3

ASIC's achievements by sector

To help industry participants understand the regulatory effort ASIC expended in the sectors we regulate, this chapter highlights the activities and outcomes achieved in each sector during this financial year.

Industry funding

ASIC industry funding means that those who create the need for regulation bear the costs of that regulation. Under the model, entities pay a share of the costs to regulate their subsector through industry levies, based on a range of business activity metrics, and cost recovery fees for service.

There are seven industry funding sectors (deposit-taking and credit; insurance; financial advice; investment management, superannuation and related services; market infrastructure and intermediaries; corporate; and large financial institutions) and 52 subsectors.

On 12 June 2020, ASIC published indicative industry levies for 2019–20 in our Cost Recovery Implementation Statement (CRIS), available on our website. As many businesses were focused on dealing with the impact of the COVID-19 pandemic when the CRIS was published, we extended the feedback period to allow entities additional time to provide comments.

3.1 Deposit-taking and credit

The deposit-taking and credit sector comprises **credit licensees** (credit providers and credit intermediaries), **deposit product providers**, **payment product providers**, and **margin lenders**.

We use the full suite of our regulatory tools to promote fairness and professionalism in this sector, in order to bring about sound consumer outcomes. This includes the use of our new powers, such as our product intervention power, to address undesirable practices and products.

ASIC's work in this sector during 2019–20 focused on responsible lending and ensuring that consumers are sold products that are appropriate for their needs, as well as responding to the impact on businesses and consumers of the COVID-19 pandemic.

Responsible lending

In December 2019, after extensive consultation, ASIC released updated Regulatory Guide 209 *Credit licensing: Responsible lending conduct* (RG 209). Our consultation included public hearings in Sydney and Melbourne and roundtables with representatives of consumer groups, non-bank and authorised deposit-taking institution lenders, brokers, small amount credit contract providers, and consumer lessors.

The updated guidance provides greater clarity and support to lenders and brokers in meeting their statutory obligations, as well as the steps lenders and brokers can take to minimise the risk of non-compliance. Importantly, we have maintained principles-based guidance that reinforces discretion and flexibility for lenders.

As well as clarifying the scope of the responsible lending obligations, the guidance sets out the areas that are not subject to those obligations – such as small business lending, irrespective of the nature of the security used for the loan. The update also reflects technological developments, including open banking and digital data capture services.

Key elements of the updated guidance include:

- a stronger focus on the legislative purpose of the obligations – to reduce the occurrence of consumers taking on unsuitable levels of credit and ensuring that licensees obtain sufficient reliable and up-to-date information about the consumer's financial situation, requirements and objectives to enable them to assess whether a particular loan is unsuitable for the particular consumer
- more guidance to illustrate where a licensee might undertake more, or less, detailed inquiries and verification steps based on different consumer circumstances and the type of credit being sought. The guidance also includes new examples about a range of different credit products and different kinds of consumer circumstances.

Following the decision of the Federal Court in *ASIC v Westpac*, ASIC will review the guidance in RG 209 to ensure that it reflects the Federal Court's decision.

ASIC's first product intervention order addresses significant harm in short-term credit

On 12 September 2019, ASIC used its new product intervention power to target a particular class of short-term credit product after an ASIC delegate found that these products result in significant consumer detriment.

Under this lending model, a credit provider issued short-term credit to consumers where the fees were capped at 5% of the loan amount. The credit provider's associate would then charge significant fees to consumers, under a separate contract, for the application, management and ongoing administration of the loan.

Short-term credit of up to $1,000 was being provided by credit providers and their associates at high cost to vulnerable consumers. The fees under both contracts, and the addition of default fees incurred by many borrowers, could (and, in some cases, did) result in a total cost of up to 990% of the amount borrowed.

Following public consultation, ASIC was satisfied that this class of products resulted in significant consumer detriment. We considered submissions received, data from industry that demonstrated the size and scale of the short-term credit industry, and ASIC complaints data, including over 200 reports of misconduct.

The short-term credit product intervention order prohibits short-term credit providers and their associates from charging fees in excess of the fees prescribed by section 6(1) of the National Credit Code.

The order is valid for 18 months and ASIC can extend it or make it permanent by obtaining the Minister's written consent.

Cigno Pty Ltd (Cigno), a company affected by the order, sought judicial review of the order. Its application was dismissed by the Federal Court in April 2020.

On 13 May 2020, Cigno lodged an appeal of the decision to the full Federal Court. The product intervention order will remain in force unless a court orders otherwise.

ASIC is continuing to monitor the provision of short-term credit to consumers.

New best interests duty for mortgage brokers

In June 2020, ASIC released guidance about the new best interests duty for mortgage brokers, Regulatory Guide 273 *Mortgage brokers: Best interests duty.*

Our guidance followed the passage of legislation creating a duty for mortgage brokers to act in the best interests of their consumer and requiring them to prioritise each consumer's interests when providing credit assistance.

We had consulted on a draft version of this guidance in February 2020, through Consultation Paper 327 *Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty.*

The guidance is intended to help industry make changes and improve practices before the new obligations commence. Given the impact of the COVID-19 pandemic, we have provided relief so that industry does not need to comply with the obligations and associated remuneration reforms until January 2021.

ASIC's guidance sets out our interpretation of the best interests obligations, expectations about how industry should meet the obligations, and our general approach to administering the reforms.

We expect the obligations to help improve the recommendations and communication provided to consumers throughout the credit assistance process and lead to a higher quality of credit assistance being provided.

ASIC's guidance follows research published in August 2019 (Report 628 *Looking for a mortgage: Consumer experiences and expectations in getting a home loan*), which found that consumers who visited a mortgage broker expected the broker to find them the 'best' home loan, but also demonstrated that brokers were inconsistent in the ways they presented home loan options to consumers and sometimes offered little, if any, explanation of the options considered.

