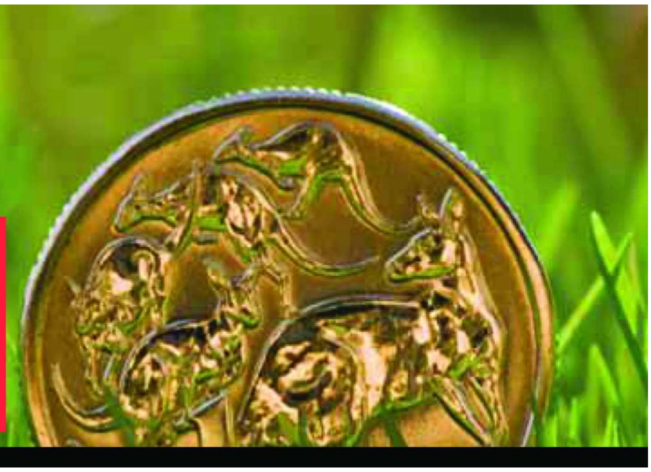
Financial Services
Newsletter



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Contents

Information contained in this newsletter is current as at October 2020

LexisNexis Butterworths

General Editor's note

Karen Lee *LEGAL KNOW-HOW*

This month, **Frank Downes** (Juris IT Services) continues to give us an overview of legislative and regulatory frameworks that clients of financial services lawyers may be subject to regarding the collection and use of personal information and data. In Part 2 of this series of articles, Frank takes a look at the key ones in China, Japan and India.

On 30 July 2020, the Australian Securities and Investments Commission (ASIC) issued *Regulatory Guide 271: Internal dispute resolution* (RG 271). RG 271 explains how we can meet ASIC's standards and requirements regarding having an internal dispute resolution system in place. It is useful to remember that the standards and requirements highlighted in RG 271 are enforceable. In another informative and practical article for the *Financial Services Newsletter*, editorial Board member **Andrea Beatty**, **Chelsea Payne** and **Chloe Kim** (Piper Alderman) consider the key enforceable provisions under RG 271 and the significant implications of breaching them, and a future where ASIC's regulatory guides will include enforceable provisions.

Last but not least, in "ASIC's regime for facilitating withdrawals from 'frozen funds' during COVID-19", **Vince Battaglia** and **Nina Mao** (Hall & Wilcox) outline for us ASIC's relief measures for responsible entities of registered schemes to facilitate withdrawals from "frozen funds". These relief measures constitute ASIC's updated relief regime on "hardship" and "rolling" withdrawals since the Global Financial Crisis in light of the impact of the COVID-19 pandemic. What are the differences between the updated relief regime and the previous one? What do we need to take into consideration when relying on the new relief regime? The authors answer these and other important questions for us.

I hope you enjoy the issue of the *Financial Services Newsletter*. Please feel free to get in touch with me to provide any feedback. I would love to hear from you.

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Karen Lee is the General Editor of the Australian Banking & Finance Law Bulletin and the Financial Services Newsletter. She also partners LexisNexis in other capacities, including as Specialist Editor for precedents in banking and finance, mortgages and options, and as contributing author of a number of other publications, including Australian Corporate Finance Law, Halsbury's Laws of Australia and Practice Guidance for General Counsel. Karen established her legal consulting practice, Legal Know-How, in 2012. She provides expert advice to firms and businesses on risk management, legal and business process improvement, legal documentation, regulatory compliance and knowledge management. Prior to this, Karen worked extensively in-house, including as Head of Legal for a leading Australasian non-bank lender, as well as in top-tier private practice, including as Counsel at Allen & Overy and Clayton Utz.

Overview of Regional Data Protection Regulations — what financial services lawyers need to know — Part 2

***Frank Downes** JURIS IT SERVICES*

This month we continue our review of legislative and regulatory frameworks that clients of financial services lawyers may be subject to under national, regional and industry specific regulations governing the collection and use of personal information and data. Particular attention will be paid to regulations that could impact cloud service providers. Last month we covered the frameworks in the Asian region, including Australia, New Zealand, Singapore and South Korea. This month we cover China, Japan and India. Regulations that are considered global will be the subject of a separate article. This overview is focussed on the compliance requirements for the financial services sector and should not be considered exhaustive, local jurisdictions may have additional regulations in place not covered in this article.

China

Information System Classified Security Protection (DJCP)

The DJCP is a multi-level protection scheme (MLPS) first established in 2007. The MLPS sets five levels of information security based on the potential consequences of damage to the information security of "critical infrastructure" ranging from harm to the legal rights of citizens to very serious harm to national security.

A major issue is the term "critical infrastructure" is undefined making it difficult to determine what products, services or operations may fall under the MLPS regime.

The cybersecurity standards

In March 2020, a new set of standards were approved and published. Of particular importance for lawyers and their banking clients is the Technical Specifications for Personal Information Security (GB/T 35273-2020). This standard provides the basic principles for personal information security, including guidance on the collection and storage of personal information. In addition, the "Information Security Standard" provides information with respect to the rights of data subjects to correct, delete and withdraw consent for particular data types. There are also guidelines for the handling and reporting of data security incidents.

