

A woman with curly hair, wearing a light-colored collared shirt, is looking down at a tablet computer she is holding. The background is a dimly lit office with blurred lights and equipment. A small red square is visible in the top left corner of the page.

# Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments.

22 November 2023

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# Boards and Directors

## Directors may have a statutory duty to use AI?

In his chapter in a new book, [Corporate Law and Governance in the 21st Century: Essays in Honour of Professor Ian Ramsay](#), and in an earlier article [AI and directors' duties](#), Andrew Godwin explores the question of when a directors' statutory duty of care might extend to an obligation to use AI (artificial intelligence) and factors relevant to determining when this duty may arise.

### Directors' statutory duty of care

Broadly, it's suggested a directors' failure to inform themselves about how AI is being used by their company, and ensure that AI is being used in appropriate circumstances, may constitute a breach of their duty of care and diligence under the relevant statutory provision – in Australia s180 of the Corporations Act 2001 (Cth).

Mr Godwin [suggests](#):



'it is increasingly likely that, in appropriate circumstances, an obligation to use AI will arise as part of directors' duty of care. It is therefore important for directors to anticipate and make provision for those circumstances'.

This is based on the idea ([drawing on insights from the 1992 US decision in Brane v Roth – the 'duty to hedge' decision](#)) that where emerging technologies offer efficiencies to the point where they are the 'best or most prudent way' of doing things, then directors may have a duty to inform themselves about/use that new technology (in certain circumstances).

### **When might this duty arise? What factors will be relevant in determining this?**

It's suggested that whether directors will have an obligation to use AI in 'appropriate circumstances' will depend on various factors including:

- the AI's reliability and effectiveness
- the cost, timing and other practicalities of using AI to obtain information or to assist in corporate decision-making.

In addition, and assuming these factors are satisfied, it's suggested that the following other factors are likely to be relevant in this context, namely:

- the sector in which the company operates - it's suggested that firms that hold large amounts of customer data (eg professional services firms) are likely to be 'prime candidates for AI'
- the applicable standards and codes for companies operating in that sector - it's suggested that the applicability of industry standards or codes of conduct is likely to inform the content and interpretation of directors' duties about the use of AI.
- The availability of AI-related expertise: It's suggested that '

'if such expertise is available at a cost and on a scale that is considered to be reasonable, the question becomes whether such expertise should be located at the board level or the management level, or both.

This brings issues about the extent to which boards will need to understand AI to satisfy their duties, and to supervise not just management but the AI systems themselves. As the use of AI expands and develops, it is likely that the performance of companies will increasingly depend on directors who have adequate knowledge of AI and its functionality'.

- The nature of board decisions and the potential for AI to support them. It's not suggested that AI will automatically be relevant for every decision or should replace human decision making – rather that, use of AI may assist in decision-making (in some contexts). On this point, the author comments that:

'It is likely that different forms of AI technology will be effective for different types of decision-making. It would be prudent for companies that confront a future in AI to maintain a register that plots its potential benefits and applications, to update the register as and when technological innovation occurs, and to use it to predict likely developments. This would operate along similar lines as a risk register, and would track the potentiality of AI by reference to factors including: The type of decision; the degree of their certainty and complexity; relevant standards and codes; and the availability and source of AI expertise within the company'.

The author does not suggest that these factors are exhaustive, rather it's submitted that they are likely to be important in determining whether an obligation to use AI might arise.

[Sources: Godwin, Andrew. 'AI and Directors' Duties.' Law.asia, 8 June 2023, [<https://law.asia/directors-duties-ai/>]; Notes from a panel discussion, Notes from a panel discussion and book launch on Company Directors, Corporate Law and Governance, Melbourne Law School, 8 November 2023: [https://www.youtube.com/watch?v=XnkJvelqEqY&ab\\_channel=MelbourneLawSchool](https://www.youtube.com/watch?v=XnkJvelqEqY&ab_channel=MelbourneLawSchool)]

# Diversity

## CEO roles: Report reveals a long journey ahead for gender parity, citing low appointment and retention rates for women



- Analysis from Russel Reynolds [suggests that](#) despite record CEO turnover across companies listed on the world's leading stock indices, progress towards gender parity remains very slow – Russel Reynolds projects that at the current rate, parity will not be achieved until next century.

- It's suggested that this is due to both:
  - The low appointment rate for women CEOs
  - Lack of focus on retaining women in the top roles.

### Low appointment rate

According to Russel Reynolds' analysis:

- **2023 has been another record year for CEO turnover:** 142 CEOs across the sample (ie 1822 companies listed on leading stock indices) have left their positions so far in 2023. To put this in context, this is more or less on par with the 148 CEOs who left their positions over the same period in 2022 – a record year for CEO turnover.

- **This is opening up opportunities for women (to an extent):** According to Russel Reynolds' analysis 15% of new CEOs appointed were women (up 9.7% on 2018).

- **The appointment rate for women CEOs would need to accelerate if change is to occur sooner than next century:** Russell Reynolds underlines that women remain underrepresented in CEO roles – for example

women hold only 42 S&P 500 CEO and 10 FSTE 100 CEO roles. It's submitted that in order for this to shift, the rate of female appointments needs to significantly increase.

### Not enough focus on retention

- The research also found that women spend less time in CEO roles than their male counterparts – women's tenure on average is 5.2 years vs 8.1 years for men.
- Russell Reynolds suggests this may be due to a number of factors including:
  - gender-bias
  - discrimination
  - (lack of) workplace support/workplace culture
- It's also suggested that women leaders 'may also be more inclined to leave the organisation in search of better positions and opportunities, with CEO to chair and Board roles becoming increasingly popular pathways'.
- It's also [submitted that:](#)

'If the tenure gap between men and women persists, it will potentially make it harder for industries to reach gender parity, suggesting more needs to be done to not only appoint women into the top seat but retain them'.

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 20/11/2023; Russel Reynolds Global CEO Turnover Index]



# Remuneration

## Remuneration disclosure requirements: New APRA instrument registered

On 20 November 2023, the Australian Prudential Regulation Authority registered a new instrument - [Superannuation \(prudential standard\) determination No. 2 of 2023](#) (the instrument) – which will revoke existing Prudential Standard SPS 510 Governance and determine a new Prudential Standard SPS 510 Governance (SPS 510).

The [purpose](#) of the instrument is to incorporate:

'necessary consequential amendments resulting from the commencement of CPS 511 [into updated SPS 510]'.  
'

The [explanatory statement](#) explains that:

'With the commencement of CPS 511, a number of existing requirements relating to remuneration, including those detailing requirements in relation to Board Remuneration Committees and Remuneration policies, currently set out in SPS 510, have become progressively redundant as these matters are covered by new requirements in CPS 511'.  
'

**Timing:** The instrument commences on 1 January 2024.

The [explanatory statement](#) comments that:

'The amendments apply to RSE licensees that are not significant financial institutions from 1 January 2024. RSE licensees that are significant financial institutions were previously carved out from applying these requirements under SPS 510.'  
'

[Source: Superannuation (prudential standard) determination No. 2 of 2023]

**In Brief | As You Sow report finds that S&P500 companies with the most 'overpaid' CEOs have delivered lower returns to shareholders than the average S&P 500 company over the past decade. As You Sow considers this undermines the rationale often given for 'outrageous pay packages' ie that high pay is necessary to recruit and retain top executives to deliver the best returns to shareholders**

[Source: As You Sow media release 15/11/2023]

# Meetings and Proxy Advisers

## 2023 AGM season: Shareholders continue to 'strike' on pay

### Lendlease shareholders deliver first strike

Lendlease Group (Lendlease) shareholders delivered a first 'strike' on the company's remuneration report at the 17 November 2023 AGM with 39.81% of shareholders voting 'against'.

