Australian Securities & Investments Commission

ASIC enforcement and regulatory update: July to September 2022

Report 753 | December 2022

About this report

This report provides an overview of ASIC's work and key matters between 1 July and 30 September 2022.

Contents

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents: consultation papers, regulatory guides, information sheets and reports.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations. Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Introduction: Setting our priorities

In August we released our strategic priorities for the next four years and our planned actions to advance these priorities, via our Corporate Plan 2022–26.

Our external priorities include protecting consumers of financial and credit products through the enhanced product design and distribution obligations, ensuring transparency and integrity in sustainable finance, protecting consumers planning for retirement (with a focus on superannuation products, managed investments and financial advice), and technology risks in the financial services industry (with a focus on digitally enabled misconduct).

Our internal priorities include expanding our use of digital technology and adopting new analytical tools in line with our digital and data strategy.

Chair Joseph Longo described the rationale behind ASIC's strategic priorities and actions in a speech delivered to the Committee for Economic Development of Australia, noting that 'each responds to a key emerging challenge that we face, each is focused on protecting people participating in the financial system and each is an explicit enforcement priority for us.'

Also in August, the Financial Regulator Assessment Authority released its first review of ASIC, acknowledging ASIC's crucial contribution to Australia's financial system. It found that ASIC is effective and capable in the areas reviewed, which included strategic prioritisation, planning and decision-making, surveillance and licensing, and our use of data and technology in these areas. The report made four recommendations around enhancing ASIC's use of data and technology, strengthening our engagement with stakeholders, enhancing our ability to measure effectiveness and capability, and continuing to broaden our mix of skillsets.

> *'ASIC's priorities address a number of emerging trends and important law reforms that are reshaping the financial system, including digitally enabled misconduct, emerging technologies, climate risks and an ageing population.'*
>
> *'ASIC is looking to the longer term and planning over the next four years. But we've seen that scenarios can change quickly. We remain alert to changes and developments in our operating and regulatory environment, and we will continue to make rapid, strategic decisions to adapt where needed. When we do so, it will be transparent.'*
>
> – Chair Joseph Longo

ASIC's priorities at a glance

EXTERNAL PRIORITIES

Product design and distribution

Reduce the risk of harm to consumers of financial and credit products, caused by poor product design, distribution and marketing, especially by driving compliance with new requirements

Sustainable finance

Support market integrity through proactive supervision and enforcement of governance, transparency and disclosure standards in relation to sustainable finance

Retirement decision making

Protect consumers, especially as they plan and make decisions for retirement, with a focus on superannuation products, managed investments and financial advice

Technology risks

Focus on the impacts of technology in financial markets and services, drive good cyber-risk and operational resilience practices, and act to address digitally enabled misconduct, including scams

ACTIONS: Core strategic projects

- Scams
- Sustainable finance practices
- Crypto-assets
- Design and distribution obligations (DDO)
- Breach reporting
- Cyber and operational resilience
- Financial Accountability Regime (FAR)
- Digital technology and data

INTERNAL PRIORITIES

Digital technology

Expand our use of digital technology to support more efficient processes in our regulatory work in line with our digital strategy

Data and analytics

Increase our efficiency and effectiveness by improving access to information and adopting new analytical tools in line with our data strategy

People and resourcing

Recruit and retain talent, enhance our skills, and improve our budget and planning process to ensure our resources are aligned to our priorities

Modernising business registers

Continue to support the successful transfer of ASIC registers to the Australian Business Registry Services

CAPABILITIES

Protecting consumers and monitoring remediation

Consumer protection in the current investment environment and throughout the financial services sector is a sharp focus for ASIC. During the quarter, we used our broad regulatory toolkit to address consumer harms including poor sales practices, charging superannuation members fees for services not provided to them, as well as failures to act in clients' best interests and provide advice appropriate to clients' circumstances. We focused on sectors where we see consumer harms from poor design or distribution practices. Our key priority is to protect consumers, especially the most vulnerable.

We also updated our guidance on consumer remediation and oversaw remediation for consumers subject to harmful sales and retention practices. We helped industry better respond to family violence considerations and made product intervention orders prohibiting issuing short-term credit and continuing credit contracts to retail clients.