Approval of Banking Code

In December 2019, following extensive consultation, ASIC approved an updated version of the Australian Banking Association (ABA) Banking Code of Practice, which commenced on 1 March 2020.

The updated Banking Code is intended to, among other things, implement the Royal Commission's recommendations relating to the accessibility of banking products and services and easing the burden on agricultural borrowers affected by drought and natural disaster.

The updates include changes to:

- introduce the concept of 'basic accounts' that have minimum features, including no account-keeping fees, no minimum deposits, free direct debit facilities, and access to a debit card
- provide eligible low-income customers with access to basic accounts and other low and no-fee accounts, each of which must not feature informal overdrafts, dishonour fees or overdrawn fees

- clarify the restrictions on non-monetary defaults on small business loans
- extend protections to guarantors of small business loans – banks will now be required to first pursue the borrower, before the guarantor, in the event of default (previously, the Code limited these protections to guarantors of consumer loans)
- prohibit default interest on small business loans secured by agricultural and commercial property in the event of drought or natural disaster.

ASIC approved the March 2020 Code on the understanding that the ABA will revisit the Code's definition of 'banking services' and include an amended definition from 1 March 2021. The amended definition will address concerns raised by stakeholders and ASIC about the consequences of the current definition (which refers to the definitions of 'retail client' and 'wholesale client' in Chapter 7 of the Corporations Act) for small business coverage under the Code.

On 25 June 2020, ASIC approved a variation of the March 2020 Code, proposed by the ABA due to the impact of the COVID-19 pandemic.

The changes acknowledge that in certain circumstances banks may not always be able to meet the timelines for customer communication outlined in some provisions of the March 2020 Code. They provide that banks' obligations when lending to small business customers – to engage in a fair, reasonable and ethical manner, and to exercise the care and skill of a diligent and prudent banker – will be informed by the circumstances and effects of the COVID-19 pandemic generally.

Buy now pay later arrangements

The buy now pay later sector is an area of ongoing focus for ASIC.

We continue to monitor buy now pay later products and the response by the sector to the COVID-19 pandemic. We will also engage with consumer representatives and closely monitor the use of small amount and alternative credit products, especially by vulnerable consumers.

3.2 Insurance

The insurance sector comprises life and general insurance and includes **insurance product providers** (including friendly societies), **insurance product distributors**, and **risk management product providers**.

This year, ASIC's work in insurance focused on the design and sale of inappropriate products, particularly to vulnerable consumers; our new regulatory powers to act on issues highlighted by the Royal Commission; and responding to the impact on businesses and consumers of the COVID-19 pandemic.

Consumer credit insurance

This year, our work to address the inappropriate sale of consumer credit insurance (CCI) by lenders focused on ensuring that consumers who have been harmed are remediated, CCI products offer better value to consumers, and sales practices comply with our requirements.

In 2019, we reported on our review of CCI sold by 11 major banks and lenders, which found poor value products and harmful sales practices: Report 622 *Consumer credit insurance: Poor value products and harmful sales practices* (REP 622).

Since we finalised our review, all lenders included in the review are no longer selling CCI with credit cards, personal loans or home loans.

We have also secured significant remediation, totalling over $160 million for more than 434,000 consumers, for the period October 2011 to April 2020. This remediation related to conduct where:

- lenders sold CCI policies to consumers who were ineligible to claim or unlikely to benefit from or need cover
- lenders used pressure selling or other unfair sales tactics, such as making false representations, in selling CCI to consumers
- consumers were incorrectly charged for CCI or their claims were incorrectly declined
- lenders did not have adequate processes to help consumers in hardship, or trustees of deceased estates, who had a CCI policy to lodge a claim
- consumers received very little or no value from the product.

ASIC will continue to collect and publish claims ratios to monitor how CCI products provide value to customers who hold cover and pay premiums. We will ensure that lenders meet the expectations we set out in REP 622.

Ban on unsolicited sales of direct life insurance and CCI

On 13 January 2020, ASIC used its modification powers to implement a ban on unsolicited 'cold call' telephone sales of direct life insurance and CCI.

The ban addressed poor sales practices that led to unfair consumer outcomes – for example, consumers being sold policies they are ineligible to claim on, high lapse rates, and poor consumer understanding of product features and coverage.

Our legislative instrument *ASIC Corporations (Hawking – Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839* prohibits the offering of life insurance products and CCI products in the course of, or because of, an unsolicited telephone call, unless the person has been given personal advice.

The ban is consistent with recommendations made by the Royal Commission and provides protections to consumers that complement broader legislative reform by the Government. Firms are no longer able to call consumers out of the blue and use sophisticated sales tactics to pressure people into buying life insurance and CCI products.

The ban followed our earlier review of the sale of direct life insurance, summarised in Report 587 *The sale of direct life insurance* (released August 2018). The review found links between outbound telephone sales, sales conduct issues and poor consumer outcomes. Similarly, Report 622 *Consumer credit insurance: Poor value products and harmful sales practices* (released 11 July 2019) also found that the design and sale of CCI had consistently failed consumers, with particular concerns about unsolicited telephone sales.

Total and permanent disability insurance

In October 2019, we released the results of our review of total and permanent disability (TPD) insurance: Report 633 *Holes in the safety net: A review of TPD insurance claims*. The report builds on ASIC's earlier review of life insurance, set out in Report 498 *Life insurance claims: An industry review*. Earlier in the year, on 4 July 2019, we had published Report 621 *Roadblocks and roundabouts: A review of car insurance claim investigations* on the findings of our work on insurance claim investigations.