[Note: For context, the 'two strikes rule' means that boards face the prospect of being 'spilled' if 25% or more of shareholders vote against the resolution to approve the company's remuneration report at two consecutive AGMs – that is, if there are two consecutive 'strikes' (25% or more 'against' votes) against the company's remuneration report. For more on the operation of the two strikes rule see: [Executive remuneration: a quick guide – Parliament of Australia \(aph.gov.au\).](#)]

All five directors standing for election were duly elected though there was a strong protest vote (over 10% against) two directors - over 33% of shareholder voted 'against' the re-election of directors Phillip Coffey (Chair of the Risk

Committee and member of the Nomination and Sustainability Committees) and Elizabeth Proust (Chair of the People & Culture Committee and member of the Nomination, Risk and Sustainability Committees).

In his [address to shareholders](#), Lendlease Chair J Ullmer acknowledged 'the votes cast ahead of today's Meeting and the recommendations of some proxy advisers may result in a vote against our Financial Year 23 Remuneration Report' adding that the board 'recognise and respect our securityholders' feedback'. Mr Ullmer did not directly address the nature of these concerns, though he did express the boards' 'disappointment with the company's financial performance and our determination to improve returns to securityholders'.

The AFR suggests the vote result may be in response to the company's financial performance, and the pace of the company's turnaround plan.





Despite the 'strike' the remuneration report had the backing of a number of investors including:

- Norges Bank Investment Management (NBIM) which [voted in support](#) of all management proposals
- Legal and General Investment Management (LGIM) which [voted in support](#) of all management proposals
- California Public Employees Retirement System (CalPERS) voted [in support](#) of all management proposals
- California State Teachers Retirement System (CalSTRS) [voted in support](#) of all management proposals

Ahead of the meeting, the Australian Shareholders Association (ASA) also advised that it [intended to support](#) all management proposals.

### Fortescue shareholders also deliver 'first strike'

All resolutions that went to a vote at Fortescue Metals Group (Fortescue) 21 November 2023 AGM were carried with the exception of the proposal to approve the remuneration report – [53.37% of shareholders](#) voting 'against'.

Media reports ([The SMH](#)) suggest that the result may reflect dissatisfaction with one-off payments made to executives over the last financial year, in line with the recommendations from influential proxy advisers and/or concern over the high level of executive turnover/communication around this ([The Guardian](#)).

#### How some investors voted:

- Norges Bank Investment Management (NBIM) [voted against](#) the remuneration report. The rationale given is as follows:  

'The board is responsible for attracting the right CEO and setting appropriate remuneration. A substantial proportion of annual remuneration should be provided as shares that are locked in for five to ten years, regardless of resignation or retirement. The board should provide transparency on total remuneration to avoid unacceptable outcomes. The board should ensure that all benefits have a clear business rationale. Pensionable income should constitute a minor part of total remuneration'.
- California Public Employees Retirement System (CalPERS) [voted against](#) the remuneration report and against three directors (Executive Chair, Andrew Forrest, Lead Independent Director and Deputy Chair, Mark Barnaba and Non-executive director, Chair of the Remuneration and People Committee, member of the Audit, Risk Management and Sustainability Committee and Finance Committee Penny Bingham-Hall) [as did the California State Teachers Retirement System \(CalSTRS\)](#).
- Ahead of the meeting, the [ASA advised](#) it intended to support all management proposals.

### Broader context

This is the latest in a string of recent 'strikes' against ASX companies over the last few weeks including:

- Tabcorp Holdings Ltd: [34.25%](#) against (25 October 2023).
- APA Group: [25.79%](#) against (26 October 2023)
- Whitehaven Coal Ltd: [40.61%](#) against (26 October 2023).
- Woolworths Group Ltd: [28.04%](#) against (26 October 2023).
- Qantas Airways Limited: [82.93%](#) against (3 November 2023)
- Magellan Financial Group: [58.19%](#) against (8 November 2023)

[Sources: Lendlease: Notice of Meeting; Results of Meeting]

# ESG

## Inching closer | Further steps to support the (planned) introduction of mandatory climate disclosure in Australia

- The Australian government plans to phase in new, internationally aligned, mandatory climate disclosure reporting requirements from July 2024 for certain entities. For more on the government's proposed approach see: [Introduction of mandatory climate reporting in Australia: Second round of consultation launched](#)
- The content of these new requirements will be set out in new Australian Sustainability Reporting Standards (ASRS) which are being developed by the Australian Accounting Standards Board (AASB).
- The AASB has released a package of three initial draft standards for consultation based on the ISSB standards: IFRS S1 and IFRS S2. The due date for submissions is **1 March 2024**. For more on the proposed AASB standards read: [Another step closer towards implementing mandatory climate disclosure in Australia - Post - MinterEllison](#)

### Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth) has passed both Houses

[Treasury Laws Amendment \(2023 Measures No. 1\) Bill 2023 \(Cth\)](#) passed both Houses on 15 November 2023 having been amended in the Senate.

#### What's interesting about the Bill?

The changes included in Schedule 2 to the Bill confirm the Australian Accounting Standards Board (AASB), Auditing and Assurance Standards Board (AUASB) and Financial Reporting Council (FRC) as the entities responsible for:

- formulating sustainability standards (AASB)
- developing auditing and assurance standards for sustainability purposes (AUASB)
- providing strategic oversight and governance functions in relation to the AASB's and the AUASB's sustainability standards functions (FRC)

The [explanatory memorandum](#) states that this changes are necessary because:

'The ASIC Act currently does not explicitly grant the AASB and the AUASB the function to develop and formulate sustainability standards and associated auditing and assurance standards. This is necessary to support the Government's commitment to ensure entities provide Australians and investors with greater transparency and accountability in relation to their climate-related plans, financial risks, and opportunities. The proposed sustainability standards would provide general guidance, assisting relevant industry to prepare systems and processes for eventual transition to mandatory climate-related financial disclosures. They would also be flexible enough to accommodate future global developments in other sustainability reporting'.

These changes are set to commence the day after the Bill receives Assent.

The Senate amendments ([summarised in the supplementary explanatory memorandum](#)) do not impact Schedule 2.

