



DWYER HARRIS



# FINANCIAL SERVICES AND CREDIT

## QUARTERLY UPDATE

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## CONSUMER CREDIT

### BNPL consultation

On 21 November 2022, Treasury [released](#) a consultation paper on proposed options to regulate buy now pay later (**BNPL**) credit. The deadline for submissions was 23 December 2022. The paper presents 3 alternative regulatory models for consideration:

- **Option 1:** Strengthening the BNPL Industry Code plus an affordability test.
- **Option 2:** Limited BNPL regulation under the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**), under which BNPL providers would need an Australian credit licence, and comply with modified responsible lending obligations under the NCCP Act to determine unsuitability, combined with a strengthened BNPL Industry Code.
- **Option 3:** Regulation of BNPL under the NCCP Act with full responsible lending obligations.

### Changes affecting small amount credit contracts and consumer leases

The *Financial Sector Reform Act 2022* (Cth) (**FSRA22**) amends the national consumer credit legislation, mostly in relation to small amount credit contracts (**SACCs**) and consumer leases. The original Bill introduced on 8 September 2022 included other provisions on the financial accountability regime (**FAR**) and the financial services compensation scheme of last resort. These were removed because of delays in negotiating changes to the FAR in the Senate. FSRA22 only deals with consumer credit. The reforms reflect recommendations made in 2016 in the Review of Small Amount Credit Contracts. FSRA22 passed both houses of Federal Parliament on 2 December 2022 and received Royal Assent on 12 December 2022. The commencement date for most of the reforms in FSRA22 is 6 months after assent.

FSRA22 makes a small change to include family violence as an example of a reasonable cause for a person being in financial hardship. This change applies to all credit products (not only SACCs) and consumer leases. All of the other amendments in FSRA22 only concern SACCs and consumer leases.

For SACCs, the changes include enhanced warning statements to be prescribed by Australian Securities and Investments Commission (**ASIC**), increased responsible lending obligations, and changes to how the protected earnings amount applies. FSRA22 also requires that SACCs have equal repayments and equal repayment intervals over the life of the loan (subject to limited exceptions), and bans the charging of monthly fees for the residual term of a SACC where the consumer fully repays the loan early. Licensees are also prohibited from making unsolicited communications to a consumer that contain an offer or invitation to enter into or apply for a SACC where the consumer is (or has at any time been) a debtor under a SACC with the licensee or another credit provider, or has at any time applied for a SACC with the licensee. The new law also prohibits SACC providers from making referrals where it is reasonable to believe that as a result of the referral, the referred person may obtain unregulated credit. In addition, there are measures to protect information about accounts that is obtained by a licensee in connection with a SACC or proposed SACC, to prevent it from being sold to third parties or used to market other products and services.

For consumer leases, the changes include enhanced warning statements to be prescribed by ASIC, and increased responsible leasing obligations. A protected earnings amount regime has also been introduced which will mirror the provisions for SACCs.

Consumer leases will now also be subject to a price cap on the total amount payable by a lessee in connection with a consumer lease, and lessors of household goods will be required to disclose the base price of the goods being leased and the difference between the base price and the total amount payable by the lessee in connection with the lease.

Lessors of household goods will be generally prohibited from making unsolicited communications in public places (and other places which are not their ordinary business premises) in relation to consumer leases for household goods.

Consumer leases for an indefinite period were previously exempt from regulation but are now regulated.

New civil and criminal penalty provisions apply in relation to contraventions of the requirements brought about by FSRA22. There are also provisions for some of the amendments that will result in a licensee in breach losing its right to recover the fees under the customer contract.

A new anti-avoidance provision has been inserted in the NCCP Act by FSRA22 which prohibits a person from entering into, beginning to carry out, or carrying out a scheme for an “avoidance purpose” in relation to SACCs, consumer leases or product intervention orders. This is the first time that the credit legislation has included a provision of this kind.

For more information on these reforms, read our blog article [here](#).

## CONSUMER PROTECTION

### ABA response to compliance committee review

The Australian Banking Association (**ABA**) has [published](#) its response to recommendations from the Final Report of the Independent Review of the Banking Code Compliance Committee. The ABA supported a majority of the recommendations of the review.

### Unfair contract terms

The *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) received Royal [Assent](#) on 9 November 2022. The Act amends the unfair contract terms (**UCT**) provisions of the *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). Amendments include a new civil penalty regime prohibiting the use of, and reliance on, unfair contract terms by businesses. The penalty regime will come into effect on 9 November 2023 and apply to new contracts made on or after 9 November 2023 and to existing contracts that are renewed or have their terms varied on or after 9 November 2023. Among other things, the Act also expands the protection of small businesses, clarifies the factors that courts must consider when determining whether a contract is a standard form contract, and also clarifies a court’s powers to determine an appropriate remedy for breaches of the UCT regime.

## CORPORATE

### Modernising business communications

The *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022* (Cth) (the **Modernising Bill**) was [introduced](#) into Federal Parliament on 23 November 2022. The Modernising Bill will enable all documents which are required or permitted to be signed under the *Corporations Act 2001* (Cth) (the **Corporations Act**) to be signed electronically or in wet-ink, and allow documents sent under Chapters 2A to 2M, 5 to 5D, 6 to 6C, 8A, 8B and 9 or Schedule 2 to the Corporations Act to be sent in either hard copy or electronic form. It will also exempt companies from the requirement to send documents to a member where the contact details for that member are known to be incorrect.

The Modernising Bill will also amend existing legislation to:

- ensure that regulators (including ASIC, the Australian Prudential Regulation Authority (**APRA**) and the Australian Competition and Consumer Commission (**ACCC**)) can use virtual enquiry technology at hearings and examinations; and

- allow notices which are currently required or permitted to be published in newspapers to be published in technology neutral ways (e.g. website publication).