For the TPD review, we obtained data on 35,000 TPD claims finalised in 2016 and 2017 and reviewed over 2,400 documents from seven insurers.

We also commissioned an independent market research firm to conduct qualitative research with consumers who had made a TPD claim with one of the insurers in our review, and undertook statistical modelling of claims data to identify factors such as TPD definitions that were significant in determining whether TPD claims were declined or admitted.

Our TPD review found:

- unfair and restrictive TPD definitions resulting in poor consumer outcomes – for example, the 'activities of daily living' test that resulted in three in five finalised claims assessed under the test being declined
- unnecessary challenging and onerous claims handling processes contributing to withdrawn claims
- insurers lacking key claims data to help them effectively manage the risk of consumer harm
- two insurers declining over a quarter of their finalised claims
- those two insurers declining more claims than our statistical modelling predicted, with the declined claim rate for one of the two insurers being almost double that predicted by our modelling.

ASIC expects life insurers to improve product design, claims handling practices and data resourcing to ensure that the risk of consumer harm is minimised and products are designed and sold in a way that provides real value to consumers.

We are undertaking a follow-up questionnaire and closely monitoring how insurers respond. We will take further action, including enforcement action where appropriate, against insurers and superannuation trustees who fail to properly address our concerns.

ASIC's response to natural disasters

ASIC established a dedicated working group to triage issues arising from recent natural disasters and events, such as the bushfire crisis that significantly affected many Australian communities in the summer of 2019–20, and to coordinate our response to those issues.

The working group monitored emerging issues based on information from the banking and insurance sectors, consumer groups and the public.

ASIC worked cooperatively with other regulators to coordinate our responses to consumer and regulatory issues.

We reinforced ASIC's expectations about fair and effective insurance claims handling for people affected by the bushfires.

We warned against unscrupulous insurance claims management 'service providers' – unlicensed for-profit businesses that sign up policy holders and, for a fee, undertake the administrative work on an insurance claim. To the extent our jurisdiction allows, we will take regulatory action to provide interim consumer protections ahead of broader legislative reform on claims handling to be considered by Parliament.

We also provided relief for bushfire-affected companies, including incorporated small businesses, by reviewing ASIC fees incurred (on application), considering alternative payment options and, in some circumstances, potentially waiving fees.

We regularly updated our natural disaster information for consumers, via our media releases and our Moneysmart website.

3.3 Financial advice

The financial advice sector includes **AFS licensees and their representatives** who provide personal advice to retail clients on financial products, general advice, and personal advice to wholesale clients.

In 2019–20, ASIC focused on improving the quality of financial advice using our full range of regulatory tools, including enforcement action, banning advisers engaging in misconduct, remediating consumers, and oversight of licensee compliance.

Charging clients without providing advice

ASIC is monitoring remediation programs by six of Australia's largest banking and financial services institutions in relation to loss or detriment suffered by consumers due to non-compliant advice or FFNS conduct.

AMP, ANZ, CBA, Macquarie, NAB and Westpac established review and remediation programs to compensate affected customers. Compensation paid or offered by the six listed financial services institutions to customers who suffered loss or detriment totalled $1.05 billion as at 30 June 2020.

FFNS misconduct was examined in some detail by the Royal Commission and is subject to ongoing ASIC regulatory responses, including investigations and enforcement action.

Compliance with financial advice fee disclosure obligations

In November 2019, we reported on our compliance assessment of fee disclosure statements (FDSs) and renewal notices (RNs) issued by 30 randomly sampled AFS licensees and their representatives: Report 636 *Compliance with fee disclosure statement and renewal notice obligations* (REP 636).

We analysed 1,496 FDSs and 373 RNs, as well as information about licensees' disclosure policies and procedures, and commissioned a compliance consultant to review 176 FDSs in detail to establish whether their contents complied with legal requirements.

We found that consumers receiving financial advice could be at risk of receiving wrong information about advice fees or, in some cases, being charged fees after ongoing fee arrangements have terminated.

Our review revealed widespread non-compliance across the sample of AFS licensees and their representatives, suggesting that failure to comply with FDS and RN obligations may be an industry-wide problem. REP 636 therefore included practical tips on how industry can comply with these obligations.

Advice in superannuation

In December 2019, we released the results of our review of the ways in which superannuation funds provide advice to members and the quality of personal advice received by members of the funds: Report 639 *Financial advice by superannuation funds* (REP 639).

We surveyed 25 superannuation funds and examined personal advice provided to members of 21 of those funds. Overall, we found that 15% of the files indicated that a member was at risk of suffering some financial or non-financial detriment as a result of following the advice provided. In these cases, we contacted the licensee, making clear our expectation that they review the advice and, where required, remediate affected members.

To help superannuation trustees continue to improve the advice services they offer fund members, we included practical tips in REP 639 for trustees, advice licensees and advice providers.

Adviser bannings

ASIC takes administrative action, such as banning individual advisers, to protect investors and consumers and to deter misconduct. This year, ASIC's Financial Advisers team banned 22 advisers from providing financial services. Bans imposed included the following.

Peter Goudie: In July 2019, ASIC banned Mr Goudie from providing financial services for four years. ASIC found that Mr Goudie failed to comply with financial services laws, including the requirement to comply with the best interests duty and to prioritise his clients' interests. When providing personal advice, Mr Goudie did not adequately identify his clients' objectives, financial situation and needs, or investigate whether the products he was recommending would meet their needs. Mr Goudie also failed to give a number of his clients a Statement of Advice. In all circumstances where Mr Goudie's advice was not in the best interests of his clients, it was found that he gave priority to generating fees and commissions for himself.