#### Plans to consolidate the AASB, AUASB and the FRC announced

- Separately, the government [has announced plans](#) to consolidate the three bodies that currently oversee financial reporting and set reporting standards – the Australian Accounting Standards Board (AASB), the Auditing and Assurance Standards Board and the Financial Reporting Council - into a single entity.
- The aim of the planned change is to
  - 'make them more efficient, effective and fit for purpose, including to assist Australia in implementing new climate and sustainability standards'.
- The government intends to consult on draft legislation to implement this planned reform. This will include consultation on 'appropriate transitional arrangements'.

#### The change is not expected to hold up the AASB's work in developing new climate disclosure standards

- The government's announcement makes clear that ahead of the establishment of the proposed new body:

'the AASB will continue to progress its work in relation to climate-related financial disclosure standards. Establishing a framework for sustainability-related financial disclosures is a key priority in the Government's draft Sustainable Finance Strategy'.

### Proposed timeline:

- In terms of timing, it is envisioned that the body will be operational on or after 1 July 2026 (subject to the passage of the necessary legislation).

[Sources: Treasury Laws Amendment (2023 Measures No. 1) Bill 2023; Joint media release: Treasurer Jim Chalmers and Assistant Treasurer and Minister for Financial Services Stephen Jones 21/11/2023]

## Global collaboration for greenhouse gas emissions transparency: Australia joins international working group to improve measurement and verification across gas supply chains

Australia has joined Brazil, Canada, Colombia, the East Mediterranean Gas forum (Observer), European Commission, France, Germany, Italy, Japan, Republic of Korea, Norway, the UK and the US in signing up to a new working group – the Measurement, Monitoring, Reporting and Verification (MMRV) – that has been formed to establish a new framework to accurately measure and verify greenhouse gas emissions (GHG emissions) including methane, across gas value chains, improving the credibility and comparability of available data.

Announcing this, Minister for Resources and Northern Australia Madeleine King commented:

'The Australian Government is committed to lowering emissions and reaching net zero by 2050 to help the world address climate change. The international working group will help Australia and the world better understand emissions from the global natural gas supply chain, from pre-production to export and final delivery. The work will ensure natural gas producers and exporters, importers, governments, end users and other key stakeholders will have accurate and verifiable information about GHG emissions from the LNG supply chain.'

[Sources: Joint media release: Minister for Climate Change and Energy Chris Bowen and Minister for Resources and Northern Australia Madeleine King 16/11/2023; MMRV agreement 15/11/2023]

## Global coalition targets financial backers in protest against Mozambique LNG Project

- A global coalition of 124 civil society organisations has released an open letter to the 28 financial institutions backing TotalEnergies' Mozambique LNG project calling on the institutions to immediately withdraw their support on human rights and environmental grounds and to publicly rule out support for other gas projects in Mozambique.
- The letter states that withdrawal from the project (and ruling out support for all others in Mozambique) is necessary/warranted because the project is exacerbating pressure on local people and causing irreversible damage to the environment/nature without delivering the promised benefits. The letter states:

'the continuation of insurgent attacks and the failure of the Mozambican government and TotalEnergies to tackle the drivers of the conflict, the ongoing human rights violations as a result of these attacks and of the relocation of families to make way for the project, a concerning lack of benefits from the project for the Mozambican population, and irreversible climate and environmental impacts'.

- The groups have requested a response to the letter by 30 November 2023.

[Source: BankTrack media release 17/11/2023]

## Global plastics treaty: It's hoped that the final text will be ready by the end of 2024, but WWF has raised concerns about the lack of progress achieved

The third round of a (planned) five rounds of negotiations to develop an 'international legally binding instrument on plastics pollution, including the marine environment' – a global plastics treaty – took place in Nairobi on 11-19 November. The negotiators' ambition is to have the final text of the treaty ready 'by the end of next year and open for signing soon after'.



## Investor support for the initiative

Ahead of this meeting,

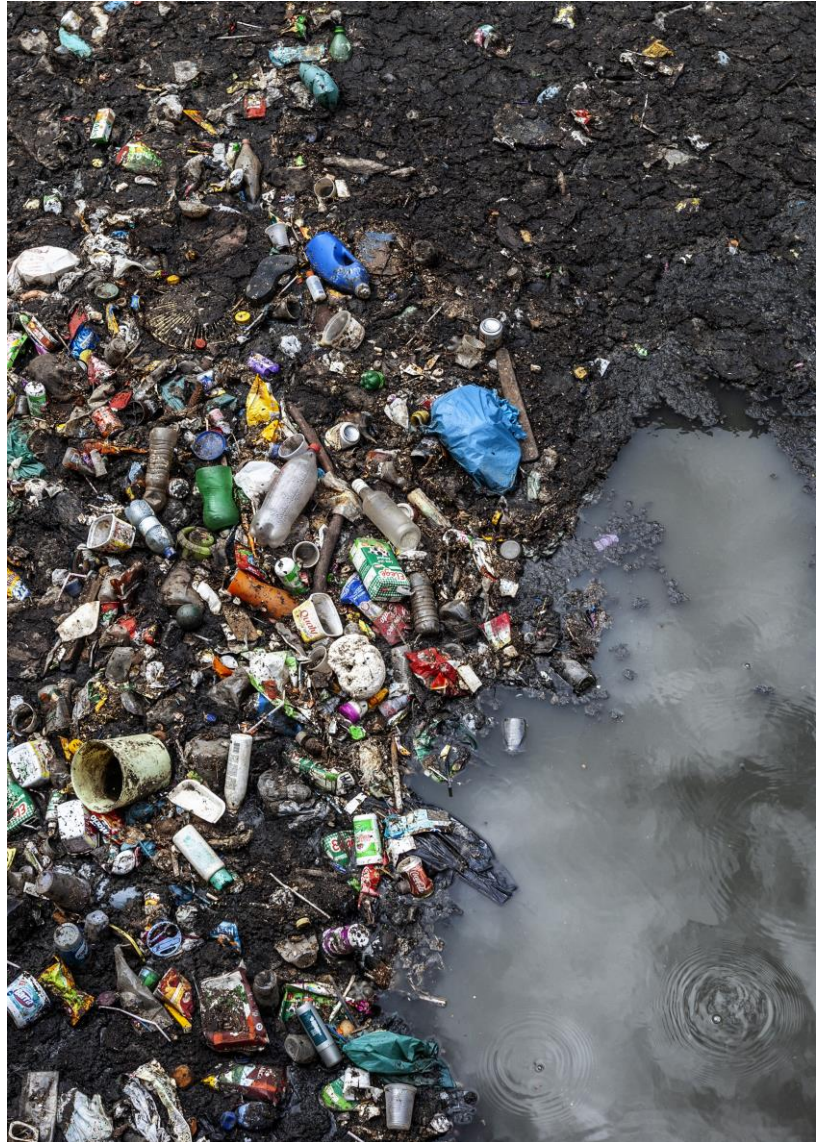
- An [international coalition of investors](#) (led by the Dutch Association of Sustainable Investors (VBDO)) called on members of the High Ambition Coalition to 'maintain ambition during the third round of negotiations'. Angélique Laskewitz, Executive Director of VBDO commented:

'The Global Plastics Treaty is a decisive and historic opportunity to address the plastics crisis. A strong and robust regulatory framework is needed, for which both governments and companies need to show their support. Only when effective measures to reduce environmental impact are in place, can financial risks be appropriately managed to which companies and their investors are exposed.'

