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GRC Solutions Compliance Forum

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Topics

- Emerging trends and challenges in ESG regulation
- Transition from Banking Executive Accountability Regime (BEAR) to Financial Accountability Regime (FAR)
- Privacy Act - proposed reforms
- Cybersecurity and scams
- Enforcement priorities of ASIC with a focus on DDO



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ESG



ESG

- ESG stands for **Environmental, Social** and **Governance**.
- A set of policies, practices and metrics that a company implements to limit negative impact, or increase positive impact, on the environment, society and governance in the sphere in which it operates.
- ESG reporting is an organisation's public disclosure of its ESG data.
- Why is ESG important?
 - A framework to evaluate a company's overall sustainability performance.
 - Investors and lenders are coming to consider ESG performance like a credit rating for sustainability.
 - Increasingly, sound ESG performance is a consideration in investment, lending and acquisition decisions.
 - International pressure for standardised, mandatory reporting.



Examples of ESG issues

ENVIRONMENTAL

- Impacts on the environment including:
 - **climate change and carbon emissions (currently gets the most focus)**
 - conservation
 - biodiversity
 - land and water management
 - waste and pollution control
 - energy efficiency and clean technologies

SOCIAL

- Social impacts on stakeholders including:
 - wages and working conditions
 - workplace health and safety
 - community engagement
 - sexual harassment and anti-discrimination
 - modern slavery and child labour
 - ethical product sourcing
 - diversity
 - indigenous reconciliation.

GOVERNANCE

- The governance, risk and compliance frameworks that are used to implement and monitor obligations, policies and procedures including:
 - board diversity
 - corporate culture and conduct
 - anti-bribery and corruption
 - whistleblower programs
 - financial integrity
 - modern slavery in supply chain
 - workplace related obligations.



Climate related financial disclosure

- Currently in Australia, material exposure to climate change risks is incorporated into disclosures required by the Corporations Act including:
 - Annual financial reports (s 295)
 - Directors' reports (s 299 and 299A(1))
 - Operating and financial review (s 299A(1)(c))
- In 2019 ASIC updated its Regulatory Guides [228](#) (prospectuses) and [247](#) (operating and financial reviews) on disclosure to provide guidance on climate change related disclosure.
- ASIC's approach to date has been to encourage listed companies to voluntarily adopt the recommendations of the [Taskforce on Climate-Related Financial Disclosures](#) (TCFC).



Treasury consultation paper December 2022

- Rationale for introducing mandatory climate-related financial disclosure in Australia, based on international standards and best practices.
- Scope and timing of proposed disclosure framework - to cover listed companies, large financial institutions and large private companies, and implemented in phases starting from FY2024-25.
- Content and format of disclosure requirements - align with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), covering governance, strategy, risk management, metrics and targets.
- Emissions reporting - seeks inputs on the appropriate requirements for requiring scope 1, 2 and 3 emissions reporting, and the potential interaction between any new disclosure obligations and existing national emissions reporting frameworks.
- Enforcement and oversight mechanisms, which will involve existing regulators such as ASIC, APRA and AUSTRAC.



Scope 1, 2 and 3 emissions

	Definition	Examples
Scope 1	Emissions generated directly from an organisation's operations. In other words, what emissions come directly from how the organisation produces its products and services?	Company facilities Company cars and trucks
Scope 2	Emissions associated with the production of energy which the organisation consumes. In other words, what are the indirect emissions from the generation of energy which the company buys to power its operations?	Electricity purchased by company. Purchased heating and cooling for company use.
Scope 3	<p>Emissions which are upstream and downstream indirect emissions in an organisation's value chain.</p> <p>What are the indirect emissions that go into making the organisation's products or services (upstream indirect emissions)?</p> <p>What are the indirect emissions caused by the company's customers when using its products or services after it has moved or sold down the supply chain (downstream indirect emissions)?</p> <p>Estimated that Scope 3 emissions account for as much as 65-95% of most companies' greenhouse gas impact.</p>	<p><u>Upstream</u>: emissions from capital goods, fuel and energy (not already in scope 2), leased assets, employee commuting, waste generated in operations, business travel, transportation and distribution, purchased goods and services</p> <p><u>Downstream</u>: emissions from use of sold products, processing of sold products, transportation or distribution, end of life treatment of product, lease assets, investments.</p>



Greenwashing – what is it?