Sean Philip Lewis: In April 2020, ASIC banned Mr Lewis from providing financial services for five years. ASIC found that Mr Lewis failed to comply with financial services law, including by failing to provide advice that was in the best interests of his clients and failing to provide advice appropriate for his clients' objectives. Mr Lewis advised most of his clients to use a limited recourse borrowing arrangement to fund the purchase of real property through an SMSF but did not professionally and independently assess whether using an SMSF and borrowed funds to invest in property was an appropriate strategy for these clients.

Non-lodging advice licensees

AFS licensees must comply with their financial reporting requirements. Financial statements and audit reports provide important information to ASIC and the market. Timely lodgement of financial statements and audit reports with ASIC demonstrates an AFS licensee's capacity to comply with financial services law.

In 2019–20, we followed up with 277 advice licensees who had failed to lodge their annual financial statements and audit reports.

Of these, we suspended one AFS licence and cancelled seven AFS licences, including:

- cancelling the AFS licence of RVM Capital Pty Ltd on 21 January 2020 for failing to lodge its annual financial statements and auditors reports for three consecutive years
- cancelling the AFS licence of Personal Risk Management Pty Ltd on 21 May 2020 for failing to lodge its annual financial statement and auditors reports for three consecutive years.

Twenty-four licensees voluntarily cancelled their licence as a result of our monitoring.

3.4 Investment management, superannuation and related services

The investment management, superannuation and related services sector includes **superannuation trustees**, **responsible entities (REs)**, **wholesale trustees**, **operators of notified foreign passport funds**, **custodians**, **investor-directed portfolio service operators**, **managed discretionary account providers**, **traditional trustee company service providers**, and **crowd-sourced funding intermediaries**.

In 2019–20, our work in this sector focused on implementing Royal Commission and Productivity Commission recommendations, strengthening ASIC's role as a conduct regulator, trustee misconduct, insurance in superannuation, enhancing our communication to trustees and their advisers, and responding to the impact on businesses and consumers of the COVID-19 pandemic.

Investment management

Responsible entities' obligations in the COVID-19 pandemic environment

In March 2020, ASIC wrote to several REs of managed investment schemes to remind them of their fundamental duties and legal obligations to members in light of the market volatility, disruption and other challenges associated with the COVID-19 pandemic. The letter was published on ASIC's website and reminded REs to:

- actively assess their scheme's liquidity status
- actively review the terms on which redemptions are made available and whether this remained consistent with the liquidity of the underlying scheme assets
- monitor the valuation of scheme property and its flow through to unit prices on which members transact
- meet disclosure obligations and communicate with scheme members in a timely manner.

We also noted the potential for REs to apply to ASIC for hardship relief, and our ability to provide REs with rolling withdrawal relief in appropriate cases.

We asked REs to help us monitor the situation by notifying us immediately if any registered scheme became non-liquid. We also met regularly with industry associations and members to discuss their management of scheme liquidity and compliance with their duties during the COVID-19 pandemic.

True-to-label managed funds

The appropriate labelling of managed funds is important to ensure a fair market and help consumers understand the products being offered. ASIC regularly conducts thematic campaigns and surveillances in the funds management sector.

This year, we conducted a risk-based targeted surveillance of current labelling practices within managed funds predominantly in the property, fixed-income, mortgages and cash sectors.

We found that, generally, product labelling and the characteristics of the underlying assets of the managed funds were consistent. However, issues were observed in funds that used the label 'cash' (and related terms, such as 'cash enhanced' or 'cash plus') in their fund name and in promotional materials.

Our concerns included:

› for a number of these 'cash' funds, most assets were things other than cash or cash-equivalent assets
› inappropriate comparisons were being drawn between some managed funds and bank term deposits
› issues with the withdrawal terms that some funds offered and their underlying assets – for example, some funds offering daily or similar withdrawal terms where the underlying assets were largely illiquid.

We dealt directly with about 20 REs in relation to labelling, inappropriate comparisons and withdrawal terms. Many have amended their product disclosures as a result of ASIC's inquiries. We are considering regulatory action in relation to a small number of REs.

Litigation funding reforms

On 22 May 2020, the Government announced that litigation funders would be regulated under the Corporations Act. From 22 August 2020, operators of litigation funding schemes will generally be required to hold an AFS licence and comply with the managed investments scheme regime. ASIC worked with Treasury and engaged with industry on various implementation and transitional issues relating to the application of the new requirements to litigation funders.

On 12 June 2020, ASIC made a public submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into litigation funding and the regulation of the class action industry, which is due to report by 7 December 2020. We also appeared at a hearing on 29 July 2020.

Superannuation

Superannuation trustees

ASIC is primarily responsible for ensuring that superannuation trustees meet their obligations in their dealings with consumers, including disclosure and advice to members and ensuring that members have access to complaints processes.

The Royal Commission recommended that ASIC become the primary conduct regulator for superannuation. In early 2020, the Government released for consultation proposed legislation about ASIC's role as conduct regulator in superannuation, addressing several Royal Commission recommendations. The proposed legislation also responded to the Productivity Commission's report *Superannuation: Assessing Efficiency and Competitiveness*, which recommended clarifying the regulators' roles, powers and areas of focus.

ASIC has focused on conduct that contributes to potential member harm, as well as on promoting better member outcomes in the implementation of reforms such as 'Protecting Your Superannuation Package'. We seek to drive better behaviour by trustees to ensure better outcomes for consumers.

ASIC and APRA are committed to working together effectively to create better outcomes for superannuation members, consistent with the principles in the revised APRA–ASIC MOU. On 14 February 2020, ASIC and APRA issued a joint letter to superannuation trustees about how regulatory oversight will operate following the legislative reforms to ASIC's role.