GB 18030 Information Technology — Chinese coded character set

GB 18030 is the Chinese government standard that defines the required language and character support necessary for software in China. Whilst not a data protection regulation directly, all software and subscription services must comply with this standard which is maintained by the China Electronics Standardization Institute (CESI).

Trusted Cloud Service Certification

Trusted Cloud Service Certification is a cloud service quality evaluation system organised by the Trusted Cloud Service working group of Data Center Alliance (DCA) under the guide of Ministry of Industry and Information Technology. This certification aims to cultivate the Chinese public cloud service market, enhance users' confidence on cloud services, protect certified cloud service providers and promote sound development of the market.

Japan

Center for Financial Industry Information Systems

The Center for Financial Industry Information Systems (FISC) is a not-for-profit organisation established by the Japanese Ministry of Finance in 1984 to promote security in banking computer systems in Japan. Some 700 corporations in Japan are supporting members, including major financial institutions, insurance and credit companies, securities firms, computer manufacturers, and telecommunications enterprises.

In collaboration with its member institutions, the Bank of Japan, and the Financial Services Agency, the FISC created guidelines for the security of banking information systems. These include basic auditing standards for computer system controls, contingency planning in the event of a disaster, and the development of security policies and standards encompassed in more than 300 controls.

Although the application of these guidelines in a cloud computing environment is not required by regulation, most financial institutions in Japan that implement cloud services have built information systems that satisfy these security standards, and it can be difficult to justify diverging from them.[1]

Conformance with this framework is not required by regulation, and not audited or otherwise validated by the FISC.

Cloud Security Mark Gold

The Cloud Security Mark Gold (CS Gold Mark) is the first security standard for cloud service providers (CSPs) in Japan, and is based on ISO/IEC 27017, the international code of practice for information security controls. This in turn is based on ISO/IEC 27002 for cloud services, which address information security in cloud computing and the implementation of cloud-related information security controls.

The CS Gold Mark is accredited by the Japan Information Security Audit Association (JASA), a non-profit organisation established by the Ministry of the Interior and the Ministry of Economy, Trade, and Industry to strengthen information security in Japan. The CS Mark promotes the use of cloud services and provides:

- a common standard that CSPs can apply to address common customer concerns about the security and confidentiality of data in the cloud and the impact on business of using cloud services
- verifiable operational transparency and visibility into the risks that customers face when they use cloud services
- objective criteria that enterprises and government can use to choose a CSP, and clarification of the security requirements that CSPs must follow to be accredited

My Number Act

The My Number Act assigns a unique 12-digit number — called My Number, or the Social Benefits and Tax Number or Individual Number — to every resident of Japan, whether Japanese or foreign. Giving each person one number for all purposes (like the US Social Security number) was designed to simplify and make more efficient taxation and the implementation of social benefits such as the national pension, medical insurance, and unemployment.

The Personal Information Protection Commission (PPC), which acts as the centralised data protection authority, was established by the Act on the Protection of Personal Information. In the PPC's role of supervising and monitoring compliance with the My Number Act.

India

Reserve Bank of India and Insurance Regulatory and Development Authority of India

The Reserve Bank of India (RBI), India's central banking institution, the Insurance Regulatory and Development Authority of India (IRDAI), and the Ministry of Electronics and Information Technology (MeitY) comprise three of the key financial industry regulators overseeing banks, insurance organisations, and market infrastructure institutions. Their directives include outsourcing and risk management guidelines and requirements for compliance with privacy rules governing sensitive data.

The *Guidelines on Managing Risk and Code of Conduct in Outsourcing of Financial Services by Banks*[2] address the risks that regulated banks would be exposed to while outsourcing financial services and help ensure that outsourcing does not impede the supervisory role of the RBI. The RBI does not require prior approval for banks seeking to outsource financial services; however, core banking functions, such as internal audit and compliance functions, should not be outsourced.

Financial institutions must report outsourcing arrangements where the scale and nature of the activities are significant or require extensive data sharing with service providers outside of India. This guidance applies particularly if operational data is stored or processed outside India.

Every year, insurance organisations are required to report outsourcing to IRDAI of certain support functions of core activities within 45 days of the close of the financial year.

Ministry of Electronics and Information Technology

The MeitY, an agency of the government of India, provides policy guidelines to all government and state public sector organisations. Its guidelines are also frequently adopted by private sector organisations in regulated industries, like financial services and telecommunications.

MeitY provides accreditation (referred to by MeitY as "empanelment") of cloud service providers, which requires that cloud services be certified as compliant against a predefined set of standards and guidelines on security, interoperability, data portability, service level agreement, and contractual terms and conditions.

Once accredited, cloud service providers are listed in a government cloud services directory where public sector organisations can compare and procure accredited cloud services.

Financial firms using cloud services must comply with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011.

Next month we will continue our review covering Europe.

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About the author
Frank Downes is the CEO of Juris IT, an IT services company that assists organisation with information security and successfully implementing, securing and maintaining remote work environments.

