Financial Services and Credit Monthly Update

December 2023

CONSUMER CREDIT

Help to Buy Bill

The *Help to Buy Bill 2023* (Cth) has been introduced into Federal Parliament to establish Help to Buy, a shared equity program to assist low to middle income earners to purchase new or existing homes by accessing an equity contribution from the Commonwealth. The shared equity arrangements will be administered and monitored by Housing Australia (formerly known as the National Housing Finance and Investment Corporation).

COMPETITION

ACCC allows banks to discuss cash distribution

The Australian Competition and Consumer Commission (**ACCC**) has given interim authorisation to the Australian Banking Association (**ABA**) and its members to discuss and develop arrangements to maintain the physical distribution of cash in Australia, following concerns raised by Armaguard, the major supplier of cash-in-transit services, about the sustainability of the industry.

The interim authorisation only covers discussions and reaching in-principle agreements on an industry response to support ongoing access to cash. The ABA will seek a separate ACCC authorisation for the proposed solution, if required.

The ACCC says that it will closely assess any proposed solution, especially its impact on access to cash in remote and regional areas where bank branches are limited. The ACCC has imposed a condition that the ABA report on its discussions to maintain access to cash in these areas.

Retail deposit customers face barriers to switching and earning higher interest

The ACCC has released its final report on the retail deposit market. The report examines how banks set interest rates and other terms and conditions for savings accounts and term deposits. The ACCC found that banks use strategic pricing and product design to segment customers and create complexity, making it harder for customers to compare products and switch to better rates. It also found that many customers miss out on bonus interest rates due to conditions that are difficult to meet and track. The ACCC has recommended measures to improve transparency and communication from banks and comparison websites, and to prompt customers to consider switching. The ACCC has also suggested that the Government further consider bank account portability, which may simplify the switching process and enhance competition in the market.

CONSUMER PROTECTION

Draft Bill on designated complaints

The Treasury has released a draft Bill for a complaints framework that would allow certain designated organisations (such as consumer and small business advocate organisations) to bring evidence of significant or systemic market issues to the ACCC, and require it to publicly respond to the complaints in a timely way. The complaints must relate to a significant or systemic market issue that affects consumers or small businesses in Australia, and either a potential breach of the *Competition and Consumer Act 2010* (Cth) (**CCA**) or the ACCC's powers or functions under the CCA. The ACCC would be required to prioritise and assess these complaints, respond in a timely manner, act where appropriate, and publish certain information on such complaints on its website to ensure transparency. The consultation closed on 3 January 2024.

Government response to ACCC Digital Platforms Services Inquiry

On 8 December 2023, the Federal Government published its response to the ACCC Digital Platform Services Inquiry released in November 2022.

The Government supports in principle the introduction of new consumer measures such as a ban on unfair trading practices and additional targeted measures to protect users of digital platforms. It also supports in principle the ACCC recommendations for mandatory service specific codes for designated digital platforms and additional competition measures in digital platform services.

CORPORATE

AHRC powers commence on positive duty

The *Anti-Discrimination and Human Rights Legislation (Respect at Work) Act 2022* (Cth) introduced a positive duty on organisations and businesses to prevent workplace sexual harassment, sex-based harassment, sex discrimination, hostile work environments and victimisation. Reasonable and proportionate measures to eliminate these forms of unlawful conduct must be taken, as far as possible. In August 2023, the Australian Human Rights Commission (**AHRC**) issued Positive Duty Guidelines to give guidance for employers on how to satisfy the positive duty. From 12 December 2023, the AHRC has the power to monitor and enforce compliance with the positive duty. The Positive Duty Guidelines will be used by the AHRC to assess compliance.

ESG

ASIC greenwashing actions

The Australian Securities and Investments Commission (**ASIC**) has issued two infringement notices to Morningstar, alleging that its investor funds were exposed to weapons investments. Morningstar's ESG policy stated that controversial weapons investments would be excluded. Morningstar self-reported and paid $29,820 to comply with the infringement notices.