- Greenwashing is:
 - making an unsubstantiated or misleading claim about:
 - the environmental status of a business. For example: “we are the lowest emissions airline” (Ryanair) a claim which was made up.
 - the environmental benefits or attributes of a product, service, technology or company practice. For example: “our furniture is made from ethically sourced timber” when it is in fact from illegal logging in protected areas.
 - making future claims without reasonable grounds for doing so. For example: “Our business will be at net zero emissions by 2030” without having any plans or programs in place to achieve this or to measure emissions.
- It can be greenwashing to provide inaccurate climate-related statements and disclosures, including “net zero” commitments that are misleading or made without a reasonable basis.
- A company, and its directors and officers, could be found to have engaged in misleading or deceptive conduct by not having reasonable ground to support the express and implied representations contained within its net-zero commitment.



EUROPE'S LOWEST FARES, LOWEST EMISSIONS AIRLINE

Everybody knows that when you fly Ryanair you enjoy the lowest fares. But do you know you are travelling on the airline with Europe's lowest emissions as well?

While aviation is responsible for just 2% of carbon emissions, our industry is determined to play a leading role in reducing emissions. Aviation already pays significant environmental taxes – this year Ryanair will pay €630m in environmental taxes in Europe.

Ryanair has the lowest carbon emissions of any major airline – 66g Co2 for every passenger kilometre flown. This is because we have the youngest fleet of aircraft (avg. age 6 years), the highest load factors (97% of seats filled) and newest most fuel efficient engines.

Ryanair is committed to cutting our carbon emissions further which is why we are investing over \$20 billion in new aircraft that will cut our carbon emissions by 10% by 2030 and lower noise emissions by a further 40%.

Many of our customers are now choosing to offset the carbon cost of their flight each time they book with us. We support them making that choice and we thank them for contributing to our 4 great environmental partners.

Find out more at www.ryanair.com/environment



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Regulator focus on greenwashing

- Both ASIC and the ACCC have identified as a key enforcement priority in 2023 a crack-down on greenwashing.
- ASIC issued [Information Sheet 271](#) *How to avoid greenwashing when offering or promoting sustainability related products*



Recent ASIC action on greenwashing

Date	Company name	Alleged contravention	Enforcement outcome
27/10/22	Thor Energy Limited (Thor)	Thor made two ASX announcements which made claims ASIC alleged were factually incorrect or had no reasonable basis to make in a “Clean Energy Presentation”.	Infringement notices \$53,280
2/12/22	Vanguard Investments Australia Ltd (Vanguard)	ASIC alleged that a PDF for Vanguard Select Exclusions Index funds may have misled the public by overstating an investment screen to prevent investments in companies involved in tobacco industry. While the screen excluded manufacturers of tobacco products it did not exclude those involved in the sale of tobacco products.	Infringement notices \$39,960
23/12/22	Diversa Trustees Limited (Diversa), superannuation trustee.	ASIC concerned that statements on Diversa’s website for its super product, Cruelty Free Super, overstated its limited investment screens to prevent investment in companies “involved in pollution and carbon intensive activities”, “financing or support of activities which cause environment and social harm” or have “poor corporate governance”.	Infringement notice \$13,230
5/1/23	Black Mountain Energy Limited (BME)	ASIC concerned that BME may have misled or may not have had a reasonable basis to make three ASX statements that claimed BME was “creating a natural gas development project with net-zero carbon emissions” and the “greenhouse gas emissions associated with their project would be net zero”.	Infringement notices \$39,960
27/2/23	Mercer Superannuation (Australia) Ltd (Mercer)	ASIC alleges that Mercer made misleading statement about the “Sustainability Plus” investments options in its website by stating the product was suitable for members who were “deeply committed to sustainability” because they excluded investments in companies involved in carbon intensive fossil fuels (e.g. thermal coal) involved in alcohol production and gambling. ASIC alleges that members who selected the Sustainability Plus option in fact had investment in 15 companies involved in carbon intensive fossil fuels, 15 companies involved the production of alcohol and 19 companies involved in gambling.	Proceedings VID117/2023. Remedies sought declarations, civil penalties, injunction, Public notices.



Other issues with ESG

- Duties of directors and officers.
- Cost/benefit analysis - do the benefits outweigh the cost?
- Rise of “soft law” and non-binding commitments.
 - Where does a company draw the line?
 - Has it gone too far? Pushback starting to happen (esp. in US)
- What is best practice? How do we embed it?
- ESG and stakeholder/class action risks. Already have been commenced ([Santos case](#)).
 - Class actions about ESG are increasing exponentially overseas and only a matter of time before Australia is affected.
 - Shift to what a company has failed to do. Not necessarily what it has done.
- Collaboration across industries to advance sustainability - anti-competitive concerns.
- How do you assess investments and third-party supplier/customer/partner due diligence?



