

Financial Services and Credit Monthly Update

March 2024

CONSUMER CREDIT

Buy Now Pay Later regulatory reforms

Exposure drafts of amendments to the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the *National Consumer Credit Protection Regulations 2010* (Cth) (**NCCPR**) were [released](#) by the Treasury on 12 March 2024. The amendments would bring Buy Now, Pay Later (**BNPL**) arrangements into the existing regulatory framework for other consumer credit products.

The proposed changes are intended to ensure consumers continue to enjoy the benefits of BNPL while providing appropriate and proportionate protections. The reforms include the following measures:

- treating BNPL as a form of credit regulated under the NCCPA and extending the NCCPR to cover BNPL;
- requiring BNPL providers to hold an Australian credit licence;
- modifying the existing responsible lending obligations (**RLO**) framework for BNPL, with BNPL providers given the option of using the modified or the standard RLO requirements; and
- establishing anti-avoidance protections to prevent BNPL providers from structuring their business models to avoid regulation.

The consultation on the draft legislation closes on 9 April 2024.

CORPORATE

Foreign bribery legislative changes

The *Crimes Legislation Amendment (Combating Foreign Bribery) Act 2023* (Cth) received [assent](#) on 8 March 2024. The Act creates a new offence of failure of a body corporate to prevent foreign bribery by an associate. The Act also:

- extends the foreign bribery offence to include the bribery of candidates for public office and bribery conducted to obtain a personal advantage;
- removes the requirement that a benefit or business advantage be 'not legitimately due' and replaces it with the concept of 'improperly influencing' a foreign public official;
- removes the requirement that the foreign public official be influenced in the exercise of their official duties;
- clarifies that the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else; and
- preserves the existing rule which prohibits a person from claiming as a deduction for a loss or outgoing a bribe to a foreign public official.

ESG

Climate reporting Bill introduced

The *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Cth) was [introduced](#) into the Federal Parliament on 27 March 2024. The Bill includes new climate-related financial reporting requirements for entities, expanding the existing financial reporting regime under Chapter 2M of the *Corporations Act 2001* (Cth) (the **Corporations Act**), which provides for record-keeping, financial reports and audit requirements.

The amendments include a new 'sustainability report' for a financial year that entities will need to prepare, in addition to their financial reports, which will include:

- the climate statement for the year;
- notes to the climate statement;

- any statements prescribed by the regulations for the year;
- notes to those prescribed statements (if any); and
- the directors' declaration about the compliance of the statements and notes with the relevant sustainability standards.

The climate statement will have to be prepared in line with the relevant sustainability standards issued by the Australian Accounting Standards Board.

A phased-in approach will apply for the obligation to prepare a sustainability report, starting with a small group of very large entities.

The size thresholds that determine the year in which entities are required to commence climate reporting are based on existing concepts in the Corporations Act and Regulations.

National Greenhouse and Energy Reporting (NGER) entities that are required to prepare and lodge financial reports under Chapter 2M of the Corporations Act are required to make climate-related financial disclosures. Those NGER entities that meet this criterion and that are above the publication threshold will commence reporting in Group 1, and the balance will commence reporting in Group 2.

Small and medium entities below the relevant size thresholds (unless they are NGER controlling corporations), and entities that are exempt from lodging financial reports under Chapter 2M, are not required to make climate related financial disclosures.

A modified liability approach will apply for a transitional period to ensure that reporting entities, auditors and directors are allowed time to develop experience and practice to report in line with the required standards.

Reporting requirements will commence from 1 January 2025 for Australia's largest listed and unlisted companies and financial institutions, and other large businesses will be phased in over time.

The Bill has been referred to the Senate Economics Legislation Committee. Its report is due on 30 April 2024.

FINANCIAL ADVICE

New legislation to increase accessibility and affordability of financial advice

On 27 March 2024, the Federal Government [introduced](#) the first tranche of legislation to reform financial advice. The *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024* (Cth) will consolidate fee

documents for ongoing fee arrangements into one simplified document and allow more flexibility in how financial services guides are provided. It will also:

- simplify the rules for conflicted remuneration to make clear that benefits paid by clients, including from their superannuation accounts, are not conflicted remuneration;
- introduce a consent requirement for customers receiving personal advice before purchasing an insurance product that will result in a commission payment; and
- make clear that superannuation accounts can be used to pay for financial advice about superannuation.

