



DWYER HARRIS



# FINANCIAL SERVICES AND CREDIT

## QUARTERLY UPDATE

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## CONSUMER CREDIT

### Anti-avoidance provisions proposed for credit product intervention orders

The Treasury has [conducted](#) a consultation on proposed amendments to the *Corporations Act 2001* (Cth) (the **Corporations Act**) which would introduce anti-avoidance measures in relation to credit product intervention orders. Submissions closed on 21 March 2023. The recently enacted *Financial Sector Reform Act 2022* (Cth) introduced anti-avoidance provisions into the *National Consumer Credit Protection Act* (Cth) (**NCCP Act**) in relation to small amount credit contracts (**SACCs**) and consumer leases.

The draft amendments define a “credit product intervention order” as a product intervention order made in relation to a credit facility under the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**). A credit facility under that definition extends broadly to include various types of credit and is not limited to SACCs and consumer leases.

### Amendments to consumer credit regulations

On 20 February 2023, the Treasury [released](#) exposure draft regulations to give effect to recent changes to the consumer credit legislation in relation to SACCs and consumer leases. The *National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023* (Cth) will:

- add an additional requirement that licensees obtain and consider information about social security payments to verify the financial situation of consumers before entering SACCs;
- set out the new consumer income requirements for SACCs and consumer leases – the total amount of repayments must not exceed 10% of available income;
- restrict the use of social security statements for other purposes;
- include a list of mandatory considerations for a court to consider when determining if a person entered a scheme for an avoidance purpose;
- prescribe new provisions which are subject to the infringement notice scheme;
- detail the new disclosure requirements for consumer leases of household goods, including fees and charges;
- detail how the base price of goods is to be calculated for a consumer lease; and
- prescribe how an early termination fee for a consumer lease is to be calculated.

## COMPETITION

### ACCC inquiry into deposit interest rates

The Australian Competition and Consumer Commission (**ACCC**) has [launched](#) an investigation into how banks set interest rates for savers, which will include examining the differences in interest rate increases between bank deposits and home loans.

The ACCC will consult with financial regulators, including the Reserve Bank of Australia, the Australian Prudential Regulation Authority (**APRA**), and the Australian Securities and Investments Commission (**ASIC**), while undertaking the inquiry. An issues paper is expected to be released in the coming months. The ACCC has been directed to report to the Treasurer by 1 December 2023.

### ACCC compliance and enforcement priorities

The ACCC [announced](#) its compliance and enforcement priorities for 2023-24 on 7 March 2023. The ACCC will be focusing on consumer and competition issues in essential services, environmental claims and sustainability, and financial services. It also aims to look at competition and pricing issues in gas markets including compliance with the recently applied price cap order.

## CORPORATE

### Amendments to aid digital communication, execution and reporting

On 3 March 2023 the Senate Economics Legislation Committee [recommended](#) that the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022* (Cth) be passed. The Bill contains amendments to enable and update provisions on digital communication, execution and reporting. More specifically, the Bill amends the Corporations Act to modernise communication methods between consumers, businesses and regulators by:

- allowing members of certain entities to elect to receive documents in either hard copy or electronic format, as well as providing relief to entities that are unable to contact members;
- ensuring that regulatory bodies can hold hearings and examinations using technology;
- updating payment provisions to allow electronic payments which were previously prescribed non-electronic methods only; and
- replacing requirements to publish notices in newspapers with a requirement that notices be published in an accessible and reasonably prominent manner.

### Treasury amendments to corporations and financial services law

The Treasury has [released](#) draft regulations to reduce the complexity of Australia's corporations and financial services laws. The regulations include a number of technical changes such as:

- creating a single glossary of defined terms in section 9 of the Corporations Act;
- allowing for the most current version of the *Acts Interpretation Act 1901* (Cth) to apply to the Corporations Act and the ASIC Act;
- repealing redundant and spent regulations, removing substantive obligations out of definitions, and amending unclear or incorrect regulations;
- making amendments to Treasury portfolio laws to improve their technology neutrality, including ensuring that certain documents can be sent in either physical or electronic form; and
- removing prescriptive requirements to publish notices in newspapers in favour of a technology neutral standard of publication.