Strategic priorities

Retirement decision making

Product design and distribution

Expanding our consumer remediation guidance

We published updated and expanded regulatory guidance on consumer remediation, following our oversight of over $5.6 billion in remediation for an estimated seven million Australian consumers in the six years to September 2022. This includes over $102 million in remediation we secured for some 83,600 Freedom Insurance customers, after identifying the insurer's harmful sales and retention practices in a 2018 review.

We expect industry to apply the updated guidance to all new remediations.

Read more

22-260MR *ASIC publishes updated and expanded remediation guidance*

22-223MR *ASIC secures over $102 million in remediation for Freedom Insurance customers, with more to come*

Freedom Insurance customers should come forward for remediation

'The release of our expanded guidance delivers licensees all they need to achieve the right remediation outcomes on their own. It explicitly allows the use of assumptions, to help firms address knowledge gaps and accelerate remediation programs in a way that does not disadvantage consumers.'

– Deputy Chair Karen Chester

Case study: Court finds Select deployed poor sales practices when selling insurance

In July the Federal Court found Select AFSL Pty Ltd (Select), BlueInc Services Pty Ltd (BlueInc) and Insurance Marketing Service Pty Ltd (IMS) engaged in unconscionable conduct when selling life, funeral and accidental injury insurance.

The court also found that Mr Russell Howden, the managing and sole director of Select and BlueInc, was involved in some of the contraventions and breached his duty of care and diligence as a director.

This action followed our review of the direct life insurance industry in 2018, which found that consumers were being harmed by poor sales practices, and Select's conduct was among the most egregious.

Our case against Select focused on the mis-selling of insurance over the phone to 14 consumers, 10 of whom lived in remote communities—with English not being the first language of many of them. Some did not fully understand the products being sold to them, while some were unaware they had been sold the insurance.

Select was the subject of a case study considered by the Financial Services Royal Commission (experiences with financial services entities in regional and remote communities).

For more information, see 22-176MR *Court finds Select AFSL and its agents acted unconscionably when selling insurance products: Royal Commission case study*.

'ASIC will pursue those who take advantage of consumers, wherever they are, and including in remote parts of Australia. This case serves as a reminder to insurers to ensure their distributors act appropriately and put the needs of consumers first.'

– Commissioner Sean Hughes

Helping industry to respond to family violence

We granted relief to exempt insurers from providing a Cash Settlement Fact Sheet and transaction confirmation to joint policyholders when they offer to settle a claim by a cash payment, where doing so creates risks of family violence.

We also adopted a temporary no-action position to enable large banks to withhold certain credit information in consumer credit reports where reporting the information could lead to consumer harm, including where a consumer may be the victim of family violence.

Read more

22-175MR *ASIC helps credit providers protect victims of family violence*

22-261MR *ASIC helps insurers to respond to family violence*

Penalty for breaching best interest obligations

In September, the Federal Court imposed a $7.2 million penalty on Dixon Advisory and Superannuation Services Limited (Dixon Advisory) after six representatives failed to act in their clients' best interests and failed to provide advice appropriate to their clients' circumstances.

In August, we reminded former clients of Dixon Advisory to make a complaint to the Australian Financial Complaints Authority (AFCA) before Dixon Advisory's AFCA membership ceases, so that they could preserve their possible eligibility under a potential future Compensation Scheme of Last Resort.

Read more

22-256MR *Dixon Advisory penalised $7.2 million for breaches of best interest obligations*

22-205MR *Former Dixon Advisory clients should consider lodging complaints with AFCA*

Penalty for superannuation advice breaches

The Federal Court in August ordered MobiSuper Pty Limited (MobiSuper) and MobiSuper's financial services licensee, ZIB Financial Pty Limited (ZIB), to pay combined penalties of $250,000 for failures surrounding promotion of the MobiSuper Fund.

Read more

22-235MR *Federal Court penalises MobiSuper and ZIB Financial for superannuation advice breaches*

'Superannuation is important for the future financial security of Australians. It is essential that consumers, when choosing their super fund, are not misled or given personal advice that is not in their best interests.'