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BEAR to FAR



BEAR to FAR

- Financial Accountability Regime (**FAR**) will replace Banking Executive Accountability Regime (**BEAR**) and extend BEAR framework to insurance and superannuation sectors.
- Two Bills:
 - *Financial Accountability Regime Bill 2023* [introduced](#) 8 March 2023. Substantially the same as previous Bill.
 - *Financial Accountability Regime (Consequential Amendments) Bill 2023* also [introduced](#) 8 March 2023. Contains transitional arrangements for banking sector.
- Government has not adopted Greens recommendation of civil penalties for breaches of accountability obligations by individuals. The Bill already contains measures to address executive failures to comply, including disqualification, loss of deferred bonuses, and individual civil penalties for assisting in an entity's contravention of its obligations.
- FAR will apply:
 - to the banking industry 6 months after royal assent
 - to the insurance and superannuation industries 18 months after royal assent.



Key FAR obligations

- **Accountability obligations:** entities and their directors and most senior and influential executives (“accountable persons”) to conduct their business in a certain manner (i.e., honesty and with care, skill and diligence)
- **Key personnel obligations:** entities to nominate senior and influential executives (accountable persons) to be responsible for all areas of their business operations
- **Deferred remuneration obligations:** entities to defer at least 40 per cent of the variable remuneration (for example, bonuses and incentive payments) of their directors and most senior and influential executives for a minimum of 4 years, and to reduce their variable remuneration for non-compliance with their accountability obligations
- **Notification obligations:**
 - entities to meet the core notification obligations by providing the regulator with certain information about their business and their directors and most senior and influential executives; and
 - *for entities above a certain threshold (determined by rules made by the Minister) to meet the enhanced notification obligations, by preparing and submitting accountability statements and accountability maps.*



Main differences BEAR to FAR

- **Accountable person new obligations:**
 - Dealing in an open, constructive and co-operative way with APRA and ASIC.
 - Taking reasonable steps to prevent matters arising that would (or would be likely to) result in a material contravention by the accountable entity of certain financial sector laws (includes Ch 7 Corporations Act, NCCP Act). Bill includes examples of reasonable steps.
- **Accountable entity new obligations:** dealing in an open, constructive and co-operative way with APRA and ASIC.
- **Accountability maps and statements:** requirement to provide will only apply to large institutions (Minister to set threshold).
- **Key personnel obligations:** Up to 90 days (increased from 28 days) to register accountable persons filling temporary or unforeseen vacancies.
- **Deferred remuneration:** Same % of remuneration to be deferred will apply to all institutions regardless of size.



Transitional arrangements for banking sector



Accountability statements under BEAR would transition automatically to FAR.



Accountable persons automatically registered for FAR (including temporary appointments)



FAR deferred remuneration obligations to apply when the decision to provide remuneration first occurs in the first financial year that begins 6 months after FAR commences to apply. BEAR obligations would apply until then. BEAR obligations would continue to apply to any accountable persons who do not transition to FAR.



Privacy Act proposed reforms

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Privacy Act proposed reforms

- Privacy Act Review commenced in 2020.
- Attorney-General publicly released the Privacy Act Review Report on 16 February 2023.
- Government is seeking feedback - deadline is 31 March 2023.
- Report makes 116 proposals to improve privacy rights of individuals, clarify privacy responsibilities of APP entities and enhance OAIC powers.
- Any changes to law are likely to be some time away, as Government is only in consultation phase.



Privacy Act proposed reforms

Subject area	Changes proposed
Definition of personal information	Change “about” to “relates to”; include list of information. Potentially broader.
Collection	Defined to include any source, including inferred or generated information.
Privacy policies	Must be clear, current, concise and understandable. Accessibility measures.
Exemptions	Small business, employee records, political, journalists.
Consent requirements	Quality of consent: voluntary, informed, current, specific and unambiguous; right to withdraw.
Privacy practices	“Fair and reasonable” general obligation.
Individual rights	Improved access rights; right to object; rights to erasure and de-indexing (public interest exceptions); unqualified right to opt out of direct marketing and targeted advertising; private right of action.
Data retention	APP entities to set their own maximum and minimum retention periods for data – and put in privacy policy.



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Cybersecurity and scams



Cybersecurity

- Optus and Medicare cyber breaches.
- Amendments to Privacy Act in 2022:
 - *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022 (Cth)* received Royal Assent on 12 December 2022.
 - Substantial increases in penalties under Privacy Act.
 - Enhanced enforcement powers to OAIC.
 - Broadens information sharing powers of Australian Information Commissioner and Australian Communications and Media Authority.
 - 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.
- APRA CPS 234
- AICD Cyber Security Governance Principles October 2022



Scams - AFCA approach

- Average of 400 scams-related complaints per month to AFCA.
- Under a bank's ordinary relationship with a customer, the bank is not generally required to:
 - conduct due diligence on investments on a customer's behalf or investigate payment recipients
 - advise customer that a transaction, product or service is not in their interest
 - prevent the customer from dealing with funds they are contractually entitled to access
 - monitor transactions on its customer's behalf
 - maintain a watching brief for scams, for its customer's benefit
 - reimburse a customer for authorised payments to a third party.