ASIC also issued two infringement notices to Northern Trust for making alleged false and misleading statements about the application of a Carbon Emissions Exclusion Screen to the NT World Green Transition Index Fund. The exclusion screen was supposed to exclude companies that derive more than 5% of their revenues from thermal coal-based power generation and which had a low score in low carbon transition management. At least three companies that failed the criteria were not excluded by the third-party company that applied the screen. Northern Trust paid $29,820 to comply with the infringement notices and disposed of the affected holdings.

ACCC releases final guidance on environmental claims

The ACCC has published its final guidance on making environmental claims in marketing and advertising. The guidance sets out eight principles to help businesses comply with the Australian Consumer Law and avoid misleading consumers about the environmental benefits of their products or services.

The eight key principles are:

- Make accurate and truthful claims.
- Have evidence to back up your claims.
- Don't hide or omit important information.
- Explain any conditions or qualifications on your claims.
- Avoid broad and unqualified claims.
- Use clear and easy-to-understand language.
- Visual elements should not give the wrong impression.
- Be direct and open about your sustainability transition.

The ACCC consulted on draft guidance which was released in July 2023.

The ACCC is developing further guidance on emission and offset claims, and the use of trust marks, which will be released in early 2024.

FINANCIAL ADVICE

Quality of Advice review – final response

The Federal Government released its final response to the Quality of Advice review on 7 December 2023.

Earlier in the year, the Government announced there would be three streams of reform to improve access to financial advice, called the Delivering Better Financial Outcomes package. It also said that there would be further consultation before the final response was released. On 14 November 2023, exposure draft legislation was released which would implement half of the Quality of Advice recommendations as part of the first tranche of the Delivering Better Financial Outcomes package.

The December 2023 announcement includes the following commitments:

- Introduction of a modernised and flexible best interests duty which will apply to all providers of advice.
- A new class of financial advice provider to support an increase in the availability and affordability of simple personal advice. These advisers will not be able to charge a fee or receive a commission relating to the personal advice they provide. They will be subject to the modernised best interests duty, and licensees will be wholly responsible for the advice provided by the advisers.
- Statements of Advice will be replaced with a principles-based advice record which must address the following four principles: subject

matter/scope; the advice; reasons for the advice; and the cost of advice to the client and/or benefits received by the adviser.
- The Financial Planners and Advisers Code of Ethics 2019 will be reviewed following the implementation of the Delivering Better Financial Outcomes package.

The Government will consult industry and consumer stakeholders over coming months on the design of the draft legislation, which is expected to be introduced in 2024.

FINANCIAL MARKETS

ASIC review of online trading providers

ASIC has released a report that outlines its findings from its surveillance of online trading providers in 2022-23 and clarifies its regulatory expectations. Some of the key findings include:

- There are products being offered or planned to be offered that may be inappropriate for retail investors and expose them to new or additional risks.
- Some online trading providers operate as authorised representatives of AFS licensees and those licensees may not have taken reasonable steps, or assigned sufficient resources, to adequately monitor and supervise their representatives.
- Business promotion by some providers may include potentially misleading claims relating to low or zero brokerage fees, the safety and security of client assets, and how they are regulated.
- The platforms of some providers incorporate behavioural levers and choice architecture that may unfairly influence consumer decisions and lead to trading that results in losses or consumer harm.
- In some cases, providers did not clearly explain how they hold client assets on trust or in pooled arrangements.
- Some providers had inadequate arrangements for handling client money.

Financial market infrastructure reforms

Treasury has released exposure draft legislation and regulations for a financial market infrastructure (**FMI**) reform package. The draft package:

- Includes powers for the Reserve Bank of Australia (**RBA**) to step in and resolve a crisis at a domestic clearing and settlement facility to ensure the continuity of critical clearing functions, and to protect Australia's financial stability.
- Enables the RBA to assist a foreign regulator to resolve an overseas clearing and settlement facility licensed in Australia.
- Strengthens the powers of ASIC and the RBA over FMIs.
- Reallocates powers between the Minister and regulators.
- Enhances regulator powers over foreign entities operating FMIs with a significant Australian nexus.

Submissions on the package are due by 9 February 2024.