### Ending ASIC instrument measures

The Federal Government has [released](#) draft legislation aimed at moving matters in legislative instruments made by ASIC into primary law and regulations. Submissions closed on 16 March 2023.

### Treasury laws amendment introduced

The Federal Government has [introduced](#) the *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023* (Cth) that will make changes to various corporations and tax legislation, including:

- allowing multiple licensees to register the same relevant provider on the Financial Advisers Register;
- allowing ASIC to use assisted decision-making for any purpose they may make in relation to performance or exercise of its functions or powers to register a relevant provider;
- laying the foundation for the implementation of sustainability standards in expanding the functions and powers of the Australian Accounting Standards Board, the Audit and Assurance Standards Board and the Financial Reporting Council;
- the partial implementation of the 2020 Tax Practitioners Review Board's recommendations and amendments of the *Tax Agent Services Act 2009* (Cth) to

- address the regulation of tax and business activity statement agents;
- amending tax legislation to ensure that no part of an off-market share buy-back can be taken to be a dividend; and
- limiting the ability of companies to issue franked dividends by disallowing the use of franking credits on certain distributions that are funded by capital raising activities.

## ASIC's best practice on whistleblowers

ASIC has [released](#) its report on good practices for handling whistleblower disclosures. The report provides insights for companies and superannuation trustees in designing programs to manage whistleblowing. ASIC found that some of the stronger whistleblower programs:

- established procedures and systems to embed whistleblower program requirements;
- created practices to support whistleblowers;
- informed and trained persons involved in receiving or handling disclosures about protecting whistleblowers and treating material confidentially;
- monitored, reviewed, and improved programs to seek feedback from whistleblowers;
- used information from disclosures to address harms and improve company performance;
- embedded senior executive accountability for the program; and
- created frameworks to entrench effective director oversight.

## DIGITAL ASSETS

### Crypto regulation strategy

On 3 February 2023, the Federal Government [announced](#) its proposed actions to ensure stronger regulation of crypto assets to protect consumers. The three-step approach includes strengthening enforcement, bolstering consumer protection, and establishing a framework for reform.

Strengthening enforcement action means that Australian regulators such as ASIC, the ACCC, and the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) will strengthen their focus on crypto asset providers to prevent scams and ensure that consumers are appropriately informed on risks.

Bolstering consumer protection involves reform of the licensing and custody of crypto assets, especially the subset of assets that sit outside the financial services regulatory framework. The Federal Government aims to design a custody and licencing framework with consultation starting in mid-2023.

Establishing a framework for reform includes the Federal Government's [release](#) of the 'token mapping' report to develop regulation frameworks within the cryptocurrency sector on 3 March 2023. The report provides an analysis of cryptocurrency assets and explores how existing regulations apply to the sector and how they inform future policies.

### Bill confirming digital currency is not foreign currency for tax purposes

A Bill was [introduced](#) to the Federal Parliament on 8 February 2023 with the aim of clarifying the use of digital currency for tax purposes. The *Treasury Laws Amendment (2022 Measures No.4) Bill 2022* (Cth) will clarify that digital currencies are to be excluded from income tax treatment as foreign currency. The Bill is currently before the Senate.

## ESG

### Greenwashing internet sweep reveals widespread claims

The ACCC has [conducted](#) an internet sweep of 247 businesses to investigate potential greenwashing practices. The ACCC found that 57% of these businesses were identified as making concerning claims on their environmental or sustainability practices. The cosmetic, clothing and footwear, and food and drink sectors, were found to have the highest proportion of concerning claims. The ACCC will conduct investigations into the companies that made these claims and provide a range of targeted activities for businesses to educate them on better environmental and sustainability practices.

## FINANCIAL ADVICE

### Register to display financial advisers who can provide tax advice

From 1 February 2023, ASIC's Financial Advisers Register [displays](#) whether a financial adviser can provide tax advice services. The Register is published on ASIC's Moneysmart website.

