

Horizon scanning – regulatory developments in Australia

October 2022

With the election outcome signalling a ‘climate mandate’ of some description, it’s likely that we will see renewed efforts to introduce enhanced climate disclosure and standardised reporting obligations to bring Australia in line with many other jurisdictions.

The challenge of how best to regulate cryptocurrency and digital assets remains on the agenda for 2022; how the new Labor Government intends to balance the twin objectives of protecting consumers and encouraging innovation is yet to be seen.

The focus on cyber threats (and business continuity more generally) will continue from policy makers and regulators alike, as they grapple with both the national security and market stability implications, and the adequacy of firms’ preparedness for shock and disruption in their governance and risk management practices.

Regulators will also ramp up the focus on larger firms’ implementation of 2021’s agenda such as the introduction of Design and Distribution Obligations (DDO), new breach reporting requirements and the LIBOR sunset milestones.



Key regulatory developments from the past 12 months

Design and Distribution Obligations – The DDO regime came into effect on 5 Oct 2021. This regime requires insurers and distributors of most financial products to design and distribute products in accordance with target market determinations.

Breach reporting – The new breach reporting obligations for Australian Financial Services and Credit licensees commenced on 1 October 2021, and introduced reporting requirements for a broader range of reportable situations.

General Insurance Code of Practice – Introduced on 5 October 2021, the new code sets out standards that general insurers must meet when providing services to their customers.

Corporate Collective Investment Schemes – This new company legal structure has now been introduced, and registration of these new entities has been permitted since 1 July 2022. This new structure can be either a wholesale or retail scheme and allows investors to purchase shares in the vehicle, which can have at least one sub-fund sitting underneath (which is quarantined and has its own class of shares).

LIBOR transition – Publication of 24 of 35 LIBOR settings permanently ceased, as prescribed by the UK Financial Conduct Authority (FCA).

Strengthening Australia's Cyber Security Regulations and Incentives – A consultation has been undertaken to introduce a significant range of new regulations and incentives (and follows the 2020 Australian Cyber Security Strategy). The consultation period has now closed; 143 submissions were received and are awaiting feedback.

Security of Critical Infrastructure Act 2018 – Following on from the introduction of the expanded critical asset definitions that took effect in December 2021, the Federal Government has passed another round of the amendments, which will impose enhanced cybersecurity obligations for nominated assets and introduce new risk management obligations.

Australian Data Strategy – The Federal Government released its first whole-of-economy Data Strategy on 14 Dec 2021, following the development of Australia's first National Data Security Action Plan announced on 6 May 2021.



Upcoming and anticipated regulatory changes

Replacement of the Banking Executive Accountability Regime (BEAR) by the FAR (Financial Accountability Regime): The main objective of the FAR is to improve the transparency and accountability of the banking, insurance and superannuation sectors in relation to prudential and conduct-related matters. Under this proposed framework, the FAR would extend to provisions modelled in the BEAR to registrable superannuation entity licensees and insurers regulated by APRA.

Currently, APRA and ASIC are working together to develop the joint administration framework and infrastructure in preparation for the anticipated implementation of the FAR. After the development of their public Joint Administration Agreement (JAA), APRA and ASIC will jointly administer the extended regime. The FAR will provide a holistic accountability framework for directors and senior executives of authorised deposit-taking institutions (ADIs) and their subsidiaries, as well as other APRA-regulated industries.

Following the introduction and passage of the Financial Accountability Regime Bill 2021 in spring 2021, the Bill lapsed, following the calling of the 2022 Federal Election.

New market integrity rules: This year, ASIC introduced new market integrity rules. These rules were primarily aimed at promoting technological and operational resilience of securities and futures market operators and participants. These changes recognise previous technological and operational risks faced by Australia's markets, such as the November 2020 ASX outage, and will apply from 10 March 2023. Key rules relate to change management, outsourcing, information security, business continuity planning, governance and resourcing, and trading controls.

The new rules also extended the prohibition on certain payments to market participants for their order flow, which can lead to poor client outcomes. This seeks to prevent this practice from emerging in Australia.

Some other rule changes have also been included such as a “good fame and character test” for market operators in securities and futures markets, and introduction of suspicious reporting requirements in the futures markets similar to the securities markets.