– Deputy Chair Sarah Court

Product intervention orders on short-term credit and continuing credit contracts

On 15 July, we made product intervention orders imposing conditions on issuing short-term credit and continuing credit contracts to retail clients.

The orders prohibit the provision of short-term credit and continuing credit contracts that involve unreasonably high fees charged to retail clients.

Read more

22-182MR *ASIC makes product intervention orders for short-term credit and continuing credit contracts*

Consultation Paper 355 *Product intervention orders: Short-term credit and continuing credit contracts*

Warning against payment redirection scams

In July, we urged small businesses to be wary of payment redirection scams, following a report by the Australian Competition and Consumer Commission showing these scams caused the highest losses to businesses in 2021.

Read more

ASIC warns small businesses to be vigilant about payment redirection scams

Acting against misconduct

Reducing the risk of harm to consumers of financial and credit products caused by poor product design, distribution and marketing is another priority set out in our Corporate Plan.

During the quarter, we issued the first stop orders under the design and distribution obligations (DDO) regime, and called on super trustees to improve their target market determinations (TMDs).

We also addressed a range of other misconduct, including failures to comply with auditing standards, to assist registered liquidators in investigations, and to meet Australian financial services (AFS) licensee obligations.

Strategic priorities

Retirement decision making

Product design and distribution

Calling on improvement in TMD effectiveness

In August, we called on superannuation trustees to review and, if necessary, improve the effectiveness of their product TMDs after a sample review of trustee compliance found some poor practices.

While some of the TMDs we reviewed reassured us that they may be part of a well-designed and comprehensive governance program, others created doubt about the underlying arrangements trustees have in place to ensure their products reach the right consumers.

Read more

22-236MR *Super trustees urged to improve effectiveness of target market determinations*

Addressing risk and compliance failures

In July, we commenced civil penalty proceedings in the Federal Court against Lanterne Fund Services Pty Ltd (Lanterne) for alleged multiple failures to meet its AFS licence obligations.

We also alleged that Lanterne, under a 'licensee for hire' business model, failed to have adequate risk management systems and resources, including financial, technological and human resources, to carry out its supervisory arrangements.

Read more

22-174MR *ASIC issues civil penalty proceedings against wholesale licensee Lanterne Fund Services for risk and compliance failures*

Case study: ASIC enforces DDO regime to tackle poor product design and protect consumers

In July, we used our stop order powers under DDO for the first time and placed interim stop orders on three financial firms after finding deficiencies in the target market determination (TMD) for their products.

ASIC was concerned that the three financial firms, namely Responsible Entity Services Limited and two companies in the UGC Global Group, did not appropriately identify the consumers they intended to target, or did not have a TMD, meaning the products may have been marketed and sold to retail investors for whom they were not appropriate or too risky.

The interim stop orders prevented these firms from issuing the relevant managed investment scheme interests or shares to retail investors.

This quarter we also issued interim stop orders on:

1. Fawkner Property Ltd to prevent it from issuing or transferring interests in Private Property Trust No. 20 because of our concerns about misleading or deceptive statements in the fund's marketing and disclosure

2. the offer and distribution of two managed funds—the Australian Residential Property Fund and the Private Property Trust No. 20—in response to concerns about deficiencies in the funds' TMDs

3. Australasian Property Investments Limited (APIL) to prevent it from offering or distributing the APIL Essential Retail Income Fund to retail investors because of concerns about a non-compliant TMD.

ASIC's DDO stop order powers took effect on 5 October 2021.

'Financial firms need to be consumer-centric in how they design their products. Issuers need to have clearly defined target markets. Where firms are not meeting their obligations, ASIC can and will respond, from stop orders to court action, to prevent consumer harm and deter non-compliance.'

– Deputy Chair Karen Chester

Penalty for failing to comply with auditing standards

On 1 August, Graham Rothesay Swan, the former auditor of the collapsed entity Big Un Limited, was convicted for failing to conduct the audit of the entity in compliance with auditing standards.