### Quality of Advice Review final report released

The Treasury [released](#) the Quality of Advice Review final report on 8 February 2023. The report includes 22 recommendations. The review is aimed at evaluating the regulatory framework to provide high quality, accessible, and affordable financial advice for retail clients. The Federal Government is now considering its response to the proposed recommendations.

## FINANCIAL MARKETS

### Consultation on clearing and settlement services

The Federal Government [proposed](#) draft legislation on 23 March 2023 that will amend the Corporations Act, the *Competition and Consumer Act 2010* (Cth) and the ASIC Act to facilitate competitive outcomes in the delivery of clearing and settlement services for Australia's financial markets.

The draft legislation will provide ASIC with powers to implement and enforce a monopoly provider of clearing and settlement services to operate and achieve competitive outcomes and ensure safe and effective competition in clearing and settlement should a competitor emerge. This draft legislation also provides the ACCC with the power to conduct binding arbitration to resolve disputes that concern access to clearing and settlement services.

The Federal Government is currently conducting a consultation on the draft legislation that will close on 20 April 2023.

## FINANCIAL PRODUCTS

### Review of regulatory framework for managed investment schemes

The Federal Government [announced](#) on 8 March 2023 that it will conduct a review of managed investment schemes (MISs). The review will examine the current regulatory framework and will consider reform options such as:

- whether the thresholds that determine whether an investor is a retail or wholesale client remain appropriate;
- whether certain MIS investments should be able to be marketed and sold to retail investors;
- the various roles and obligations of responsible entities and whether the governance,

- compliance and risk management frameworks for MIS are appropriate; and
- interactions between Commonwealth and State laws when regulating real estate investments by MISs.

## FINANCIAL SERVICES

### ASIC to help deliver financial outcomes for First Nations peoples

ASIC [published](#) its Indigenous Financial Services Framework on 14 February 2023. It aims to provide positive financial outcomes for First Nations peoples.

To develop the framework, ASIC cross-collaborated with First Nations peoples, financial services industry representatives, as well as other Federal Government departments, agencies and regulators. The consultation process identified four key learning outcomes:

- First Nations peoples had unique and established economies prior to colonisation that have continued today, which deserve to be understood, respected, and maintained;
- First Nations peoples have been prohibited and widely excluded from participating within Australia's financial system and frameworks;
- financial wellbeing affects all areas of First Nations peoples' lives; and
- First Nations peoples have distinctive ideas of financial success that require acceptance and empowerment.

These learning outcomes have informed the financial outcome goals of ASIC to reduce harm and misconduct to First Nations peoples, as well as provide accessible financial products and services, and establish a positive and cultural appropriate environment to engage with financial services.

### 'Sunsetting' class orders on financial requirements

ASIC has carried out a [consultation](#) on proposals to remake 'sunsetting' class orders that would impose financial resource requirements on the managed funds industry. The class orders will set out financial resource requirements that responsible entities, investor directed portfolio services operators, custodians, and corporate directors would have to meet as an Australian financial services licensee. The fundamental policy principles have not changed, but ASIC has invited submissions from stakeholders on proposals. The consultation closed on 31 March 2023.

## INSOLVENCY

### ASIC small business restructuring report

On 17 January 2023, ASIC [published](#) a report of its findings on small business restructuring after reforms introduced in January 2021. The reforms created a new and simplified debt restructuring process for eligible small businesses, enabling control of the insolvent company to be left in the hands of directors rather than a registered liquidator.

## INSURANCE

### Conditional relief granted to reissue certain life insurance policies

ASIC has [granted](#) conditional relief for life insurers from the design and distribution obligations (DDO) when reissuing life insurance policies. The relief, which has been granted in certain and limited circumstances, sets to reduce the regulatory burden for life insurers so they can reissue pre-DDO policies where there is a low risk of consumer harm. The relief also allows for the correction of administrative errors and reinstatement of lapsed policies.



## Insurance in superannuation report released

On 22 March 2023, ASIC [released](#) its report on insurance in superannuation which examines the progress by superannuation trustees to improve their arrangements for life insurance in superannuation.

