

## Article Information

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## Five minutes in financial services - March 2023

**Partners, Andrea Beatty, Shannon Adams and Joshua Annese provide an update on key reforms and developments in financial services for February 2023.**

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### What did Santa bring for 2023?

The holiday period seems a long distant memory, both for us and seemingly for our politicians and regulators – February was a mega month of financial services enforcement activity, regulatory developments and proposals for reform.

#### BNPL

The regulation of Buy Now, Pay Later (**BNPL**) products is on the table following the publication of Treasury's [Options Paper](#) in November, with 'Option 3' (bringing the regulation of BNPL regulation in line with existing consumer credit products) emerging as the preferred option in the court of public opinion. It's unsurprising that larger lenders with established frameworks compliant with the *National Consumer Credit Protection Act 2009* (Cth) would support more onerous regulatory obligations for BNPL products. The Australian Finance Industry Association, has thrown its weight behind option 1 (strengthening the BNPL Code of Practice and introduce an affordability test) with elements of option 2 (limited BNPL regulation under the NCCPA), citing the \$18.4 billion that BNPL products contribute to Australia's GDP. Treasury is expected to release its proposal in the coming months.

#### DDO - TMDs

ASIC's focus on enforcement action for breaches of the Design and Distribution Obligations (**DDO**) shows no sign of waning, with an interim stop order issued to prevent the sale of a product issued by One Card Credit Pty Ltd due to concerns about the adequacy of the target market determination – further details below. Inadequate TMDs (including due to the use of broad descriptions to identify the target market, or requiring customers to determine their own suitability for a product) are a recurring theme in recent stop orders, and a key concern identified in ASIC's released [Report 754 Target market determinations for small amount credit contracts](#) issued in November.

#### Privacy

In other big news this month, the Attorney-General's Department has published the long-awaited [Privacy Act Review Report](#) (**Report**), detailing its findings on the adequacy of the privacy framework established by the *Privacy Act 1998* (Cth). The Report makes 116 proposals aimed at strengthening the protection of personal information. Key proposals include the removal of the small business exemption, a "fair and reasonable" test to be applied to the handling of personal information and the introduction of a statutory tort for serious invasions of privacy. Reception to the Report has been largely positive. We've considered the key takeaways [here](#).

Read on for a summary of other key developments in financial services since Christmas '22.

#### ASIC

##### Warning - The bigger issue! ASIC launches first court proceedings for alleged greenwashing

- On 28 February 2023, ASIC commenced [civil penalty proceedings](#) in the Federal Court against Mercer Superannuation (Australia) Limited (**Mercer**). ASIC alleges that Mercer engaged in greenwashing by making

misleading statements about the sustainable nature and characteristics of some of its superannuation investment options. This is the first time that ASIC has taken an Australian entity to court over alleged greenwashing.

### **ASIC sues former Freedom Foods Group and its former CEO and CFO**

- On 27 February 2023, ASIC commenced [civil penalty proceedings](#) in the Federal Court against Noumi Limited (formerly Freedom Foods Group Limited), its former managing director and CEO Rory Macleod and its former CFO Campbell Nicholas. ASIC alleges that Freedom Foods failed to disclose material information about the value of inventories and material information about its sales revenue, gross profit and profit after tax in its financial reports. It is also alleged that Mr Macleod and Mr Nicholas were involved in Freedom Foods' failures to disclose this information and that by allowing these failures, they breached their duties as a director and officer.

### **ASIC commences Federal Court proceedings over alleged pricing discount failures**

- On 24 February 2023, ASIC commenced [civil penalty proceedings](#) in the Federal Court against an insurance company. ASIC alleges that the company misled customers in its product disclosure statements about the pricing discounts available for certain types of insurance cover. ASIC Deputy Chair Sarah Court commented that pricing failures are an industry-wide issue and urged industry to improve pricing practices.

### **ClearLoans penalised \$6 million**

- On 23 February 2023, the [Federal Court](#) ordered Membo Finance Pty Ltd and its sole credit representative, Richmond Group Financial Services Pty Ltd (RGFS), trading as ClearLoans, to pay over \$6 million in penalties for various breaches of the National Consumer Credit Protection Act 2009. The companies were found to have breached the obligation to act efficiently, honestly and fairly when dealing with debtors in financial hardship and commenced court proceedings to enforce credit contracts in states or territories outside of where a borrower or guarantor lived.