Disclaimer: *This document is part of our commitment to assist lawyers understand the information technologies that will impact them and their clients. It is not legal or regulatory advice and it does not constitute any warranty or contractual commitment on our part. If you have any questions, please contact us.*

Footnotes

1. The latest guidelines, Version 8 Supplemental Revised, issued in 2015, added two revisions relating to the use of cloud services by financial institutions and countermeasures against cyberattack.
2. Reserve Bank of India, *Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services by Banks* (11 March 2015) available at www.rbi.org.in/scripts/NotificationUser.aspx?Id=9597&Mode=0.

RG 271 — Internal dispute resolution — are enforceable regulatory guides the way of the future?

Andrea Beatty, ***Chelsea Payne*** *and* ***Chloe Kim*** *PIPER ALDERMAN*

The Australian Securities Investments Commission's (ASIC) new *Regulatory Guide 271 — Internal dispute resolution*[1] (RG 271) is paving the way for aspects of ASIC's "guidance" effectively having the force of law. This means licensees should carefully consider ASIC's regulatory guides and be aware of how ASIC interprets the law.

Released on 30 July 2020, RG 271 outlines the updated requirements for how financial firms should deal with consumer and small business complaints under their internal dispute resolution (IDR) process. RG 271 will replace *RG 165 — Licensing: Internal and external dispute resolution*[2] (RG 165), providing more in-depth guidance on how financial firms should deal with retail customers when there is a dispute. ASIC has provided a deadline of 5 October 2021 for industry to comply with the new IDR standards and guidelines, with RG 165 being repealed from 5 October 2022. This article will focus on the key enforceable provisions under RG 271 and the significant implications of breaching them, and a future where ASIC's regulatory guides will include enforceable provisions.

Background

ASIC sought feedback through public consultation by releasing *Consultation Paper 311 — Internal dispute resolution: Update to RG 165*[3] on 15 March 2019 concerning a proposed update of RG 165. The responses received were directed towards further guidance regarding complaints, small businesses, IDR timeframes and the content of IDR responses, customer advocates, managing systemic issues, enforcing draft RG 165 and transitional arrangements.

The update to RG 165 was also encouraged by the findings from ASIC's on-site surveillance of the IDR process observed at the big four banks and AMP which had initially commenced to monitor whether they were complying with their regulatory requirements (Close and Continuous Monitoring Program). The results from the Close and Continuous Monitoring Program encouraged more stringent procedures for IDR, after ASIC monitors found significant "deficiencies" and "delays" in the banks' disputes and complaints processes.[4] Although the in-person surveillance has been halted due to COVID-19, the results so far have provided ASIC with great insight and encouraged the regulatory body to renew and update IDR standards.[5]

With the increased levels of financial hardship and consumer vulnerability resultant from the COVID-19 pandemic, ASIC considers it essential that IDR performance is significantly improved.

RG 271 updates

The updated RG 271 was published and aimed at a number of entities including Australian financial services licensees and Australian credit licensees. There were several key updates from RG 165, including:

- the definition of "complaint"
- outsourcing the IDR process
- a reduction in deadlines for complaints, including superannuation complaints;
- information that financial firms need to include in a written IDR notice
- new timeframe requirements for customer advocate reviews of appeals against IDR decisions
- acting in the consumers' best interests, and
- systemic issues

We discuss each of the above below.

Complaint

A complaint is identified to be "an expression of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required". ASIC's guidance states that "or about an organisation" includes dissatisfaction expressed on social media.[6]

Outsourcing

Financial firms who outsource a part, or all of their IDR process must ensure:[7]

- due skill and care is taken when choosing suitable service providers
- they are monitoring the performance of service providers. and
- they can deal with any actions that breach or fall short of service providers' obligations under RG 271

Reduction in timeline

ASIC has also provided greater comprehensive guidelines concerning the satisfaction of a complaint being resolved. When doing so, ASIC expects firms to consider whether the complainant has confirmed that they are satisfied with the action taken by the financial firm in response to the complaint or other circumstances which make it reasonable for the firm to form the view that the complaint has been resolved to the complainant's satisfaction.[8]

ASIC has noted that it expects firms to acknowledge the complaint within 24 hours (or one business day) of receiving it, or as soon as practically possible.[9]

Under the new RG 271, the deadline for IDR responses has reduced in accordance with the table below.

Complaint type	Maximum timeframes for IDR response after receiving the complaint
Standard complaints	No later than 30 calendar days
Credit-related complaints involving default notices	No later than 21 calendar days after receiving the complaint
Credit-related complaints involving hardship notices or requests to postpone enforcement proceedings	No later than 21 calendar days after receiving the complaint. However, exceptions will apply if there is insufficient information to make an appropriate decision, or if an agreement has been reached with the complainant
Traditional trustee complaints	No later than 45 calendar days
Superannuation trustee complaints, except for complaints about death benefit distributions	No later than 45 calendar days
Complaints about superannuation death benefit distributions	No later than 90 calendar days after the expiration of the 28-calendar day period for objecting to a proposed death benefit distribution

Information to include in written IDR

The information required to be included in an IDR response is an enforceable provision by ASIC. The IDR response is communicated from the financial firm to the complainant and must inform the complainant of:

- the final outcome of their complaint at IDR
- their right to complain to the Australian Financial Complaints Authority (AFCA) if they are not satisfied with the financial firm's response, and
- the contact details for AFCA

If the final outcome is to reject or partially reject the complainant, the IDR response needs to clearly identify the reasons for that outcome.[10]

Financial services dispute resolution framework

Financial firms are required to have an IDR procedure that complies with standards and requirements made or approved by ASIC and membership of AFCA.