## Simplification law reform

The Modernising Bill makes technical amendments to the corporations and financial services laws in line with some of the recommendations in Interim Report A of the Inquiry into the Legislative Framework for Corporations and Financial Services Regulation conducted by the Australian Law Reform Commission (**ALRC**). The amendments will remove erroneous references; remove redundant definitions; improve the use of definitions; repeal redundant regulations; and make other minor and technical amendments to simplify and improve the readability and navigability of the ASIC Act and Corporations Act.

Treasury has also [released](#) exposure draft legislation to implement a further 2 recommendations made by the ALRC in Interim Report A relating to improving navigability and readability of the law. The reforms will create a single glossary of defined terms in section 9 of the Corporations Act, and 'unfreeze' the *Acts Interpretation Act 1901* (Cth) (**AIA**) as it applies to the Corporations Act and ASIC Act so the most current version of the AIA applies to both Acts. The draft legislation will also partially implement 3 recommendations from the ALRC's Interim Report B, by repealing definitions that are no longer used, removing cross-references to repealed provisions and other redundant provisions, amending the law to address unclear or incorrect provisions, and simplifying unnecessarily complex provisions.

## DIGITAL ASSETS

### Token mapping update

The Treasurer [announced](#) on 14 December 2022 that the next steps in the Federal Government's ongoing 'token mapping' work will include the release of a consultation paper in early 2023, which will inform what digital assets should be regulated by financial services laws, and the development of appropriate custody and licensing settings to safeguard consumers. The Treasurer said that following the release of token mapping, the Government will consult on a custody and licensing framework in 2023 before introducing legislation.

## ESG

### Proposal to empower AASB for sustainability standards

Treasury has [released](#) exposure draft legislation that would amend the ASIC Act to empower the Australian Accounting Standards Board to deliver sustainability standards. Submissions closed on 16 December 2022.

### Climate Vulnerability Assessments of big banks

APRA requested the big 5 banks to undertake a Climate Vulnerability Assessment and [published](#) a report on the results on 30 November 2022. There were 3 broad categories of risks identified:

- Physical risk: changing climate conditions, extreme weather events;
- Transition risk: policy changes, technological innovation, social adaptation; and
- Liability risk: stakeholder litigation, regulatory enforcement.

It is clear from the report that it is difficult to model these risks. For example, estimates of lending losses in mortgage portfolios ranged from no lending losses directly attributable to climate scenarios, to 3 times higher lending loss rates. Overall, the modelling suggested that lending losses were unlikely to cause severe stress.

## Treasury consultation paper on climate disclosure

Treasury [released](#) a consultation paper on 12 December 2022 seeking initial views on key considerations for the design and implementation of the Federal Government's commitment to standardised, internationally-aligned requirements for disclosure of climate-related financial risks and opportunities in Australia. Comments are due by 17 February 2023.

### FINANCIAL ADVICE

## Financial adviser registration deadline postponed

On 1 November 2022, the Assistant Treasurer and Minister for Financial Services [announced](#) a 6 month delay to the requirement to register financial advisers with ASIC, with the deadline for registration now being 1 July 2023.

### FINANCIAL MARKETS

## ASIC reports on practices in wholesale financial markets

On 25 October 2022 ASIC [released](#) two reports on better and poorer practices in wholesale financial markets: Report 741 *Conduct risk in wholesale fixed income markets* (REP 741) and Report 742 *Managing conflicts of interest in wholesale financial markets* (REP 742). The reports summarise ASIC's surveillance activities and provide practical examples of practices observed.

## ASIC guidance on ETP naming conventions

On 24 November 2022 ASIC [announced](#) that it had updated its guidance on naming conventions for licensed Australian exchanges that admit exchange traded products (**ETPs**). ASIC has divided the naming conventions into two levels of labelling: primary labels ('ETF' and 'Structured Product') based on product type, and secondary labels ('Active' and 'Complex') for products with specific risks or strategies. The updates have been included in ASIC Information Sheet 230 *Exchange-traded products: Admission guidelines* ([INFO 230](#)).

## Financial market infrastructure

The Treasurer [announced](#) on 14 December 2022 that the Federal Government will act on recommendations by the Council of Financial Regulators to improve Australia's financial market infrastructure. The reforms will include:

- providing the Reserve Bank of Australia (**RBA**) with powers to step in and resolve a crisis at a domestic clearing and settlement facility;
- strengthening and streamlining regulators' licensing, supervisory, and enforcement powers in respect of financial market infrastructure to reduce the likelihood of a crisis occurring;
- introducing legislation to provide ASIC and the ACCC with additional powers to facilitate competitive outcomes if a competitor emerges and in the event of ongoing monopoly provision, in clearing and settlement; and
- rule-making powers to allow ASIC, with ministerial approval, to quickly act to make rules to manage matters related to competition, such as pricing, access, governance arrangements and interoperability.

## CHES replacement actions

On 17 November 2022 the Australian Securities Exchange (**ASX**) [announced](#) that ASX will reassess all aspects of the CHES replacement project following completion of an independent review, conducted by Accenture, and its own internal assessment. ASX had been working for some years on a blockchain based replacement for CHES.

On the same day, ASIC and the RBA [released](#) a joint statement noting ASX's announcement and stating that ASIC and RBA have provided ASX with a joint letter of regulatory expectations. The regulators expect that the current CHES is supported and maintained to ensure its stability, resilience and longevity so that it can continue to service the market reliably, that ASX improves its program delivery capabilities, and that the replacement program is brought back on track after the solution design has been completed so ASX's commitment to deliver safe and reliable clearing and settlement infrastructure is fulfilled.

On 15 December 2022 [released](#) a further joint statement advising that ASIC had issued notices to ASX entities under section 823B of the Corporations Act requiring a special report on specified matters in relation to the current CHES. The special report is to be audited by Ernst & Young. The statement also advised that the RBA has issued a letter of expectations to the boards of ASX entities in respect of the current CHES and its replacement.