Other legislation will be developed to implement the remaining elements of the Delivering Better Financial Outcomes package in 2024.

FINANCIAL SYSTEM

ASIC and APRA release final rules and further guidance on FAR

On 8 March 2024, the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) [issued](#) final rules and further guidance for the Financial Accountability Regime (FAR) which came into effect on 15 March 2024 for the banking sector and which will commence on 15 March 2025 for the insurance and superannuation sectors.

The finalised rules and guidance package include:

- rules regarding information to be included in the FAR register of accountable persons;
- transitional rules prescribing information to be provided by authorised deposit-taking institutions (ADIs) in regard to their existing accountable persons under the Banking Executive Accountability Regime on transition to the FAR;
- descriptions of ADI key functions to assist banking entities in allocating key functions; and
- reporting form instructions to assist banking entities in providing the required information to ASIC and APRA.

On 14 March 2024, ASIC and APRA [published](#) additional guidance materials to assist banks, insurers and superannuation trustees in their preparation for the commencement of the FAR.

The additional information package includes the following materials relevant to all industries:

- an information paper to assist entities and

their accountable persons in understanding and complying with their FAR obligations;

- an updated accountability statement guide and template for entities subject to the FAR enhanced notification obligations; and
- reporting form instructions to assist entities in reporting FAR breaches to ASIC and APRA.

For insurance and superannuation entities, the information package includes a consultation comprising:

- a joint letter introducing the consultation package and guidance for preparation for the FAR commencement on 15 March 2025; and
- proposed amendments to the rules and draft key functions descriptions.

The rules and guidance information can be accessed [here](#).

Financial sector regulatory initiatives grid

The Federal Government has announced that it is [developing](#) a financial regulatory grid to enhance coordination of new regulation. The regulatory grid is intended to:

- promote transparency and collaboration with the private sector through the Government's engagement with the industry in its development;
- assist financial services businesses in engaging with the Government and regulators more effectively and enable regulators to avoid duplication, build shared strategic priorities, and focus on how to best implement reforms;
- reduce businesses' compliance burden and costs by enabling them to better allocate their resources when implementing regulation; and
- enhance financial services providers' visibility of regulation that might impact their businesses.

The grid will be based on the model in place in the United Kingdom. It will be a rolling 24-month forward program of regulatory initiatives that will materially affect the financial sector and will be updated twice a year.

The grid will be set up and managed by the Treasury and include proposed legislation, rules and regulations and standard making, consultation processes, and data collection processes.

Financial market infrastructure reforms

The *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Cth) [introduced](#) on 27 March 2024 includes reforms to strengthen regulatory arrangements for Australia's financial market infrastructure.

The Bill implements recommendations from the Council of Financial Regulators report, *Financial Market Infrastructure Regulatory Reforms: Advice to Government, July 2020*, which made 16 recommendations for regulatory reform. The Bill implements the recommendations by:

- introducing a crisis management and resolution regime;
- enhancing the licensing, supervisory and enforcement powers of ASIC and the Reserve Bank of Australia (**RBA**); and
- streamlining and adjusting roles and responsibilities between the Minister, ASIC and the RBA.

INSURANCE

Government consults on standardising definitions and cover for insurance

The Federal Government is [seeking](#) submissions on possible natural hazards terms to standardise, and potential reforms for the standard cover regime, for insurance contracts under the *Insurance Contracts Act 1984* (Cth). The consultation is part of a broader reform package to improve insurance affordability in communities at risk of natural disasters, enhance mitigation measures and improve consumer outcomes.

At present, the only standardised natural hazard definition is 'flood', and the standard cover regime requires insurers to offer a baseline level of cover unless:

- prior to entry into the insurance contract, the insurer 'clearly informed' the insured in writing; or
- the insured knew, or a reasonable person in the circumstances could be expected to have known, that the insurance contract provided less than the standard cover, or no cover.

The consultation closes on 4 April 2024.

PRUDENTIAL

Demystifying credit risk capital requirements for housing loans

APRA has [released](#) an information paper explaining how the capital adequacy rules for housing lending work. The paper explores how APRA ensures that:

- capital requirements for housing lending are sufficient to withstand losses through the cycle; and
- the differences between internal ratings-based and standardised capital requirements are appropriate, and limit impacts on competition in the Australian banking system.