Credit representatives and exempt special purpose funding entities (including securitisation bodies) who do not have IDR obligations must be a member of AFCA.

RG 271 covers and links the process between IDR and AFCA including the requirement for financial firms to provide details on how to access AFCA through a range of disclosure documents such as:[11]

- for AFSL holders — Financial Services Guides, Product Disclosure Statements, and
- for ACL holders — other forms and notices issued under the National Credit Code

AFCA has confirmed that they are supportive of ASIC's updated RG 271, as it provides affected firms certainty and enough time to make the changes required to meet the updated regulatory guidance. ASIC intends for the enhanced and stringent IDR procedures in RG 271 to adequately address the requirement for customer remediation. RG 271 is also complimented by RG 267 *Oversight of the Australian Financial Complaints Authority*[12] which identifies how ASIC will use their power and perform their oversight role over AFCA.

Acting in the consumer's best interest

ASIC has also identified the required IDR standards to be adopted by financial firms including:

- top-level commitment to effective, fair and timely complaint management
- enabling complaints
- resourcing
- responsiveness
- objectivity and fairness
- complaint management policies and procedures
- data collection, analysis and internal reporting, and
- continuous improvement of the IDR process

The accessibility factor is of key importance for ASIC with RG 271 outlining the requirement for financial firms to have an easily understandable and usable IDR process, including for people with disabilities or language difficulties.[13]

RG 271 also identified that financial firms should offer flexibility as to how complaints can be lodged and offer multiple lodgement methods such as via telephone, email, letter, social media, in person, or online.[14]

The IDR process must also be free to complainants. This includes materials which explain how the IDR process operates and RG 271 outlines that complainants should be able to make or pursue their complaint against the financial firm via free IDR process.

Systemic issues

An enforceable requirement is for financial firms' boards to have clear accountabilities regarding complaints handling functions, this includes managing systemic issues identified through consumer complaints. If the financial firm provides boards with reports, it is required to include information regarding metrics and analysis of consumer complaints.[15]

Accordingly, ASIC has identified that financial firms need to:[16]

- encourage and cater for staff to escalate possible system issues which they have identified from complaints
- regularly analyse complaint data to identify specific systemic issues
- promptly escalate possible systemic issues to appropriate areas within the firm for investigation and action, and
- report internally on the investigations' outcomes, including taking action in a timely manner

Instrument

RG 271 was released at the same time as the ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 (Cth) (Instrument). The Instrument clarifies the new enforceable standards applicable to IDR procedures.

The Instrument which will apply from 5 October 2021 importantly identifies:

- the new standards and requirements that ASIC has made and approved for the IDR procedures of financial firms
- requirements for written reasons for decisions about complaints in relation to regulated superannuation funds, approved deposit funds and retirement savings accounts, and
- that financial firms must comply with their IDR procedures

A contravention of the IDR obligations could result in civil penalty consequences as it may constitute an offence.

If the entity is a financial services licensees, a contravention of the requirement to comply with the IDR procedures in s 912A(2)(a)(i) and s 1017G(2)(a)(i) of the Corporations Act 2001 (Cth) (Corporations Act) will attract civil penalty provisions. A contravention of this section will attract a maximum of 50,000 penalty units for body corporates amounting to $11.1 million.

Credit licensees are also bound by s 47(1) of the National Consumer Credit Protection Act 2009 (Cth) to have an IDR procedure that complies with the standards and requirements made or approved by ASIC and relates to disputes concerning the licensee or representatives' credit activities. If this occurs, it will attract 5,000 penalty units amounting to $1.11 million.

As at the time of writing, the Instrument has been placed on the Senate Disallowable Instruments List.[17] If successfully disallowed, it could leave potential uncertainty concerning the enforceability of RG 271. As it was presented to the Senate on 24 August 2020, there are 8 sitting days remaining for the notice of motion to disallow to be agreed to, withdrawn or negatived.

Implications of RG 271

The enforcement of RG 271 carries some significant implications on the financial services industry, beyond requiring an updated IDR process for affected parties but also on the future of enforceable regulatory guides across the industry.

Enforceability

RG 271 contains "enforceable paragraphs" identifying which sections ASIC can pursue civil action to ensure financial firms comply with the regulatory guide. These guides alongside the enforceable Instrument indicate the types of regulatory guidance ASIC will release, focusing on compliance and enforceability.