## FINANCIAL PRODUCTS

### ASIC reports on surveillance of marketing of managed funds

On 30 November 2022 ASIC [published](#) the findings of its ongoing ASIC surveillance of the marketing of 5 managed funds and the oversight of this marketing by 4 responsible entities. ASIC was concerned that the representations made were not consistent with long-standing regulatory guidance, specifically:

- projected fund performance must be reasonable and include prominent and proximate qualification or warnings;
- promotion of fund benefits requires prominent and proximate balancing risk disclosure;
- comparisons of funds with other products must be appropriate and reasonable; and
- recommendations should be attributed and testimonials should be appropriate and reasonable.

All the responsible entities subject to surveillance have now voluntarily amended their marketing materials and practices and agreed to amend their compliance plans to enhance their approval and ongoing supervision of fund marketing.

### Class actions relief

The *Corporations Amendment (Litigation Funding) Regulations 2022* (Cth) commenced on 10 December 2022. The regulations provide an exemption for class action litigation funding schemes from the managed investment scheme regime and the requirement to hold an Australian financial services licence (AFSL), and from the product disclosure regime and anti-hawking provisions in the Corporations Act. Class action litigation funding schemes must still comply with conflict of interest requirements.

ASIC has also [extended](#) certain class action relief because their subject matter was not covered by the new regulations. The relief was due to expire on 31 January 2023 and has been extended until 31 January 2026. *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37* (Cth) provides relief from the application of the National Credit Code to litigation funding arrangements and proof of debt arrangements. *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* (Cth) provides relief from the requirements in Chapters 5C (managed investment schemes) and 7 (financial services licensing and disclosure) of the Corporations Act to litigation funding arrangements where the members wholly or substantially fund their legal costs under a conditional costs agreement.



## Employee share schemes

A new legislative regime for employee share schemes commenced on 1 October 2022. The new regime is intended to make it easier for businesses to offer employee share schemes (ESS) to their employees and to simplify the regulatory framework. On 20 December 2022 ASIC [announced](#) that it had made a new legislative instrument to facilitate ESS.

## INSURANCE

### ASIC FSG relief

ASIC [announced](#) on 28 November 2022 that it has provided relief from the requirement to provide a financial services guide for representatives that are authorised by licensees to deal in general insurance products and/or bundled consumer credit insurance products and provide claims handling and settling services. The relief is provided in the *ASIC Corporations (Financial Services Guides) Instrument 2022/910* (Cth), and commenced on 29 November 2022. The relief is limited to only general insurance products or bundled consumer credit insurance products and includes conditions requiring the licensee to take reasonable steps to ensure that its authorised representative draws the client's attention to the availability of a dispute resolution system for client complaints, and gives the client information in writing about who the authorised representative acts for when providing the financial service and any remuneration (including commission) that the authorised representative may receive.

### APRA and ASIC concerns about life premium increases

APRA and ASIC have jointly [expressed](#) concerns that some life companies have not appropriately applied premium increases to retail life insurance policies, particularly level premium policies, in accordance with the policy terms, or have not acted in accordance with the reasonable expectations created through disclosure and marketing material. They have requested all life companies that write, or have written, retail life insurance policies to review past premium increases, including for legacy products, to ascertain whether increases or re-pricing decisions have been applied in accordance with the applicable policy terms, and also to review disclosure and marketing material to determine whether policyholders have been provided sufficient clarity about future premiums, including the way in which premiums may change over the life of the policy.

For future policies, the regulators say that life companies should consider the appropriateness and clarity of disclosures and marketing material as they relate to future premium increases, review existing product labels, consider the appropriateness of describing a product as 'level premium' if there is not a high degree of confidence around premium stability, and consider how to manage the reasonable expectations of policyholders around premium increases in an ongoing manner.

APRA and ASIC have asked life companies to respond to ASIC in relation to these concerns by 31 March 2023.

### ASIC asks life insurers to review claims payment systems

On 12 December 2022 ASIC [issued](#) a statement calling on life insurers to review the accuracy of their systems and controls for claims calculations and payments, following identification of system failures resulting in the incorrect application of consumer price indexation to life insurance policy benefits, and other benefit payment errors. ASIC said that it had received breach reports from 7 life insurers for the miscalculation of life insurance benefits, resulting in the affected customers being either under or overpaid on their claims. ASIC noted that the insurers have implemented system fixes and customer remediation programs.

## PAYMENTS

### Strategic plan consultation

On 14 December 2022, Treasury [released](#) a consultation paper for input into the Federal Government's Strategic Plan for the Payments System. The consultation is open until 6 February 2023.

## PRIVACY AND DATA

### Consumer Data Right (CDR) update

- Treasury [published](#) a sectoral assessment report on the banking sector on 1 November 2022, recommending that the banking designation instrument be amended to explicitly include goods and services that have been supplied in connection with the letting on hire of goods (leases), including on hire-purchase.
- Legislation was [introduced](#) into Federal Parliament on 30 November 2022 to enable consumers to initiate CDR-powered actions with their consent and on their behalf (known as action initiation). Actions that will be enabled could for example allow consumers to initiate regular payments towards savings or investment goals, automatically move funds to optimise interest or minimise fees from their financial services provider, or find and switch to a utility plan better suited to their circumstances.
- The Office of the Australian Information Commissioner (**OAIC**) has [published](#) updates to its CDR Privacy Safeguard Guidelines to reflect amendments to the CDR.
- Treasury and the Data Standards Body are seeking input on the development of rules and data standards to implement the CDR in the non-bank lending sector and have [released](#) a design paper for consideration.
- A CDR Information Map has been [published](#) as a guide to where to find CDR guidance and publications.
- Guidance has been [published](#) on the obligations of accredited data recipients in relation to the treatment of de-identified and redundant data.
- CDR accreditation guidelines have been [updated](#).