SUPERANNUATION

Consultation on superannuation performance test

The Federal Government has [released](#) a consultation paper for input on options to improve the superannuation performance test to ensure super funds provide optimal returns for members. The superannuation performance test was introduced to hold trustees to account for their investment performance and the fees they charge. However, the current test has raised concerns that it is holding back investment in certain sectors that could produce strong returns for members.

The consultation paper introduces four broad options for improving the current performance test:

- status quo: retaining the current testing framework but improving it;
- alternative single-metric: developing a different single-metric framework to assess performance; Suggestions include the Sharpe ratio, a peer comparison, and a simple-reference portfolio frontier;
- multi-metric framework: developing a multiple metric framework which provides a more fulsome performance assessment. Suggestions include a framework aligned with the APRA heatmaps and a targeted three-metric test; and
- alternative framework: proposals from stakeholders.

The consultation period ends on 19 April 2024.

Superannuation data transformation

APRA has [reviewed](#) feedback on its consultation regarding the publication of superannuation data and decided to retain most proposals with minor modifications. APRA plans to publish fund level data on expenses and detailed asset allocation, aiming for transparency while addressing concerns about commercial sensitivity. The new expenditure data to be published from August 2024 will provide details on:

- the breakdown of expenses for the whole industry, and for each fund, by categories including administration, advice, member services, marketing, trustee board (including director remuneration), and other corporate overheads (such as travel

- and entertainment);
- recipients of payments made by each fund to industrial bodies and related parties, in relation to promotion, marketing or sponsorship expenses and any political donations; and
- the type of investments the industry holds in relation to property and infrastructure, alternative strategy funds, listed equity and private equity.

Reduced superannuation concessions: draft regulations

Treasury has [released](#) exposure draft regulations to support implementation of changes to superannuation tax concessions announced in the 2023-24 Budget. The *Treasury Laws Amendment (Measures for Future Instruments) Instrument 2023: Better Targeted Superannuation Concessions* prescribe certain values, calculations, and methods so that all applicable superannuation interests are properly assessed for the purposes of Division 296 tax. In particular, the draft regulations provide rules to enable commensurate treatment to be applied to defined benefit superannuation interests.

DISPUTES AND ENFORCEMENT

ASIC approves new AFCA rules

Material changes to the Australian Financial Complaints Authority (AFCA) scheme have been [approved](#) by ASIC. This follows a consultation on changes to AFCA's Rules and Operational Guidelines in 2023. AFCA will publish new versions of its Rules and Operational Guidelines on 1 July 2024. These will apply to complaints lodged on or after this date. According to AFCA, the incoming changes will:

- Increase AFCA's ability to manage unreasonable or inappropriate conduct within the scheme from Complainants and Paid Representatives.
- Deal with complaints where an appropriate offer of settlement has been made or where issues in dispute have been previously settled.
- Provide further guidance and clarity on the exclusion of complaints lodged by professional or sophisticated investors unless exceptions apply.
- Enhance the visibility, accessibility and performance of the Forward-Looking Review Mechanism.
- Ensure greater transparency and understanding of AFCA's decision making including how the slip rule works and clarification of effects of AFCA determination.
- Make minor changes to definitions and language to update certain areas of the Rules arising from legislative change,

which will give greater clarity and transparency of the scheme's operation overall.

- Make minor changes to clarify AFCA's reporting and transparency obligations.

ASIC shuts down nearly 3,500 scam websites

ASIC's scam website takedown capacity has been [reported](#) to have shut down nearly 3,500 investment scam websites since its launch in July 2023. This is a part of ASIC's increased efforts and surveillance to minimise and prevent consumer harm through targeting digitally enabled misconduct.

ASIC wins conflicted remuneration case against RM Capital and SMSF Club

The Federal Court has [found](#) that R M Capital Pty Ltd (**RM Capital**) failed to take reasonable steps to ensure that its authorised representative, SMSF Club Pty Ltd (**SMSF Club**), did not accept conflicted remuneration. SMSF Club advised its clients to establish self-managed superannuation funds (**SMSFs**) to purchase properties marketed by Positive RealEstate Pty Ltd (**PRE**). However, between December 2013 and July 2016, under a referral arrangement with PRE, SMSF Club received around \$5,000 each time a client bought a property through PRE using their SMSF.