- Separately, the CDP [led an open letter](#), endorsed by 48 financial institutions, calling for mandatory disclosure of plastic data to be included in the global plastics treaty. The letter states that:

'Our objective is to establish robust text mandating corporate disclosure of comprehensive plastic data within the Global Plastics Treaty, covering the risks, opportunities, impacts, and dependencies associated with the entire lifecycle of plastic products, from creation to responsible disposal.'

The rationale behind our call for access to this data lies in its critical role as the foundation for informed decisions and strategic actions. We firmly believe that by endorsing this call for mandatory disclosure, we seize a strategic opportunity for businesses to scrutinise their environmental impact and align with long-term sustainability objectives'.



## Lack of progress?

Following the close of the third round of negotiations, the [World Wildlife Fund](#) (WWF) has expressed concern at the lack of progress achieved. Specifically, WWF is concerned that:

'The third round of UN global plastic pollution treaty talks ended with no plan for how to move the negotiations forward, despite a majority of countries supporting a robust treaty grounded in global rules'.

WWF has called for

'countries who want to see a meaningful treaty emerge to remain resolute and take the process in their own hands by advancing information gathering and sharing over the next five months in the lead up to the fourth round of negotiations in April 2024'.

[Sources: CDP media release; VBDO media release 08/11/2023; WWF media release 19/11/2023]



# Regulators

## Top Story | ASIC's 2024 enforcement priorities

We summarise ASIC's latest insights into its enforcement approach and outline the regulator's immediate enforcement priorities for the next 12 months.

### Key Takeouts

- In separate addresses at the ASIC Annual Forum, ASIC Deputy Chair Sarah Court and ASIC Chair Joe Longo took the opportunity to emphasise ASIC's strong record on enforcement post-Hayne, including ASIC's continued willingness to take court action where necessary
- Ms Court also announced ASIC's enforcement priorities ([listed here](#)) for 2024.
- Continuing areas of enforcement focus include (among others): sustainable finance and tackling greenwashing, DDO compliance, and tackling 'predatory lending'.
- New focus areas include: enforcing compliance with the reportable situation regime; insurance claims handling (delays); compliance with financial hardship obligations; and used car financing. Taking enforcement action against 'gatekeepers' (eg auditors, registered liquidators and financial services/credit licensees) facilitating misconduct is also a priority for 2024.

### ASIC's enforcement approach is 'proactive, strategic and bold'

A key message in both Australian Securities and Investments Commission (ASIC) Chair [Joe Longo's 21 November 2023 opening address](#) to the ASIC Annual Forum, and separately in ASIC Deputy Chair Sarah Court's [address](#) is that ASIC stands by its record on enforcement. Mr Longo commented:

'Despite assertions flying in the face of the evidence, ASIC is very much committed to law enforcement. Our record demonstrates this'.

Both the ASIC Chair and Deputy Chair emphasised that ASIC is one of Australia's most active law enforcement agencies, pointing to ASIC's enforcement over the past several years post-Hayne in support. Both Ms Court and Mr Longo drew a distinction between ASIC's stance pre and post the Hayne Commission.

Ms Court stated:

'Our enforcement approach of today is fundamentally different to that which pre-dated the Royal Commission. In those days ASIC negotiated outcomes, accepted undertakings from large financial institutions and – in those matters that did go to court – penalties were relatively low. Our enforcement approach of today, by contrast, is proactive, strategic and bold'.

Ms Court also underlined that ASIC is 'not conservative' in the cases it takes on, but has proven itself ready to act where harm or potential harm is identified, testing the limits of existing law to 'make sure they [existing laws] have broad protective application'.

### ASIC's success in delivering against its 2023 enforcement priorities

Ms Court stated that:

'By any measure we successfully delivered against the targets we set ourselves this time last year'.

In illustration of this, Ms Court pointed to both ASIC's record in taking action to enforce compliance with the Design and Distribution Obligations (DDO) regime and ASIC's greenwashing actions (both included in ASIC's 2023 enforcement priorities), among other examples.

### ASIC's 2024 enforcement priorities

#### 2024 priorities

ASIC's priorities for the next 12 months are as follows.

- **'Enforcement action targeting poor distribution of financial products'** is set to be a continuing priority for ASIC over the next 12 months. [Announcing this](#), Ms Court reiterated that to date ASIC's focus has predominantly been on product design and target market determinations (TMDs). Over the next 12 months, ASIC intends to focus on distribution of financial products ie on the reasonable steps taken by product issuers to ensure their products are distributed to the relevant target market.
- **Misleading conduct in relation to sustainable finance including greenwashing** will also continue to be a key enforcement priority for ASIC. Ms Court stated that
  - 'Going forward our focus will be on net zero statements and targets made without a reasonable basis; the use of terms like 'carbon neutral', 'clean' or 'green' that are not founded on reasonable grounds; and the use of inaccurate labelling or vague terms in sustainability-related funds'.
- **Protection of vulnerable consumers:** A number of ASIC's priorities over the next twelve months are focused on protection of vulnerable consumers. These include:
  - Continued focus on high-cost credit and predatory lending practices impacting consumers and small business
  - The provision of used car finance to vulnerable consumers including misconduct by brokers, car dealers and finance companies – a new priority for 2024
  - Compliance with financial hardship obligations – also a new priority for 2024.
- **Conduct impacting small business including small business creditors** is also identified as a new priority: [Announcing this](#), Ms Court said that ASIC plans to focus in particular on:
  - 'misconduct by financial services and credit providers who engage in misconduct in their dealings with small business, including unlawful credit activity, unfair contract terms and insurance claims handling misconduct'.
- **Compliance with the reportable situations regime:** [Announcing this](#), Ms Court observed that:
  - 'Our work in this area suggests that compliance with the new regime is low – with a disappointing 89% of licensees not reporting against this regime at all. These reporting rates suggest we need a stronger approach to compliance in this area, and we have recently commenced a targeted surveillance of those licensees who are not reporting to us as we would expect'.
- **'Ensuring fair and orderly financial markets':** Two objectives fall under this broader aim.
  - Technology and operational resilience for market operators and market participants: [Announcing this](#), Ms Court said that in 2024, ASIC intends to:
    - 'specifically focus on technology and operational resilience for market operators and market participants, including compliance with the new market integrity rules'.
 Further to this point, ASIC Chair Joe Longo explained that ASIC is prioritising this because:
    - 'As financial markets continue to become increasingly fragmented and digitised, the risks faced by our financial markets increase too. We've observed that where failures in implementation of automated systems aren't identified in initial testing, they tend to persist. In some cases, for many years. The automated nature of these systems means market harm can far exceed that caused by errors stemming from manual processes, hence its strategic importance. For this reason, technological and operational resilience remains integral to ASICs mandate to supervise financial markets. Enforcement action for these types of serious and long-standing failures will reinforce the importance of getting the changes right before they are rolled out'.
  - Enforcement action targeting gatekeepers (eg auditors, registered liquidators and financial services/credit licensees) facilitating misconduct. Summing up ASIC's reasons for prioritising this issue Mr Longo said:
    - 'Market participants need to be vigilant in ensuring that the trades and orders they facilitate for their clients are neither suspicious nor potentially manipulative. In fact, the market integrity rules oblige market participants to devote appropriate organisational and technical resources to this task. They're also obliged to take action in relation to suspicious trading and to stop harm before it occurs. While there are clearly fewer market participants than individuals and firms who trade on our markets, by focussing our enforcement action at the gatekeeper level, we send a strong message to those with the greatest potential to have a meaningful impact on market integrity. But let me be very clear: we won't focus on gatekeepers to the exclusion of those who engage in market manipulation. This will always remain an ASIC enduring priority'.