In the *Australian Securities Investments Commission v Westpac Banking Corp* trials[18] (Westpac trials), ASIC relied upon their own interpretation of the responsible lending obligations under the National Consumer Credit Protection Act 2009 (Cth), as demonstrated in *RG 209 — Credit licensing: Responsible lending conduct*[19] to argue Westpac had breached their responsible lending obligations. This differed from the judiciary's interpretation of the law, leading to the regulatory body's loss at the Full Federal Court. Accordingly, ASIC implementing enforceable provisions in their regulatory guides will ensure situations do not arise where there is inconsistency between ASIC's guidance on legislation and judiciary's application of the law. Especially as ASIC's enforceable regulatory guides will be supplemented by a legislative instrument, it indicates an attempt to ensure greater consistency between ASIC and the judiciary.

Follow through

ASIC has indicated that it will continue to conduct further consultation into the IDR data reporting regime which had been recommended in 2018 through the *Ramsay Review into dispute resolution and complaints framework*.[20] The regulatory body will also continue monitoring the big four banks and AMP remotely through their Close and Continuous Monitoring Program, ensuring they are both supervising and supporting the firms.[21]

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Footnotes

1. ASIC, *Regulatory Guide 271: Internal dispute resolution* (July 2020) available at https://download.asic.gov.au/media/5720607/rg271-published-30-july-2020.pdf.
2. ASIC, *RG 165 Licensing: Internal and external dispute resolution,* (July 2020) available at https://download.asic.gov.au/media/5720809/rg165-published-30-july-2020.pdf.
3. ASIC, *Consultation Paper 311 — Internal dispute resolution: Update to RG 165*, (May 2019) available at https://download.asic.gov.au/media/5113692/cp311-published-15-may-2019.PDF.
4. ASIC Commissioner Sean Hughes, "ASIC's approach to enforcement after the Royal Commission", Speech, 36th Annual Conference of the Banking and Financial Services Law Association, 30 August 2019.
5. ASIC, *Regulation Impact Statement: Maximum timeframes for internal dispute resolution*, July 2020 available at https://download.asic.gov.au/media/5720613/ris-rg271-published-30-july-2020.pdf.
6. Above n 1, at RG 271.184.
7. Above n 1, at RG 271.48.
8. Above n 1, at RG 271.73.
9. Above n 1, at RG 271.51.
10. Above n 1, at RG 271.54.
11. Above n 1, at RG 271.113.
12. ASIC, *Regulatory Guide 267 — Oversight of the Australian Financial Complaints Authority* (June 2018) available at https://download.asic.gov.au/media/5716695/rg267-published-20-june-2018-20200730.pdf.
13. Above n 1, at RG 271.134.
14. Above n 1, at RG 271.136.
15. Above n 1, at RG 271.118.
16. Above n 1, at RG 271.120.
17. Parliament of Australia, *Senate Disallowable Instruments List* (November 2020) available at www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/senate-dissallowable-instruments.
18. *Australian Securities and Investments Commission v Westpac Banking Corp* (2020) 380 ALR 262; 145 ACSR 382; [2020] FCAFC 111; BC202005844; *Australian Securities and Investments Commission v Westpac Banking Corp (Liability Trial)* (2019) 139 ACSR 25; [2019] FCA 1244; BC201907218.
19. Parliament of Australia, *Regulatory Guide 209 — Credit licensing: Responsible lending conduct* (December 2019) available at https://download.asic.gov.au/media/5403117/rg209-published-9-december-2019.pdf.
20. Australian Government, The Treasury, "Review into External Dispute Resolution and Complaints Framework" 2015–2017, https://treasury.gov.au/review/review-into-dispute-resolution-and-complaints-framework.
21. ASIC, "20-086MR Details of changes to ASIC regulatory work and priorities in light of COVID-19" media release (14 April 2020).

ASIC's regime for facilitating withdrawals from "frozen funds" during COVID-19

Vince Battaglia *and* ***Nina Mao*** *HALL & WILCOX*

In this article, we outline briefly the Australian Securities and Investments Commission's (ASIC) relief measures for responsible entities of registered schemes to facilitate withdrawals from "frozen funds". These relief measures constitute ASIC's updated relief regime on "hardship" and "rolling" withdrawals since the Global Financial Crisis (GFC) in light of the impact of the COVID-19 pandemic.

We consider some of the differences between the updated relief regime and the relief provided by ASIC during the GFC, and highlight important considerations in relying on the new relief regime.

Background

On 20 March 2020, ASIC wrote to responsible entities to remind them of their duties and obligations with respect to managing scheme liquidity. ASIC also informed responsible entities that it will consider granting hardship or rolling withdrawal relief on a case-by-case basis.[1] The establishment of standard hardship and rolling withdrawal relief measures for frozen funds eventually crystallised as a "key action" for ASIC in its Interim Corporate Plan 2020–21, which was published on 11 June 2020.[2]

Subsequently, on 26 August 2020, ASIC announced a new relief regime to facilitate withdrawals from frozen funds. In announcing the new relief, ASIC stated that it had reviewed and updated the existing relief and guidance given as a result of the GFC and as a consequence of the COVID-19 pandemic.[3]

Summary of the new regime

Under the new regime, ASIC considers a "frozen fund" to be a registered scheme for which the responsible entity of the scheme has:

- suspended withdrawals (other than any hardship withdrawals) from the scheme, and
- ceased to allow the issue of new interests in the scheme,

regardless of whether the fund was originally liquid or not liquid within the meaning of that term under pt 5C.6 of the Corporations Act 2001 (Cth) (Corporations Act).