The Court found that SMSF Club's acceptance of PRE's payments contravened s 963G of the Corporations Act and that RM Capital's failure to take reasonable steps to ensure SMSF did not accept the payments breached s 963F of the Corporations Act.

ASX pays \$1,050,000 penalty for information transparency failure

ASX Limited (**ASX**) has [paid](#) a \$1,050,000 penalty following an ASIC investigation into its compliance with the Market Integrity Rules (**Rules**). This is the first infringement notice to be issued to a market operator by ASIC. Under the Rules, ASX is required to publish information about orders available on its trading system. However, ASX failed to do so for certain equity market products due to an incorrect configuration of certain order functionality on its trading system. The incorrect configuration was only raised to ASX's attention by a market participant.

ASIC has reasonable grounds to believe that ASX breached the pre-trade transparency rule on 8,417 occasions between 4 April 2019 and 22 December 2022. Although no losses were recorded, the damage to public confidence in the market operation caused by ASX's failure was an aggravating factor in ASIC's penalty determination.

APRA removes National Australia Bank's operational risk capital add-on

APRA has [removed](#) the \$500 million capital add-on that it imposed on National Bank of Australia Limited (**NAB**) in July 2019 in response to non-financial risk management and risk culture weaknesses identified in the bank's self-assessment. NAB was among 36 of Australia's largest banks, insurers, and superannuation trustees that APRA required to conduct risk governance self-assessments following the Prudential Inquiry into Commonwealth Bank of Australia. The decision to remove the capital add-on came after APRA was satisfied that NAB had completed its remediation program and adequately addressed the issues in raised in its self-assessment.

ACCC reports early success of scammer crackdown

The National Anti-Scam Centre has [released](#) a new quarterly report showing scam losses from October to December 2023 reduced by:

- 43% from the same quarter in 2022;
- for investment scams, 38% from the same quarter in 2022;
- for cryptocurrency scams, 74% from the same quarter in 2022;
- for bank transfer scams, 31% from the same quarter in 2022; and
- 26% from the July to September 2023 quarter.

The quarterly report can be accessed [here](#).

Finder Earn not a financial product

The Federal Court has [dismissed](#) ASIC's allegation that Finder Wallet Pty Ltd (**Finder Wallet**) had engaged in unlicensed financial services by finding that Finder Wallet's product, Finder Earn, was not a financial product.

Finder Earn enabled consumers to buy TrueAUD stablecoins with Australian dollars (**AUD**) and receive a fixed return if they allowed Finder Wallet to use the TrueAUD for a period known as 'Earn Term'.

ASIC's case was that Finder Earn was a financial product in the form of a debenture and Finder Wallet had breached the Corporations Act for, among other things, offering a financial product without holding an Australian Financial Services Licence.

A debenture is defined under the Corporations Act as a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body. The Federal Court dissected the

elements of the definition and found that although Finder Earn customers had a chose in action against Finder Wallet, there was no money deposited with or lent to Finder Wallet, because the customers did not deposit or lend any AUD to Finder Wallet. Instead, AUD was used to purchase TrueAUD which in turn was transferred or loaned to Finder Wallet. In addition, the Federal Court found that there was a contractual promise by Finder Wallet to return to the customer the TrueAUD given to Finder Wallet, but this did not amount to an undertaking by Finder Wallet to repay any moneys as a debt.

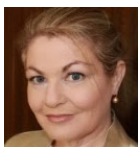
Greenwashing civil penalty against Vanguard

Vanguard Investments Australia has been [found](#) by the Federal Court to have made misleading claims about environmental, social and governance exclusionary screens applied to investments in a Vanguard index fund. Vanguard admitted to engaging in conduct and on 28 March 2024, Justice O'Bryan found that Vanguard contravened the *Australian Securities and Investments Commission Act 2001* (Cth). This case was ASIC's first greenwashing court outcome. There will be a further hearing on 1 August 2024 to consider the penalty to be imposed.

Court says change notification clause was not unfair

On 22 March 2024, the Federal Court [found](#) in favour of Auto & General Insurance Company Limited in an action brought against it by ASIC, which alleged that a term requiring policy holders to notify any changes to their home and contents was an unfair contract term. Justice Jackman decided that all of the criteria for an unfair contract term were not met. In particular, he found that the term would not cause a significant imbalance in the parties' rights and obligations arising under the contract, and was reasonably necessary in order to protect the legitimate interests of the insurer.

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