## Insurance

- Insurance claims handling is included in the list of ASIC's enforcement priorities for the next 12 months.
- Announcing this, Ms Court said that ASIC will focus in particular on:  
'delays in claims handling, poor communication and record keeping, and inappropriate use of exclusions'.

## Superannuation

- In the superannuation context, ASIC's priorities for the next 12 months are:
  - Addressing 'member services failures in the superannuation sector'; and
  - Addressing 'misconduct resulting in the systematic erosion of superannuation balances'.
- Ms Longo [flagged that](#) acting on the findings of [REP 766 Implementation of the retirement income covenant: Findings from the APRA and ASIC thematic review \(summarised in Governance News 19 July 2023 at p22\)](#) – to enhance members' retirement outcomes – will be one area of focus for ASIC over the next 12 months. Mr Longo stated that:

'Poor marketing, distribution and advice practices leave consumers in sub-optimal investment choices, resulting in poor investment returns...Trustees should put – must put – members at the heart of decision-making in relation to how superannuation products are developed, governed, and marketed....But our review [see: [REP 766](#)] showed that trustees aren't doing enough to enhance their members' retirement outcomes. We will take strong action to protect consumers against conduct that is not efficient, honest and fair in this sector'.

## ASIC's 'enduring' priorities

ASIC's 'enduring enforcement priorities' are: a) misconduct damaging market integrity; b) misconduct impacting First Nations people; c) misconduct involving a high risk of significant consumer harm; d) systemic compliance failures by large financial institutions; e) new or emerging conduct risks within the financial system; and f) governance and directors' duties failures.

[Sources: ASIC Chair Joe Longo, Keynote opening address at the ASIC Annual Forum 21/11/2023; Opening speech by ASIC Deputy Chair Sarah Court at the ASIC Annual Forum 21/11/2023; ASIC enforcement priorities 2024]

## New ASIC Commissioners commence their terms

- Australian Securities and Investment Commission Chair Joe Longo has [welcomed](#) the commencement of new Commissioners:
  - Simone Constant who's initial focus will be on markets and superannuation; and
  - Alan Kirkland, who's initial focus will be on insurance, credit and financial advisers and investment management.
- Mr Longo also confirmed that Commissioner Kate O'Rourke (who commenced her term in September 2023) is focused on banking and payments, audit, insolvency and registers.

[Source: ASIC media release 20/10/2023]

## In Brief | The AFR reports that the government is set to release a statement of expectations for ASIC focused on financial services, cyber and climate risk

[Source: The AFR 21/11/2023]

## Financial Services

### Consultation on new anti-scam industry Code for banks, telcos and social media platforms expected soon, smaller banks not proposed to be exempt and urged to engage in the consultation

The focus of Assistant Treasurer and Minister for Financial Services Stephen Jones' [15 November 2023 address to the Customer Owned Banking Association](#) (COBA) was the role of smaller banks in combatting online scams and new measures planned to be implemented to tackle the issue.

Mr Jones flagged plans to consult on a new industry code which said would impose 'tough new [anti-scam] obligations for banks, telcos and social media platforms'.

Mr Jones said that the planned consultation will seek feedback on various 'options for the sort of obligations that could apply' including:

- 'obligations to have anti-scam business plans in place;
- stricter authentication requirements for bank account applicants, customers and payees;
- methods to detect high-risk transactions and provide appropriate holds or warnings to customers; and
- procedures for consumers to quickly report and be notified of suspicious transactions or compromised accounts'.

Mr Jones also underlined the government's intention to work with industry in developing the Code stating that:

'For a code to work, it needs to be responsive to changes in the ecosystem. It needs to be clear, it needs to complement the work happening in other parts of the scams ecosystem, and it needs to support collaboration. It is in all our interests to work together and get this right'.

#### Smaller banks not proposed to be exempt

Mr Jones acknowledged industry concerns about smaller banks' ability to meet the additional anti-scam obligations given their limited resources, and the additional time smaller banks are likely to need to 'get up to speed' in light of these constraints, but underlined the government's commitment to push ahead with tightening requirements. Mr Jones stated:

'We are realistic...But we are also determined. There can be no weak spots in our fight against scams. If one part of our defence is weak, that part will become a target, and we will have succeeded only in shifting the problem from one part of the system to another'.

Mr Jones also called on smaller banks to 'focus on' and 'shut down' mule accounts – ie 'accounts that are fraudulently used as a funnel for stolen money'.

[Source; Assistant Treasurer and Minister for Financial Services Stephen Jones address to the Customer Owned Banking Association 15/11/2023]

### Consumer credit | Tackling predatory lending, DDO compliance, compliance with the reportable situations regime and combatting 'digitally enabled misconduct' highlighted as key enforcement priorities for ASIC

Our key takeaways from Australian Securities and Investments Commission (ASIC) Deputy Chair Sarah Court's [16 November address](#) to the Australian Retail Credit Association Credit Summit are below.

#### ASIC's enforcement priorities for the consumer credit sector

In light of current cost of living pressures and the increasing numbers of consumers experiencing financial distress, Ms Court said that ASIC's

'overarching concern...is that lenders take all necessary steps to avoid either causing or compounding such distress through poor conduct. Whether it be through predatory lending practices, non-compliance with consumer protections, the provision of high-cost credit and/or poor product design or distribution'.



## Lenders' obligations to support customers experiencing financial hardship:

- Ms Court reiterated the concerns raised, and the expectations set out in an [open letter to the CEOs of 30 large lenders](#) in August 2023 around lenders' obligations to support customers experiencing financial hardship and ASIC's expectations in this context. In particular, Ms Court emphasised that ASIC expects lenders to:
  - 'Proactively communicating how and when customers can seek assistance – and making it easy to do so;
  - Ensuring customer-facing staff are trained and have procedures in place to help them identify when a customer might be experiencing hardship;
  - Genuinely considering a customer's individual circumstances to develop sustainable solutions, where possible; and
  - Communicating regularly with customers throughout the assistance period'.
- Ms Court said that ASIC is collecting data on financial hardship applications from the 30 large lenders that received the letter, as well as 'reviewing' the practices of the ten lenders who are home loan lenders 'to understand their approach to customer hardship'.
- Ms Court also underlined ASIC's willingness to take action, including court action, to enforce consumer protection obligations where necessary, referencing (among other examples) ASIC's recent court action against a bank over its handling of hardship notices in support. Commenting on this example Ms Court observed:

'We took on this case because of the circumstances of those individuals, and because submitting a hardship notice can be a lifeline for people experiencing challenging financial circumstances, but this can only be the case if those notices are responded to promptly'.