FINANCIAL SERVICES

Exemptions for foreign financial services providers

The *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023* (Cth) (**Treasury Laws Bill**) has been introduced into Federal Parliament. Schedule 7 of the Treasury Laws Bill amends the *Corporations Act 2001* (Cth) in relation to foreign financial services providers in Australian financial markets. The amendments exempt from the requirement to hold an Australian financial services (**AFS**) licence persons who:

- provide financial services from outside Australia to professional investors; or
- who are regulated by comparable regulators and that provide financial services to wholesale clients; or
- who provide financial services that involve making a market for derivatives that are able to be traded on a specified licensed market.

The amendments also fast-track the licensing process for persons seeking to establish more permanent operations in Australia by providing an exemption for persons regulated by comparable regulators from the fit and proper person test when they apply for an AFS licence to provide financial services to wholesale clients.

FINANCIAL SYSTEM

RBA reforms

The *Treasury Laws Amendment (Reserve Bank Reforms) Bill 2023* (Cth) has been introduced into Federal Parliament. The Bill will:

- confirm the independence of the RBA in setting monetary policy;
- clarify that the dual objectives of monetary policy are price stability in Australia and the maintenance of full employment in Australia;
- remove the power of the RBA to determine the lending policy of private banks;
- include a new RBA function of contributing to financial system stability; and
- replace the Reserve Bank Board with a new Monetary Policy Board and a Governance Board.

Statement on the Conduct of Monetary Policy

The Treasurer and the RBA issued an updated Statement on the Conduct of Monetary Policy on 8 December 2023.

INSURANCE

APRA surveys group life insurance in superannuation

The Australian Prudential Regulation Authority (**APRA**) has conducted a survey of selected superannuation trustees, life insurers and reinsurers to assess how they are addressing the sustainability of group life insurance in superannuation. The survey was a follow-up to APRA's letter to the industry in March 2021, which outlined three areas of concern: premium volatility, data availability and provision, and tender practices. APRA reported on its findings on 6 December 2023 in a letter to RSE licensees and life insurers.

The survey results indicated that premium volatility is still evident, but expected to abate significantly. APRA noted some examples of better practice in designing and pricing insurance benefits that are suitable and valuable for members, and in collaborating and communicating between regulated entities. However, the survey also suggested that there has been minimal progress in improving the availability and provision of data. APRA also observed some improvement in tender practices, with more consultation and adherence to internal pricing hurdles.

APRA says that it will continue to monitor the industry's progress on these issues and expects trustees, insurers and reinsurers to work together to ensure the sustainability of group life insurance in superannuation.

APRA and ASIC review life insurance premium practices

APRA and ASIC have jointly reviewed the practices of life insurance companies in relation to premium increases. The review was prompted by increasing complaints from consumers and stakeholders about premium volatility and transparency.

The review found that some life insurers had applied premium increases without a clear contractual right, used potentially misleading marketing materials, and failed to adequately disclose how premiums may change over time. The review also identified challenges in product design and governance, such as the use of duration-based pricing models and broad target markets.

The regulators have outlined their expectations for life insurers to improve their risk management and compliance frameworks, disclosure and marketing materials, and product design and distribution processes. The regulators have also indicated that they will monitor the progress of life insurers and consider further regulatory action if needed.

PAYMENTS

Amendment Bill to introduce changes to PSRA

The Treasury Laws Bill includes in Schedule 8 reforms to the *Payment Systems (Regulation) Act 1998* (Cth) (**PSRA**) in line with the Federal Government's previously announced position. The reforms include expanded definitions of 'payment system' and 'participant', powers given to the Minister to designate a payment system and nominate a regulator, and increased civil penalties.

Second consultation paper on payments regulation framework

On 8 December 2023, Treasury released a second consultation paper on a licensing framework for payment service providers (**PSPs**). It follows the first consultation paper released in June 2023. The proposed regulatory framework outlined in the second paper includes an updated list of payment functions as follows:

- stored-value facilities;
- issuance of payment stablecoins;
- payment instruments;
- payment initiation services;
- payment facilitation services;
- payment technology and enablement services; and
- cross-border transfer services.

The AFS licensing framework would be used to license PSPs.

Comments on the consultation paper are due by 2 February 2024.

Phasing out cheques

The Federal Government is winding down the cheques system in Australia. Cheques will cease to be used by no later than 2030. Government use is planned to be phased out by the end of 2028. On 8 December 2023, Treasury released a consultation paper on winding down the cheques system, with a proposed staged transition plan. Submissions on the paper are due by 2 February 2024.

