.	1 November 2021
39.	Recommendation 6.14 — new oversight authority for APRA and ASIC, independent of Government, should be established by legislation to assess the effectiveness of each regulator in discharging its functions and meeting its statutory objects. The authority should be comprised of three part time members and staffed by a permanent secretariat. It should be required to report to the Minister in respect of each regulator at least biennially.	Legislation passed 23 June 2021	Not applicable

	Introduced in the Financial Regulator Assessment Authority Bill 2021 on 13 May 2021.		
40.	Recommendation 2.10 —establish a new disciplinary system for financial advisers that: requires all financial advisers who provide personal financial advice to retail clients to be registered; provides for a single, central, disciplinary body; requires AFSL holders to report 'serious compliance concerns' to the disciplinary body; and allows clients and other stakeholders to report information about the conduct of financial advisers to the disciplinary body.	Legislation passed 21 October 2021	Single disciplinary body commences 1 January 2022
41.	Recommendation 7.3 — As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated.	Australian Law Reform Commission has been tasked to undertake a review of the legislative framework for corporations and financial services regulation.	Not applicable
42.	Recommendation 7.4 — As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.		
43.	Recommendation 1.11 – A national scheme of farm debt mediation should be enacted		A national scheme of FDM has been implemented by enacting similar legislation based on consistent principles across participating states and territories. The Department of Agriculture is consulting with stakeholders on the development of a better practice guide for FDM. The guide will outline high-level principles and

		further support the national scheme and is on track to be finalised in the coming months.

6 recommendations to be introduced to Parliament

Recommendation	Status
1. Recommendation 3.9 — The BEAR should be extended to all RSE licensees	Legislation was introduced as part of Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021. Bills lapsed at the prorogation of the previous Parliament
2. Recommendation 4.12 — the BEAR should be extended to all APRA-regulated insurers, as referred to in Recommendation 6.8.	
3. Recommendation 6.6 —ASIC and APRA should jointly administer the BEAR.	
4. Recommendation 6.7 — Require, as part of obligations under BEAR, for accountable persons to deal with APRA and ASIC in an open, constructive and co-operative way.	
5. Recommendation 6.8 —the BEAR should be extended to all APRA-regulated financial services institutions. APRA and ASIC should jointly administer those new provisions.	
6. Recommendation 7.1 —establish a compensation scheme of last resort consistent with the recommendations made by the review into external dispute and complaints arrangements' supplementary final report	

3 recommendations require reviews to be undertaken in 2021-22

Recommendation	Status
7. Recommendation 1.4 — Establish a Treasury-led working group to monitor and, if necessary, adjust the remuneration model referred to in Recommendation 1.3, and any fee that lenders should be required to charge to achieve a level playing field, in response to market changes.	Announcement on 18 March 2022 that the review would not proceed.

8.	Recommendation 2.3 — In three years' time, there should be a review by Government in consultation with ASIC of the effectiveness of measures that have been implemented by the Government, regulators and financial services entities to improve the quality of financial advice. The review should preferably be completed by 30 June 2022, but no later than 31 December 2022.	Underway - the terms of reference were released on 11 March 2022 along with the appointment of the reviewer.
9.	Recommendation 2.6 — The review referred to in Recommendation 2.3 (review of financial advice) should also consider whether each remaining exemption to the ban on conflicted remuneration remains justified, including the exemptions for general insurance products and consumer credit insurance products; and the exemptions for non-monetary benefits	

2 recommendations to be progressed

Recommendation		Status
10.	Recommendation 1.5 — Harmonise the laws that apply to mortgage brokers with those that currently apply to financial advisers after a period of time.	The then government's response to the FSRC committed to consider this recommendation following the review into financial advice in 2022 (Rec 2.3)
11.	Recommendation 1.7 — remove the exemption of retail dealers from the operation of the NCCP Act	**s 47E(d)**

18 Additional commitments made in response to the FSRC

18 additional commitment were made in response to the FSRC based on observations in the final Report.

13 additional commitments completed	
1.	Extend legislation for the Product Intervention Power and Design and Distribution Obligations to additional products – The Government extended the Product Intervention Power and Design and Distribution Obligations legislation so that it applied to credit and Australian Securities and Investments Commission Act 2001 products. The legislation received Royal Assent on 5 April 2019
2.	Direct ASIC to undertake grandfathering review – On 22 February 2019, the Government directed ASIC to monitor and report on industry actions from 1 July 2019 to 1 January 2021 (the period leading up to the end of grandfathered conflicted remuneration for financial advisers).
3.	Payment of unpaid external dispute resolution (EDR) determinations – On 4 April 2019, regulations were made to enable the payment of unpaid determinations made under the Financial Ombudsman Service (FOS) Terms of Reference and the Credit & Investments Ombudsman (CIO) Rules.
4.	Expanding AFCA's remit to consider past disputes – On 20 February 2019, the Government extended AFCA's remit to consider financial complaints dating back to 1 January 2008, providing expanded access to redress for consumers and small businesses harmed by financial misconduct. AFCA commenced receiving legacy complaints from 1 July 2019.
5.	Commence a review of financial counselling – On 7 February 2019, the Government commissioned a review of the coordination and funding of financial counselling services, led by Louise Sylvan AM. That review has now been completed and the Government is considering its response.
6.	Consult on superannuation binding death benefit nominations for Indigenous people – From 29 March to 24 May 2019, the Government consulted on a discussion paper: *Superannuation binding death benefit nominations and kinship structures*. The Government is considering its response to the outcomes of those consultations.
7.	Review of the effects of vertical and horizontal integration in the financial system – tasked the Australian Competition and Consumer Commission to consider integration issues in the financial system where they are identified as part of its market studies work.
8.	Passed legislation to implement recommendations from the ASIC Enforcement review to strengthen ASIC's search warrant powers
9.	Passed legislation to implement recommendations from the ASIC Enforcement review to strengthen ASIC's telecommunications interceptions powers
10.	Passed legislation to implement recommendations from the ASIC Enforcement review to strengthen ASIC's licensing powers
11.	Passed legislation to implement recommendations from the ASIC Enforcement review to strengthen ASIC's power to ban people in the financial sector
12.	Restricting use of the term 'insurer' and 'insurance' to financial services firms that are engaged in insurance activities.
13.	Assessment of the effectiveness of changes made by the regulators following the Royal Commission by the (to be established) financial regulatory assessment authority – being progressed as part of the biennial FRAA reviews.

