DWYER HARRIS

Financial Services and Credit Monthly Update
January 2024

CONSUMER CREDIT

Product intervention orders extended

ASIC has extended its product intervention orders on short term credit and continuing credit contracts until 1 October 2032. The orders originally came into effect on 15 July 2022. In August 2023, ASIC released a consultation paper proposing to extend the orders.

CORPORATE

Statutory declaration amendments have commenced

Amendments to the law on statutory declarations enacted by the *Statutory Declarations Amendment Act 2023* (Cth) commenced on 1 January 2024. The Act enables a statutory declaration to be validly made in one of three ways:

- traditional paper-based, requiring wet-ink signatures and in person witnessing;
- electronically, through the application of an electronic signature and witnessing via an audio-visual communication link; and
- digitally verified, through the use of a prescribed online platform (myGov) that verifies the identity of the declarant through a prescribed digital identity service provider. This option is scheduled to become available in early 2024.

The Attorney-General's Department has updated its website guidance on statutory declarations. It includes a link to the new approved form of Commonwealth statutory declaration.

ESG

Climate-related financial disclosure draft legislation

The Treasury has released Exposure Draft legislation to amend the *Australian Securities and Investment Commission Act 2001* (Cth) (the **ASIC Act**) and the *Corporations Act 2001* (Cth) (the **Corporations Act**) to introduce mandatory disclosure of climate-related risks and opportunities by large businesses and financial institutions.

The reporting requirements will apply (with some exemptions) to:

- large entities required to prepare and lodge annual reports under Chapter 2M of the Corporations Act. Asset owners such as registrable superannuation entities and registered schemes will be considered large if funds under management are more than $5 billion; and
- entities subject to both the annual reporting requirements under the Corporations Act and emissions reporting obligations under the *National Greenhouse and Energy Reporting Act 2007* (Cth).

There will be a four year phased in implementation of the reforms, from 1 July 2024, based on the size of the entity or the level of its emissions.

The required climate-related financial disclosures will include information about an entity's climate-related risks and opportunities, as set out in Australian climate disclosure standards. This will include information relating to governance, strategy, risk management and metrics and targets (including Scope 1 and Scope 2 greenhouse gas emissions) from the first year of reporting. Scope 3 emissions will be required from the second year of reporting and only include information that is available at the reporting date without undue cost or effort. Scope 3 emissions are those that occur up or down the supply chain, and emissions associated with the financing or investment activities of an entity.

However, Group 3 entities would only be required to make climate-related financial disclosures in line with the climate disclosure standards if they face material climate-related risks or opportunities for the financial reporting period. Group 3 entities will be

those which meet any two of the following three criteria: consolidated revenue of $50 million or more, consolidated gross assets of $25 million or more, and employees of 100 or more.

Climate-related financial disclosures will have to be included in a sustainability report, which will form part of annual financial reporting obligations and be contained in an entity's annual report. Entities will have to obtain an assurance report from their financial auditors on their climate disclosures, and the climate disclosures will be subject to the existing liability framework in the ASIC Act and Corporations Act (with a three year exemption for Scope 3 emission disclosures and some climate-related forward-looking statements).

Submissions are due by 9 February 2024.

FINANCIAL ADVICE

ASIC extends registration deadline

ASIC has extended the deadline for registration for financial advisers from 1 February 2024 to 16 February 2024 in the *ASIC Corporations (Amendment) Instrument 2024/23* (Cth).

FINANCIAL MARKETS

Draft Ministerial instrument on CS services for cash equities

Treasury has released a draft Ministerial instrument that would define a "cash equity", and declare a clearing and settlement service (**CS service**) in relation to cash equities as one to which ASIC may impose rules and as a service to which access may be the subject of negotiations or arbitration under Part XICB of the *Competition and Consumer Act 2010* (Cth). Submissions on the draft are due by 1 March 2024.

