

FINANCIAL SERVICES REGULATORY UPDATE

True Oak develops and distributes a monthly overview of current and proposed regulatory changes in the Australian financial services industry that we think might be of interest to our CAR clients and Trustee Services clients.

FEATURE ARTICLE

This month's feature article comes from Holley Nethercote Lawyers – www.hnlaw.com.au. For a copy of the full article, please reach out to Simone at simone@trueoakinvestments.com.au.

Some practical lessons on the regulatory “wildcard”: the efficiently, honestly and fairly obligation

Section 912A of the *Corporations Act 2001* sets out the “ten(ish) commandments” for AFS licensees, the first of which is the obligation for a licensee to do all things necessary to ensure that financial services covered by its licence are provided efficiently, honestly and fairly (“the EHF obligation”). Recent regulatory actions have shown that ASIC has not been shy about cracking down on licensees for alleged breaches of this “first commandment”. This article highlights some practical lessons to be learned from ASIC and court actions in the past 18 months.

Lesson #1: The EHF obligation is a separate, standalone obligation

While a breach of the EHF obligation is often coupled with other contraventions of the Corporations Act, such as the misleading or deceptive conduct provisions, more recent case law has demonstrated that it can be breached even where there is no contravention of an existing duty or obligation.

The requirement to provide financial services efficiently, honestly and fairly is not just a “mission statement” for good corporate governance; it is a standalone, civil penalty provision actionable in court, and one of ASIC's favourite weapons.

While it is still unclear whether the EHF obligation should be interpreted compendiously or whether it imposes three standalone obligations, recent judicial commentary suggests that the duty comprises of three separate obligations, so that a failure to discharge one – for example, providing services honestly and fairly, but not efficiently – could lead to a finding that the entire EHF obligation is breached

Lesson #2: Prevention and remediation are key

Compliance with the EHF obligation does not “require commercial perfection whereby any possibility of error or mistake is eliminated”. Licensees should implement robust processes and procedures that *prevent* bad things from happening and, if those bad things happen, to *remediate* and *reassess* their processes so that those things are unlikely to happen again.

ASIC and the courts are not finding EHF breaches on the basis of a *single* error, a *single* transaction or a *single* oversight. Breaches are more often being alleged and found where licensees fail to implement effective compliance frameworks leading to *systemic* errors, *systemic* failures to detect and prevent fraudulent or illegal activity, or *systemic* delays. A licensee is more likely to breach the EHF obligation where the licensee learns of, or ought to have learnt of, the error and does not take steps to rectify or remediate in a timely manner.

Lesson #3: Consider community expectations

Recent breaches (and alleged breaches) of the EHF obligation have all been focused on consumer protection.

Breaches (alleged or proven) tend to be due to poor client treatment, and ASIC and the courts are influenced by community (or clients') expectations of how the licensee would provide financial services given its size, reputation and role in the Australian market. Licensees should review their policies, processes, disclosures, targets and timelines for providing their service – all from a client's perspective, to assess whether anything falls below the “community expectations” line.

GOVERNMENT

1. PJC Tables Report into Wholesale Investor and Client Tests

The Parliamentary Joint Committee on corporations and financial services has tabled its report on the wholesale investor and client tests in the Senate. The report is available [here](#).

By its own acknowledgment, the committee “did not reach any conclusive view or recommendations on these matters”.

While the report noted a large number of submissions calling for an increase to the wholesale thresholds, it ultimately decided that there was a lack of evidence of harm and potential negative impacts of changing the levels.

“During the inquiry, the committee was not persuaded by the examples of investor harm identified by ASIC and other submitters as having been caused by the current settings of the test thresholds,” the report said.

Additionally, although it accepted that deliberately fraudulent misclassification of investors was an issue, “increasing the test thresholds would have no impact” on this problem, nor would it affect the “regulation and effectiveness of consumer protections in the retail investment market”.

The committee was far more persuaded by arguments that an increase in the wholesale thresholds would reduce the pool of available investors and clients and, therefore, “generally increase the risk to investors by reducing their ability to diversify and reduce levels of innovation and competition in Australia’s financial services industry”.

“More particularly, the committee heard that increasing the test thresholds would be disruptive to established funds and investors, to the extent that significant numbers of investors currently operating as wholesale investors would be reclassified as retail investors,” it said.

Instead, the PJC recommended that the government consider establishing a mechanism for periodic review of the operation of the wholesale investor and client tests.