## Predatory lending

Ms Court also flagged predatory lending as a continuing area of focus, stating that ASIC is

'particularly concerned where it appears to us that business models have been designed to avoid consumer credit protections'.

## Enforcing DDO compliance

- Ms Court said that the 'new tools' available to ASIC under the Design and Distribution Obligations (DDO) regime 'are becoming increasingly critical in...[ASIC's] work in credit regulation' where ASIC's chief focus is on 'protecting vulnerable consumers and those in financial hardship'.
- Again, Ms Court emphasised ASIC's willingness to use the full range of tools available to enforce compliance including through issuing stop orders and taking court action.
- Ms Court underlined ASIC's expectation that product providers 'monitor and review – on an ongoing basis – whether consumers are receiving products consistent with their needs, objectives and financial situation' observing that 'once a provider is on notice that consumers are experiencing poor outcomes from their products, active consideration needs to be given as to whether changes to the target market or distribution of the product needs to be made'.
- Looking ahead, in addition to increased scrutiny of Target Market Determinations (TMDs) where ASIC considers there remains room for improvement, Ms Court said that ASIC intends to focus on compliance with the 'reasonable steps' obligations (ie the actions taken by product issuers to ensure their products are distributed in line with the TMDs).
- Ms Court said that 'in the coming months' ASIC plans to commence a review into:
  - 'How product issuers distribute their products, including interacting with any product distributors, to ensure they are not straying beyond their target market;
  - How they monitor product governance arrangements; and
  - How they review data to ensure customers are receiving suitable products on a continuing basis'.

## Compliance with the reportable situations regime

- Ms Court said that 'ASIC has a number of concerns relating to compliance with the reportable situations regime' including:
  - 'that the proportion of licensees reporting remains very low. Indeed, since the regime commenced, only 11% of the licensee population has submitted a report. This suggests to us that many licensees may not be in compliance'.

- 'licensees are taking too long to identify and investigate some breaches – and that a significant number of remediation activities are taking too long to complete. In 17% of the reports received, it took the licensee more than one year to identify and commence an investigation into an issue after it had first occurred'.
- Ms Court said that reports lodged with ASIC are 'a critical source of regulatory intelligence...and [ASIC]...are now considering taking stronger action to improve compliance rates, including enforcement action where appropriate'.

### Tackling digitally enabled misconduct

- Ms Court said that ASIC is 'increasingly setting its sights on the cyber and operational resilience of our regulated entities'. As part of this work ASIC recently published the results of the 'cyber pulse survey' – a voluntary exercise intended to gauge regulated entities' level of cyber maturity. Ms Court also highlighted ASIC's work in taking down scam investment sites.
- From an enforcement perspective Ms Court observed that:
  - 'ASIC is one of a number of agencies that regulate cyber risk. While we are not seeking to prescribe technical standards nor to provide expert guidance, where we consider that an entity has not met its cyber risk management obligations, we may consider enforcement action to drive changes in behaviour'.

[Source: ASIC Deputy Chair Sarah Court Address at the Australian Retail Credit Association Credit Summit 16/11/2012]

## Improving access to financial counselling: Introduction of new industry funding model announced

### Context

- In response to the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry a [review into the coordination and funding of financial counselling services](#) (the Sylvan Review) was undertaken by Louise Sylvan in 2019.
- The Sylvan Review identified funding as the largest impediment to more people in financial hardship being able to access financial counselling and recommended industry contribute funding to help address this gap.
- The former government released [its formal response](#) to the Sylvan Review committing to 'introduce an industry funding model following consultations with industry and the financial counselling sector that will ensure predictability and stability of funding for generalist financial counselling services into the future' in 2020.

### New (voluntary) industry funding model announced

- On 21 November 2023, the government [announced](#), a new Industry Funding Model for Financial Counselling.
- Under the new model, industry – ie some industry bodies/companies in the banking and finance, energy, insurance, online gambling, Buy Now Pay Later and telecommunications sectors - have made a (voluntary) three year funding commitment of approx \$30 million to contribute to supporting provision of financial counselling services which will supplement existing funding from federal, state and territory governments.
- To date memorandums of understanding have been signed with the Australian Banking Association, the Australian Energy Council, the Insurance Council of Australia, Responsible Wagering Australia, Tabcorp, Afterpay and Telstra. The government has indicated that discussions with other industry representatives are ongoing including with additional representatives from the energy sector and debt collection sector.
- [Announcing this](#), Minister for Social Services Amanda Rishworth underlined that:
  - 'Today's announcement is our starting point, and we will continue to expect full sign-on. We are working to secure the additional funding from industry, and I anticipate we will secure a further \$1.5 million from industry by the end of the year'.

### Additional measures

- **New independent body:** To support the new industry funding model, the Minister also announced:
  - \$1.5 million in funding to establish a new not-for-profit independent body, to be established by Financial Counselling Australia in consultation with industry stakeholders, to 'to collect and distribute industry funding'.
  - This new body is planned to be established in 'early 2024'
- **Data initiatives and evaluation:** The government has also allocated funding (amount not specified) to 'data initiative and evaluation to inform the longer term approach to the model'.

## FCA has welcomed the announcement as a 'great first step' (though it considers a mandatory model would be preferable)

- [Financial Counselling Australia](#) (FCA) has welcomed these developments as 'a great first step which gives us a launch pad to work towards a viable, longer-term solution and make industry funding an enduring feature of funding for financial counselling'.
- The FCA has called on the industries and companies yet to commit, to join the model. These include:
  - the telecommunications industry (apart from Telstra);
  - the Buy Now Pay Later industry (apart from Afterpay);
  - the debt collection industry (apart from Credit Corp).
- The FCA's statement also submits that 'the patchy response from industries' confirms that 'the ultimate and most desirable outcome is a mandatory funding model, not a voluntary one'.

[Source: Minister for Social Services Amanda Rishworth media release 21/11/2023]

## Legislation to ban credit cards for online gambling has progressed to the Senate

- The [Interactive Gambling Amendment \(Credit and Other Measures\) Bill 2023](#) (Cth) was introduced into the House of Representatives on 13 September 2023 and passed the House on the 14 November 2023, the Senate Environment and Communications Legislation Committee having [recommended its passage](#). The Bill is now before the Senate.
- The [explanatory memorandum](#) states that the purpose of the Bill is to 'minimise the significant gambling harms experienced by Australians and reduce societal harms arising from interactive wagering services through the use of credit cards and related credit products'.
- Broadly, if enacted in its current form, the Bill would amend the Interactive Gambling Act 2001 (Cth) (the Act) to:
  - ban operators of regulated interactive gambling services from accepting or offering to accept payment (for online bets) from customers by credit card, credit related products or digital currency and create a new criminal offence and civil penalty provisions related to the ban
  - give the Australian Communications and Media Authority (ACMA) 'enhanced powers' to enforce the ban and compliance with it and other existing civil penalty provisions under the Act
  - make consequential changes/remove 'spent provisions'
- It's proposed that there would be a six month transition period (from the day the Bill receives Assent) to 'give banks and gambling service providers time to prepare for and implement changes necessary to ensure compliance with the new requirements'.
- The [Bill proposes to implement](#) the government's response to the recommendations from the November 2021 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Regulation of the use of financial services such as credit cards and digital wallets for online gambling in Australia.
- The Bill is [part of a broader suite](#) of measures/planned measures aimed at protecting from harms caused by online gambling.