### Privacy Act amendments respond to privacy breaches

Following recent major privacy breaches, amendments to the privacy legislation have been [enacted](#). The *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth) received Royal Assent on 12 December 2022. The Act amends the *Privacy Act 1988* (Cth) (**Privacy Act**), the *Australian Information Commissioner Act 2010* (Cth) and the *Australian Communications and Media Authority Act 2005* (Cth). The Act includes substantial increases in penalties under the Privacy Act. For a company, the maximum penalty will increase to an amount not exceeding the greater of (a) \$50 million, (b) 3 times the value of the benefit obtained, or, if the court cannot determine the value of the benefit, (c) 30% of the company's adjusted turnover in the relevant period. The Act also gives enhanced enforcement powers to the OAIC and broadens the information sharing powers of the Australian Information Commissioner and the Australian Communications and Media Authority.

Another amendment to the Privacy Act removes the requirement that in order to be covered by the Privacy Act, foreign companies carrying on business in Australia must collect or hold the personal information in Australia. This means that a foreign company doing business in Australia can now be subject to the Privacy Act in relation to personal information collected or used outside Australia.

## PRUDENTIAL

### APRA publishes roadmap for reviewing prudential framework for groups

On 24 October 2022, APRA [published](#) a roadmap for a review of the prudential framework for groups. The aim of the review is to ensure that the prudential framework is fit for purpose to cater to an increasing array of new groups, and consistently applied to existing structures to ensure a level playing field.

### APRA releases minor amendments to capital framework for ADIs

On 31 October 2022, APRA [released](#) final prudential standards and guidance with consequential amendments from the updated capital adequacy and credit risk capital requirements for authorised deposit-taking institutions (**ADIs**).

### APRA sets out expectations on capital calls

On 1 November 2022 APRA [published](#) its expectations for ADIs, general insurers and life companies that are seeking APRA approval to call and replace an outstanding Additional Tier 1 Capital or Tier 2 Capital instrument with one that has a higher credit spread or that is otherwise more expensive. APRA said that it expected the senior executive accountable for capital to follow the expectations. APRA's view is that ADIs, general insurers and life companies generally should not call an Additional Tier 1 Capital or Tier 2 Capital instrument and replace it with an instrument with a higher credit spread or that is otherwise more expensive, as it may create the expectation that the issuer will exercise a call option on other outstanding Additional Tier 1 Capital and Tier 2 Capital instruments with call options. However an exception would be where the issuer can satisfy APRA as to the economic and prudential rationale of the call, and satisfy APRA that such action will not create an expectation that other instruments will be called in similar circumstances.

### Proposals for super fund transfers

APRA has [released](#) a discussion paper outlining proposals aimed at ensuring that super fund trustees prepare for, manage and execute successor fund transfers more smoothly and efficiently. APRA proposes to update the prudential framework to introduce new requirements for all trustees to be prepared for a future transfer of members, and relating to the transfer of MySuper assets within 90 days if APRA cancels a trustee's authority to offer a MySuper product. Consultation is open until 10 March 2023.

### APRA proposes amendments to PPF provider capital requirements

On 14 November 2022, APRA [released](#) proposed amendments to the minimum capital requirements for purchased payment facility (**PPF**) providers. The amendments would vary Prudential Standard APS 610 *Prudential Requirements for Providers of Purchased Payment Facilities (APS 610)*, to align the current minimum capital adequacy requirement for PPF providers with the capital framework for other APRA-regulated entities. The proposal is an interim measure, as APRA is planning a broader review of APS 610. The consultation is open until 14 February 2023.

### Guide for directors

APRA has [published](#) a guide for directors of ADIs to help them understand their obligations under the APRA prudential framework. It includes general guidance for directors on effective oversight of an ADI and a summary of material requirements and guidance for Boards in APRA prudential standards and prudential practice guides.

## Final standard on recovery and exit planning

On 1 December 2022, APRA [released](#) its final Prudential Standard *CPS 190 Recovery and Exit Planning (CPS 190)*, aimed at reinforcing the resilience of the financial system. CPS 190 comes into effect from 1 January 2024 for banks and insurers, and from 1 January 2025 for RSE licensees.

## Final guidance on contingent liquidity for MLH ADIs

On 7 December 2022, APRA [released](#) its final guidance on contingent liquidity for locally incorporated ADIs subject to APS 210 Minimum Liquidity Holdings (MLH) requirements.

## Minor amendments to superannuation prudential standard SPS 310

On 7 December 2022, APRA [released](#) updated Prudential Standard *SPS 310 Audit and Related Matters (SPS 310)*, along with the final version of SPS 310. The amendments to SPS 310 are minor and apply to the scope of audits for the financial year ending 30 June 2023 onwards.

## APRA annual update on countercyclical capital buffer setting

APRA has confirmed that the countercyclical capital buffer will be set at a new default rate of 1 per cent of risk-weighted assets from 1 January 2023.

## Final prudential standard on public disclosure requirements for ADIs

APRA has [released](#) its final Prudential Standard APS 330 *Public Disclosure for locally incorporated ADIs*. The new APS 330 will be effective from 1 January 2025.

## SUPERANNUATION

### ASIC updated guidance on SMSF

ASIC has updated its guidance on the provision of SMSF advice by [publishing](#) Information Sheet 274 *Tips for giving self-managed superannuation fund advice (INFO 274)*.

## AML/CTF

### New financial crime guide on trade-based money laundering

The Australian Transaction Reports and Analysis Centre (AUSTRAC) [released](#) a new financial crime guide 28 October 2022 dealing with trade-based money laundering, which is the process of disguising the proceeds of crime by moving funds through trade transactions, in an attempt to legitimise their illegal origin or finance illegal activities. AUSTRAC says that the guide will help financial service providers identify and report suspicious transactions indicative of criminals engaging in trade-based money laundering. The guide was developed by AUSTRAC's Fintel Alliance in partnership with the Australian Border Force. AUSTRAC says that financial service providers engaged in trade financing should assess and understand the risks associated with the services they offer, and have appropriate risk-based systems and controls in place to identify suspicious activity. According to the guide, indicators of trade-based money laundering include: customers suddenly being involved in the import/export of goods; customers who appear to conduct business exclusively with a single counterpart; an unexplained change in transaction volume and/or value; and evidence of consistent and significant cash payments, including to previously unknown third-parties.