Insurance in Superannuation Voluntary Code of Practice

The Insurance in Superannuation Voluntary Code of Practice (IS Code) sets standards aimed at improving industry practices in benefit design, claims handling and communications to members. The IS Code is being adopted in whole or in part by 70% of superannuation trustees. Full compliance is not necessary until July 2021.

Along with APRA, ASIC engaged with industry – trustees, administrators and the Code owners – to understand how effectively the implementation and coverage of the IS Code is improving industry practice. We undertook over 100 website disclosure reviews, a desk-based 'mystery shopping exercise' to 100 superannuation hotlines, a survey of trustees about claim timeframes, and structured meetings with 18 trustees.

We observed some improvements in practice being introduced as a result of adoption of the IS Code by a significant number of trustees. However, further work needs to be done to achieve the high industry standards that consumers expect.

We identified several inconsistencies in implementation, some relating to fundamental aspects of the IS Code. In our view, the IS Code could go further in detailing how trustees should proactively identify and engage with vulnerable consumers, and in embedding a consumer-centric approach to vulnerability.

Our findings were outlined in Report 646 *Insurance in Superannuation: Industry implementation of the Voluntary Code of Practice*, published on 13 December 2019.

Consolidation of superannuation accounts

Working with the ATO and the Australian Competition and Consumer Commission (ACCC), ASIC identified financial advisers, trustees, fund promoters and unlicensed providers running marketing campaigns based around the provision of 'free' lost superannuation search and consolidation services. In many cases, these 'free' services were accompanied by the charging of various significant advice fees. Although consolidation of superannuation accounts can benefit consumers, if not done appropriately it can lead to the loss of valuable insurance and the payment of higher fees.

The primary tool used by those offering 'free' lost superannuation and consolidation services was the ATO's SuperMatch2 service, which allows trustees and entities authorised by the trustee to obtain a list of active superannuation accounts belonging to their members or clients.

Concerns highlighted by this review included:

- trustees' poor oversight of how third parties use their SuperMatch2 access
- trustees' inadequate oversight of payments to advisers, including payments for general advice
- lost superannuation search providers setting up fake adviser profiles with a trustee in order to gain access to the trustee's service
- the use of high-pressure sales tactics or forged signatures
- advisers inappropriately encouraging members to apply for early release of superannuation and targeting funds that appeared to be more lenient in granting the release of funds.

We are investigating this conduct for suspected contraventions of the law and continue to work with the ATO in relation to potential misuse of the SuperMatch2 service. The ATO has temporarily removed all access to SuperMatch2 and is working with industry and other government agencies to strengthen controls on access to SuperMatch2, including consideration of the issues identified by ASIC.

Protecting Your Superannuation Package review

The *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* and accompanying Regulations (PYSP measures) were introduced in order to reduce erosion of Australians' superannuation savings by inappropriate fees or insurance arrangements.

To assess superannuation trustees' initial implementation of these reforms, we undertook a detailed review of approximately 1,100 documents distributed by a sample of 12 trustees. We focused on trustees more likely to be affected by the reforms – for example, due to a relatively high proportion of inactive accounts. We also examined disclosures about the PYSP measures from a number of other trustees and third parties.

We reviewed how well the documents that were mandated under the PYSP measures complied with legal requirements, and how well other communications and marketing materials (including call centre scripts and SMS campaigns) helped members understand and respond to the reforms.

While some aspects of communication were addressed well, there were several areas of concern that had the potential to cause consumer harm. We intervened to improve communications where we identified problems and provided all 12 trustees in the sample with feedback about their communications approach.

Report 655 *Review of member communications: Protecting Your Superannuation Package (PYSP) reform*, which summarised our review findings, highlighted to trustees the importance of:

- providing clear and balanced information about the importance and purpose of PYSP measures
- providing appropriate options and avoiding techniques that influence members to take a specific course of action
- improving member data, so that information can be delivered that is relevant to particular members.

Our report set clear expectations of trustees when developing further PYSP communications and provided general guidance that trustees should consider when communicating with members in the future.

3.5 Market infrastructure

The market infrastructure sector includes **Australian market licensees**, various types of **market operators**, **benchmark administrators**, **clearing and settlement facility operators**, **Australian derivative trade repository operators**, **exempt market operators**, and **credit rating agencies**.

ASIC's work in this sector during 2019–20 continued to focus on providers' compliance with their obligations under the financial services laws to help ensure good consumer and investor outcomes and maintain trust and integrity in Australia's financial markets. We also focused on responding to the impact on businesses and consumers of the COVID-19 pandemic.

Ensuring market resilience

The Australian equity markets experienced significant volatility and record numbers of executed trades during the COVID-19 pandemic period. This placed unprecedented strain on the trade processing capacity of Australia's financial market infrastructure and the middle and back offices of market participants. There was a serious risk that the number of trades executed on the market could exceed the number that could be reliably processed by the market intermediaries and the clearing and settlement system on a single day.

In order to safeguard Australia's equity market resiliency, ASIC issued directions under the ASIC Market Integrity Rules (Securities Markets) on 15 March 2020, requiring nine large equity market participants, representing roughly 75% of total trading activity, to limit the number of trades they execute each day.

To comply with the directions, those participants implemented various changes designed to reduce their number of executed trades and increase the average size of submitted orders.

Once we were satisfied that the measures taken by participants were effective, and overall trading activity had stabilised, we revoked the directions on 14 May 2020 and issued an expectations letter to all equity market participants, setting out a principles-based approach to maintaining market resilience.

These actions were supported and enhanced by ongoing dialogue with market operators, clearing and settlement facilities, and market participants, as well as ASIC's active surveillance of the market, which included monitoring tools developed specifically to help manage COVID-19 pandemic-related risks.