s 47E(d)

Status of the 12 recommendations directed to regulators

Of 12 recommendations to regulators:

- 10 have been implemented while 1 is in progress and 1 has been subsumed in a recommendation to Government.

ASIC	
Recommendation	**Status**
19. Recommendation 2.5 – When ASIC conducts its review of conflicted remuneration relating to life risk insurance products consider further reducing the cap on commissions in respect of life risk insurance products.	**Being progressed by Government and ASIC** **Terms of reference were released on 11 March 2022.** The Government asked ASIC to conduct a review of the LIF reforms. On 21 April 2021, the Minister, the Hon. Jane Hume announced that the LIF review will be incorporated into the Government's broader Quality of Advice Review (recommendation 2.3 of the Financial Services Royal Commission) so that a single review considers the full breadth of financial advice issues. ASIC will not report publicly on the LIF review. ASIC remains responsible for and is currently in the process of reviewing life insurance advice files and collecting data from life insurers. ASIC's work will continue according to its current timelines, concluding in late 2022. The advice file reviews comprise two randomly selected sample pools of life insurance advice files, one sample pool of files from 2017 before the LIF reforms were introduced and one sample pool of files from 2021, after the LIF reforms were fully phased in. This will allow a comparison of the results to see if the quality of life insurance advice has improved since the LIF reforms. ASIC is also collecting aggregate level data from life insurers every six months, covering the period from 2017 to 2021. ASIC has engaged with the Treasury in relation **to the LIF review.**

20.	Recommendation 6.2 – ASIC should adopt an approach to enforcement that takes the question of whether a court should determine the consequences of a contravention and recognises that infringement notices will rarely be an appropriate enforcement tool where the infringing party is a large corporation.	**Implemented** On 1 July 2019, ASIC established the Office of Enforcement to strengthen governance and effectiveness of ASIC's enforcement work. Since then, the Office of Enforcement has dedicated significant resources to completing the investigation of almost all FSRC referrals and related matters. It has also used its additional resources to continue to increase its capacity to investigate market, corporate and financial sector misconduct, ensuring that the importance of putting contraventions before a Court to determine the consequences of that contravention is given proper consideration in deciding on the appropriate action.
21.	Recommendation 6.10 – ASIC and APRA should prepare joint memorandum – to be reviewed biennially and reported against in annual reports – setting out how they intend to comply with their statutory obligation to co-operate.	**Implemented** An Updated Memorandum of Understanding between ASIC and APRA was published on 29 November 2019**.** The agencies report on cooperation in their annual reports, and published updates in 2020 and 2021. A review of the MOU was conducted at the end of 2021. The MOU remained the same following the review.
22.	Recommendation 6.12 –APRA and ASIC should internally formulate and apply to its own management accountability principles of the kind established by the BEAR.	
	APRA	
23.	Recommendation 1.12 – APRA should amend Prudential Standard 220 relating to value of land appraisals to require that internal valuations to be independent of loan origination and processing and for valuations to recognise external events.	**Implemented** APRA amended APS 220 Credit Risk Management in December 2019 and it came into effect on 1 January 2022.
24.	Recommendation 1.17 – APRA should introduce an end-to end accountability for products design, delivery and maintenance under BEAR	**Subsumed into FAR (matter for Government)** This recommendation is being implemented as part of the Financial Accountability Regime (FAR) legislation. Consultation was completed in August 2021 and part of the Bill introduced into Parliament on 28 October 2021.