## Draft debanking guidance

AUSTRAC has [issued](#) draft guidance on debanking. Comments closed on 21 December 2022. The AUSTRAC guidance aims to help financial institutions understand AUSTRAC's expectations when providing designated services to businesses they consider 'higher-risk', and to encourage businesses in affected sectors to engage openly with financial institutions and provide the type of information they may request, to demonstrate the steps they are taking to address risks within their particular business. AUSTRAC says that it discourages the indiscriminate and widespread closure of accounts across entire industry sectors and encourages financial institutions to assess their customers' financial crime risks on a case-by-case basis.

## Guidance to ensure greater access to financial services

On 9 December 2022, AUSTRAC [released](#) guidance to banks and superannuation funds to support people from diverse backgrounds and in challenging circumstances access the financial services they need. AUSTRAC notes that some members of the community cannot access traditional forms of documentation to prove their identity, whether due to emergency, personal circumstances, location or structural barriers. Persons affected can include Aboriginal and Torres Strait Islander peoples; those in remote communities; the incarcerated or recently released; intersex, trans and gender diverse people whose documentation may not reflect their identity; and persons fleeing domestic violence or evacuated from their home due to a natural disaster. AUSTRAC says that the guidance will help financial institutions adopt flexible and compassionate approaches to customer identity processes, while still maintaining due diligence processes where they are concerned that a customer is not who they claim to be.

## AUSTRAC proliferation financing risk assessment

On 14 December 2022 AUSTRAC [released](#) Australia's first national proliferation financing risk assessment. Proliferation financing is when a person makes available an asset, provides a financial service or conducts a financial transaction that is intended to facilitate the proliferation of weapons of mass destruction, regardless of whether the activity occurs or is only attempted. The assessment found that Australia is primarily targeted by state-based or linked procurement networks that wish to exploit a range of sectors to export restricted, sensitive or dual-use goods and knowledge.

## Due diligence draft guidance

On 3 November 2022, AUSTRAC [released](#) draft updated guidance products for consultation on enhanced customer due diligence and employee due diligence and training. The consultation period has now closed.

## DISPUTES AND ENFORCEMENT

### Complaints reporting period commenced on 1 January 2023

For most financial firms, reporting of complaints data to ASIC will begin in 2023 with the first report due on 31 August 2023 to cover the 6 month period of 1 January 2023 to 30 June 2023. In March 2022, ASIC released the mandatory requirements for the IDR data framework and an IDR data reporting [handbook](#). ASIC has also released [FAQs](#) on reporting IDR data. See our article [here](#) for more details.

### ASIC outlines enforcement priorities

At the ASIC Annual Forum on 3 November 2022, ASIC Chair Joe Longo [outlined](#) ASIC's enforcement priorities for 2023, which he grouped into three categories of protecting consumers, responding to emerging issues, and maintaining market integrity.

ASIC is focused on conduct that targets vulnerable consumers including First Nations people, and serious misconduct that is damaging to market integrity. The regulator is looking at systemic compliance failures by large institutions that result in widespread consumer harm, and on emerging conduct risks. ASIC will use a broad regulatory toolkit which includes (in addition to enforcement) supervision and surveillance, financial capability work, guidance, industry engagement, and input into law reform. Mr Longo said that while it was necessary to take decisive action against those who cause harm to consumers and investors, there was also a need to focus on deterrence, education, and prevention to reduce harms arising in the first place. ASIC needed to be strategic, directing resources to ensure maximum public benefit, and it would continue to actively target cases of high deterrent value and those involving egregious harm or misconduct.

### Ultiqa timeshare penalty

Timeshare company Ultiqa Lifestyle Promotions Ltd (in liquidation) has been [ordered](#) by the Federal Court to pay a \$900,000 penalty following a decision in May 2022 that Ultiqa financial advisers advised consumers to invest in the Ultiqa Lifestyle Scheme despite this advice not being in the consumers' best interests and not being appropriate to their circumstances.

### ASIC interim stop orders on Holon crypto investment funds

On 17 October 2022, ASIC [announced](#) that it had made interim stop orders preventing Holon Investments Australia Limited (**Holon**) from offering or distributing three of its funds (**Funds**) to retail investors because of non-compliant target market determinations (**TMDs**). The Funds were the Holon Bitcoin Fund, the Holon Ethereum Fund, and the Holon Filecoin Fund. Each of the Funds was invested in an individual crypto-asset: Bitcoin, Ether and Filecoin respectively. The interim orders stopped Holon from issuing interests in the Funds, giving a product disclosure statement for the Funds, or providing general advice to retail clients recommending investments in the Funds. ASIC alleged that Holon had not appropriately considered the features and risks of the Funds in determining their target markets. The TMDs for the Funds suggested that the Funds were suitable for investors with a potential risk and return profile ranging from medium to very high and who intended to use the Funds as a satellite component (up to 25%) of their investment portfolio or even as a solution/standalone component (75-100%) of their investment portfolio. ASIC made the interim orders to protect retail investors from potentially investing in funds that may not be suitable for their financial objectives, situation or needs. After a hearing on 28 October 2022, ASIC made indefinite interim stop orders against Holon prohibiting the conduct covered by the original interim stop orders. Holon informed ASIC that it would wind-up the schemes and on 14 November 2022, ASIC revoked the indefinite interim stop orders, and no final stop orders were made.