In brief, under the new relief regime, responsible entities may seek to rely on the following forms of conditional relief to facilitate withdrawals by investors from frozen funds and non-liquid funds:

- class-based relief implemented under the *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778*[4] (Hardship Relief Instrument) to facilitate hardship withdrawals
- case-by-case hardship relief for which responsible entities may apply if they cannot rely on the Hardship Relief Instrument, and
- case-by-case relief for "rolling" withdrawal offers for which responsible entities of non-liquid registered schemes may apply

ASIC will list the responsible entities that rely on any form of its relief on its website.

The hardship withdrawal relief does not apply to time-sharing schemes, mortgage investment schemes, investor-directed portfolio services (IDPS)-like schemes and registered litigation funding schemes that involve representative proceedings.

An outline of the relief options

In the table below, we summarise briefly the general features of the three forms of relief for responsible entities.

<table>
<tr><th></th><th>Relief under Hardship Relief Instrument</th><th>Individual hardship relief</th><th>Individual rolling withdrawal relief</th></tr>
<tr><td>Does a responsible entity need to apply for relief on a case-by-case basis?</td><td>No. This relief is implemented under the Hardship Relief Instrument and applies to give responsible entities relief where the criteria are met and the conditions are satisfied.</td><td colspan="2">Yes, a responsible entity is required to apply for the relief. ASIC will consider applications on a case-by-case basis (in accordance with specific guidance set out in ASIC Regulatory Guide 136 — Funds management: Discretionary powers[5] (RG 136) and general guidance on applications for individual relief in ASIC Regulatory Guide 51 — Applications for relief.[6]</td></tr>
<tr><td>What does this relief allow a responsible entity to do?</td><td>According to RG 136, under this relief, a responsible entity has the discretion to facilitate a withdrawal request where the request satisfies at least one of hardship criteria (specified under the Hardship Relief Instrument).
Under the relief, a responsible entity may grant up to four hardship withdrawals per calendar year to a member, up to a cap of $100,000 of their investment per calendar year.</td><td>If a responsible entity cannot rely on the Hardship Relief Instrument, it may apply to ASIC for individual relief to allow members suffering hardship to withdraw in priority to other members.
ASIC states that it will consider granting individual relief in these circumstances.</td><td>ASIC states that it will consider granting relief to allow responsible entities to implement 12-month rolling withdrawal offers.
According to ASIC, the purpose of this relief is to allow responsible entities of illiquid schemes to provide all members with periodic withdrawal opportunities with administrative ease.</td></tr>
<tr><td>What exemptions or modifications does this relief provide?</td><td>The Hardship Relief Instrument provides relief to eligible responsible entities from:
• the duty to treat members of the same class equally under s 601FC(1)(d)
• the withdrawal regime in pt 5C.6 of the Corporations Act, by introducing a new hardship withdrawal regime
• the requirement to set out adequate procedures for making and dealing with hardship withdrawal requests in the scheme constitution (with conditions), and</td><td>ASIC states that it will consider granting individual relief from the following provisions of the Corporations Act:
• the duty to treat members of the same class equally under s 601FC(1)(d)
• the withdrawal regime in pt 5C.6 and
• s 601GC</td><td>ASIC states that it may consider granting relief from requirements under pt 5C.6 of the Corporations Act to allow a responsible entity to implement 12-month “rolling” withdrawal offers</td></tr>
</table>

	• the requirement under s 601GC(1)(a) that a special resolution of members must approve a constitutional change to enable hardship withdrawals (with conditions)		
What are the conditions for eligibility for the relief?	A responsible entity must: • have suspended or cancelled withdrawals. and • have ceased to allow the issue of new interests (including distribution reinvestments and issues to existing members), and • not be considered an "excluded scheme" under the Hardship Relief Instrument	ASIC states that a responsible entity must outline why it cannot meet specified key parameters of the Hardship Relief Instrument. ASIC has also set out specific factors it may consider in deciding whether to grant the relief in RG 136.	ASIC states that this relief is available to responsible entities of illiquid schemes (as defined in s 601KA). ASIC has also set out specific factors it may consider in deciding whether to grant relief in RG 136.
What are the conditions of relief?	Before relying on the relief, a responsible entity needs to: • submit a notice of reliance to ASIC (stating that, among other matters, the board has resolved that the scheme is frozen and has adequate cash) • publish a statement on its website (and send the statement directly to all of the fund's members) and • make sure the scheme constitution expressly allows hardship withdrawals for members. To continue to rely on the relief, a responsible entity must: • not allow a hardship withdrawal unless the responsible entity is satisfied of certain matters in relation to the fund's cash resources	ASIC states that it will generally include conditions on the relief to require the responsible entity to: • notify members that it has been granted relief and the effect of the relief • not allow a hardship withdrawal unless it is satisfied of certain matters in relation to its cash resources • act reasonably in exercising any discretion in relation to a hardship withdrawal • keep records in relation to its decisions and • provide quarterly data to ASIC in the required form	ASIC states that it will generally include conditions on the relief to require the responsible entity to: • provide all members with information on each withdrawal opportunity before it is open • remind members about their ability to participate in the rolling withdrawal in member communications • notify all members in writing of the outcome of each withdrawal opportunity and maintain a website with relevant and up-to-date information • distribute all available cash to members for as long as withdrawal requests exceed available cash, and • provide ASIC with details for each withdrawal opportunity