FINANCIAL SERVICES

ALRC final report released

The final report of the Australian Law Reform Commission (**ALRC**) into corporations and financial services legislation (ALRC Report 141) was tabled in Parliament on 18 January 2024. It contains 58 recommendations to transform corporations and financial services legislation into a more adaptive, efficient, and navigable legislative framework. The Final Report follows 3 Interim Reports published during the ALRC inquiry which contained 23 of the 58 recommendations.

The ALRC found that the legislative framework for corporations and financial services regulation is no longer fit for purpose and unnecessarily complex. It has proposed a new framework that would replace the existing legislation, regulations and ASIC legislative instruments with a new Financial Services Law as a Schedule to the *Corporations Act 2001* (Cth), under which would sit a "Scoping Order", which would be a single legislative instrument that adjusts regulatory boundaries and replace hundreds of regulations and ASIC legislative instruments. The third element of the new framework would be "Rulebooks" that contain detail to give effect to different aspects of the regulatory regime for particular products, services, persons, or circumstances.

The Federal Government will now consider the recommendations in the ALRC report.

PRIVACY AND DATA

Cyber Security Legislative Reforms Consultation Paper

The Federal Government is seeking feedback on proposed reforms to Australia's cyber security laws. The reforms aim to improve the protection and resilience of Australia's critical infrastructure and digital economy from cyber threats. The Department of Home Affairs has issued a consultation paper to facilitate submissions. Some of the proposals floated in the paper include:

- mandatory ransomware reporting;
- a new Cyber Incident Review Board;
- enhancing the *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**) to cover more sectors and introduce new obligations and powers for cyber security; and
- consolidation of telecommunications security requirements under the SOCI Act.

Submissions can be made until 1 March 2024.

AI regulation in Australia: next steps

The Federal Government released its interim response to the *Safe and responsible AI in Australia* Discussion Paper on 17 January 2024. The Discussion Paper issued in June 2023 surveyed regulatory and governance responses to artificial intelligence (**AI**) in Australia and other countries, identified potential gaps, and proposed some AI regulatory options.

The Government says that it will use a risk-based framework which would regulate AI depending on the level of risk posed by the use, deployment or development of AI, and will avoid unnecessary or disproportionate burdens for business by balancing the need for competition and innovation with the need to protect community interests.

The interim response sets out a number of actions the Government now proposes to take, including:

- consult on the need for (and the form of) mandatory guardrails for developing and

deploying AI in "high-risk" settings, looking to leverage existing requirements where available;
- instruct the National AI Centre to work with industry to develop a voluntary AI Safety Standard;
- consult on the merits of voluntary labelling and watermarking of AI generated material in high-risk settings;
- consider further opportunities to strengthen existing laws to address risks and harms from AI;
- take forward the commitments made in the Bletchley Declaration and engage internationally to help shape global AI governance; and
- consider opportunities to ensure Australia can maximise the benefits of AI and robotics.

Minister for Financial Services and ASIC Chair speak on Australian AI regulation

The Minister for Financial Services, Stephen Jones, opened the UTS Human Technology Institute Shaping Our Future Symposium on 31 January 2024 with an address on the relevance of AI and the Federal Government's approach to regulating its development. Mr Jones said that the Government embraced the benefits of innovation and technology, and AI would be a significant productivity booster for the economy. He said that the Government's approach to regulating AI is to regulate the activity and not the technology to create an environment for innovation but ensure it occurs safely. Mr Jones also said that the Government is pursuing a risk-based approach to regulating AI and committed to consider a mandatory guardrail for its development.

At the same event, ASIC Chairman Joe Longo delivered a speech on the current and future state of AI regulation and governance. Mr Longo said that AI was already subject to existing laws regardless of any future AI regulatory changes. However, he acknowledged that current laws might be sufficient to punish bad actions and were inadequate in preventing the harm caused by AI. There remains issues of transparency, explainability and oversight regarding the use of AI and the current regulatory framework is unlikely to address them. He said that all participants in the financial system have a duty to balance innovation with the responsible, safe and ethical use of emerging technologies.