Retail investor trading during the COVID-19 pandemic

Due to elevated market volatility associated with the COVID-19 pandemic, ASIC observed a substantial increase in retail activity in markets, as well as greater exposure to risk.

In May 2020, we released our analysis of retail investor trading during the period, to raise awareness of the risks observed.

ASIC noted significant increases in new and previously dormant accounts of retail brokers entering the market. Trading frequency also increased rapidly, as did the number of different securities traded per day, while the duration of holding securities significantly decreased – indicating an increase in short-term and 'day-trading' activity.

Our analysis suggested that few investors pursuing quick windfalls were successful at timing the market, with most likely to incur heavy losses. The higher probability and impact of unpredictable news and events in offshore markets overnight magnified the danger.

ASIC also highlighted concerns around the significant increase in retail investors' trading in complex, often high-risk investment products, which further contributed to our estimate of retail trading losses. These include highly geared exchange-traded products and CFDs.

As well as releasing our analysis and issuing warnings in the media, we published investor education resources on our Moneysmart website and other channels to highlight market structure, market dynamics and common behavioural biases that retail investors should be aware of during periods of financial market stress.

Licensing of market operators

We strengthened our supervision of wholesale market operators by completing the licensing of previously exempt operators of trading platforms, resulting in heightened supervision and reporting requirements.

We continue our in-depth assessments of governance, supervision and cyber resilience arrangements of professional trading platforms, with the **report on Bloomberg Tradebook Australia Pty Ltd** published in October 2019.

LIBOR transition

We continued to monitor the transition from LIBOR (London Inter-bank Offered Rate) to alternative reference rates.

We released feedback on responses to 'Dear CEO' letters we issued, highlighting the need for financial institutions to plan for LIBOR transition, the issues to consider in transition, and the importance of addressing issues early. We also wrote to a number of entities to increase awareness among smaller financial institutions, fund managers and corporations.

Clearing and settlement

CHESS replacement

ASX is undertaking a multi-year transformation program to replace its clearing and settlement system (CHESS) with a system based on distributed ledger technology.

Together with other Council of Financial Regulators (CFR) agencies and the ACCC, we are supervising ASX's governance of the project, stakeholder engagement, and management of key risks, including system development and testing, participant readiness, and pricing and data access.

The replacement system must at least deliver the same resilience, performance, recoverability, availability and security as CHESS does, while also delivering the benefits of contemporary technology.

We are engaging with participants and their technology vendors, market operators, issuers and share registries in relation to the change program.

3.6 Market intermediaries

The market intermediaries sector includes **market participants**, **securities dealers**, **corporate advisers**, **over-the-counter (OTC) traders**, **retail OTC derivatives issuers**, and **wholesale electricity dealers**.

ASIC's work in this sector during 2019–20 included focusing on market integrity and retail investor trading in the COVID-19 pandemic environment, as well as monitoring of fixed income, currencies and commodities (FICC) markets.

ASIC deferred its onsite supervision programs for market intermediaries, instead publishing guidance on business continuity and supervision arrangements to help intermediaries comply with their regulatory obligations in the pandemic environment.

Market integrity during the COVID-19 pandemic

ASIC closely monitored securities, futures, interest rates, commodities and FX markets during the COVID-19 pandemic period to identify market misconduct, price dislocation and emerging market vulnerabilities.

We focused particularly on promoting informed markets and quickly identifying and responding to misinformation, market manipulation and inappropriate short selling.

With the significant increase in trading volumes and volatility, alerts from ASIC's trade surveillance system peaked at over 1,000 alerts on several days (around seven times the norm).

In a bid to detect potential market disruption caused by market intermediaries being unable to provide effective trade execution and facilitation of capital raising activities, ASIC engaged with intermediaries to understand and assess their operational resilience, business continuity and supervision arrangements, including whether outsourced and offshore services continued to operate effectively.

To help market intermediaries meet their regulatory obligations, ASIC published guidance and reminders of regulatory obligations in our Market Integrity Update newsletters. We also provided guidance on business continuity and back-up arrangements and the supervision of staff in a remote working environment.

Fixed income, currencies and commodities onsite reviews

FICC markets are global and directly link to the real economy. While they are wholesale markets, FICC transactions may fund or manage risk for businesses and superannuation funds. ASIC's FICC strategy addresses threats to these markets that may cause harm to the real economy and consumers.

We have intensified our focus on FICC markets through proactive onsite surveillance.

Each review of FICC market participants was conducted over several days, involving a series of meetings with key staff, onsite inspections, and demonstration of key systems and controls. We required production of detailed information to test business practices and employee behaviours, and controls implemented by licensees to effectively manage conduct risk.

Two thematic reviews targeted:

- fixed income sales and trading practices, including governance and supervision, risk management, and compliance controls that supported these businesses at nine intermediaries
- conflicts of interest arrangements employed by four wholesale financial markets businesses.

Foreign exchange markets

Our work in wholesale foreign exchange (FX) markets, including onsite reviews during 2018 and 2019, was summarised in Report 652 *Wholesale FX practices in Australia*, published in December 2019. It highlighted our observations about better practices, as well as some poor practices by participants operating in the market.

We will continue to test these practices and arrangements to drive better behaviours and industry standards. Where we identify compliance failures or misconduct, we will take regulatory action.

Allocation practices in debt capital market transactions

Building on our findings in Report 605 *Allocations in equity raising transactions*, we undertook a review of market practice for allocations in debt capital market (DCM) transactions and are co-leading work with international peers through the International Organization of Securities Commissions (IOSCO).

A properly functioning DCM market is vital for the real economy, as demonstrated by governments' and corporates' ability to issue bonds and raise capital during the COVID-19 pandemic crisis.