25.	Recommendation 4.14 – APRA should amend Prudential Standard SPS 250 to require additional scrutiny of for related party engagements.	**Implemented** *Prudential Standard SPS 250 Insurance in Superannuation* (SPS 250) was released on 12 November 2021 and will commence on 1 July 2022. The revised SPS 250 imposes new requirements on RSE licensees to: • obtain independent certification that an arrangement or any other arrangement in relation to the provision of group life insurance, is in best interests of the members, and satisfies all legal and regulatory requirements; and • ensure that any rules they apply to attribute a particular status to a beneficiary in connection with insurance, are fair and reasonable.
26.	Recommendation 4.15 – APRA should amend Prudential Standard SPS 250 to require status attribution to be fair and reasonable.	
27.	Recommendation 5.1 – APRA should give effect to the principles, standards and guidance on compensation set out by the Financial Stability Board.	**Implemented** APRA released a final version of *Prudential Standard CPS 511 Remuneration* in August 2021. CPS 511 will apply to large ADIs from January 2023; to large insurers and RSE licensees from July and smaller entities from January 2024. Remuneration has also been incorporated as a new risk category in APRA's Supervision Risk and Intensity (SRI) Model.
28.	Recommendation 5.2 – Supervision of remuneration - APRA should have, as one of its aims, the sound management by APRA-regulated institutions of not only financial risk but also misconduct, compliance and other non-financial risks.	
29.	Recommendation 5.3 – revised prudential standards and guidance – remuneration.	
30.	Recommendation 5.7 – In conducting its prudential supervision of APRA-regulated institutions and in revising its prudential standards and guidance, APRA should take an enhanced focus on the regulation on risk culture	**Implemented** APRA's revamped supervisory model, the Supervision Risk and Intensity Model includes new modules targeted at governance, culture and accountability. APRA has also established a specialist risk culture team. In 2021 the team conducted a pilot risk culture survey, publishing observations from that survey in October 2021. APRA will also extend the survey across its regulated population and will continue other work set out in APRA's 2021 Supervision Priorities such as risk culture deep dive entities.

31.	Recommendation 6.10 – ASIC and APRA should prepare and maintain a joint memorandum setting out how they intend to comply with their statutory obligation to co-operate. The memorandum should be reviewed biennially and each of ASIC and APRA should report each year on the operation of and steps taken under it in its annual report.	**Implemented** The revised APRA-ASIC MoU was updated and published in November 2019.
32.	Recommendation 6.12 – In a manner agreed with the external oversight body (the establishment of which is the subject of Recommendation 6.14 below) each of APRA and ASIC should internally formulate and apply to its own management accountability principles of the kind established by the BEAR.	**Implemented** APRA published its Governance and Senior Executive Accountabilities (including Accountability Statements) on 19 December 2019.

Status of recommendations directed to industry

Recommendation	Relevant industry body/firm	Status
1. Recommendation 1.8 – Amending the Banking Code	Australian Banking Association (ABA), individual banks	**Implemented** The Banking Code amendments commenced on 1 March 2020.
2. Recommendation 1.10 – Definition of small business	ABA	**In progress** The ABA has announced that the definition of small business in the Banking Code of Practice, will be expanded as part of its response to an independent review. The changes include lifting the threshold for total credit to $5 million. The change will be made as part of the planned triennial review of the Banking Code of Practice scheduled for next year, with implementation in early 2023.
3. Recommendation 1.13 – Charging default interest	ABA, individual banks	**Implemented** This was part of the Banking Code amendments that commenced on 1 March 2020.
4. Recommendation 1.14 – Distressed agricultural loans	Individual banks	**Implemented** This was part of the Banking Code amendments that commenced on 1 March 2020.
5. Recommendation 1.16 – 2019 Banking Code	ABA	**Incomplete** Legislation enabling the enforceable code reforms passed on 10 December 2020, however it requires industry to make further changes to the Banking Code and for ASIC to approve it.
6. Recommendation 4.9 – Enforceable code provisions	Financial Services Council (FSC), Insurance Council of Australia (ICA)	**Incomplete** Legislation enabling the enforceable code reforms passed on 10 December 2020, however it requires industry to make further changes to the Banking Code and for ASIC to approve it.
7. Recommendation 4.10 – Extension of the sanctions power	FSC, ICA	**In progress** The revised General Insurance Code of Compliance was effective from 1 January 2021. The FSC have indicated they will update the Life Insurance

Recommendation	Relevant industry body/firm	Status
		Code of Practice in line with the recommendation.
8. Recommendation 5.4 – Remuneration for front line staff	All financial services entities	**Implemented** In July 2021, Mr Stephen Sedgwick released his Final Report, which found that 'with few exceptions, the industry's policies have changed in line with the letter of the 2017 Recommendations'. The ABA now considers that the delivery of this report completes the Royal Commission recommendation to fully implement the recommendations of the Sedgwick Review.
9. Recommendation 5.5 – Banks should implement fully the recommendations of the Sedgwick Review.		
10. Recommendation 5.6 – each financial services entity should take proper steps to assess culture and governance.	All Financial Services industry	**In progress** This recommendation requires ongoing review and action by financial services firms. The regulators, through their supervision and enforcement activities, will continue to assess compliance.

Australian Government
The Treasury

Ministerial Submission

MS22-002280

FOR ACTION - Review of the regulatory framework for managed investment schemes

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC: Treasurer - The Hon Jim Chalmers MP

TIMING: Your response by 25 October 2022 so that the media release can be published after the 2022 Budget.

Recommendation

- That you **note** the scope of the review of the regulatory framework for managed investment schemes (MIS) which will now be delivered within existing resources (Attachment A).

  Noted / Please discuss

- That you **note** the proposed timing of the review (Attachment B).

  Noted / Please discuss

- That you agree to publish a media release after Budget which outlines the scope and timing of the review (Attachment C).

  Agreed / Not agreed

Signature	Date: / /2022

KEY POINTS

- s 34(2), s 34(3) 34(2)
  - We have previously briefed you on the review (refer to s 22 MS22-000942).
- We will establish a dedicated team to prepare a public consultation paper, conduct stakeholder consultations and report findings to you by December 2023.

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  - This will allow us to commence work in January 2023, consult on all of the issues outlined in the previous briefings and report findings to you in December 2023.

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Scope of the review

- A list of issues that will be considered by the review, and those outside of the scope are set out at Attachment A.

