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# Update Summary

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UPDATE 191

JULY 2024 (2)

## THE LAW RELATING TO BANKER AND CUSTOMER IN AUSTRALIA

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**Material Code 42725337**

**Print Post Approved PP255003/00356**

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Author Prudence Weaver has updated her allocated chapters in the work and significant changes are referred to below.

## **Reserve Bank Act 1959 (Cth)**

It is noted that a wide-ranging review of the Reserve Bank has been undertaken by a panel of three independent experts, supported by Treasury. It reported in April 2023 and made a number of recommendations on the operations of the Board and the Bank itself. Draft legislation has been circulated proposing, among other things, a new Monetary Policy Board and separate Governance Board. The Monetary Policy Board will be responsible for monetary policy decisions and oversight of the Bank's financial system stability activity. The Governance Board will have oversight of the Bank's management and organisational affairs. [1.1710].

## **The Banking Executive Accountability Regime**

The Banking Executive Accountability Regime (BEAR) was repealed by the *Financial Accountability Regime (Consequential Amendments) Act 2023* (Cth) and replaced by the Financial Accountability Regime (FAR) set out in the *Financial Accountability Regime Act 2023* (Cth) which came into effect in March 2024. See [1.2045] and [2.2630].

## **ASIC funding**

A review of ASIC's industry funding model was announced in August 2022 and the federal government released the final report in June 2023. It concluded that the broad settings of the funding model were appropriate but recommended some refinements to the model and streamlining of ASIC activities such as in the reporting process. The Report recommendations were supported by government. See [1.2305].

## **Financial Accountability Regime**

The *Financial Accountability Regime Bill 2023* (Cth) received assent in September 2023 and commenced six months later for banks and other ADIs on 15 March 2024. It applies to entities in insurance and superannuation from March 2025. See [1.2632].

## **Licensing**

The obligations of an AFSL holder in relation to the oversight of its authorised representatives were considered in *Australian Securities and Investments Commission v Lanterne Fund Services Pty Ltd* [2024] FCA 353.

An aspect of development in technology that has attracted ASIC attention is the emergence of digital assets and products. In *ASIC v Web3 Ventures Pty Ltd* [2024] FCA 64 the Federal Court determined that the company trading as Block Earner was operating an unregistered managed investment scheme and so was conducting a financial service without holding the necessary AFSL in breach of s 911A of the Corporations Act 2001 (Cth). See, however, the discussion of *ASIC v Funder Wallet Pty Ltd* [2024] FCA 228, where it was found there was no breach by the digital asset

provider of the requirement to hold an AFSL because the product was not a debenture. See [1.3230].

### **National Consumer Credit Protection Act 2009 (Cth)**

Changes to the requirement to hold an ACL are ongoing. For example, consultation is underway into whether “buy now pay later” (BNPL) facilities which currently are not subject to any legislative framework should be regulated as credit and thus require providers to hold an ACL. See [1.3260]

### **Financial Accountability Regime Act 2023 (Cth)**

Extensive new commentary addresses the Financial Accountability Regime (FAR). See [1.3290].

An accountable entity is defined as an authorised deposit-taking institution (ADI) or the authorised non-operating holding company (NOHC) of an ADI that carries on the business of banking or insurance, or is the trustee of a superannuation fund, or is a body corporate whose conduct affects the activities, functions or relationships of business of another body corporate that carries on these activities. Further, an accountable person is defined by reference to their role in an accountable entity. See [1.3293].

The obligations of an accountable entity and an accountable person are set out in Ch 2 of the *Financial Accountability Regime Act 2023* (Cth) (FAR Act) (ss 15 to 34). See [1.3295].

The remaining Parts of the *Financial Accountability Regime Act 2023* (Cth) (FAR Act) cover administration. See [1.3297].

### **The AML/CTF Act**

In *Human Appeal International Australia v Beyond Bank Australia Ltd (No 2)* [2023] NSWSC 1161 the NSW Supreme Court found that Beyond Bank Australia, which operated as a mutual bank, had invalidly terminated the banking facilities of Human Appeal International Australia, one of the largest Muslim charities operating in Australia. When the matter came before the court, the bank argued that its decision was made in the context of its obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), and that to advise the customer of the bank’s concerns under the Act would put the bank in breach of the “tipping off” provisions in s123. Relevant provisions of the Customer Owned Banking Code of Practice were also considered. See [1.6060].

### **Further revisions to the Banking Code of Practice – 2019 version**

The ABA submitted a new version of the Banking Code to ASIC for approval in September 2023 which included, among other things, the long-debated change to the definition of “small business” from \$3 million to \$5 million in total debt owed by the business to credit providers. ASIC, however, took the unusual step of undertaking public consultation seeking feedback on a number of matters. The consultation period closed in January 2024 and ASIC’s response is expected later in 2024. See [2.560].

## **Customer Owned Banking Code of Practice**

Some of the provisions of the Customer Owned Banking Code of Practice (COBCP) were briefly considered by the NSW Supreme Court in *Human Appeal International Australia v Beyond Bank Australia Ltd (No 2)* [2023] NSWSC 1161. See [2.640].

## **Australian Financial Complaints Authority**

A new compensation scheme became law under a package of legislation including the *Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 2023* (Cth). From 2 April 2024 consumers can lodge claims for compensation up to \$150,000 where AFCA has determined misconduct by a licensed financial provider, but the provider cannot pay the claim. See [2.720].

## **Protection for mistaken compliance with reporting obligations on suspected transactions**

In *Marundrury v Commonwealth Bank of Australia* [2021] FCA 1379 and *Marundrury v Commonwealth Bank of Australia (No 2)* [2022] FCA 916 an action challenging the bank's protections under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) was considered. See [2.3580].

## **Credit reporting**

In February 2024 the federal Attorney-General announced a review of the credit reporting framework, covering matters such as the provisions in Pt IIIA of the *Privacy Act 1988* (Cth) together with mandatory reporting under Pt 3-2CA of the *National Consumer Credit Reporting Act 2009* (Cth) (NCCP Act), the latter of which was required under s 133CZL of the NCCP Act. Among other things, the review will consider the efficiency and effectiveness of the framework. The final report is due by October 2024. See [2.4660].

## **Debtor or depositor has primary right of appropriation**

The question of whether unappropriated payments should apply to interest or principal first where an amount is owed under a loan agreement was considered by the NSW Supreme Court in *Marquess Investment Fund Pty Ltd v Tjen (No 2)* [2023] NSWSC 834. See [3.6640].

## **Payment systems reform**

In December 2022 Treasury issued a consultation paper outlining the government's proposed reforms and priorities for a broad range of activity. Further papers were issued in June 2023 and consultation with regulators, industry groups, consumer and business representatives is underway with a number of proposals being considered. These include, for example, licensing under the Australian financial services regime of payments-related functions as financial products or services. See [4.2580].