### PRIVACY AND DATA

## Privacy Act review report released

On 16 February 2023, the Attorney-General's Department [released](#) its final report of the review of the *Privacy Act 1988* (Cth), which contains 116 proposals. The Federal Government has sought feedback to the Report to inform the next steps, with the deadline for comments having closed on 31 March 2023. A full summary of the proposals is beyond the scope of this Update, but the following are notable recommendations which could have a significant impact if adopted:

- changing the definition of personal information so that it refers to information “relating to” rather than “about” an individual, and including examples in the legislation;
- defining the meaning of “collection” of personal information, including inferred or generated information;
- requiring privacy policies to be clear, current, concise and understandable;
- modifying the exemptions for small business, employee records, political and journalists;
- requirements for quality of consent to privacy practices: consent must be voluntary, informed, current, specific and unambiguous;
- requiring that privacy practices must be fair and reasonable;
- improving rights of the individual including access rights; rights to object; rights to erasure and de-indexing (with public interest exceptions); an unqualified right to opt out of direct marketing and targeted advertising; and a private right of action for interferences with privacy; and
- regulated entities will have to set their own maximum and minimum retention periods for data – and put these in their privacy policy.

## Report on Consumer Data Right compliance

The OAIC has [released](#) its summary report on whether Consumer Data Right (CDR) accredited persons, who are or may become accredited data recipients of CDR data, were complying with Privacy Safeguard 1, which requires CDR entities (including accredited persons) to have a policy describing how they manage CDR data, and to maintain internal practices, procedures and systems to ensure compliance. The OAIC found some instances of non-compliance but did not identify any high privacy risks.

### PRUDENTIAL

## APRA imposes additional licence conditions on Diversa Trustees

APRA has [imposed](#) additional conditions on Diversa Trustees Limited (**Diversa**) which are designed to address prudential concerns. The terms of the new licence came into force on 23 January 2023.

## APRA updates macroprudential policy settings

APRA has [updated](#) its macroprudential policy settings, in an information paper published on 27 February 2023.

## SUPERANNUATION

### Consultation begins on legislating objective of superannuation

The Federal Government [released](#) a consultation paper on 20 February 2023 to seek feedback on the benefits, phrasing and implementation of an objective for superannuation. The consultation process closed on 31 March 2023.

### Proposal for victims and survivors of abuse to have access to offender's superannuation

The Federal Government has [proposed](#) allowing victims and survivors of child sexual abuse to have access to the superannuation of their offender for unpaid compensation orders. The draft proposals seek to support those accessing redress by preventing offenders from shielding their assets.

### Updates to AFCA approach to superannuation fees and charges

The Australian Financial Complaints Authority (AFCA) has [updated](#) its approach to superannuation fees and charges. These changes are aimed at addressing grandfathered commission arrangements.

### Your Future, Your Super review

The Federal Government is conducting a review of the Your Future, Your Super reforms and on 4 April 2023, it [released](#) the submissions received in the consultation process and a summary of the issues. Exposure draft regulations have also been [released](#) to make changes to the performance test. Consultation on the draft regulations is open until 2 May 2023. The Minister has [confirmed](#) that the Government will not be changing the best financial interests duty of trustees.

## TAXATION

### Consultation on super tax concessions

On 28 February 2023, the Government announced it would reduce the superannuation tax concessions available to individuals whose total superannuation balances exceed \$3 million. The changes are proposed to apply from 1 July 2025. The tax rate will increase from 15% to 30%, for earnings corresponding to the proportion of an individual's superannuation balance that is greater than \$3 million. On 31 March 2023, the Treasury [released](#) a consultation paper seeking views from interested parties on the implementation of these changes.

## DISPUTES AND ENFORCEMENT

### ASIC to expand enforcement focus

ASIC [announced](#) on 15 February 2023 that it will expand its focus areas in the coming year and will be targeting greenwashing, predatory lending, as well as a misleading insurance pricing promises, as part of protecting consumers from financial harm. Enforcement activity will focus on finance practices and disclosure of climate risks, financial scams, cyber and operational resilience, and investor harms involving cryptocurrency.

### ASIC replaces infringement notices information sheet

In March 2023, ASIC [released](#) a new information sheet on infringement notices: *Information Sheet 275 Infringement notices: Your rights*.