RBA expectations for card tokenisation and PAN storage

On 21 December 2023, the RBA published its final expectations for the tokenisation of payment cards and the storage of primary account numbers (**PANs**) in the online environment.

The RBA expects that by the end of June 2025, all relevant industry participants will support token portability and token synchronisation, using a unique account identifier such as the Payment Account Reference (**PAR**).

The RBA also expects that by the same date, merchants and payment service providers that do not meet minimum security requirements, such as compliance with the Payment Card Industry Data Security Standard (**PCI-DSS**), will stop storing customer PANs.

The RBA further expects that the eftpos core eCommerce tokenisation service will be rolled out by the end of March 2024, and that dual network debit cards will be tokenised for both the domestic and international networks, where supported by both networks.

The RBA's expectations follow a consultation paper issued in June 2023 and a draft set of expectations published in a response paper in December 2023. The Australian Payments Network (**AusPayNet**) has agreed to coordinate the industry's work to meet the RBA's expectations and draft more specific tokenisation standards if required.

PRIVACY AND DATA

Digital ID Bill

The Federal Government has introduced the *Digital ID Bill 2023* (Cth). The Bill proposes to:

- legislate and strengthen a voluntary Accreditation Scheme for digital ID service providers that wish to demonstrate compliance with best practice privacy, security, proofing and authentication standards;
- legislate and enable expansion of the Australian Government Digital ID System (**AGDIS**) for use by the Commonwealth, State and Territory governments and eventually private sector organisations;
- embed privacy and consumer safeguards to ensure users are protected;
- make the ACCC the Digital ID Regulator; and
- expand the role of the Information Commissioner to regulate privacy protections for digital IDs.

NGS Super licence conditions following cyber security lapse

Additional licence conditions have been imposed on NGS Super Pty Limited (**NGS**) by the Australian Prudential Regulation Authority (**APRA**) after major deficiencies in cyber controls were identified. NGS is the trustee of NGS Super, a super fund with more than $14 billion in assets. The issues were identified in an internal audit report in August 2022, a cyber incident in March 2023 and an independent tripartite review undertaken at APRA's request and delivered in April 2023. The cyber incident involved significant data loss and compromise of NGS systems.

NGS is required to engage an independent third party to provide assurance regarding remediation activities and to address the recommendations contained in the internal audit and tripartite review reports, and to conduct an operational effectiveness review of the CPS 234 controls and frameworks of NGS. When the operational effectiveness review is completed, NGS has to provide APRA with an attestation from the NGS Chair that the remediation actions are complete and effective, and that NGS is compliant with CPS 234.

PRUDENTIAL

APRA update on macroprudential policy settings

APRA has announced that it will maintain its current macroprudential policy settings. The mortgage serviceability buffer will remain at 3 percentage points, and the countercyclical capital buffer will stay at 1 per cent of risk-weighted assets. APRA has determined that no other macroprudential policies are required to be introduced at this juncture. APRA conducts regular reviews of these settings.

APRA consulting on minor changes to ADI capital framework

APRA has released for consultation minor updates to the capital framework for authorised deposit-taking institutions (**ADIs**). APRA says that these address issues raised by industry on the implementation of the new capital framework for ADIs and are technical in nature.

APRA updates interest rate risk framework for banks

APRA has released a response to consultation on its proposed revisions to the prudential standard APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book (**IRRBB**). The standard sets out the requirements that ADIs must meet in managing their IRRBB risk, which arises from changes in interest rates that affect their banking book positions.

The response paper reaffirms that all ADIs are required to manage their material risks, including IRRBB, commensurate with their nature, scale, and complexity. APRA may impose additional capital requirements on ADIs that do not manage their IRRBB appropriately.

APRA is also consulting on some aspects of APS 117 that are relevant to smaller ADIs, as well as the reporting standards and practice guidance that accompany the revised standard. Submissions are due by 1 March 2024.

SUPERANNUATION

Treasury issues consultation paper on the retirement phase of superannuation

On 1 December 2023, the Treasury released a discussion paper asking for submissions about how the superannuation system can best provide income and security to meet retirees' needs, as average life expectancy increases. The consultation examines the retirement (decumulation) phase in three areas:

- Supporting those with superannuation account to navigate the retirement income system.
- Supporting superannuation funds to deliver better requirement income products and services.
- Making lifetime income products more accessible.