Mr Swan was ordered to pay a penalty of $2,000. The audit related to the financial year ended 30 June 2017.

Read more

22-198MR *Former auditor of Big Un Limited convicted for failing to comply with auditing standards*

Taking action against failure to assist registered liquidators

We made an announcement in August regarding successful prosecutions of 73 people from 1 January 2022 to 30 June 2022 for failing to assist registered liquidators in their investigations.

In the six months to 30 June 2022, we secured over $340,000 in fines and costs against those who failed in their obligations to assist liquidators. We took action against company officers and other related individuals who failed to provide registered liquidators with access to company books and to submit a report on company activities and property.

Read more

22-209MR *ASIC prosecutes 73 individuals for failing to assist registered liquidator*

Case study: Court fines AMP companies $14.5 million for fees for no service

In September, the Federal Court ordered five companies that are or were part of the AMP Limited group (together 'AMP') to pay a total of $14.5 million in penalties for charging fees for services that were not provided to 1,452 superannuation members.

These members had been paying fees in return for access to general financial advice as part of an agreement between their employer and AMP. On leaving their employer, the members continued to be automatically charged the advice fee, despite no longer having access to the advice services for which they were being charged.

The Court found AMP deducted $356,188 in fees between July 2015 and September 2018 even though it was aware the members had ceased their employment and could no longer access the advice services. Although AMP has remediated $691,032 to affected customers, the Court found AMP failed to investigate whether there was a systemic issue, despite many complaints over a lengthy period of time.

By charging fees for no service and failing to have internal procedures and controls in place to prevent this kind of misconduct, the court found that AMP also breached its obligations as an Australian financial services (AFS) licence holder to act efficiently, honestly and fairly and to comply with financial services laws.

For more information, see 22-258MR *AMP companies admit liability and fined $14.5 million for fees for no service*.

Protecting investors and strengthening market integrity

During the quarter, we acted against conduct harmful to investors or the integrity of Australia's financial markets by banning or disqualifying the people concerned or commencing court action. We also extended our product intervention order banning the issue and distribution of binary options to retail clients.

Our retail investor research found that Australian investors are using a range of online trading platforms, as well as using digital channels and social media platforms to source information on investing.

This quarter we also signed a consultation agreement with the Financial Markets Standards Board (FMSB) to promote global standards for wholesale financial markets.

Strategic priority

Technology risks

Better understanding and protecting retail investors

In August, we warned brokers to reconsider offering high-risk products and services to retail investors, such as securities lending, crypto-assets and offers of 'zero' or 'low-cost' brokerage—where the true cost is masked.

We also released a report of our research into the motivations, attitudes and behaviours of retail investors. The research—conducted in November last year—found that cryptocurrency was the second most common product type among the 1,053 retail investors surveyed. It also confirmed the prominence of digital and social channels as sources of information for investors, and the diversity in trading platforms they use.

Read more

22-239MR *ASIC warns brokers considering high-risk offers to retail investors*

'ASIC is working to better understand the use of digital engagement practices and maintain regulatory pace with these developments. Risk is part of the investment process, but entities need to operate fairly and avoid the use of features that can harm investors.'

– Chair Joseph Longo

Case study: Proceedings against Nuix over continuous disclosure and directors' duties breaches

In September, we commenced proceedings in the Federal Court against Nuix Limited for alleged continuous disclosure breaches and misleading or deceptive conduct, and against members of the Nuix board for breaches of their directors' duties.

We alleged that Nuix made misleading or deceptive statements when reaffirming its Prospectus financial year 2021 forecasts for statutory revenue and for annualised contract value (ACV) in announcements to the ASX on 26 February 2021 and 8 March 2021.

We alleged that at the time of these announcements, Nuix was aware that statutory revenue and ACV for financial year 2021 was likely to be materially below forecast, which made those announcements misleading and gave rise to the need for corrective disclosure.

We also alleged that by 18 January 2021, Nuix was aware that its underlying business, as measured by ACV, had essentially shrunk by almost 4% over the first half of FY21, however it took the company more than a month—until 26 February 2021—to disclose this material information to the market.