Scams - AFCA approach

- A bank's primary duty is to follow its customer's mandate or instruction when processing transfers.
- Nonetheless, the bank must not process a customer's instructions if they are unclear or ambiguous.
- AFCA considers that customer's mandate or instruction will be ambiguous if the nominated payee account name and account number on the instructions do not correspond.
- AFCA will generally require the bank to compensate the customer for their resulting loss unless at the time of providing their instructions, the bank gives the customer a clear and prominent warning that the bank does not take the account name into account in processing the payment, and will only rely on the account number and bank details.
- A bank must not turn a blind eye to evidence pointing to a real possibility that their customer is being defrauded (referred to as 'red flags') - the bank should make further enquiries.
- The duty to be vigilant for scams and to question its customer's mandate is subordinate to the bank's primary duty to comply with the valid instructions of its customer.
- AFCA will not review the adequacy of a bank's system or its compliance with regulatory requirements.



Scams - financial institution liability

- ePayments Code – mistaken internet payments – does not apply to scams
- Moves toward liability for financial institutions
 - UK – Contingent Reimbursement Model Code - a voluntary code for authorised push payment (“APP”) fraud. Victims of scams entitled to be reimbursed for their loss jointly by the sending and receiving banks caught up in the scam transaction fraud - unless proved that victim participated in the scam or acted with gross negligence. Payments System Regulator proposes to make mandatory.
 - Calls for the same to be adopted in Australia.



SMS scams

- New anti-SMS scam rules introduced in July 2022 require all telecommunications providers to:
 - identify, trace and block SMS scams
 - publish information to assist their customers to proactively manage and report SMS scams, to share information about scam messages with other mobile providers and report identified scams to authorities.
- Australian Communications and Media Authority (ACMA) to investigate the implementation of a SMS sender ID register, which has been successful in deterring scammers in other countries.



ASIC enforcement priorities



ASIC enforcement priorities 2023



Enforcement action targeting poor design, pricing and distribution of financial products

including in relation to insurance, superannuation and other investment products and credit



Misleading conduct in relation to sustainable finance including greenwashing



Misconduct involving high risk products including crypto assets



Combating and disrupting investment scams

including working with other regulators, industry and social media platforms to reduce consumer harm



Protecting financially vulnerable consumers

impacted by predatory lending practices or high-cost credit including conduct by unlicensed or 'fringe' entities



Misleading and deceptive conduct relating to investment products

which obscures the risk, performance or nature of financial products



Misconduct in the superannuation sector

including misleading conduct and poor governance



Failures by providers of general insurance

to deliver on pricing promises to consumers



Misconduct that involves misinformation through social media

about investment products, including 'influencer' conduct



Governance and director's duties failures

including those related to property schemes that expose investors to significant loss



Manipulation in energy and commodities derivatives markets



Unfair contract terms

including in insurance products



Poor design, pricing and distribution of financial products

- Product design and distribution obligations (“DDO”) have been in place since 5 October 2021.
- Product issuers must have a target market determination (“TMD”) for regulated financial and credit products.
- ASIC powers:
 - Stop order to protect consumers from breaches of DDO – must conduct an administrative hearing first.
 - Interim stop order without a hearing if it considers that a delay would be prejudicial to the public interest. Lasts for 21 days, unless revoked earlier.
 - Interim stop order during a hearing. Lasts until ASIC makes a stop order or the interim stop order is revoked.
 - Enforcement action for a breach of DDO.
 - Product intervention power.
- ASIC has been using the interim stop orders power very frequently (24 times as of 9/3/23)



TMD “appropriateness requirements”

- TMD must be such that it would be reasonable to conclude that, if the product were to be issued, or sold in a regulated sale:
 - to a consumer in accordance with the distribution conditions - it would be likely that the consumer is in the target market
 - to a consumer in the target market - it would likely be consistent with the likely objectives, financial situation and needs of the consumer: s 994B(8). This is almost a product suitability requirement
- ASIC has used interim stop orders to stop the selling of products it thinks are not appropriate – e.g. Holon:
 - [22-278MR ASIC places interim stop orders on Holon crypto funds | ASIC](#)



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FINANCIAL SERVICES AND CREDIT
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