[Sources: Interactive Gambling Amendment (Credit and Other Measures) Bill 2023; Joint Media release: Minister for Communications Michelle Rowland and Minister for Social Services Amanda Rishworth 13/09/2023;

## A Bill proposing to legislate an 'objective' for superannuation has been introduced

The [Superannuation \(Objective\) Bill 2023](#) (Cth) was introduced into the House of Representatives on 16 November 2023.

The Bill proposes to legislate the following 'objective' for superannuation:

'The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way (the objective)'.

The [policy intent](#) of the Bill is to:

'require policy-makers to demonstrate to the Parliament, and Australians, how future changes to superannuation law are consistent with the legislated objective'.



The [explanatory memorandum](#) emphasises that this is not intended to:

'change the operation or interpretation of existing superannuation law, prudential standards or governing rules of superannuation entities. For example, it will not change or prevent how members can currently access their superannuation such as the payment of a lump sum on retirement or early access to their superannuation in exceptional circumstances'.

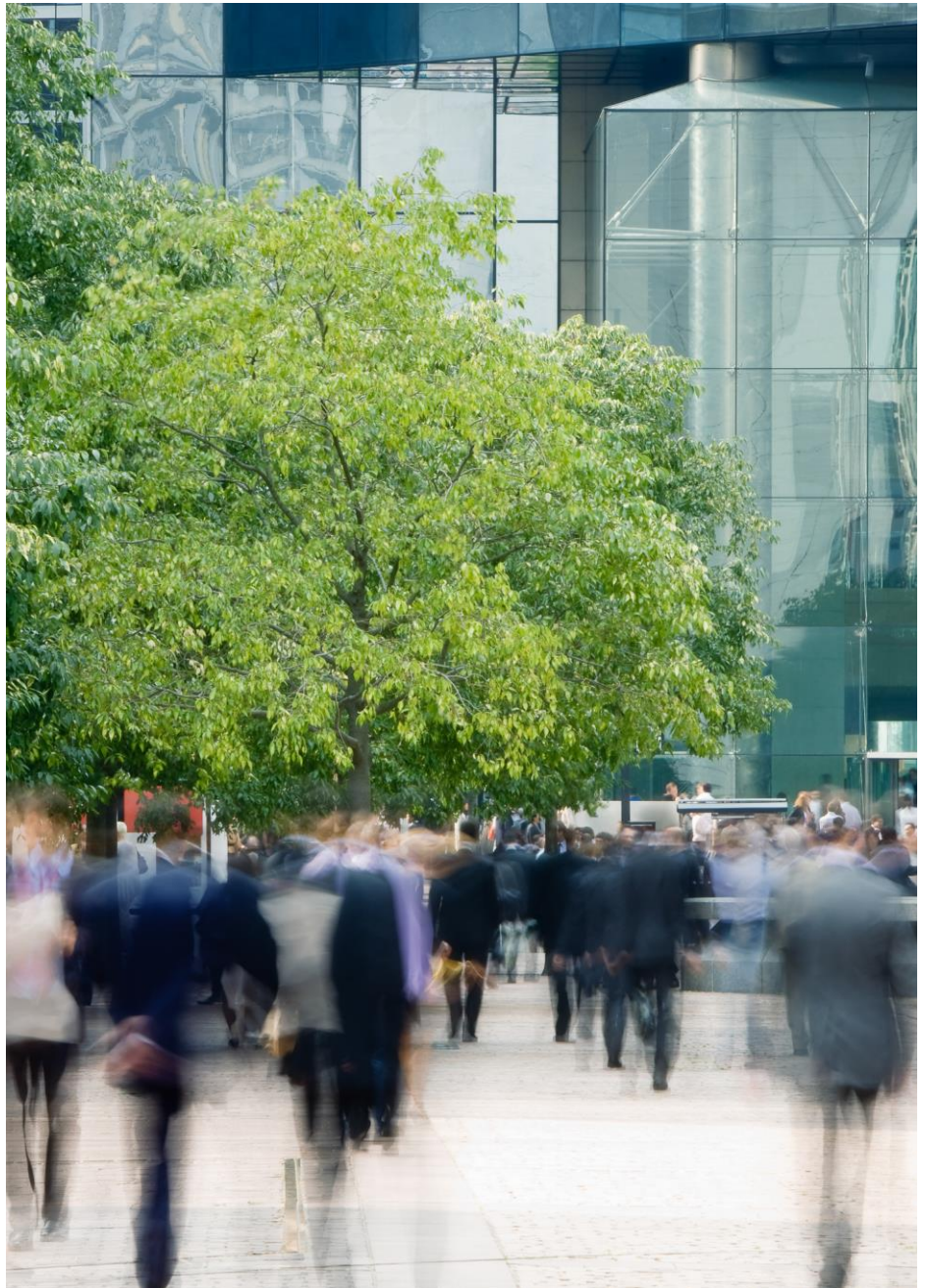
**Proposed timing:** It's proposed that the changes would commence 28 days after Assent is given.

In a statement welcoming the introduction of the Bill the Association of Superannuation Funds of Australia (ASFA) Interim CEO, Leanne Turner [said that](#):

'As drafted in this Bill, the Objective will underpin policy stability and help anchor future policy debates in ensuring our Age Pension remains affordable, that superannuation savings

are preserved to retirement, and that the system delivers in an equitable manner for women and low-income earners. Importantly, the legislation acknowledges the role group insurance through super can play in delivering valuable protection to the community and supporting a dignified retirement, as well as the overall contribution insurance makes to the sustainability of the system. ASFA supports the formalisation of an objective for superannuation that holds stakeholders across the system accountable for the long-term retirement outcomes of Australians and which encourages stability in the policy settings and the security of members' benefits'.

[Source: [Superannuation \(Objective\) Bill 2023 \(Cth\)](#)]



## ASIC consults on proposed changes to the ABA's Banking Code

The Australian Securities and Investments Commission (ASIC) has released:

- proposed changes to the Australian Banking Association's Banking Code of Practice (Code)
- proposed changes to the Banking Code Compliance Committee Charter; and
- a (proposed) new customer-facing document entitled the Customer Guide: Banking with confidence: your key rights and protections as a customer.



for consultation ahead of making a decision on whether to approve the updated Code. This is the first time that ASIC has undertaken consultation ahead of making such a decision.

## Proposed updates to the Code

The proposed changes to the Code are summarised in ASIC's consultation paper [CP 373](#) at p12-13.