As a result, Nuix's directors have allegedly breached their directors' duties by failing to take reasonable steps to prevent Nuix from making misleading statements and breaching its continuous disclosure obligations.

ASIC is seeking declarations, pecuniary penalties and disqualification orders from the Federal Court.

22-262MR *ASIC sues Nuix and its board for continuous disclosure and directors' duties breaches*.

Surrender of AFS licence by OTC derivatives provider

Over-the-counter (OTC) derivatives provider Sirius Financial Markets Pty Ltd (Sirius Financial) has surrendered its AFS licence after an ASIC investigation found representatives of an offshore call centre it engaged used high-pressure selling tactics to persuade clients to trade. They also provided personal advice to clients when Sirius Financial was not licensed to do so.

Mark Bringans, former responsible manager of Sirius, was banned by ASIC from providing financial services for eight years. In addition, two of Sirius Financial's former executives, Jonathan Schneider and Oskar Pecyna, were banned from controlling an entity that carries on a financial services business or performing any executive or management role in relation to a financial services business for eight years. All three have applied to the Administrative Appeals Tribunal (AAT) for a review of ASIC's respective decisions.

Read more

22-181MR *OTC derivatives provider Sirius Financial Markets surrenders licence, former executives handed eight-year bans*

Penalty for failing to comply with market integrity rules

In September, ABN AMRO Clearing Sydney Pty Ltd paid a penalty of $222,000 to comply with an infringement notice issued to it by the Markets Disciplinary Panel.

The panel found that the firm had, on three occasions, registered block trades on the ASX 24 Market in the SPI 200 Futures contract, each of which included split allocations below the Minimum Value Threshold of 200 lots. It considered the firm's conduct was 'careless'.

Read more

22-245MR *ABN AMRO Clearing Sydney Pty Ltd pays $222,000 infringement notice*

Penalty and disqualification of director upheld by court

On 5 August, the Full Federal Court dismissed an appeal against orders that Blue Star Helium's (formerly Antares Energy and Big Star Energy) former CEO, James Cruickshank, be disqualified from managing corporations for four years and pay a $40,000 pecuniary penalty.

In dismissing the appeal, the court stated that 'the primary judge's reasons provided a logical and reasoned basis for the conclusion that Mr Cruickshank failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in considering whether the company was required to disclose the purchaser identity information or the cumulative information concerned to the ASX'.

Read more

22-211MR *ASIC successful as Court upholds decision to penalise and disqualify former director James Cruickshank*

Extension of binary options product intervention order

In September we extended our product intervention order banning the issue and distribution of binary options to retail clients until 1 October 2031. The extension ensures binary option protections in Australia remain in line with those in force in comparable markets overseas.

Read more

22-243MR *ASIC's binary options ban extended until 2031*

Report 736 *Response to submissions on CP 362 Extension of the binary options product intervention order*

Case study: Arrest and extradition of unlicensed foreign exchange trader over dishonest use of investor funds

Unlicensed foreign exchange trader Daniel Farook Ali was charged with eight counts of fraud totalling $977,000 after being extradited from Poland and arrested following an ASIC investigation.

ASIC alleged that Mr Ali had dishonestly used funds provided to him by investors for trading and investment purposes between May 2016 and November 2017. It was alleged that Mr Ali had used the funds to buy real estate and luxury cars for his family members and related companies, and pay returns to other investors.

ASIC alleged that, in some cases, the funds provided to Mr Ali by investors had come from investors' self-managed superannuation accounts.

Mr Ali departed Australia in May 2018 while there were ongoing civil proceedings against him—commenced by ASIC—and an ongoing ASIC investigation into his conduct. Following an application by ASIC, a Queensland magistrate issued a warrant for Mr Ali's arrest in December 2020. Mr Ali was arrested in Poland in November 2021.

The Polish Government granted his extradition in July this year. Mr Ali consented to being extradited.

ASIC acknowledges the assistance of the Australian Federal Police's Fugitive Apprehension Strike Team, the Commonwealth Attorney-General's Department, the Commonwealth Director of Public Prosecutions and Polish authorities in relation to Mr Ali's extradition.