## AFCA consultation on rule changes

AFCA [announced](#) it is running a consultation on changes to its Rules and Operations Guidelines which began on 27 March 2023 and will close on 22 May 2023. The proposed changes are set to address recommendations made in the Treasury's Independent Review of AFCA. The proposed changes include:

- managing conduct within the scheme with respect to paid representatives and complainants;
- appropriate offers of settlement or previously settled matters;
- how AFCA deals with complaints lodged by sophisticated or professional investors;
- the effect of determinations, and dealing with errors in determinations; and
- other changes that range from definition changes to annual reporting.

## Enforceable undertakings from Cash Converters and PayPal

AUSTRAC [accepted](#) an Enforceable Undertaking (EU) from Cash Converters on 21 February 2023 and also [accepted](#) an EU from PayPal Australia Pty Ltd (**PayPal**) on 17 March 2023. The EUs are aimed at uplifting compliance with Australia's anti-money laundering and counter-terrorism financing (AML/CTF) laws. The EUs follow investigations that identified concerns with both Cash Converters and PayPal's previous AML/CTF programs.

## National Advice Solutions convicted of hawking

National Advice Solutions Pty Ltd has pleaded [guilty](#) to a charge of breaching anti-hawking laws. The Court imposed a penalty of \$70,000 for the company's conduct between August 2019 and June 2020, when it made unsolicited calls to consumers to get them to roll over their superannuation.

## Penalties for failing to cooperate with AFCA

General Commercial Group Pty Ltd (**General Commercial**) and Eden Capital (Australia) Pty Ltd (**Eden Capital**) have each been [penalised](#) for their failure to cooperate with AFCA. The Federal Court has penalised the companies \$50,000 each, and for the next 12 months, both companies are restrained from engaging in credit activity.

The companies were found to have repeatedly refused to provide documents and information requested by ACFA. AFCA was also subjected to inappropriate and unprofessional behaviour by both companies. General Commercial director Dale Brendan Heremaia and his son, Eden Capital director Benjamin Eden Heremaia, were also personally ordered to pay \$30,000 and \$20,000 respectively for their part in the misconduct. The Heremaias themselves are restrained from any involvement in any credit activity business for the next 12 months, while Eden Capital will only be allowed to collect payments on existing loans.

The Court concluded that the conduct of General Commercial and Eden Capital infringed the obligation under their Australian credit licences to act efficiently, honestly and fairly, as well as their obligation to cooperate with AFCA.

## ClearLoans penalised \$6 million for breaches and misconduct

The Federal Court has [found](#) that Membo Finance Pty Ltd and its sole credit representative, Richmond Group Financial Services Pty Ltd, which trade under the name ClearLoans, breached the NCCP Act. The Court found that both companies had failed to act efficiently, honestly and fairly during their dealings with debtors in financial hardship and had commenced court proceedings to enforce credit contracts in a State where the borrower or guarantor did not live. The companies were ordered to pay over \$6 million in penalties for the breaches.

## ASIC interim stop order on credit for rent product

On 17 February 2023, ASIC [issued](#) an interim stop order on One Card Credit Pty Ltd's Scorebuilder and SafetyNet loan products due to deficiencies in their target market determinations. ASIC was concerned with the loan targets of consumers looking to use credit to pay their rent, which places consumers at a heightened risk of becoming financially vulnerable.

## Jacaranda Finance infringement notices

Two infringement notices were [issued](#) by ASIC to credit provider Jacaranda Finance Pty Ltd (**Jacaranda**) on 17 February 2023 in relation to a repayment estimate calculator on its website.

ASIC was concerned that the repayment calculator on the website may have been false or misleading because the annual percentage rate used was significantly less than the rate applied to most consumers who entered a credit contract, and it was advertising loans at an annual percentage rate which was not actually offered. Jacaranda has since removed the repayment calculator from its website.

## ASIC sues RACQ over alleged pricing discount failures

ASIC [commenced](#) civil penalty proceedings against RACQ Insurance Limited (**RACQ**) on 24 February 2023, over allegations of misleading customers in its product disclosure statements. RACQ is alleged to have included statements about discounts in its product disclosure statements for motor, home, caravan & trailer and unique vehicle insurance policies. ASIC claims that the discounts were only applied by RACQ to the base insurance premium, and not to additional premiums paid for certain optional extras.