While it did not push for any changes to the wholesale test, the committee did recommend amending the Corporations Act to make the sophisticated investor test less subjective in order to bolster its utilisation.

The release of the Committee’s report is expected to remove a barrier to the completion of the separate Treasury review into Managed Investment Schemes.

2. Passes Scams Prevention Legislation

On 13 February 2025, the [Scams Prevention Framework Bill 2025](#) passed both Houses of Parliament. The Framework requires designated entities to prevent, detect, disrupt, respond and report scams and attempted scams.

A scam under the SPF is a direct or indirect attempt (whether or not successful) to engage an SPF consumer of a regulated service where it would be reasonable to conclude that the attempt:

- Involves deception; and
- Would, if successful, cause loss or harm including the obtaining of SPF personal information of, or a benefit (such as a financial benefit) from, the SPF consumer or the SPF consumer’s associates.

The Scams Prevention Framework empowers the ACCC to investigate potential breaches and take enforcement action where entities do not take reasonable steps to fulfill their obligations under these principles.

Where a business is unable to satisfactorily resolve a complaint, consumers will have access to a single external dispute resolution (EDR) body. The Australian Financial Complaints Authority (AFCA) will deliver EDR for the three initial sectors. AFCA will be able to consider the actions of each business connected to a scam complaint and award compensation having regard to the business' proportionate responsibility for the loss.

Treasury stated that the Government will initially designate banks, telcos, and social media companies under the Framework. Those businesses will be subject to comprehensive and enforceable sector-specific rules for what they must do to protect Australians.

The Federal Government has published [a guide](#) on the implementation and key features of the SPF.

ASIC

3. Intensifies Focus on Private Markets

ASIC has released a paper titled [Australia's Evolving Capital Markets: A Discussion Paper on the Dynamics Between Public and Private Markets](#).

The paper, which seeks to open a discussion on ASIC's regulatory approach and gather actionable ideas to improve Australia's capital markets, highlights a clear connection between the increasing role of superannuation in the economy and the growth of private markets - an area where ASIC currently lacks visibility.

The paper highlights that as public markets shrink and "opaque" private markets expand, ASIC is keen to explore how it can make public markets more attractive and enhance transparency in private markets without hindering their evolution.

8 key questions form the foundation of the Paper:

1. Are the changes in Australia's public and private markets due to structural or cyclical shifts (or both)?
2. What impacts will the continual growth of superannuation funds have on Australia's capital markets?
3. Do regulators have access to the right data to understand the impact of changes in our capital markets on the economy?
4. What data do we have to understand how private capital – both debt and equity – will respond in a system stress scenario?
5. What does market integrity look like in practice as more capital raising occurs outside public markets?
6. Is the shift to private markets creating issues for retail investors such as reduced access to investment opportunities and greater exposure to risk, with fewer protections?
7. Does there need to be greater harmonisation in the regulation of public and private companies?
8. How can Australia's capital markets remain attractive and meet future economic needs?

Submissions on the paper are open until 28 April 2025. An update will be released later in 2025 to reveal key industry feedback and how such feedback has informed ASIC's priorities and work program.

Linked Article: [Industry calls for clearer disclosure, not overregulation, in private markets](#) – While the sector sees merit in additional disclosure requirements, there is broad consensus that a heightened regulatory burden could undermine the fundamental appeal of the asset class. (Investor Daily, 26 February 2025)

Linked Article: [Regulatory scrutiny of private capital increases](#) - In this *Insight*, we explore the Discussion Paper and outline the regulatory tools ASIC may use to investigate and enforce its concerns, and the steps that private capital funds, managers and superannuation funds might consider to mitigate the risk of enforcement action. (Allens Lawyers, 28 February 2025)

4. Consults on Additional Relief under the Reportable Situations Regime

ASIC is [proposing relief](#) from reporting certain breaches of the misleading and deceptive conduct (MDC) provisions and certain contraventions of civil penalty provisions (CPPs), when:

- a. the breach has been rectified within 30 days from when it first occurred (this includes paying any necessary remediation);
- b. the number of impacted consumers does not exceed five;
- c. the total financial loss or damage to all impacted consumers resulting from the breach does not exceed \$500 (including where the loss has been remediated); and
- d. the breach is not a contravention of the client money reporting rules and clearing and settlement rules.

Feedback is due by [11 March 2025](#).