### ASIC flexes DDO powers

In the last quarter ASIC has issued a number of interim stop orders to prevent the offer and sale of various financial products based on its concerns about the target markets for those products. In addition to the action against Holon described above, these actions include:

- an interim stop [order](#) preventing Westlawn Financial Services Limited from offering or distributing the Westlawn Income Fund to retail investors because of a non-compliant TMD ;
- an interim stop [order](#) on offers from Neldner Road Vintners Limited (**Neldner**) in response to TMD deficiencies. The order has now been revoked. Neldner was seeking to raise capital and intended to rely on self-certification from investors that they were in the target market. ASIC's view is that under the design and distribution obligations (**DDO**), the onus is on the product issuer to ensure that consumers who acquire the product are in the target market, rather than relying on investors self-determining that they fall within the target market. ASIC also could not find a publicly available version of the TMD;
- interim stop [orders](#) preventing MPG Funds Management Limited from offering or

distributing two trusts to retail investors because of deficient TMDs. ASIC made the interim orders to protect retail investors from potentially investing in funds that may not be suitable for their financial objectives, situation or needs;

- interim stop [orders](#) preventing Perpetual Investment Management Limited from offering or distributing 2 funds to retail investors because of deficiencies in their TMDs;
- an interim stop [order](#) on offers from APS Savings Limited (**APS Savings**) because of deficiencies in its TMD. APS Savings seeks to raise funds through the issue of secured notes under a prospectus and then lend the funds raised to its parent company to use these monies to fund personal loans for its members. ASIC's view was that the TMD for APS Savings did not adequately describe the objectives, financial situation and needs of consumers likely to be in the target market in an objective manner, and that the TMD for the prospectus did not meet the appropriateness requirements under DDO;
- interim stop [orders](#) preventing Australian Fiduciaries Limited from offering or distributing 3 funds to retail investors because of TMD deficiencies;
- an interim stop [order](#) on offers from Finnia Income Ltd in response to deficiencies in its TMD;
- civil penalty [action](#) against American Express Australia Limited (**Amex**). This is ASIC's first civil penalty case alleging breaches of DDO. The case involves 2 David Jones co-branded credit cards issued by Amex. ASIC alleges that the TMDs issued by Amex did not limit distribution to people looking to make purchases on credit with a card that earned points or other benefits. ASIC also claims that Amex was aware that the cancellation rates for consumers who applied for the credit cards in David Jones stores were high, and significantly higher than cancellation rates for credit cards applied for online, and that Amex knew that some consumers were confused about whether they had applied for a loyalty card or a credit card and that this was a circumstance that indicated the TMDs were not appropriate and required Amex to review the TMD and stop issuing the credit cards; and
- civil penalty [action](#) in the Federal Court against Firstmac Limited, a product distributor, for alleged breaches of DDO. Firstmac Limited distributes term deposits and other investment products, including interests in a registered managed investment scheme.

On 13 December 2022 ASIC [published](#) Report 754 following a review into small amount credit lenders' compliance with DDO. The report covers improvements lenders have made to their TMDs following ASIC intervention. ASIC says that the report is relevant to all credit providers when drafting and reviewing their TMDs.

## ASIC sues over Qoin crypto asset

On 25 October 2022, ASIC [announced](#) that it had commenced civil penalty proceedings in the Federal Court against BPS Financial Pty Ltd (**BPS**) in relation to the Qoin crypto asset token (the **Qoin Facility**). Qoin was marketed as a digital currency, with participating merchants accepting Qoin as payment for goods and services. Qoin could also be traded on Block Trade Exchange Limited (**BTX**). ASIC alleges that BPS made false, misleading or deceptive representations about Qoin and that BPS has been carrying on a financial services business without an AFSL, because the Qoin Facility is a "non-cash payment facility", a type of financial product that falls under the AFSL regime. In its media release, ASIC says that the elements of the non-cash payment facility include Qoin tokens, the Qoin wallet, and a distributed digital ledger implemented by blockchain technology.

The false, misleading or deceptive representations by BPS are alleged to include:

- consumers who bought Qoin tokens can be confident that they will be able to exchange them for other crypto-assets or fiat currency through independent exchanges (ASIC notes that increasingly restrictive limits were imposed on exchanging Qoin tokens for Australian dollars on BTX over time);
- Qoin tokens can be used to purchase goods and services from an increasing number of merchants registered with BPS;
- the Qoin Facility and/or the Qoin wallet application used to transact Qoin tokens are

- regulated, registered and/or approved in Australia; and
- the Qoin Facility and/or BPS are compliant with financial services laws.

## **ANZ fined \$25m for fee overcharging**

In his [decision](#) in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2022] FCA 1251 handed down on 26 October 2022, Justice O’Callaghan of the Federal Court ordered that ANZ Bank pay a penalty of \$25 million and publish an adverse publicity notice. ASIC had sued ANZ Bank over its Breakfree package loan. Customers paid an annual fee and were supposed to receive fee waivers and interest rate discounts on eligible ANZ products. Customers with offset accounts were entitled to interest rate reductions on eligible home and commercial loans linked to an ANZ offset account. ANZ failed to apply some of these benefits over a long period – stretching back to the mid-1990s for some customers.

ANZ issued terms and conditions for its Breakfree product which promised benefits that were not received. By doing this, ANZ made “implied representations that it had, and would continue to have, adequate systems and processes in place” to administer those benefits, when all the while it did not have adequate systems and processes, and did not have reasonable grounds for saying so. These representations to customers were found to be misleading or deceptive conduct, or conduct that was likely to mislead or deceive, and also found to be false or misleading representations concerning the benefits of services. The false or misleading representations finding was the basis of the \$25 million penalty. Section 12DB(1)(e) of the ASIC Act states that a person must not make a false or misleading representation that financial services have sponsorship, approval, performance characteristics, uses or benefits.