PRUDENTIAL

APRA retires outdated prudential guidance

As part of its Modernising the Prudential Architecture initiative, the Australian Prudential Regulation Authority (**APRA**) has announced the retirement of two Prudential Practice Guides (**PPGs**) that are no longer relevant or useful for regulated institutions. The PPGs are GPG 250 Balance Sheet and Market Risk and LPG 250 Asset and Liability Management Risk. Both PPGs provided high-level guidance on elements that would typically be included in a risk management framework, but are now superseded by the more comprehensive and updated Prudential Standard CPS 220 Risk Management (**CPS 220**), which applies to all APRA-regulated institutions. CPS 220 sets out APRA's expectations regarding risk management, including credit, market, liquidity, insurance, operational, strategic and other material risks. CPS 220 is supported by Prudential Practice Guide CPG 220 Risk Management. The retirement of GPG 250 and LPG 250 is effective immediately.

APRA consultation on minor superannuation prudential framework changes

APRA is seeking feedback from superannuation industry stakeholders on minor and consequential amendments to the prudential framework. The changes are related to audit, governance and fitness and propriety standards, and follow the financial reporting and auditing reforms for superannuation enacted by the *Treasury Laws Amendment (2022 Measures No. 4) Act 2023* (Cth).

APRA interim update on 2024 supervision and policy priorities

APRA has issued an interim update on its supervision and policy priorities for the first half of 2024.

The focus of APRA's priorities is on:

- operational and cyber resilience for all regulated entities;
- implementing targeted changes to the prudential framework for authorised deposit-taking institutions drawn from last year's global banking turmoil;
- lifting superannuation trustees' practices on retirement incomes, implementing recommendations from the Financial Regulator Assessment Authority, enhancing transparency and aligning APRA's heatmaps with the performance test; and
- regarding the insurance industry, continuing to balance financial sustainability with the need to enhance affordability and availability.

A timeline and details of APRA's key initiatives for the next six months can be found here.

AML/CTF

AUSTRAC compliance report questions

The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) has published the questions in the AUSTRAC 2023 compliance report, which must be submitted to AUSTRAC by reporting entities between 1 January and 31 March 2024.

DISPUTES AND ENFORCEMENT

ASIC speaks on litigation strategy, cyber and AI

In an interview with *The Australian Financial Review* published on 10 January 2024, ASIC Chairman Joe Longo said that ASIC would pursue a bold litigation strategy in 2024 with a focus on financial services, crypto and superannuation, and target firms operating in grey areas where the law is unclear or untested. Mr Longo said that this was not the "why not litigate" approach adopted after the Hayne Royal Commission but a more targeted, strategic approach. Mr Longo also said that the use of algorithms and AI in setting prices and dealing with consumers would come under increasing scrutiny, and that ASIC would seek to make an example of board directors and executives who were recklessly ill-prepared for cyberattacks.

The responsibilities of directors and executives in cyber attacks was also highlighted by ASIC Deputy Chair Sarah Court in an interview with *The Australian* published on 14 January 2024. She said that while cyber is not a 2024 enforcement priority for ASIC, it would be looking at whether companies should have done more to prevent cyberattacks when they have occurred, and also how they respond, and the role of the company's leadership in any response. Ms Court raised whether the failure to respond in a way that people expect could amount to a breach of director duties. Ms Court also said that ASIC was taking a very keen interest in AI and whether it was being used in a fair way by banks and insurers. She said that ASIC needed to ensure that companies do not try to absolve themselves from liability for unlawful conduct by blaming AI for outcomes.

Director penalties order

Four current and former directors of Endeavour Securities (Australia) Ltd (in liquidation) and Linchpin Capital Group Ltd (in liquidation) have been ordered by the Federal Court to pay $390,000 in penalties. The orders follow a previous finding of the Federal Court the directors had breached their duties as officers of a responsible entity of a registered managed investment scheme and did not act in the best interests of members.