Remuneration: The cross-industry Prudential Standard CPS 511 Remuneration (CPS 511) introduces more stringent requirements on remuneration and accountability to create more balanced incentive structures, promoting financial resilience and supporting better outcomes for customers. APRA has also supplemented CPS 511 with the Prudential Practice Guide CPG 511 Remuneration (CPG 511) which sets out guidance and examples of better practice in regard to meeting CPS 511 requirements. APRA-regulated entities will be required to comply with the new CPS 511 requirements from 1 January 2023, under a staged implementation approach:

- ADIs that are significant financial institutions (SFIs) from 1 January 2023;
- Insurance and registrable superannuation entity (RSE) licensees that are SFIs from 1 July 2023; and
- Non-SFIs (across all APRA-regulated industries) from 1 January 2024.

To support the new CPS 511, APRA has recently sought feedback on proposals to strengthen remuneration disclosure and reporting requirements for APRA-regulated insurers, superannuation funds, and banks.



Contingency and resolution planning: APRA recently closed its consultation for two new prudential standards to strengthen the preparedness of banks, insurers and superannuation trustees to respond to future financial crises. CPS 190 Financial Contingency Planning (CPS 190) ensures all APRA-regulated entities have plans to respond to severe financial stress. CPS 900 Resolution Planning (CPS 900) demands that large or complex APRA-regulated entities take pre-emptive actions such that, in the event of their failure, APRA can ensure limited adverse impacts on the community and the overall financial system.

APRA proposes that CPS 190 and CPS 900 both come into force from 1 January 2024 with further consultation on supporting guidance material in 2022. However, for superannuation trustees only, CPS 190 will come into force on 1 January 2025.

Operational risk: In 2022, APRA plans to consult on enhanced requirements for operational risk management, introducing the new Prudential Standards CPS 230 that will revise existing requirements in CPS 231 Outsourcing and CPS 232 Business Continuity Management, and the equivalent superannuation standards. The new standard is expected to come into effect in 2024 and will set out minimum expectations for systems, control and remediation on operational risk, business continuity and third party arrangements.

ADI Disclosure Requirements: In a letter dated 2 September 2021, APRA announced an updated timeline for revisions to APS 330, which sets out requirements for periodic disclosure information of an entity's capital adequacy, capital instrument, remuneration practices, and other indicators of financial condition and risk profile. APRA released its proposed amendments for consultation on 6 July 2022; the final standard will be released in late 2022 and will come into force from 1 January 2024.

Open Banking: The new Open Banking regime was first rolled out to major banks in 2020–2021 and is now in its final phase of implementation across non-major ADIs. It is expected that the roll-out will be completed with full data transfer for customers available in 2022. This has generated renewed focus on data governance, risk and customer experience as all ADIs now have a mandatory obligation to share consumer data with accredited third parties.

Payments Ecosystem: A range of developments are now underway as the previous Federal Government agreed to implement 14 of the 15 recommendations made by the Payment System Review in 2021. The more significant recommendations relate to modernising the existing payments and licensing frameworks, for example:

- Developing a 5-year plan for the payment ecosystem in 2022, assessed annually to address future challenges and opportunities;
- Introducing a single, tiered payments licensing framework with a defined list of payment functions. Under this framework, applicants would apply solely through ASIC and there would be separate authorisations for the provision of payments facilitation services and the provision of stored-value facilities, and two tiers of authorisations based on the scale of the activity performed by the payment service provider. Consultation is expected to conclude by the end of 2022; and
- Expanding the definition of “payment system” in the Payment Systems (Regulation) Act 1998. This is in response to emerging payment systems that are part of the changing and growing payments ecosystem. Under the current outdated definitions, the RBA's regulatory powers may not adequately capture the full suite of systems and participants in the payments ecosystem such as digital wallet providers and buy-now-pay-later services. Consultation is expected to conclude in 2022.



Digital Currencies and Assets: Following the recommendations by the Bragg Report in 2021, the previous Federal Government planned to consult upon and review Australia's regulatory framework for crypto-assets.

- Treasury has subsequently consulted on the establishment of a market licensing regime for Digital Currency Exchanges, including capital adequacy, auditing and responsible person tests under the Treasury portfolio. Treasury has also consulted on establishing a custody or depository regime for digital assets with minimum standards under the Treasury portfolio; and
- Looking forward, Treasury will consult on the appropriate regulatory structure for innovative corporate structures like Decentralised Autonomous Organisations. It will also work with the Board of Taxation to review the policy framework for the taxation of digital transactions and assets. Separately, Treasury and the RBA will continue to assess the viability of a retail CBDC in Australia.