The breaches of the ASIC Act led to a finding by the Court that ANZ had breached its obligations as an AFSL holder and as an Australian credit licence holder to comply with the financial services laws and credit legislation respectively. ANZ’s failure to maintain adequate systems and processes to apply the Breakfree benefits, and its failure to conduct adequate monitoring or analysis of its systems and processes to identify the issues, were also held to be a breach of its licence obligations to do all things necessary to ensure that its financial services and credit activities were engaged in efficiently, honestly and fairly.

ANZ admitted to the contraventions and has been remediating customers.

## **\$27 million penalty against CommSec and AUSIEX for systemic compliance failures**

Commonwealth Securities Limited (**CommSec**) has been [ordered](#) by the Federal Court to pay a penalty of \$20 million, and Australian Investment Exchange Limited (**AUSIEX**) has been ordered to pay a penalty of \$7.12 million, for systemic compliance failures relating to the Market Integrity Rules, the Corporations Act and (in the case of CommSec) the ASIC Act.

## **Mortgage fees not enforceable**

In *N & M Investments/Properties Pty Ltd v Australian Property Enterprise Pty Ltd* [2022] [NSWSC 1370](#) decided on 12 October 2022, the Court found that a further establishment fee and a default loan management fee in a mortgage were unenforceable because they were penalties.

## **ASIC appeals conflicted remuneration decision**

On 26 October 2022 ASIC [announced](#) that it was appealing the Federal Court’s September 2022 decision to dismiss ASIC’s proceedings against Colonial First State Investments Limited (**Colonial**) and Commonwealth Bank of Australia (**CBA**) which alleged a breach of conflicted remuneration laws when Colonial agreed to pay CBA to distribute its Essential Super product



through CBA's branch and digital channels. ASIC said it was concerned that the decision would limit the operation of conflicted remuneration laws introduced in 2012.

## **ASIC publishes insights on breach reporting**

On 27 October 2022 ASIC [released](#) its first publication of information lodged under the reportable situations regime. ASIC reported that over 8000 reports were made to ASIC by financial services and credit licensees between 1 October 2021 and 30 June 2022. According to ASIC, a much smaller proportion of licensees reported under the regime than anticipated (6% of all licensees); licensees are still taking too long to identify and investigate some breaches (more than a year, in 18% of cases); more work needs to be done to appropriately identify and report the root cause of breaches (in 55% of cases, staff negligence or error was identified as the sole root cause); and further improvements are needed to licensees' practices towards remediating impacted customers.

ASIC said that it was focussing on improving the operation of the reportable situations regime, and will work with stakeholders to address issues that have arisen from implementation of the regime, including by providing additional guidance where needed.

## **NAB engaged in unconscionable conduct over account fees**

In a judgment handed down on 7 November 2022, the Federal Court has [found](#) that National Australia Bank Ltd (**NAB**) engaged in unconscionable conduct by continuing to charge customers periodic payment fees even though NAB knew the overcharging was occurring. Justice Derrington said that NAB "took advantage of the customers' continuing lack of knowledge, and acted in its own self-interest by continuing to operate a system which it knew wrongfully deducted sums from its customers' accounts. This conduct fell so far below the standards required of a bank's obligations to its customers that it was unconscionable. It was neither proper nor right according to ordinary commercial values in Australian society, and it was offensive to conscience ... Once it [NAB] was aware that its systems were wrongly charging [the fees] to some clients who had no obligation to pay them, it was neither competent nor ethical to continue to charge them and to fail to inform them or advise them to review their accounts. Neither could it be said to be fair or honest. Compliance would require suitable remedial action to be undertaken with appropriate urgency once aware of the wrong it had done." NAB's unconscionable conduct was found to have also contravened its obligations as an Australian financial services licensee to ensure that financial services covered by its licence were provided efficiently, honestly and fairly, and to comply with the financial services laws.

## **ASIC suspends AFSL of FTX Australia's AFS licence**

ASIC [announced](#) on 16 November 2022 that it had suspended the Australian financial services licence of FTX Australia Pty Ltd until 15 May 2023 after it was placed into voluntary administration on 11 November 2022. Until 19 December 2022, FTX Australia was permitted to continue to provide limited financial services that relate to the termination of existing derivatives with clients. FTX Australia's licence had permitted it to deal in, make a market for and provide general advice relating to derivatives and foreign exchange contracts to retail and wholesale clients.

## **ASIC sues crypto earn providers Block Earner and Finder Earn**

ASIC has taken separate legal proceedings against two providers of 'crypto earn' products, alleging that they are regulated financial products and that the providers have breached financial services laws when offering them.

On 23 November 2022, ASIC [announced](#) that it was taking civil penalty proceedings in the Federal Court against fintech company Web3 Ventures Pty Ltd trading as Block Earner. ASIC alleges that Block Earner provided unlicensed financial services in relation to its crypto-asset based products and that it operated unregistered managed investment schemes. Block Earner

offered fixed-yield earning products based on crypto-assets under the names USD Earner, Gold Earner and Crypto Earner. ASIC claims that these were managed investment schemes and/or derivatives.

On 15 December 2022, ASIC [announced](#) that it had commenced civil penalty proceedings in the Federal Court against Finder Wallet Pty Ltd (**Finder Wallet**) for allegedly providing unlicensed financial services, breaching product disclosure requirements and failing to comply with DDO in relation to its crypto-asset related product Finder Earn. ASIC says that Finder Wallet offered Finder Earn between late February and 10 November 2022, and that the product enabled customers to deposit Australian dollars into their accounts, which were then converted to an Australian dollar-denominated ‘stablecoin’ called TAUD and allocated to Finder Wallet to use for its own working capital. According to ASIC, Finder Wallet paid customers (in Australian dollars) an annual compounding return in exchange for the use of their funds by Finder Wallet. ASIC alleges that the Finder Earn product was a regulated financial product in the form of a debenture.