RACQ has since updated its product disclosure statements and committed to a remediation program for a range of pricing promise failures.

## ASIC seeks action against alleged greenwashing

The first ASIC court action against alleged greenwashing [commenced](#) on 28 February 2023 with ASIC launching civil penalties proceedings in the Federal Court against Mercer Superannuation (Australia) Limited (**Mercer**) for allegedly making misleading statements about the sustainability of its superannuation investment options.

ASIC has claimed that Mercer made statements on its website about seven "Sustainable Plus" investment options offered by the Mercer Super Trust, of which Mercer is the trustee. The statements marketed the options as excluding investments in companies involved in carbon intensive fossil fuels, alcohol production and gambling. ASIC made findings that 15 of the companies were involved in the extraction or sale of carbon intensive fossil fuels, 15 companies were involved in the production of alcohol and 19 companies were involved in gambling.

ASIC has also recently [issued](#) three infringement notices for greenwashing against energy company Black Mountain Energy Limited (**BME**). BME paid a total of \$39,960 to comply with the notices, which relate to concerns of alleged false or misleading sustainability-related statements made to the Australian Securities Exchange (**ASX**) between 23 December 2021 and 8 September 2022. ASX announcements made by the company claimed that BME was creating a natural gas development project with 'net-zero carbon emissions', and that the greenhouse gas emissions associated with Project Valhalla would be net zero.

## Interim stop on Pivotal Diversified Fund

ASIC [issued](#) an interim stop order on Vasco Responsible Entity Services (**Vasco**) on 9 February 2023, preventing it from offering or distributing the Pivotal Diversified Fund to retail investors.

ASIC was concerned Vasco had not appropriately considered the features and risks in determining the target market for the Pivotal Diversified Fund. ASIC also asserted that the target market determination did not meet the requirements under the DDO, as it did not include any distribution conditions.

## GetSwift receives record continuous disclosure penalty

The Federal Court [handed down](#) its largest ever penalty against a company for breaching continuous disclosure laws on 17 February 2023 when ordering GetSwift Limited to pay a penalty of \$15 million.

The company (formerly ASX: GSW) (in liquidation) had been found to have made numerous misleading statements in its announcements on ASX and breached its continuous disclosure obligations on 22 occasions between February and December 2017.

## ANZ penalised over non-compliance

The Federal Court has [penalised](#) ANZ Bank \$10 million for its Home Loan Introducer Program. The program involved home loan referrals to ANZ from third party introducers who covered various professions, including cleaners and real estate agents.

## Interim stop orders for a securities lending product

Two interim stop orders have been [issued](#) by ASIC to Interactive Brokers Australia Pty Ltd. The orders stop the company from issuing Stock Yield Enhancement Program (**SYEP**) Derivatives to retail investors because of deficiencies in the product's TMD and product disclosure statement.

The orders are valid for 21 days unless revoked earlier and made with the intention of protecting retail investors from acquiring SYEP Derivatives where they may not be suitable for their financial objectives, situations or needs.

## Court proceedings over alleged unlicensed credit activity

ASIC has [taken](#) court action against Green County Pty Ltd and Max Funding Pty Ltd over allegations that both companies conducted unlicensed credit activity and committed other breaches of consumer credit law. Neither company was licensed to provide personal loans or act as an intermediary. ASIC is now seeking declarations, pecuniary penalties, injunctions, disqualification orders and other orders.

## Auto & General Insurance sued for alleged unfair contract terms

ASIC has [commenced](#) proceedings against Auto & General Insurance Company Limited (**Auto & General**), alleging unfair contract terms in its insurance contracts. The allegations involve standard form home and contents insurance contracts that include a term requiring customers to notify the insurer 'if anything changes about your home or contents'. ASIC alleges that the contract term is unfair within the meaning of s 12BG of the ASIC Act and is seeking declarations that the term is void, as well as injunctions and corrective orders.

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