Poor conduct in DCM markets can reduce the trust and confidence of issuers and investors, resulting in reduced participation and higher funding costs. The proper management of risks associated with allocations of debt securities, including management of conflicts of interest and ensuring that information provided to issuers and investors is accurate and not misleading, is essential.

ASIC consulted with a range of stakeholders and industry participants on DCM market practices and reviewed selected corporate, government and semi-government bond issues.

We extended our review to include post-COVID-19 pandemic transactions to see if market practices changed during this volatile period.

We identified various areas for improvement, including:

- management of conflicts of interest
- messaging to investors during transactions, including defining and disclosing joint lead manager interest
- excluding inflated bids from being recorded in bookbuild demand
- providing meaningful post-deal statistics to investors, particularly around allocation decisions
- supervision and compliance arrangements.

Cyber resilience

We continue to focus on the cyber resilience capabilities of firms operating in Australia's financial markets. Our Report 651 *Cyber resilience of firms in Australia's financial markets: 2018–19*, released on 18 December 2019, identifies new and emerging trends, as well as challenges that have emerged over the past two years. We will continue to monitor and assess improvement over time.

3.7 Corporate

The corporate sector includes **auditors and liquidators**, who are subject to separate fees and levies. The corporate subsectors include **corporations** (listed corporations, unlisted public companies, large proprietary companies and small proprietary companies), **auditors of disclosing entities**, **registered company auditors**, and **registered liquidators**.

In 2019–20, our work in this sector focused on the healthy operation of capital markets by promoting best practice corporate culture and conduct and ensuring that investors are treated fairly in corporate transactions. This included targeting corporate governance practices and the integrity of financial reporting. We also focused on responding to the impact on businesses and consumers of the COVID-19 pandemic.

Capital raising initiatives in the COVID-19 pandemic environment

On 31 March 2020, ASIC announced it would help listed companies raise capital quickly by giving temporary relief to enable certain 'low doc' offers (including rights offers, placements and share purchase plans) to be made to investors, even if they did not meet all the usual requirements. We did this to assist companies that needed to raise funds urgently because of the impact of the COVID-19 pandemic.

Without this relief, some listed companies would have been prevented from using 'low doc' offers because they were suspended from trading for longer than the Corporations Act permitted, while they assessed the impact of the COVID-19 pandemic on their business and prepared for a capital raising.

ASX also granted a temporary waiver to allow companies to raise an increased amount of capital without shareholder approval. After consultation with a wide range of capital market participants and shareholder associations, we secured changes to these rules to provide enhanced disclosure for placement allocations and share purchase plans. These changes reflected our expectation that directors make fair and transparent fundraising decisions in the best interests of the company.

Mining and exploration initial public offerings

In December 2019, we reviewed the initial public offering (IPO) process for small-cap and micro-cap mining and exploration listings. Our observations from that review were published in Report 641 *An inside look at mining and exploration initial public offers*.

We found that advisers often have significant influence in these listings and in relation to the governance of the company itself. There was often poor management of conflicts of interest resulting from multiple roles played by some advisers. In some cases, we also identified preferential treatment of investors who had a pre-existing relationship with the adviser.

Our report included guidance and best practice recommendations for lead managers and directors to address the concerns we identified. These recommendations were complemented by a range of ASX Listing Rule changes.

We continue to monitor conduct in relation to IPOs of securities in mining and exploration companies and we intervene when necessary.

Improving audit quality

Auditors play a vital role in underpinning investor trust and confidence in the quality of financial reports, which provide important information for investors and others who make decisions based on those reports.

ASIC is taking a broader, more intensive supervisory and enforcement approach to our work program on audit, which includes:

› reviewing how conflicts of interest are managed in the six largest audit firms, as well as firm culture, governance and accountability mechanisms in relation to audit quality, and firm talent for quality audits
› analysing the processes that underpin audit quality and the effectiveness of director oversight of financial reporting – in particular, the use of root cause analysis in audit firms, as identifying the root causes of an adverse finding enables corrective action to be taken
› increasing transparency by publishing the level of adverse findings for large audit firms, as well as broader measures and indicators of audit quality
› implementing our 'Why not litigate?' approach in relation to auditor conduct matters.

This year, we continued our review of the financial statements of listed and other public interest entities and the audit files of a number of these entities.

Our inspection findings showed that more needs to be done to improve audit quality: see Report 648 *Audit inspection report for 2018–19* and our supplementary report containing a broader group of audit quality measures and indicators:

Report 649 *Audit quality measures, indicators and other information: 2018–19*. These were jointly released on 12 December 2019.

In October 2019, we made a submission to the Parliamentary Joint Committee Inquiry on the regulation of auditing in Australia and appeared at four hearings. The Inquiry is due to report by 2 December 2020.

COVID-19 pandemic initiatives – financial reporting and audit

Financial reporting and audit processes of many companies were affected by the COVID-19 pandemic. ASIC helped companies, directors and auditors meet their reporting and audit obligations by:

- maintaining regular contact with audit firms, accounting bodies, the Australian Institute of Company Directors, standard setters and other regulators internationally to monitor developments
- outlining reporting and audit focus areas, including asset values, liabilities, solvency and going concern, as well as disclosures on uncertainties, key assumptions, underlying drivers of results, strategies, risks and future prospects
- providing an additional month for listed and unlisted entities to lodge audited financial reports for balance dates to 7 July 2020
- adopting a 'no action' position where annual general meetings of public companies for year ends up to 7 July 2020 are held seven months, rather than five months, after year end
- providing information on our website to address common questions about the reporting and audit obligations of companies, directors and auditors, given the impact of the pandemic
- refocusing our financial reporting surveillances and audit inspections to promote informing markets about the impact of the pandemic on entities through audited financial reports
- some changes to our regulatory activities to ease the burden on companies, directors and auditors who may be under pressure due to remote work and other impacts of the pandemic.