Timing of the review

- The review will commence in January 2023, with Treasury to report findings to you in December 2023.
- We propose to release a public consultation paper in the first quarter of next year, undertake a six-week consultation period (including roundtables and bilateral meetings) and then test our draft recommendations in further targeted meetings during the second half of 2023. We will report findings to you in December 2023.
- The proposed timing is set out at Attachment B.

Draft media release

- We recommend that you agree to publish a media release after Budget which outlines the scope and timing of the review (Attachment C).

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Clearance Officer	Contact Officer
Melissa Bray	s 22
Assistant Secretary	Director
Advice and Investment Branch	Ph: s 22
Retirement, Advice and Investment Division	

CONSULTATION

Financial Services Division, ASIC, Law Division

ATTACHMENTS

A: Scope of the review
B: Proposed timing of the review
C: Draft media release

ATTACHMENT A – SCOPE OF THE REVIEW

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Issues to be considered in the review		
Item No.	**Item for review**	**Nature of the issue**
1	**Whether the governance, compliance and risk management frameworks for MIS remain appropriate**	Some concerns have been raised whether the existing settings for governance, compliance and risk management of MIS remain appropriate.
2	**Roles and responsibilities of responsible entities (REs) to ensure that conflicts of interest are appropriately managed**	MIS are generally structured as a trust and the trustee (known as a Responsible Entity (RE)) manages the MIS. This will consider whether it is necessary to clarify the functions and duties of REs to ensure that conflicts of interest are appropriately managed.
3	**Insolvency regime**	There is currently no tailored insolvency regime for MIS and MIS failures normally result in court proceedings. This increases the complexity and expense of the winding up procedures for insolvent MIS and potentially reduces the proceeds that can be obtained from the insolvency (if any).
4	**Liquidity requirements**	Consider whether the limited liquidity requirements for MIS mean that investors are not able to redeem their investments quickly.

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Issues to be considered in the review		
Item No.	**Item for review**	**Nature of the issue**
5	**Whether certain MIS investments are too complex and not suitable for retail investors**	Some countries specify that retail investors cannot invest in certain types of complex managed funds. Evidence to the Senate Standing Committee on Economics inquiry into the Sterling Income Trust suggests that investors did not fully understand the complexity and risk of their investments in the Sterling MIS.
6	**Whether the classification of investors as wholesale or retail clients remains appropriate**	The thresholds in the Corporations Act that determine whether an investor is a retail or wholesale client have not changed in over twenty years. This will consider whether the thresholds are still appropriate.
7	**MIS investments in real estate and interactions between Commonwealth and State laws**	The failure of the Sterling Income Trust highlighted a range of complex issues that arise when a MIS invests in real estate, particularly, residential real estate. The Senate Standing Committee on Economics report into the Sterling Income Trust raised concerns about the interactions between Commonwealth and State regulation of MIS that invest in real property.

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Issues excluded from the review		
Item No.	**Item for review**	**Nature of the issue**
1	**Litigation funding**	Whether a litigation funding scheme is appropriately classified as a MIS and whether improvements to the licensing and consumer protection settings for litigation funding schemes are required.
2	**Taxation issues**	The Financial Services Council (FSC) and other industry stakeholders regularly argue for changes to the tax settings for MIS to encourage international competitiveness.
3	**Enhancements to Corporate Collective Investment Vehicle (CCIVs)**	The CCIV regime commenced on 1 July 2022. The FSC have suggested amendments to the CCIVs framework.
4	**Timeshare**	ASIC and consumer groups have advised that timeshare investors require more robust protection features given the inappropriate sales practices and product features which are common in this sector.
5	**Rights and obligations of custodians**	Custodians are not subject to comprehensive licensing or statutory obligations.

ATTACHMENT B – PROPOSED TIMING OF THE REVIEW

We propose the following indicative timeframe for the review:

Review Timeline	
October 2022	Announce scope of review
January 2023	Review commences
March 2023	Consultation paper released
March 2023 – May 2023	Consultation period, including roundtables and bilateral meetings with stakeholders
June 2023	We will brief you about the outcome of consultation and submissions and draft proposals
August 2023	Targeted consultation to test draft proposals
November 2023	We will brief you about our findings
December 2023	We will provide advice to you about our findings

ATTACHMENT C – DRAFT MEDIA RELEASE

The Hon Stephen Jones MP
Assistant Treasurer and Minister for Financial Services

MEDIA RELEASE

[Insert date] 2022

REVIEW OF THE REGULATORY FRAMEWORK FOR MANAGED INVESTMENT SCHEMES

The government has tasked Treasury to review the regulatory framework for managed investment schemes (MIS) to strengthen investor protections.

The regulatory framework for managed investment schemes was introduced more than twenty years ago and there have been a number of significant scheme failures, including the recent failure of the Sterling Income Trust.

It is now timely to consider whether the regulatory framework is still appropriate and what enhancements can be made to reduce financial risk and losses for investors.

The review will identify gaps in the current regulatory framework and potential reform options.

Treasury will focus on the following issues:

- whether certain investments are too complex and not suitable for retail investors
- whether the thresholds that determine whether an investor is a retail or wholesale client remain appropriate
- the various roles and obligations of responsible entities and whether conflicts of interest can be appropriately managed, and
- interactions between Commonwealth and State laws when regulating real estate investments by MIS (including issues arising in relation to the failure of the Sterling Income Trust).