22-226MR *Former DanFX Trade director Daniel Ali arrested and extradited from Poland following ASIC investigation*.

Surveillance outcomes and implementing law reform

During the quarter, we continued to implement law reform related to ASIC's responsibilities under the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act* 2021 (Better Advice Act). This included releasing guidance and information about the Financial Services and Credit Panel (FSCP) and financial adviser exam.

Based on findings from our surveillances, we called on superannuation trustees to review their internal dispute resolution (IDR) arrangements. We also urged fund managers to ensure investment performance representations in their marketing materials were appropriate, and insurers to protect consumers from unfair practices in the claims handling process.

Strategic priorities

Retirement decision making | Product design and distribution

Further guidance to support better financial advice

During the quarter, we released new guidance about the Financial Services and Credit Panel (FSCP), including an update to Regulatory Guide 263 *Financial Services and Credit Panel* and the new Information Sheet 273 *FSCP decisions: Your rights*.

We also released results of the July and August financial adviser exams. Given this exam sitting was the last opportunity for financial advisers operating under the nine-month exam extension to pass the exam, we provided information on next steps for those who did not pass.

Read more

22-206MR *ASIC publishes updated Financial Services and Credit Panel regulatory guidance and new 'your rights' infosheet*

ASIC releases July and August 2022 financial adviser exam results

Important next steps for existing financial advisers who have not passed the exam and their licensees

'The FSCP, combined with ASIC's new warning and reprimand powers, enables ASIC to respond to a range of financial advice misconduct, including lower-level misconduct that may otherwise go unaddressed.'

– Commissioner Danielle Press

Implementing the reportable situations regime

In August we announced our approach to implementing the reportable situations regime. We developed a comprehensive plan of work to ensure the new regime, which commenced in October 2021, meets its objectives for ASIC, industry and consumers.

Read more

22-214MR *ASIC's approach to breach reporting: implementation of reportable situations regime*

Calling for improvement in fund marketing materials

In September we called on fund managers to do more to ensure the investment performance representations in their funds' marketing materials were appropriate.

This followed an ASIC surveillance.

Thirteen responsible entities or trustees of investment funds have voluntarily amended—or arranged for the investment manager to amend—their marketing materials and practices across 18 funds as a result of ASIC's surveillance.

Read more

22-249MR *Managed funds amend their marketing following ASIC surveillance*

Calling for improvement in life insurance claims handling

We announced in September that our review of individual disability income insurance claims found that more work was needed by insurers to protect consumers from unfair practices in non-disclosure investigations and physical surveillances.

We reviewed claims received between 1 January and 30 June 2021.

As a result of our review, some life insurers have made improvements to their practices. Our inquiries are continuing into those life insurers with a higher proportion of potentially unwarranted investigations identified in the review.

Read more

22-241MR *ASIC review finds room for improvement remains with life insurance claims handling*

Review of compliance with IDR arrangements

In August we urged superannuation trustees to review their internal dispute resolution (IDR) arrangements after the first stage of an ASIC surveillance found indications of significant compliance issues.

Our surveillance examined trustees' compliance with the new enforceable requirements in Regulatory Guide 271 *Internal dispute resolution*, which took effect on 5 October 2021.

Read more

22-213MR *ASIC's surveillance of internal dispute resolution in superannuation identifies concerns*

Guidance on tools for retirement decision-making

In July we released Regulatory Guide 276 *Superannuation forecasts: Calculators and retirement estimates* and a new legislative instrument updating the relief which facilitates the provision of superannuation calculators and retirement estimates.

The guidance aims to provide greater clarity to trustees about how they can use calculators and retirement estimates as part of their strategies under the retirement income covenant, which came into effect on 1 July 2022.

The new relief for superannuation calculators and retirement estimates is set out in *ASIC (Superannuation Calculators and Retirement Estimates) Instrument 2022/603*.

Read more

22-173MR *ASIC releases guidance for superannuation calculators and retirement estimates*

'Superannuation calculators and retirement estimates are important tools that can help consumers engage with their superannuation, especially as they approach retirement.'

– Commissioner Danielle Press