### **ASIC issues interim stop order**

- On 17 February 2023, the Australian Securities and Investments Commission (ASIC) issued an [interim stop order](#) on One Card Credit Pty Ltd's (**One Card Credit**) Scorebuilder and Safetynet loan product due to deficiencies in its target market determination (TMD). ASIC asserts that One Card Credit's TMD is insufficient as it does not contain specific details about the financial situation or needs of the target market. ASIC expressed particular concern over the nature of the loan products which are targeted at consumers looking to use credit to pay rent. At the time of writing, ASIC has issued **23** interim stop orders under the Design and Distribution Obligations (DDO) regime, 5 of which remain in place. The remaining 18 interim stop orders were lifted following remedial action taken by the entities to address ASIC's concerns.

### **ASIC expands enforcement focus areas**

- On 15 February 2023, ASIC [announced](#) that it was expanding its enforcement focus areas to target greenwashing, predatory lending and misleading insurance policies. The update coincides with the release of ASIC's regulatory and enforcement update ([Rep 757](#)). Rep 757 reveals that for the period 1 July to December 2022, 73 criminal charges were laid, \$76.3 million in civil penalties were imposed by the courts and 62 investigations were commenced with another 103 investigations ongoing.

### **ASIC Framework to deliver better outcomes for First Nations people**

- On 14 February 2023, ASIC published its [Indigenous Financial Services Framework \(Framework\)](#). ASIC's Framework is informed by consultation with First Nations people, industry representatives and Government Departments, Agencies and Regulators. The consultation revealed several key learnings such as the fact that First Nations people had unique, established economies before colonisation that continue today and should be understood and respected. Intended outcomes of the Framework include reducing the impact of harms and misconduct on First Nations people and providing accessible and appropriate financial products and services.

### **ACCC**

#### **ACCC inquiry into deposit interest rates**

- On 15 February 2023, the ACCC launched an [investigation](#) into how banks set interest rates for savers, including the differences in interest rate increases between bank deposits and home loans. At the direction of the Federal Government, the ACCC will consult with financial regulators including the RBA and ASIC to determine whether the

banking sector has distributed interest rate hikes fairly. The ACCC is expected to release an issues paper in the coming months, and is directed to report to the Treasurer by 1 December 2023.

### **ACCC CDR compliance review of Authorisations Process**

- On 2 February 2023, the Australian Competition and Consumer Commission (ACCC) released its [findings](#) from a targeted review data holders' compliance with their authorisation-related Consumer Data Right (CDR) obligations. The ACCC analysed the process by which six data holders' asked eligible CDR consumers for their authorisation to disclose CDR data. Overall, the ACCC observed "a good level of compliance" with the CDR Rules and mandatory Banking Language CX Standards. Where necessary, the ACCC addressed non-compliance by adopting a risk-based approach to enforcement to ensure efficient and fair outcomes.

### **Treasury**

#### **Anti-avoidance provisions - Exposure draft bill**

- On 21 February 2023, Treasury released an exposure draft bill to introduce new rules that prohibit schemes designed to avoid the application of a product intervention order (in relation to a credit facility) made under Part 7.9A of the *Corporations Act 2001* (**Corporations Act**). The [Treasury Laws Amendment \(Measures for Consultation\) Bill 2023: Anti-avoidance rule for product intervention order](#) is designed to supplement the *Financial Sector Reform Act 2022* by capturing product intervention orders that are made under the Corporations Act and in relation to a product of a kind captured by the broader concept of 'credit' under the *Australian Securities and Investments Commission Act 2001*.

#### **Credit - Exposure draft regulations**

- On 20 February 2023, Treasury released exposure draft regulations to supplement the reforms introduced under the *Financial Sector Reform Act 2022*. If enacted, the [National Consumer Credit Protection Amendment \(Financial Sector Reform\) Regulations 2023](#) will amend the *National Consumer Credit Protection Regulations 2010* to enhance the consumer protection framework for small amount credit contracts and consumer leases.

#### **Quality of Advice Final Report**

- On 8 February 2023, Treasury released the [Quality of Advice Review Final Report \(Final Report\)](#). Authored by Michelle Levy, the Final Report makes 22 recommendations aimed at improving the regulatory framework for financial advice to better enable the provision of high quality, accessible and affordable financial advice for retail clients. Key recommendations include broadening the definition of personal advice to capture more of what is currently deemed to be general advice and the introduction of a 'good advice' duty that would require personal advice to be both 'good' and 'fit for purpose'. In response to the Final Report, the Government has called on interested parties to provide feedback and is currently considering its response.

#### **Token Mapping Consultation Paper**

- On 3 February 2023, Treasury released its [Token Mapping Consultation Paper](#). The Token Mapping Consultation Paper seeks to identify the key features of products in the crypto ecosystem and map them against existing regulations.