Treasury will also consider the following issues:

- liquidity requirements for managed investment schemes

- whether an insolvency regime is required for managed investment schemes
- whether the governance, compliance and risk management frameworks for managed investment schemes are appropriate, and
- whether 'investor rights' for people who invest in managed investment schemes are appropriate.

The review will not consider the compensation scheme of last resort (CSLR) and whether managed investment schemes should be brought within the scope of the scheme. Any consideration of the inclusion of managed investment schemes within the scope of the CSLR would be informed by the review and any reforms that may follow.

In addition, the review will not consider the following issues:

- litigation funding schemes
- issues relating to the tax treatment of managed investment schemes and investors
- any changes to the corporate collective investment vehicle (CCIV) regime
- timeshare investments, and
- the rights and obligations of custodians.

Treasury is due to release a public consultation paper in the first quarter of 2023 and will report findings to Government by early 2024. Treasury will consult with industry stakeholders and investor and consumer groups.

The Government acknowledges the previous work and recommendations by various bodies, including the former Corporations and Markets Advisory Committee and the Parliamentary Joint Committee on Corporations and Financial Services and this will inform Treasury's consideration of these issues.

The government encourages interested stakeholders to engage with the consultation process to ensure Australia's regulatory framework for managed investment schemes remains fit for purpose.

Ends

Australian Government
The Treasury

FOI 3671
Document 3

Ministerial Submission

MS22-002712

FOR ACTION - 2023 Rationalisation of Ending of ASIC Instrument Measures - exposure draft legislation for public consultation

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC:

TIMING

By **Tuesday 7 February 2023** to allow for four weeks for public consultation on the exposure draft legislation and associated explanatory materials.

Recommendation

- That you agree to release for public consultation the attached draft Bill, Regulations and explanatory materials that comprise the 2023 Winter Rationalisation of Ending ASIC Instruments Measures package (**Attachments A-D**).

Agreed / Not agreed

- That you agree that, when moved into the *Corporations Act 2001*, the breach of obligations currently included in ASIC Class Order [CO 13/657] be subject to the civil penalty regime set out in that Act, which will significantly increase the maximum penalties that apply.

Agreed / Not agreed

- That you agree that, subject to the outcomes of consultation, the documentation requirements in ASIC Class Order [CO 13/657] will not be incorporated into the *Corporations Act 2001*.

Signature	Date: / /2023

KEY POINTS

- Treasury is developing the second tranche of amendments to make general improvements to portfolio legislation, which is proposed for introduction in the Winter 2023 sitting period.
- This submission seeks your agreement to release exposure draft legislation for amendments incorporating longstanding matters currently in ASIC legislative instruments into the primary law and regulations (the Rationalisation of Ending ASIC Instrument Measures). The draft legislation moves matters currently in ASIC legislative instruments into the *Corporations Act 2001*, *National Consumer Credit Protection Act 2009* and *National Consumer Credit Protection Regulations 2010*.
- Moving these matters from the instruments to primary law and regulations will improve the clarity of the law, provide certainty and make it simpler for regulated entities and consumers to understand their rights and obligations.
- The exposure draft legislation includes matters from five longstanding ASIC instruments and generally does not change the broad regulatory settings that currently apply to affected entities. A sixth instrument may be repealed entirely subject to feedback received during consultation. Further details about the amendments are below and in **Attachment E**.

ASIC Class Order [CO 13/657]

Increase in maximum penalties

- Your approval is required to consult on increasing the penalties that will apply to breaches of obligations currently in ASIC Class Order [CO 13/657] by making them civil penalty provisions when they are moved into the *Corporations Act 2001*.

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- ASIC Class Order [CO 13/657] allows the constitution of a registered scheme to grant a responsible entity a discretion that could affect the acquisition or withdrawal price of interests in the scheme and requires that a responsible entity comply with certain obligations when exercising such a discretion. Under the draft legislation, a breach of these obligations would be a breach of a civil penalty provision.
- When there is a breach of a *Corporations Act 2001* civil penalty provision, a court may make a pecuniary penalty order in relation to the breach. The maximum penalty that can be imposed for individuals is 5,000 penalty units or, if the Court can determine the benefit derived, three times the benefit. The maximum penalty for a body corporate is 50,000 penalty units or, if the court can determine the benefit derived, an amount based on the turnover of the body corporate or benefit derived, capped at 2.5 million penalty units.

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[redacted]

Change in documentation requirements

- The requirement to prepare and keep documentation relating to the exercise of a discretion that is set out in the instrument is not included in the amendments and would be repealed. This is because it does not provide meaningful benefits to consumers so imposes an unnecessary burden on responsible entities. However, the repeal of this provision is subject to feedback received during consultation.

ASIC Corporations (Managed investment product consideration) Instrument 2015/847

- During consultation we will seek feedback as to whether the ASIC Corporations (Managed investment product consideration) Instrument 2015/847 is still in use or should be repealed. ASIC would need to repeal the instrument if it is no longer required.
    - This instrument provides legacy arrangements for registered schemes that were registered before 1 October 2013 and provides a very similar framework to ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657], which are being incorporated into the *Corporations Act 2001* in this package. Once a registered scheme has moved to the framework in the 2013 instruments it cannot revert to the previous arrangements.

