Michael Vrisakis	Hi everyone. I'm Michael Vrisakis, a Partner in the Herbert Smith Freehills Financial Services Team. Welcome to our podcast series called the FSR GPS. This series focuses on topical and emerging issues in financial services regulation which we think are the most strategic and important issues for our clients. Feel free to suggest topics you would like us to cover in the future but for now, we hope you enjoy today's episode.
Ruth Overington	Hello, I'm Ruth Overington, a partner in the Disputes team at HSF with a focus on regulatory investigations, class actions, and the insurance industry.
James Samartzis	And hi, I'm James Samartzis. I specialise in contentious disputes and regulatory implementation, mainly in the financial services sector and I'm based in the Melbourne Disputes team here at HSF.
Ruth Overington	The focus of today's podcast is on a topic that was a feature in our FSR Global Outlook that we published in January this year. In countries that host the world's biggest financial markets, we are seeing an increasing determination by prudential and conduct regulators to embed and enforce senior executive and director accountability regimes. With some regimes now starting to reach maturity, we expect to see more concrete trends emerge. For example, in Singapore, there has been increased enforcement action in the past year and similar increases in enforcement activity are expected in the UK in light of the first enforcement action against an individual and a growing pipeline of investigative activity. For its part, Australia is right in middle with the Financial Accountability Regime having commenced for banks (and the regulators' grace period expiring on 1 July), and with insurance and superannuation entities preparing for its commencement in March 2025. Starting with a focus on the banking industry, regulators are moving to expand the scope of these regimes to other industries, such as the insurance and superannuation industries. Depending on how effective these regimes are, we can predict an even further expansion to other business critical or high-risk industries.

We hope the discussion today offers some food for thought on how Australia stacks up against its peers, how impacted companies can stay proactive in this space, and where corporate accountability is heading in the near to medium term.

James – do you want to provide some observations on the current landscape with respect to individual accountability regimes?

James Samartzis

Of course, thanks Ruth – and just to expand on what Ruth has mentioned, Australia is currently sitting in an interesting position. So on the one hand, ASIC and APRA are learning lessons from the more mature senior manager regimes in the UK and Hong Kong, which are now approaching around 8 years since their introduction. On the other hand, in light of the limited enforcement outcomes under those regimes, how Australian regulators approach enforcement of the FAR will no doubt guide other countries such as Ireland, Malaysia, Switzerland and Taiwan who are all in the process of developing and embedding similar accountability regimes, or at least have publicly flagged an intention to go down that path.

Another interesting development is the review commenced in 2023 by the UK Treasury, the Financial Conduct Authority and the Prudential Regulation Authority in respect of the UK SMCR. It is clear from those discussion materials that the review is looking at the evolution of accountability regimes in other jurisdictions, including the approach to enforcement and how the regime interacts and complements overlapping laws.

Although much has been made of the lack of concluded enforcement outcomes under the SMCR in the UK and the BEAR in Australia (the precursor to the FAR), this only leaves space for regulators to continue to run test cases and leverage approaches to enforcement taken by its peers. In particular, in Australia, we expect the “reasonable steps” standard of conduct as well as the breadth of the responsibilities that accountable persons under FAR are required to be across at both an individual and organisational level to really become a focal point in Australian jurisprudence.

One other point to make here – the twin peaks model of Australian regulatory enforcement and also the recent developments since the Banking Royal Commission in respect of regulator cooperation and information sharing – so the reportable situations regime is a good example of that – means that regulators will start to adopt a more holistic approach. So when an issue of concern is identified, I think we’ll start to see regulators will look

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to all supervisory and enforcement action and entities should be mindful of consequential risk and the way information provided, for example information provided in the course of a regulatory investigation, might be leveraged in a future FAR investigation.

Ruth – are there any particular areas of Australian's accountability framework where you see Australia leading the pack amongst its international peers?

Ruth Overington

Well one area where Australia's accountability framework is arguably more robust than its international peers is in its inclusion of all Non-Executive Directors of entities captured by the FAR. Australia already has a well-developed regime in the Corporations Act that steps out the duties directors are required to meet.

In a recent keynote address in March, ASIC's Chair Joe Longo told his audience that "being a director isn't meant to be easy" and that "while complying with directors' duties may be difficult, ASIC expects it can and will be done". At an earlier Cyber Summit, Mr Longo commented that "ASIC expects directors to ensure their organisation's risk management framework adequately addresses cyber security risk, and that controls are implemented to protect key assets and enhance cyber resilience. Failing to do so could mean failing to meet your regulatory obligations."

Under the FAR, regulators will have more information and alternative pathways to hold directors to account that go beyond the current directors' duties obligations. By way of example, directors now have an obligation to "take reasonable steps" in conducting those responsibilities to prevent matters from arising that would (or would be likely to) result in a material contravention of various financial services laws.

James Samartzis

And just to add to what Ruth has just mentioned, one of the major challenges that individuals and entities will face as these regimes expand is how to deal with non-financial risk and also emerging issues down the pipeline. Clearly, issues like non-financial disclosure, cyber risk, climate resilience, artificial intelligence and just more generally, a company's social licence to operate – those issues aren't going away. And alongside those, we'll also see a range of other emerging issues that arise that will not have even been thought of at this point in time.

So we really recommend directors and senior executives challenge themselves and their peers about how their organisations are identifying emerging issues, what systems their teams are setting up to monitor compliance with these issues, and how they are resourcing those issues. And just on that resourcing point – that's been a big feature of the regulatory guidance that was released earlier this year in relation to the FAR.

So more broadly, remaining curious, workshopping emerging trends, undertaking scenario analysis and simulations are becoming more than just a "nice to have" or a value-add. I think we'll see in the medium to long-term that these types of actions and activities will be taken to be a critical part of the steps an individual and a company will need to take to meet its accountability obligations.

Ruth Overington

Yeah – and insurance and superannuation entities have a little more time to prepare for FAR, which commences in March 2025 for those industries. These entities should be using the intervening period to not only prepare for its introduction but to learn lessons from ADIs who have already gone through the process. Given the lead time and the sophistication of insurance and superannuation entities, we expect the regulators to require strong compliance from commencement of the regime. There are distinguishable risk areas for these entities compared to banks, such as insurance risk management, underwriting policies, investment management, member returns and outcomes, and marketing and advertising.

In our experience, a robust FAR compliance program creates positive outcomes commercially by driving or creating important clarity about business accountability and areas of high risk, challenge, and opportunity within the organisation.

FAR will add a layer of complexity to operations, especially where businesses are vertically integrated. In addition, as the regulators look to test the scope of the regime, we anticipate that there will be some appetite for "quick wins" and so ensuring that your FAR compliance is competitive and ahead of your peers is important to not only insulate risk in the short term but set you up for legal and commercial clarity in the longer term.

So what do we predict in the near to medium term? I think we will see expanded set of similar accountability regimes around the globe, and we'll see an expanded set of industries caught under those regimes, and it's likely that we'll see an expanded regulatory toolkit to deal with supervision and enforcement. It's clear that regulators are seeking to cooperate

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internationally and learn from what is working and what isn't working under peer regimes. For these reasons, it is important that organisations that are or may be required to deal with regimes like the FAR remain proactive and curious about where this form of regulation is heading.

Thank you for joining for this short conversation and please feel free to reach out to us if you have your own observations or any questions in relation to your accountability obligations. Thank you.

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