Submissions close on 9 February 2024.

Superannuation concessions reforms

The Treasury Laws Bill introduced into Federal Parliament on 30 November 2023 (and the related *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023* (Cth)) implement the Better Targeted Superannuation Concessions measure from the 2023-2024 Budget. The amendments will reduce the tax concessions available to individuals with total superannuation balances (**TSBs**) exceeding $3 million so that from the 2025-26 income year onwards, the headline concessional tax rates applying to superannuation earnings will be:

- up to 15 per cent on earnings on superannuation balances of $3 million and below; and
- up to an overall 30 per cent on a percentage of earnings equal to the percentage of the individual's TSB above $3 million.

Consumer advocate appointed

The Federal Government committed to funding a consumer advocate in the superannuation sector in the 2023–24 Budget. On 20 December 2023, the Minister announced that Super Consumers Australia had been chosen as the successful recipient of this funding. The grant is for $5 million over 5 years from 2023–24, funded from the Superannuation Supervisory Levy.

DISPUTES AND ENFORCEMENT

AFCA publishes its approach on responsible lending

The Australian Financial Complaints Authority (**AFCA**) published *The AFCA Approach to Responsible Lending* (**Approach**) on 15 December 2023. The 68 page guide covers how AFCA:

- assesses a financial firm's compliance with responsible lending obligations;
- applies legal principles, industry codes and regulatory guidance when considering complaints about responsible lending;
- determines a fair outcome where a firm breaches its responsible lending obligations;
- calculates loss and assesses benefits to determine compensation; and
- considers all the circumstances to determine an outcome that is fair to all parties.

AFCA says that its Approach aligns with ASIC's regulatory guidance and the responsible lending laws and was drafted with the support of advice from experienced Senior Counsel after significant input from financial firms, industry bodies, regulators and consumer groups.

ANZ continuous disclosure case: penalty awarded and appeal lodged

On 8 December 2023 the Federal Court of Australia ordered Australia and New Zealand Banking Group Limited (**ANZ**) to pay a penalty of $900,000 for breaching its continuous disclosure obligation during a $2.5 billion institutional share placement in 2015. The penalty follows the decision of the court on 13 October 2023 which found that ANZ had committed the breach. On 14 December 2023, ANZ announced that it would appeal the decision.

High Court rules that UCT law applies to contracts made outside Australia

In *Karpik v Carnival Plc* [2023] HCA 39, a class action arising from a COVID-19 outbreak on the Ruby Princess cruise ship in March 2020, the High Court held that the Australian Consumer Law applies to contracts made outside Australia (in this case, passengers from the US) by entities carrying on business in Australia, and that a class action waiver clause in those contracts was void as an unfair contract term (**UCT**). The Court also refused to enforce an exclusive jurisdiction clause in favour of the United States courts, finding that there were strong reasons to allow the class action to proceed in the Federal Court of Australia.

ASIC loses case against Zurich over income protection policy

On 21 December 2023, the Federal Court dismissed ASIC's action against Zurich Australia Limited (**Zurich**) for allegedly breaching its duty of utmost good faith in avoiding an income protection policy. The policy was issued by OnePath Life Limited (**OnePath**), the former owner of Zurich's life insurance business, to a customer who had failed to disclose her previous hospitalisation for serious mental health issues.

ASIC argued that Zurich, who replaced OnePath as the respondent, breached its duty by:

- not making enquiries with the financial adviser who had assisted the customer in applying for the policy;
- not adequately notifying the customer of its intention to avoid the policy on the basis of fraud; and
- not informing the customer of her right to dispute or appeal the decision.

However, Justice Jackman found that Zurich did not act in bad faith and that OnePath had valid grounds to avoid the policy. He also found that OnePath had complied with the relevant provisions of the *Insurance Contracts Act 1984* (Cth) and the Life Insurance Code of Practice.

This was the first case brought by ASIC seeking a civil penalty for a breach of the duty of utmost good faith. ASIC is reviewing the decision.

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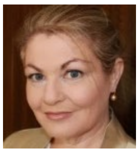

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