<u>Public consultation</u>

- We recommend four weeks consultation from early February to early March 2023, which would allow for introduction in the Winter 2023 sittings. We note that the Corporations Agreement 2002 requires four weeks consultation for some of the amendments.
    - We note that ASIC has also consulted on the matters in [CO 13/520] as that instrument is part of a package of instruments that sunset on 1 October 2023, most of which need to be remade by ASIC. It may be appropriate to make changes to the bill amendments to incorporate feedback received during that consultation. We will brief you about any such changes after consultation.]

- The draft legislation and explanatory documents are undergoing final editorial checking and quality assurance by Treasury and the Office of Parliamentary Counsel and minor editorial changes may occur to the package ahead of its release for public consultation.

<u>State and Territory Consultation</u>

- Parts of the package will amend law that the States have referred to the Commonwealth under the Corporations Agreement 2002. The Agreement requires you to notify the States and Territories of your intention to make the amendments prior to their introduction to Parliament.

- We will brief you separately about this process.

Financial and Regulatory Impacts

s 47E(d)

Clearance Officer
s 22
Assistant Secretary (a/g)
Law Division
24 January 2023

Contact Officer
s 22
Director
Ph: s 22

CONSULTATION

The Department of the Prime Minister and Cabinet, Office of Parliamentary Counsel, ASIC

ATTACHMENTS

A: Exposure Draft Bill
B: Exposure Draft Explanatory Memorandum
C: Exposure Draft Regulations
D: Exposure Draft Explanatory Statement
E: Details of instruments

Summary of ASIC instruments and proposed amendments

Proposed amendments to the *Corporations Act 2001*

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
ASIC Class Order [CO 13/520] Relevant interests, voting power and exceptions to the general prohibition	Chapter 6, specifically sections 609, 610, 611, 615 and 671B.	Chapter 6 of the Act relates to takeovers. It regulates the acquisition of substantial interests in listed companies and bodies, listed registered managed investment schemes and unlisted companies with more than 50 members. This includes imposing a general prohibition relating to the acquisition of interests by, or on behalf of a person, resulting in an increase of a persons voting power in a regulated entity to, or from, a point above 20 per cent (section 606).	The instrument makes a number of modifications to Chapter 6 of the Act in relation to situations that will not give rise to a relevant interest under section 609 of the Act and exceptions to the general prohibition.	The amendments would transfer the modifications in the instrument directly into Chapter 6 of the Act.
ASIC Class Order [CO 13/655]	Section 601GA	Part 5C.3 of the Act sets out the constitutional requirements of a managed investment scheme that is registered with ASIC and subject to the legal requirements of a registered scheme (a 'registered scheme'). Paragraph 601GA(1)(a) requires the constitution of a registered scheme to make adequate provision for the consideration to be paid in order to acquire an interest in the scheme. Subsection 601GA(4) requires the constitution of a registered scheme to specify the right (if there is a right) to withdraw from the scheme, as well as set out adequate procedures for	The instrument inserts notional sections 601GAD, 601GAE, and 601GAF. Section 601GAD allows the constitution to include provisions that allow the responsible entity to set the acquisition price of interests under certain circumstances. Sections 601GAE and 601GAF allow a constitution to provide a formula or method to determine the amount of consideration to acquire interests or the amount to be paid on a withdrawal. The constitution can provide responsible entities with the discretion to decide certain matters	The amendments would transfer the modifications included in sections 601GAE and 601GAF to Chapter 5C of the Act. Notional section 601GAD will not be transferred and will remain in ASIC Class Order [CO 13/655].

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
		making and dealing with withdrawal requests.	relating to the formula or method, however the formula or method must be based on market price or net asset value (depending on the class of interests).	
ASIC Class Order [CO 13/657]	Section 601FC	Division 1 of Part 5C.2 of the Act sets out the responsibilities and powers of the responsible entity of a managed investment scheme. Section 601FC sets out the duties of a responsible entity. Part 5C.3 of the Act sets out the constitutional requirements of a registered scheme. Paragraph 601GA(1)(a) requires the constitution of a registered scheme to make adequate provision for the consideration to be paid in order to acquire an interest in the scheme. Subsection 601GA(4) requires the constitution of a registered scheme to specify the right (if there is a right) to withdraw from the scheme, as well as set out adequate procedures for making and dealing with withdrawal requests.	The instrument inserts notional subsections into section 601FC to require that a responsible entity that is exercising their discretion under [CO 13/655] has a duty to exercise that discretion consistent with ordinary commercial practice and consistent with producing a reasonably current value. Notional subsections 601FC(1C) to 601FC(1E) also require the responsible entity to prepare and keep documentation relating to the exercise of discretion. The instrument also inserts notional section 1013DAA which requires the PDS to include the statement that those documents are available at no charge.	The amendments would transfer most of the modifications directly into Chapter 5C of the Act. Namely, a responsible entity's duties to exercise their discretion consistent with ordinary commercial practice and consistent with producing a reasonably current value. However, contravention of the duties would become a contravention of a civil penalty provision (as outlined by existing sections 1317E-1317H of the Act). This change is consistent with the civil penalty applicable to similar duties of responsible entities already in the Act, ensures the integrity of the registered scheme, and protect members interests relating to acquisition price and withdrawal payments.