5. Addresses Senate Estimates

During February ASIC [addressed](#) the Senate Economics Legislation Committee's 2024-2025 Additional Budget Estimates, outlining key regulatory priorities and developments.

ASIC highlighted:

- a. A decline in initial public offerings, driven by increasing private capital investment and domestic superannuation growth, and its release of a discussion paper seeking feedback on balancing market accessibility with investor protection.
- b. The newly established ASIC Simplification Consultative Group, which aims to streamline legal processes and reduce regulatory complexity.
- c. Enforcement activity has increased, with a 20% rise in investigations and civil litigation filings, focusing on greenwashing, cryptocurrency, predatory lending, high-cost credit, and insider trading.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

Sophie Grace Compliance Videos

Consultancy [Sophie Grace](#) has released a number of compliance-based videos that can be purchased separately. Consider, in particular, [AFSL Wholesale Client Qualification](#) and [What Things Must Not Be On Your Website](#).

Carbon Market Institute Courses

- a. **Carbon Market Fundamentals Training:** e-learning course provides participants with an overview of the scientific and economic basis for carbon markets. More info [here](#).
- b. **Carbon Farming Banker Training:** This finance sector-focused module builds capacity and knowledge of carbon farming in Australia from the perspective of bankers and agri-lenders. More info [here](#).

March 2025

- a. APAC 2025 – **AM Tech Day** (Sydney – 11 March) – more info [here](#).
- b. Australian Investment Council – **Foundations of Directorship** (Sydney, 14 + 21 + 28 March) – more info [here](#).
- c. Piper Alderman – **Cyber Security and Mismanagement: Safeguarding Your Organisation** (Melbourne or online, 18 March) – more info [here](#).
- d. Climate Zeitgeist – **Climate Investor Forum** (Melbourne – 19 March) – more info [here](#).
- e. Australian Investment Council – **Principles of Private Debt** (Sydney – 19 March) – more info [here](#).
- f. EEC – **Industrial Decarbonisation Summit** (Sydney – 27 March) – more info [here](#).

April 2025

- a. Forestry Australia – **2025 Forest Carbon Summit** (Canberra – 10-11 April) – more info [here](#).
- b. Australian Investment Council – **Foundations of Private Capital** (Sydney – 15-17 April) – more info [here](#).
- c. CyberDaily – **Australian Cyber Summit 2025** (Sydney – 29 April) – more info [here](#).

May 2025

- a. Carbon Market Institute – **Carbon Farming Industry Forum** (Lennox Head, NSW – 6-8 May) – more info [here](#).
- b. International Business Review – **Investment Performance Measurement, Attribution and Risk Management 2025 Conference** (Sydney – 20-21 May) – more info to come.

July 2025

- a. Investor Daily – **Australian Wealth Management Summit** (Sydney – 31 July) – more info to come.

August 2025

- a. Carbon Market Institute – **12th AER Summit** (Melbourne – 13-14 August) – more info [here](#).

INTERESTING READS

Links to interesting blogs and articles I've recently read:

- a. [Building the Foundations for Responsible AI Investing](#) – Generative artificial intelligence (Gen AI) is the fourth wave of technology, following from the mainframe, personal computer internet and mobile waves. These prior waves of innovation have transformed industries from retail to media to e-commerce and now Gen AI has the potential to transform a broader range of industries, underscoring the critical need for responsible deployment amid challenges and risks. (FS Super, February 2025)
- b. [The State of Australian Start-Up Funding](#) - This State of Australian Startup Funding Report marks the 4th year Australian funds, founders, and contributors have come together to highlight the scale and breadth of an industry that barely existed only 10 years ago. (February 2025)
- c. [2024 regulatory enforcement trends and what they mean for the year ahead](#) – The future trajectory of regulatory enforcement in Australia signals a rigorous continuation of last year's priorities while adapting to new challenges on the horizon. This report delves into how the pivotal themes from 2024

are expected to mould the enforcement landscape in 2025, with significant implications for risk profiles across sectors. (Allens Lawyers, 5 February 2025)

- d. [Using gen AI tools for business? Be aware of the \(many\) limitations on your IP protections](#) - To assist businesses to make informed decisions about which AI tools to use and for what purposes, we have conducted an in-depth analysis of the terms and conditions applicable to a range of commonly used, off-the-shelf generative AI tools from an intellectual property perspective. (Allens Lawyers, 19 February 2025)

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