	• act reasonably in exercising any discretion in relation to a hardship withdrawal • keep records in relation to its decisions, and • provide quarterly data to ASIC in ASIC's required form		
When does the relief cease?	The Hardship Relief Instrument specifies that the relief will cease to apply on 27 August 2025. In addition, a responsible entity will no longer be able to rely on the relief if it does not satisfy the relief conditions. A responsible entity must submit a notice of cessation of reliance to ASIC.	ASIC states that it will generally limit this relief to cease at the end of a defined period, or when the registered scheme ceases to be frozen (whichever occurs first).	ASIC states that it may limit the relief to a defined period or until the registered scheme becomes liquid.

Echoes of the GFC

From 2008 to 2010, ASIC announced three types of standard relief that responsible entities may individually apply for to facilitate withdrawals from frozen or non-liquid funds. While mortgage funds were initially singled out as the target of relief policy, ASIC subsequently clarified that such relief was available to other types of frozen funds. ASIC noted in particular that "a significant number of open-end pooled mortgage schemes, and a smaller number of open-end real property schemes, enhanced cash schemes and retail hedge funds, are currently frozen".[7] The new relief regime does not single out any particular type of fund, however, likely in recognition of the broad-ranging impact of the COVID-19 pandemic.

The Hardship Relief Instrument is based on a form of pro forma conditional relief announced by ASIC in 2008 (and expanded in 2009). Broadly speaking, the 2008 pro forma relief granted conditional relief to responsible entities:[8]

(a) from the obligation to treat members equally[9] and
(b) by modifying withdrawal restrictions applicable to non-liquid schemes[10]

to facilitate the withdrawal of an investor from a scheme in circumstances where the responsible entity is satisfied that the investor has experienced hardship of a specified type, or is likely to experience such hardship if not permitted to withdraw. Initially, circumstances constituting relevant hardship were limited to:

(a) severe financial hardship
(b) compassionate grounds (ie medical costs, disability-related modifications to residences or vehicles, funeral expenses, palliative care, avoidance of foreclosure, and financial obligations entered into by the investor prior to the fund becoming frozen) and
(c) permanent incapacity

ASIC also introduced an "enhanced" form of the relief that extended hardship withdrawals to indirect investors who invested in the frozen fund through intermediate structures such as superannuation funds or self-managed super funds (SMSFs), IDPSs, or other managed investment schemes.

The initial formulation of the pro forma conditional relief capped hardship withdrawals to one per investor for a total of $20,000, plus half of the investor's remaining investment balance (after the $20,000). ASIC subsequently extended the terms of pro forma relief by increasing the hardship withdrawal cap to four per year for a total amount of $100,000, extended hardship grounds to include unemployment for three months, and permitted withdrawals on account of hardship suffered by the beneficiary of a deceased estate of an investor (2009 Hardship Relief).[11]

The new hardship relief is based on the extended version of the relief in 2009. Unlike the 2009 Hardship Relief, however, the new relief is implemented under a legislative instrument as a form of class relief. ASIC states that this is a "more timely and effective option than considering relief applications from responsible entities on an individual basis".[12] In addition, the Hardship Relief Instrument provides relief from pt 5C.3 of the Corporations Act to enable modifications or repeals and replacements of a scheme constitution to the extent necessary to facilitate hardship withdrawals (provided that the responsible entity notifies investors and does not receive requests to hold a meeting from investors holding 5% of votes).

There are schemes that are excluded from the scope of the Hardship Relief Instrument. These are registered time-sharing schemes, mortgage investment schemes (within the meaning of *ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857*), IDPS-like schemes (although ASIC clarifies that the relief still applies in relation to interests in a frozen fund held through an IDPS-like scheme[13]), and registered litigation funding schemes. According to ASIC, mortgage investment schemes, IDPS-like schemes, and registered litigation funding schemes are already subject to other relief or modifications in relation to the non-liquid scheme withdrawal restrictions in pt 5C.6 of the Corporations Act, and the specific features of time-sharing schemes indicate that they are not appropriate for general hardship withdrawal relief under the instrument.[14]

ASIC has indicated that it will consider granting individual relief on a case-by-case basis to responsible entities who are unable to rely on the Hardship Relief Instrument.[15] In 2013, ASIC refused to grant 2009 Hardship Relief in circumstances where members had invested in a scheme on the basis that they would not be able to withdraw until the expiry of the investment term. ASIC stated that the relief was directed towards schemes where members have made investments with an expectation that they would be able to withdraw their interests from time to time, but where that ability to withdraw has been suspended.[16] Assuming ASIC's policy position has not changed, even where a responsible entity is unable to rely on the Hardship Relief Instrument, it is possible that ASIC will refuse to grant individual hardship relief where members invested with the understanding of a long minimum holding term.