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
				Further, the requirement to prepare and keep documentation relating to the exercise of discretions would be repealed and not moved into the Act. It is no longer required, is burdensome for responsible entities and does not provide meaningful benefits to consumers. The repeal of this provision is subject to feedback received during consultation.
ASIC Corporations (Managed investment product consideration) Instrument 2015/847	N/A	N/A	This instrument can only be used by registered schemes that were registered by 1 October 2013 and provides a very similar framework to ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657] with slight differences. Registered schemes that were registered prior to 1 October 2013 may rely upon ASIC Corporations (Managed investment product consideration) Instrument 2015/847 or ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657]. If such schemes have chosen to move to the framework in the 2013 instruments, they cannot return to the previous framework.	**Consultation question only:** In the exposure draft of the explanatory memorandum we will seek feedback in consultation whether ASIC Corporations (Managed investment product consideration) Instrument 2015/847 is still relied upon or should be repealed. If it is repealed then only the framework currently set out in ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657] (as moved into the Act) will be available to registered schemes (see above).

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
				If the instrument is no longer required then ASIC would need to repeal it.
Section 6 of ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378	Section 941C	Section 941A of the Act requires AFSL licensees to provide Financial Service Guides (FSG) to retail clients for their financial products. Section 941C provides exemptions to the requirement to provide an FSG for dealing by a trustee in fund interests and dealing by a responsible entity in scheme interests.	Section 6 of the instrument includes two exemptions. The first exempts the trustee of a superannuation entity from the requirement to provide a Financial Services Guide for dealing in financial products in the ordinary course of operation of the entity. The second exemptions provides a similar relief to the responsible entity of a registered scheme for dealing in the ordinary course of operation.	The amendments would transfer the effect of section 6 of the instrument into the Act by introducing new exemptions to cover the underlying dealing of responsible entities and trustees. These amendments only move matters in section 6 of the instrument. The remainder of the instrument will continue to apply.

Proposed amendments to the *National Consumer Credit Protection Act 2009* and *National Consumer Credit Protection Regulations 2010*

ASIC-made legislative instrument	Provisions affected	Operation of the primary law without instrument	Effect of the instrument	Proposed amendment
ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835	Section 16 of Schedule 1 to the *National Consumer Credit Protection Act 2009* (the National Credit Code) and the *National Consumer Credit Protection Regulations 2010*	Section 16 of the National Credit Code requires a credit provider to give a prospective debtor a precontractual statement and an information statement, prior to entering into a contract. The standard arrangements for the provision of documents electronically in regulation 28L do not apply to section 16 of the National Credit Code. Regulation 28L of the *National Consumer Credit Protection Regulations 2010* provides for the giving of certain prescribed documents by electronic means, including via an electronic document retrieval system, with the consent of the consumer. Regulation 28L also sets out a range of administrative matters relating to consent and the form of the documents and matters that the licensee must be satisfied of.	The instrument applies the equivalent of regulation 28L to credit providers and debtors in relation to precontractual statements and information statements required to be given under section 16 of the National Credit Code.	The amendments would insert a regulation making power into the *National Consumer Credit Protection Act 2009*, and make regulations in reliance on that power, to allow documents that must be provided under section 16 of the National Credit Code to be provided electronically, consistent with the existing arrangements in regulation 28L.

Australian Government
The Treasury

Ministerial Submission

MS23-001158

FOR ACTION – Consultation paper - Review of the regulatory framework for managed investment schemes (MIS)

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC: Treasurer - The Hon Jim Chalmers MP

TIMING

By 26 July 2023 - to allow publication of the consultation paper before the end of July 2023.

Recommendation

- That you agree to publish the attached consultation paper (**Attachment A**) on the regulatory framework for managed investment schemes before the end of July 2023 (date to be agreed with your office).

Agreed / Not agreed

- That you agree to publish the attached draft media release (**Attachment B**) to announce the consultation.

Agreed / Not agreed

- That you note the proposed consultation strategy (**Attachment C**).

Noted / Please Discuss

Signature	Date: / /2023

KEY POINTS

- On 8 March 2023, you announced a review of the regulatory framework for managed investment schemes (MIS review). The announcement included a commitment for Treasury to release a consultation paper by mid-2023 and report findings to Government by early 2024.

- A draft consultation paper has been prepared at **Attachment A**. The paper reflects the scope of the review you agreed to in October 2022 (MS22-002280 refers). The paper also seeks stakeholder views on opportunities to streamline the regulatory framework.

    - An overview of the content of the consultation paper is included in **Additional Information**. Prior to the release of the paper, minor formatting and technical amendments may be incorporated to ensure accuracy and readability.

- A draft media release announcing the consultation is at **Attachment B**. We recommend publishing the consultation paper before the end of July to allow consultation to commence by mid-2023, reflecting your announcement.

- Our proposed consultation strategy is at **Attachment C**. We recommend an 8 week consultation due to the breadth and complexity of the issues being considered by the review and the broad stakeholder interest. In addition to seeking formal submissions, we propose directly engaging stakeholders on the issues covered in the paper via roundtables and bilateral meetings.

Next steps

- Subject to your agreement, we propose releasing the consultation paper on the Treasury website before the end of July 2023 on a date to be agreed with your office.

- After consultation closes we will analyse stakeholder feedback and brief you on the outcomes.

s 47E(d)

Clearance Officer
Andre Moore
Assistant Secretary
RAID, Advice and Investment Branch
14/07/2023

Contact Officer
s 22
A/g Director, Investment Funds Unit
Ph: s 22

CONSULTATION

Law Division, Financial System Division, Market Conduct Digital Division, Australian Securities and Investments Commission (consultation paper).