Flex interest rates class action

Toyota Finance is reportedly being sued in a consumer class action over "flex" interest rates set by dealers over a period from 2010 to November 2018, when they were banned by ASIC. In the UK, similar arrangements were banned in 2021 and motor dealers are now facing a wave of complaints about rates charged before the ban took effect.

AFCA updates monetary limits and compensation caps

The Australian Financial Complaints Authority (**AFCA**) has revised its monetary limits and compensation caps for complaints, effective from 1 January 2024. These changes apply to all complaints received by AFCA from that date. The AFCA Rules require AFCA to adjust its monetary limits every three years.

The monetary limits determine the maximum value of a claim for compensation AFCA can consider, and the maximum amount AFCA can award a consumer or small business for complaints about banking and finance, general insurance, life insurance and investments and advice. Superannuation complaints are not affected, as these limits do not apply in the superannuation jurisdiction.

Under the new limits, AFCA can consider disputes where the amount being claimed by a consumer does not exceed $1,263,000 or where the credit facility does not exceed $6,317,000 for small businesses and primary producers.

The maximum amount of compensation AFCA can order, per claim, varies depending on the type of claim and is set out here.

ME Bank fined for misleading home loan customers

The Federal Court has imposed a penalty of $820,000 on Members Equity Bank Limited (**ME Bank**) for breaching the ASIC Act and the *National Credit Code* (**NCC**). ME Bank pleaded guilty to the charges, which related to false and misleading representations and failures to provide required notices to its home loan customers. The court found that ME Bank sent 589 letters to customers between May and September 2018, informing them of incorrect minimum repayment amounts after the expiry of either a fixed-rate or interest-only period. The letters understated the actual amount required to repay the loan. ME Bank also failed to send letters to some customers between December 2016 and February 2018, notifying them of changes to the interest rate and minimum repayment amount after the expiry of an interest-only or fixed-rate period.

The penalty included $750,000 for the ASIC Act charge and $70,000 for the NCC charges. ME Bank has remediated the affected customers. This was the first criminal prosecution under section 12DB of the ASIC Act, which prohibits false or misleading representations in relation to financial services.

ASIC fines Penta Capital for misleading website statements

Penta Capital Pty Ltd has agreed to pay $53,280 in penalties for making false and misleading statements on its website, according to ASIC. The regulator issued four infringement notices to Penta Capital for breaching the ASIC Act. The company's website claimed that it managed $6.9 billion on behalf of various investors, that it had been in operation for 25 years, and that it had received endorsements or affiliations from several industry bodies. ASIC alleges that these statements were untrue, as Penta Capital did not manage any assets, had only been in operation since May 2022, and did not have the claimed sponsorships or approvals.

Westpac receives maximum penalty for unconscionable conduct

The Federal Court has imposed a $1.8 million penalty on Westpac Banking Corporation (**Westpac**) for engaging in unconscionable conduct in relation to a $12 billion interest rate swap transaction in October 2016. The transaction was the largest of its kind in Australian financial markets history and involved a consortium of AustralianSuper and IFM entities that purchased a majority stake in electricity provider Ausgrid from the NSW Government.

The Court found that Westpac acted unconscionably by pre-hedging up to 50% of the interest rate risk before the swap transaction was executed, without obtaining the consortium's consent or giving clear and full disclosure. This had the potential to adversely affect the price of the swap transaction to the consortium's detriment. The Court also found that Westpac failed to have adequate arrangements to manage the conflict of interests and did not provide the swap transaction efficiently, honestly and fairly.

The $1.8 million penalty was the maximum available for statutory unconscionable conduct in 2016, when the conduct occurred.

The Court reserved its decision on whether to order Westpac to complete a compliance program with an independent review of its pre-hedging practices and controls.

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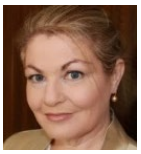

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