Changing liquidator behaviour

In 2019–20, ASIC focused on improving the behaviour of registered liquidators in relation to independence, remuneration and investigation of illegal phoenix activity.

Independence: Registered liquidators must provide to creditors, and lodge with ASIC, a Declaration of Relevant Relationships and Declaration of Indemnities (DIRRI), a key document considered by stakeholders to assess liquidator independence.

We identified 39 registered liquidators who were not lodging their DIRRIs. Some had previously been contacted by ASIC regarding non-lodgement, but most were first-time non-lodgers. We requested that all outstanding DIRRIs be lodged and issued five formal directions to the liquidators with whom we had previously corresponded. Liquidators reviewed their internal procedures to prevent this in future.

Remuneration: We worked with registered liquidators in relation to how changes to the law introduced in 2017 applied to seeking approval of remuneration passed on papers – that is, without convening a meeting of creditors. A misunderstanding about how the law applied meant that some resolutions were invalid. ASIC worked with the liquidators affected to rectify the invalid resolutions, ensuring that they obtained valid resolutions and reviewed their processes and procedures to ensure future compliance with the Corporations Act.

Investigation of illegal phoenix activity: Following the changes to the law in 2017, where ASIC suspects possible illegal phoenix activity, it can appoint a reviewing liquidator to inquire, investigate and report findings to us objectively and independently. The appointment of a reviewing liquidator does not mean that the liquidator subject to review has done anything wrong.

To date, we have appointed 10 reviewing liquidators to 22 external administrations. We have observed positive changes in the behaviour of the liquidators under review, including:

- improved file management processes
- focused investigations, including performing historical company searches
- seeking ASIC assistance via the External Administration Assistance program and/or the Assetless Administration Fund
- improved timeliness of reporting and finalisation of external administrations
- better record keeping, particularly of decisions made in the course of their work.

Assetless Administration Fund reforms – transition to Grant Connect

The Assetless Administration Fund (AA Fund) is a Commonwealth grant scheme administered by ASIC. Funds allocated for 2019–20 were $7.083 million. Where a registered liquidator suspects illegal phoenix activity and other serious misconduct, but there are no assets to fund investigations and reporting, the AA Fund supports registered liquidators to investigate and report misconduct to ASIC. In some cases, it also funds legal action to recover assets.

ASIC conducted a series of workshops with registered liquidators to raise awareness of the type of funding they can apply for, including for asset recoveries, and the eligibility criteria for that funding. We obtained valuable feedback to help improve how we administer the AA Fund.

Changes implemented include preparing for the transition of grants to the Grant Connect website and platform, as well as new grant guidelines that simplify the definition of 'assetless', outline the potential staged approach and the types of tasks that may be funded under the Asset Recovery stream, and clarify the assessment criteria for funding under that stream.

This year, ASIC also migrated applications for the AA Fund onto ASIC's new Regulatory Portal, which pre-fills some data, improves collection of information to assist with the assessment of applications, and improves tracking of the status of applications and transactions.

Amanda Young – cancellation of registration as a liquidator

On 2 September 2019, following an ASIC investigation into alleged misappropriation of funds, we issued Amanda Young with a notice to show cause why she should remain registered as a liquidator.

Ms Young had agreed to voluntarily suspend her registration on 18 December 2018 pending our investigation into allegations she had misappropriated funds totalling approximately $238,000 from four liquidations.

Ms Young failed to respond to our notice and we referred her to a disciplinary Committee convened on 1 November 2019. On 3 June 2020, the Committee concluded that Ms Young had misappropriated the funds, had improperly used her position, had falsified books, and was not a fit and proper person to be registered as a liquidator.

The Committee concluded that Ms Young's registration as a liquidator should be cancelled. The Committee's decision noted that Ms Young 'took deliberate steps to conceal her actions, including falsifying official documents and misleading and deceiving her colleagues'. The Committee recognised that a suspension would be inappropriate and contrary to the public interest, due to the repeated misconduct, Ms Young's failure to express contrition or remorse, and the importance of protecting the public and deterring others from similar conduct.

Registered liquidators hold other people's money when carrying out their duties. Maintaining trust is critical for the integrity of the financial system and confidence in the corporate insolvency regime.

Helping protect small business

Where necessary, we take action against companies, directors and other officeholders who fail in their duties. By doing so, ASIC works to create a level playing field. This year, ASIC recorded 322 small business-related outcomes.

Table 3.7.1 Small business enforcement outcomes by misconduct and remedy type

Misconduct type	Criminal	Administrative	Total (misconduct)
Action against persons or companies	261	61	**322**

As at 1 July 2020, ASIC had 168 small business-related criminal cases underway against persons or companies.

ASIC also works to combat illegal phoenix activity. This year, of the 61 administrative actions in Table 3.7.1, 10 involved disqualification of directors where there were clear indicia of illegal phoenix activity.

As part of our focus on this type of misconduct, we also undertook surveillances of 41 high-risk phoenix subjects, assisted liquidators to obtain books and records, and ensured that directors comply with their obligations through our External Administration Assistance program.

Further details of prosecutions are set out in Chapter 2.

3.8 Large financial institutions

Supervision of large financial institutions

As set out in Chapter 2, we have enhanced key aspects of our supervisory approach as part of our response to widespread conduct failures in the Australian financial services industry.

ASIC's Supervision Group seeks to influence behavioural change in our most significant financial services institutions to prevent harm resulting from poor corporate systems and conduct.

Key results of our supervision of large financial institutions are set out in Chapter 2.