Foreign Financial Service Provider Licensing: Following the introduction of the Foreign Australian Financial Services Licence in March 2020, ASIC have undertaken another consultation process into licensing of foreign financial service providers (**FFSPs**). The outcome of this consultation process is still outstanding, and the prior relief for FFSPs (including Sufficient Equivalence Relief and Limited Connection Relief) has been extended until 31 March 2024. The Funds Management Relief, proposed simultaneously with the Foreign AFSL, has also had its implementation date extended until 1 April 2024.

In addition to the above, in February 2022, the Treasury Laws Amendment (Strengthening and Improving Economic Outcomes for Australians) Bill 2022 was introduced in the House of Representatives. This Bill set out the Comparable Regulator Exemption, which was similar to the prior Sufficient Equivalence Relief, and exempted entities who were regulated in certain jurisdictions which ASIC deemed to be equivalent or comparable to Australia, and thus placed fewer obligations onto those entities. It also set out a Professional Investor

Exemption, which would allow FFSPs' whose head office and principal place of business is outside of Australia, to provide financial services from outside of Australia, if it is only to professional investors or wholesale clients. Following the change of Government in June 2022, it is unclear if this Bill will continue through Parliament.

Climate change financial risk: In March 2022, APRA commenced a survey of medium-to-large APRA-regulated entities, asking them to voluntarily self-assess how their current practices align with APRA's Prudential Practice Guide CPG 229 Climate Change Financial Risks (**CPG 229**). APRA published their findings on 4 August 2022. APRA received responses from 64 medium-to-large institutions, and suggested that these entities were generally aligning well to APRA's CPG 229, especially in areas of governance and disclosure but found that only a small portion of survey respondents indicated that they had fully incorporated climate risk across their risk management framework. Other key observations included:

- four out of five boards oversee climate risk on a regular basis, while 63% have incorporated climate risk into their strategic planning process;
- almost 40% of respondents said climate-related events could have a material or moderate impact on their direct operations;
- 73% of respondents said they had one or more climate-related targets in place, however 23% of institutions do not have any metrics to measure and monitor climate risks; and
- 68% said they have publicly disclosed their approach to measuring and managing climate risks, with 90% of those aligning their disclosure to the Taskforce for Climate-related Financial Disclosures (TCFD) framework.





LIBOR transition: Publication of synthetic JPY LIBOR settings (1-month, 3-month and 6-month tenors) are due to cease on 31 December 2022. The FCA also intends to consult during 2022 as to discontinuing 1-month, 3-month and 6-month GBP LIBOR settings on this date. Organisations with longer-dated legacy exposure to these JPY and GBP LIBOR settings should actively prepare to transition in advance to other benchmarks (eg TONA or SONIA respectively).

Following this, publication of remaining USD LIBOR settings (overnight, 1-month, 3-month, 6-month and 12-month tenors) will cease in mid-2023. Organisations with longer-dated legacy exposure to these settings should actively prepare to transition in advance to other benchmarks (eg SOFR or Term SOFR).

UK Consumer Duty: In the UK, the FCA is on course to set a higher standard of protection for retail customers with the publication of its new Consumer Duty rules. For financial services firms engaging in regulated activities in the UK, this will likely require a fundamental shift in impacted firms' strategies and business models, and a significant evolution in many organisations' approach to product design, consumer interactions and ongoing testing and oversight

capabilities. It is likely that the FCA's approach will influence other conduct and consumer protection regulators globally, including ASIC. You can read more about how this may impact Australian Financial Services Licensees [by clicking here](#).

Privacy reforms: Submissions have closed on the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the Online Privacy Bill) and associated consultation Regulation Impact Statement. The Online Privacy Bill proposed to strengthen the Privacy Act 1988 and enable the introduction of a binding online privacy code (OP Code) for social media and other online platforms such as data brokerage companies. It also proposed to update the Office of the Australian Information Commissioner's enforcement powers and increase penalties for breaches. If the Online Privacy Bill is introduced to the Parliament and an OP Code is adopted, impacted organisations are expected to be subject to significantly more prescriptive obligations relating to protection of personal information, consumer transparency and obtaining consumer consent.

Questions on how these regulatory developments may impact you? Please reach out to:

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