Key changes include:

- An updated definition of small business, which increases the upper limit of aggregate borrowings from \$3 million to \$5 million.
- The removal of a number of provisions in the existing Code which the ABA considers 'to be duplicative of other legislative or regulatory obligations'. These provisions include (among others);
  - the commitment to exercise the care and skill of a diligent and prudent banker when considering providing a new loan or an increase in a loan limit to an individual customer that is not a business
  - commitments relating to a deferred sales period for the sale of consumer credit insurance with credit cards and personal loans sold in branches or over the phone
  - commitments relating to customers experiencing financial difficulty
  - commitments relating to dispute resolution/complaints
  - certain privacy commitments
- Less frequent reviews of the Code – the Code is proposed to be reviewed every five years (as opposed to every three years)

## Focus of the consultation

The issues on which ASIC is seeking feedback are set out in ASIC's consultation paper CP 373.

These include:

- whether the proposed Code imposes obligations on subscribers that are beyond those required by the law and, in doing so, addresses key potential consumer harms;
- whether the proposed Code provides for effective administrative systems for monitoring compliance and whether the obligations are capable of being enforced;
- whether any Code review recommendations that the ABA has not supported should be included in the proposed Code;
- whether the recommendations accepted by the ABA are appropriately reflected in the proposed Code and proposed Charter;
- whether the proposed Code strikes an appropriate balance between simplifying the Code and minimising regulatory duplication on the one hand, and promoting consumer awareness of protections applicable to their banking relationship on the other; and
- the role of industry guidelines.

## Planned next steps

The due date for submissions is 15 January 2024.

ASIC plans to make a decision on whether to grant approval 'in the first half of 2024'.

[Sources: ASIC media release 17/11/2023; ASIC Consultation paper: CP 373 Proposed changes to the Banking Code of Practice]

# Risk Management

## Government's new national cyber strategy to include additional supports for small business

The government has [announced](#) that the yet-to-be-released 2023-2030 Australian Cyber Security Strategy is set to include two new measures to 'support small and medium businesses to strengthen their cyber security capabilities'. Namely:

- \$7.2 million in funding to establish 'a voluntary cyber health-check program' which will 'allow businesses to undertake a free, tailored self-assessment of their cyber security maturity'. Businesses with higher risk exposure will also be able to access a 'more sophisticated, third party assessment to provide additional security across national supply chains'. It's envisioned that this will be used by businesses to assess the current state of their cyber maturity and the educational tools they need to lift their capabilities.
- \$11 million to fund the 'Small Business Cyber Resilience Service' which will provide 'one-on-one assistance to help small businesses navigate their cyber challenges, including walking them through the steps to recover from a cyber attack'.

[Source: Joint media release: Minister for Home Affairs and Cyber Security Clare O'Neil and Minister for Housing, Homelessness and Small Business Julie Collins 20/11/2023]

## Strengthening the public sector whistleblower scheme | Consultation opens on second stage of reforms

### Context: Implementing Phase 1 of the Moss Review recommendations

- The [Public Interest Disclosure Amendment \(Review\) Bill 2022](#) (Cth) (Bill) passed both Houses on 15 June 2023 and received Assent on 19 June 2023.
- The changes contained in the Bill implement the government's response to 21 of the 33 recommendations in the 2016 Review of the Public Interest Disclosure Act (Moss Review) and are also informed by other parliamentary committee reports.
- Broadly, the changes in the Bill aim to strengthen protections for public sector whistleblowers (covered by the public sector whistleblowing scheme under the Public Interest Disclosure Act 2013 (Cth) (PID Act)) in various respects as well as implement changes to improve the administration and oversight of the scheme.
- The [replacement explanatory memorandum](#) sums up the five main changes introduced by the Bill as follows. Broadly, the Bill will:
  - 'make it easier for agencies to administer the PID scheme by providing greater flexibility in how they handle disclosures
  - provide increased protections for disclosers
  - enhance oversight of the scheme by the Office of the Commonwealth Ombudsman (Ombudsman) and the IGIS [Inspector General of Intelligence and Security]
  - make it easier for a disclosure to be investigated under another law or power, including by the National Anti-Corruption Commission (NACC), where this is more appropriate than dealing with the disclosure under the PID Act, and
  - improve information-sharing provisions, giving agencies more confidence to share information relating to a disclosure to ensure it can be investigated by the most appropriate agency'.
- Announcing the passage of the Bill, Attorney General Mark Dreyfus described the Bill as:

'a significant milestone towards a best practice whistleblowing framework for the public sector, which will support the establishment of the National Anti-Corruption Commission'.

### Consultation on second round of reforms now open

The government has released a [consultation paper](#) seeking views on proposals to implement the second stage of reforms to strengthen the public sector whistleblowing framework.

Broadly, views are sought on:

- whether there is a need to establish a Whistleblower Protection Authority or Commissioner,
- the remaining recommendations from the Moss Review including (for example) broadening who can receive an 'internal disclosure' within government (Recommendation 2 of the Moss Review).
- recommendations from other relevant reports and reviews.

A table summarising the recommendations of the Moss Review and other reviews referenced in the consultation paper is included at [p30 of the Consultation Paper](#). A full list of consultation questions is included at [p27 of the Consultation Paper](#).

## Timing

The due date for submissions is **22 December 2023**.

[Source: Attorney General's Department consultation: Public sector whistleblowing stage 2 reforms 16 November – 22 December 2023]

**In Brief | Reports of cybercrime submitted through ReportCyber have jumped 23% on last year: The latest Cyber Threat Report from the Australian Signals Directorate's Australian Cyber Security Centre confirms that 'malicious cyber activity in Australia continued to increase in terms of frequency, cost and severity' compared with last year**

[Source: ASD Cyber Threat Report 2022-23]

## Other News

### Federal Court proposed to have jurisdiction over corporations matters: New Bill introduced

The [Attorney-General's Portfolio Miscellaneous Measures Bill 2023 \(Cth\)](#) was introduced into the House of Representatives on 16 November 2023.

Among other things, the proposed changes would:

'[confer jurisdiction](#) on the Federal Court of Australia (Federal Court) to hear and determine a range of summary and indictable offences relating to conduct within the regulatory remit of the Australian Securities and Investments Commission (ASIC).'

This new jurisdiction would operate concurrently with the existing jurisdiction of State and Territory courts in relation to these offences.

**Proposed timing:** It's proposed that these changes would commence on the day after the Bill receives Assent.

[Source: Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth)]

### Top Story | Starter gun fired on merger reforms in Australia

After a lengthy ACCC advocacy campaign, Australia's new Competition Taskforce has [commenced consultation](#) on potentially wide reaching reforms to Australia's merger control regime with the release of a [consultation paper](#).

The Taskforce is accepting submissions from interested parties until 19 January 2024.

MinterEllison has released an article highlighting the key issues on which the Taskforce is seeking feedback, namely: proposed changes to merger control processes and the test that is applied by the ACCC.

You can find the full text here: [Starter gun fired on merger reforms in Australia - Insight - MinterEllison](#)

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