### **Limitation period for criminal prosecutions of false or misleading conduct**

In *Walker v Members Equity Bank Ltd* [2022] FCAFC 184 the Full Court of the Federal Court [confirmed](#) that a criminal prosecution of a false or misleading conduct offence under the ASIC Act must be commenced within 3 years of the alleged commission of the offence: this was a hard deadline with no discretion to extend. (The limitation period for civil claims is 6 years).

### **Criminal proceedings against CBA dismissed**

Following the decision in *Walker v Members Equity Bank Ltd* [2022] FCAFC 184 (see above), the Federal Court has made [orders](#) by consent to dismiss criminal proceedings against CBA in an unrelated matter concerning the sale of consumer credit insurance due to the expiry of the limitation period, even though CBA had previously pleaded guilty to 30 criminal charges of making false or misleading representations to customers when selling the insurance.

### **Federal Court dismisses ASIC claim against CBA on monthly fees**

On 29 November 2022, Justice Downes of the Federal Court [dismissed](#) proceedings brought by ASIC against CBA which alleged that CBA had engaged in misleading or deceptive conduct, made false or misleading representations and contravened its obligations as an Australian financial services licensee by incorrectly charging monthly access fees to customers. The Court found that in relation to fees incorrectly charged and recorded on a customer’s bank statement, the only representation by CBA was that a fee of a particular amount had been charged on or around the nominated date, and that the customer should check whether the entry was correct and notify CBA in the event of any error. The Court also decided that CBA did not represent that it would have adequate systems and processes in place to ensure that it could and would provide the applicable fee waiver when it entered into a contract with a customer to establish an account. CBA’s terms and conditions acknowledged that sometimes the bank “can get things wrong, and when this happens” the bank is “determined to make them right again”. The Court also found that CBA had not breached its general obligation to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly.

### **Vanguard pinged for alleged greenwashing**

ASIC [issued](#) 3 infringement notices to Vanguard Investments Australia Ltd (**Vanguard**), an investment manager, for alleged greenwashing. ASIC considered that product disclosure statements for the Vanguard International Shares Select Exclusions Index Funds (the **Vanguard Funds**) may have been liable to mislead the public by overstating an exclusion, otherwise known as an investment screen, claimed to prevent investment in companies involved in significant tobacco sales. The Vanguard Funds were structured to exclude certain investments in tobacco. While this screen applied to exclude manufacturers of cigarettes and other tobacco products, it did not exclude companies involved in the sale of tobacco products.

Vanguard paid \$39,960 in compliance with the infringement notices on 1 December 2022. Payment of an infringement notice is not an admission of guilt or liability.

## **ASIC seeking financial penalties against OnePath Life**

On 8 December 2022 ASIC [announced](#) that it had commenced proceedings in the Federal Court against OnePath Life Limited (**OnePath Life**). ASIC alleges that the company failed to comply with its duty to act with utmost good faith during claims handling and noted that this was the first time that ASIC had sought financial penalties for a breach of this duty, following the introduction of new civil penalties in 2019. The case concerns a customer with a OnePath Life income protection policy that was obtained in 2016.

## **ASIC and AUSTRAC actions against Star and its directors and officers**

In December 2022, ASIC [commenced](#) civil penalty proceedings in the Federal Court against 11 current and former directors and officers of The Star Entertainment Group Limited (**Star**), alleging breaches of their duties under section 180 of the Corporations Act by failing to give sufficient focus to the risk of money laundering and criminal associations.

On 30 November 2022, AUSTRAC [announced](#) that it had commenced civil penalty proceedings in the Federal Court against The Star Pty Limited and The Star Entertainment QLD Limited for alleged serious and systemic non-compliance with AML/CTF laws. The civil penalty proceedings come after an industry wide AUSTRAC compliance campaign that began in September 2019 and led to an enforcement investigation into The Star Pty Limited being opened in June 2021. In January 2022 the investigation was expanded to include The Star Entertainment Qld Limited and other Star entities.

## **AUSTRAC proceedings against SkyCity Adelaide**

On 7 December 2022 AUSTRAC [commenced](#) civil penalty proceedings in the Federal Court against SkyCity Adelaide Pty Ltd (**SkyCity**) for alleged serious and systemic non-compliance with AML/CTF laws. The proceedings follow an AUSTRAC enforcement investigation into SkyCity.

## **High Court refuses special leave in Cigno case**

In December 2022 the High Court of Australia [dismissed](#) special leave applications by Cigno Pty Ltd (**Cigno**) and BHF Solutions Pty Ltd (**BHF Solutions**), seeking to appeal the decision of the Full Federal Court which unanimously found that a financial supply fee charged by Cigno was a charge made for providing credit. The fee charged by Cigno was part of an arrangement that sought to avoid the application of the National Credit Code to loans made by BHF Solutions.

## **ING pays penalties to ACCC re CDR**

ING Bank (Australia) Limited (**ING Bank**) has [paid](#) penalties of \$53,280 to the ACCC for allegedly failing to comply with CDR Rules and making a false or misleading representation to consumers, after the ACCC issued it with 4 infringement notices. The ACCC alleges that ING Bank missed 3 important legislated deadlines for CDR and made a misleading statement to consumers on its website about the reliability and security of its CDR service.

## **ASIC succeeds against 'finfluencer'**

On 20 December 2022 the Federal Court [held](#) that social media 'finfluencer' Tyson Robert Scholz contravened the Corporations Act by carrying on a financial service business without an AFSL. ASIC sued Mr Scholz, alleging that he was carrying on a financial services business by providing financial product advice regarding share trading on the ASX without a licence by

delivering training courses and seminars, promoting those courses and seminars on Twitter and Instagram, and making share purchase recommendations on private online forums (that he administered) and on Instagram.

### **ASIC issues infringement notice for greenwashing**

On 23 December 2022 ASIC [announced](#) that it had issued an infringement notice to superannuation trustee Diversa Trustees Limited in further action against alleged greenwashing in relation to the superannuation product Cruelty Free Super.

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