ATTACHMENTS

A: Consultation Paper
B: Media Release
C: Proposed consultation strategy

ADDITIONAL INFORMATION

- The purpose of the consultation paper is to identify the potential gaps and vulnerabilities in the MIS regulatory framework. The issues presented are consistent with the scope announced and have primarily been informed by the findings and recommendations from previous reviews and inquiries.
    - A summary of the relevant reviews and inquiries is provided in Box 1 and Box 2 of the consultation paper. A list of consultation questions is provided in Appendix B of the consultation paper

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- The consultation paper addresses the following matters:
    - The wholesale client thresholds. The paper discusses the importance of the retail client and wholesale client distinction and the adequacy of the financial thresholds in today's environment. The wholesale client consent arrangements proposed by the Quality of Advice Review is also examined.
    - Suitability of scheme investments for retail clients. The paper discusses the existing regulatory settings that support retail clients invest in suitable MIS products. The paper explores if further enhancements are required. This includes an examination of the MIS registration process and the expectation of investors.
    - Governance and compliance frameworks for scheme operators. The paper explores the effectiveness of the existing governance and compliance frameworks for MIS. The paper discusses potential vulnerabilities that may contribute to poor scheme governance and seeks views on what enhancements could be made.
    - The rights of investors. The paper examines the definition of scheme liquidity and how this impacts an investor's right to withdraw. The paper also considers whether there is a mismatch in investor expectations regarding withdrawal rights. The ability for investors to exercise their right to replace the responsible entity of a scheme is also discussed with consideration as to how barriers could be removed.
    - Winding up insolvent schemes. The paper discusses the lack of statutory wind up provisions for insolvent schemes and explores the need to introduce a tailored insolvency regime. Introducing statutory limited liability for investors is also examined.
    - Commonwealth/state regulation of real property investments. The paper presents the dual jurisdictional responsibility for financial products involving real property investments. The paper seeks to understand what issues arise for investors and how these could be addressed.
    - Streamlining the regulatory framework. The paper invites views on opportunities to modernise and streamline the framework without detracting from investor outcomes.

ATTACHMENT C – PROPOSED CONSULTATION STRATEGY

Summary

- Our proposed 8 week consultation process has three components. Key consultation objectives have been outlined in the table below.
  - Public release of the consultation paper on the Treasury website inviting written submissions from interested parties.
  - Stakeholder roundtables consisting of both general and targeted policy discussions. For example, we propose targeted roundtables to examine the wholesale client financial thresholds.
  - Bilateral meetings with key stakeholders.
- We propose to engage with the following stakeholders:
  - Investment funds and platform providers such as Blackrock, Vanguard, Macquarie, State Street, Hub24, Westpac, and Commsec.
  - Legal firms that advise funds such as Allens, Clayton Utz, Norton Rose Fulbright, Mills Oakley and Herbert Smith Freehills.
  - Industry associations and consumer bodies such as the Financial Services Council, CHOICE, Australian Investors Association, Association of Superannuation Funds of Australia, Financial Advice Association Australia, Financial Rights Legal Centre and the Sterling First Action Group.
  - Regulators and Government-related bodies such as the WA Department of Mines, Industry Regulation and Safety, Australian Financial Complaints Authority and ASIC.
  - Academics who have been active in policy debates about the regulation of MIS.

Consultation objectives

Consultation paper chapter	High-level summary
Wholesale client thresholds	• Whether the existing wholesale client thresholds are still adequate and if not, how should they be revised. • How wholesale client consent arrangements should be designed to ensure investors understand the consequences of being considered a wholesale client.
Suitability of scheme investments	• Whether there should be changes to the scheme registration process and/or conditions applied to certain schemes offered to retail clients.

Scheme governance and the role of the responsible entity	• Whether the governance and compliance requirements for schemes effectively protect and promote investor interests through good scheme governance.
Right to replace the responsible entity	• Whether there are barriers that restrict scheme members from exercising their right to remove or replace the responsible entity.
Right to withdraw from a scheme	• Whether the current definition of liquidity and how this informs withdrawal rights for scheme members is fair and equitable.
Winding up insolvent schemes	• Whether there are opportunities to modify wind up provisions for insolvent scheme to improve outcomes for scheme operators, members and creditors.
Commonwealth and state regulation of real property investments	• Whether the duality of jurisdictional responsibility between Commonwealth and state laws when regulating schemes that involve real property investments gives rise to consumer harm.
Regulatory cost savings	• Whether there are opportunities to streamline and modernise the regulatory framework for managed investment schemes.

s 47E(d)

The Hon Stephen Jones MP

Assistant Treasurer and Minister for Financial Services

MEDIA RELEASE

XXXX2023

CONSULTATION OPENS FOR THE REVIEW OF THE REGULATORY FRAMEWORK FOR MANAGED INVESTMENT SCHEMES

The Albanese Government is continuing its work to modernise and strengthen regulatory settings in the financial services sector.

Today the Government has released a consultation paper examining the regulatory framework for managed investment schemes to ensure it remains fit-for-purpose and effectively protects investors from undue financial risk.

The paper seeks stakeholder views on a range of issues, including whether the wholesale client thresholds remain appropriate, whether the governance and compliance frameworks promote the effective operation of schemes, and whether the rights of investors are adequate. The Government is also seeking views on opportunities to reduce regulatory burdens without detracting from outcomes for consumers.

Further information about the consultation process is available on the Treasury consultation website at www.treasury.gov.au/consultation.

Submissions close on [date month 2023].

The Government welcomes submissions from all interested parties.

Ends