In addition to the Hardship Relief Instrument and case-by-case hardship relief, the new relief regime also includes case-by-case "rolling" withdrawal relief. This appears to be on largely similar terms to the rolling withdrawal relief introduced by ASIC in 2009.[17]

Currently, the new relief regime does not include an equivalent to the "wind up" relief introduced by ASIC in 2010.[18] This was a form of conditional case-by-case relief intended to enable responsible entities in the process of winding up their funds, to prioritise payments to investors who have experienced hardship, or are likely to experience hardship if they are not paid their winding up entitlements on a preferential basis.

In its Interim Corporate Plan, ASIC states that the actions it may take as part of its COVID-19 strategic priority to maintain financial system resilience and stability include enabling the sound and fair operation of managed investment schemes — including winding up, where necessary. While ASIC did not commit to wind up relief in its interim plan, it is possible that such relief will be on the table once more (as in the years following the GFC, where a number of funds were wound down).

Some implementation issues for responsible entities

Compared to the 2009 Hardship Relief, relief under the Hardship Relief Instrument is easier to access for fund managers as it does not require an individual relief application to be made and it permits the responsible entity to manage a unilateral amendment to the scheme's constitution to facilitate the relief. Reliance on the Hardship Relief Instrument, however, may raise expectations from investors about a perceived entitlement to a withdrawal as the relief is subject to a *requirement* about having sufficient cash resources in the fund. A responsible entity will need to manage this with careful communication with investors.

Consistent with ASIC's guidance in relation to withdrawal relief during the GFC, in relation to the new relief regime, ASIC has also published guidance under the new relief regime to inform investors about their right to make a complaint, call a members' meeting or apply for court orders.[19] Under the Hardship Relief Instrument, there are also obligations to notify all scheme members of the effect of hardship withdrawals (whether or not that investor has made any withdrawal request) and to publish a similar notice on the responsible entity's website. Managing investor complaints may pose a challenge, given the highly technical nature of the relief. In these circumstances, it is likely beneficial to have a clear, fair, transparent and reasonable policy in considering applications for withdrawals on hardship grounds.

ASIC has warned that the allowance of hardship withdrawals without reliance on relief will constitute a breach of the Corporations Act, and that it may take action for non-compliance. In determining whether to rely on relief and to permit withdrawals from frozen funds, a responsible entity will need to keep in mind not only the conditions of the relief, but also other ongoing obligations under the Corporations Act, the constitution of the scheme, and duties under general law. Navigating these duties, which can sometimes be in tension, will require prudential judgment and governance practices.

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Footnotes

1. ASIC "Responsible entity obligations in the current challenging environment" letter (20 March 2020) available at https://download.asic.gov.au/media/5550789/20200320-asic-re-liquidity-letter.pdf.
2. ASIC *Interim Corporate Report 2020–21* (11 June 2020) 8.
3. ASIC "20-197MR ASIC grants industry-wide relief to help members of frozen funds make hardship withdrawals" media release (26 August 2020).
4. ASIC, *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778,* (26 August 2020) available at https://download.asic.gov.au/media/5767483/asic-corporations-hardship-withdrawals-relief-instrument-2020-778-signed.pdf.
5. ASIC, *Funds management: Discretionary powers* Regulatory Guide 136 (July 2018) available at https://download.asic.gov.au/media/5767954/rg136-published-31-july-2018-20200826.pdf.
6. ASIC, *Applications for relief* (July 2020), https://download.asic.gov.au/media/5705408/rg51-published-27-july-2020.pdf.
7. ASIC *Information for investors in frozen funds* Information Sheet 111 (July 2011).
8. ASIC "08-214ASIC facilitates withdrawals from frozen funds" media release (31 October 2008).
9. Corporations Act 2001 (Cth), s 601FC(1)(d).
10. Above, part 5C.6.
11. ASIC "09-148 ASIC expands relief for hardship withdrawals from frozen mortgage funds" media release (17 August 2009).
12. Explanatory Statement, ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778, at [7].
13. Above, at [17].
14. Above n 12, at [14] to [18].
15. ASIC *Funds management: Discretionary powers* Regulatory Guide 136 (26 August 2020), RG 136.101 available at https://download.asic.gov.au/media/5767954/rg136-published-31-july-2018-20200826.pdf.
16. ASIC, *Overview of decisions on relief applications (February to May 2013)* Report 371 (September 2013) [78] to [79].
17. ASIC "09-269MR ASIC grants conditional relief to improve access to capital for investors in frozen mortgage funds" media release (23 December 2009).
18. ASIC "10-96AD ASIC extends hardship relief to apply to a 'frozen fund' in winding up" media release (7 May 2010).
19. ASIC "Frozen funds and hardship withdrawals" (26 August 2020) available at https://asic.gov.au/for-consumers/investing-and-financial-advice/frozen-funds-and-hardship-withdrawals/.

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