

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 and Fund Manager clients.

FEATURE ARTICLE

Using Disclaimers to Guard Against Misleading or Deceptive Conduct

Whilst undertaking some investigation into disclosure law earlier this month, we came across an article produced by Herbert Smith Freehills in April of this year exploring the key principles for financial services businesses to consider when considering the use of a disclaimer to mitigate false, misleading or deceptive conduct. Here's a summary of the key points. You can read the full article [here](#).

The key test for misleading or deceptive conduct is whether the conduct, viewed as a whole, has a sufficient tendency (i.e. a real and not remote probability) to lead the relevant person into error.

What might a disclaimer look like?

The relevance of a disclaimer will vary depending on the context in each case. Here's a useful generic example:

We use reasonable efforts to provide accurate and up to date information. However, mistakes may still occur from time to time, and we cannot guarantee that this document is free from any errors, inaccuracies or omissions.

If the document is also a form of statement or record of account, the disclaimer may also state:

You should check this [statement] and let us know of any errors or omissions as soon as practicable.

You should check this statement against your records and/or your understanding and let us know if you suspect that there may be any error or inaccuracy.

The disclaimer should be reasonably prominent, rather than obscured in fine text.

Limitations of using a disclaimer

A disclaimer is not a 'Get Out of Jail Free card'. Providers will need to strike the right balance in framing the disclaimer. In doing so, the following limitations of using disclaimer should be considered:

- **General obligations:** A financial service provider will still have duties to take reasonable care and act efficiently, honestly and fairly in the provision of its financial services. A provider cannot rely on the disclaimer to do things incorrectly or negligently.
- **Context of the document:** The misleading or deceptive test is applied in relation to the context of document as a whole. In some contexts, ASIC or the Court could potentially take the view that a disclaimer is not sufficient to negate the overall context and dominant message of a particular document or statement. When thinking about the context, some questions to ask may include: (a) What is the purpose of the document or statement? Would the ordinary and reasonable reader view the document or statement as accurate and binding? (b) Is there any demand for the reader to perform any obligation (e.g. pay a potentially incorrect fee which is due imminently)? (c) Are there any representations that the provider warrants the accuracy of the document or statement?
- **Unfair contract terms:** In a contract, care should be taken to ensure that the effect of the disclaimer does not cause a significant imbalance in the parties' rights and obligations. This could arise, for example, if the misstatement gives the provider an advantage (to the detriment of the customer) and the disclaimer allows the provider to retain the advantage.

GOVERNMENT

(1) Climate Risk Disclosure Framework Established

The Government has passed the [Treasury Laws Amendment \(Financial Market Infrastructure and Other Measures\) Bill 2024](#) through the Senate to establish Australia's climate risk disclosure framework.

The Bill will see new mandatory climate reporting requirements apply to Australia's biggest listed and unlisted companies and financial institutions from 1 January 2025, with other large businesses to be phased in over time.

Companies will need to make their climate financial disclosures in a 'sustainability report'. The sustainability report will form part of an entity's annual reporting package. Companies need to obtain audit and assurance for their annual sustainability report.

The Treasurer confirmed that the Australian Accounting Standards Board (AASB) will be tasked with issuing internationally aligned standards in the near future. Alignment with global standards, where possible, will streamline reporting processes for investors and companies who operate in multiple jurisdictions.

ASIC has said it will release information and guidance on the mandatory climate-reporting duties for businesses and responsible entities once the bill receives Royal Assent.

(2) Regulators Given New Powers to Protect Financial Markets in Crisis

With the passing of the [Treasury Laws Amendment \(Financial Market Infrastructure and Other Measures\) Bill 2024](#) through the Senate, the Government has put into place new powers for regulators to protect financial market infrastructure in the event of a crisis.

The Bill gives the RBA the power to provide up to \$5 billion in support to ensure continuity of critical clearing and settlement services during a crisis event, intended as a last resort where financial failure threatens the stability of the financial system.

The Bill also grants ASIC and the RBA greater licencing and supervision powers to strengthen clearing and settlement facility standards, equipping them with the tools to take decisive action to monitor, mitigate, and reduce market risks.

The new powers include notification requirements, the power to issue directions and rule-making powers for clearing and settlement facilities. It also gives the RBA and ASIC the power to ban people when they are not fit or proper or competent and ensures that changes in control of any financial market infrastructure must be approved by either the minister or ASIC.

ASIC

(3) Publishes Report on Greenwashing Regulatory Interventions

ASIC has published [Report 791 - ASIC's Interventions on Greenwashing Misconduct: 2023-2024](#). The Report outlines ASIC's 47 regulatory interventions to address greenwashing misconduct in the 15 months up to 30 June 2024.

ASIC's regulatory interventions in this period included:

- Obtaining an \$11.3 million penalty against a superannuation trustee;
- Obtaining 37 corrective disclosure outcomes from various entities;
- Issuing eight infringement notices totalling over \$123,000; and
- Succeeding in two civil penalty proceedings for greenwashing misconduct.

ASIC's regulatory interventions related to:

- Insufficient disclosure on the scope of ESG investment screens and investment methodologies;
- Underlying investments that are inconsistent with disclosed ESG investment screens and investment policies; and
- Sustainability-related claims made without reasonable grounds or without sufficient detail.

One of the key recommendations made in the Report is that Responsible Entities should ensure that investments made by their managers or sub-managers are competently and independently verified as being consistent with the claims made about the fund's sustainable investment strategy.

The Report also recommended that Responsible Entities provide adequate explanations of investment exclusions or screening criteria, including in relation to any terms or thresholds used and whether screens are absolute, or thresholds based.

True Oak Analysis: Whilst ASIC is currently focused on Responsible Entities of registered schemes, we recommend that our Fund Managers of wholesale unregistered schemes also take on board ASIC's recommendations.

(4) Expands Strategic Priorities

ASIC's latest [Corporate Plan](#) includes a new pillar in its strategic priorities that underscores a commitment to strengthening integrity across Australia's public and private markets.

'While Australia's private markets are dwarfed in size by our listed equity markets, their opacity presents an outsized risk to market integrity, particularly as more investors become exposed. The addition of a new strategic priority aimed at driving consistency and transparency across markets and products puts all market participants on notice.'

ASIC's 2024-28 Plan:



ATO

(5) Launches Corporate Plan 2024-25

In summary, the [Corporate Plan](#) outlines:

- 6 key activities that support the ATO to deliver on its core commitments to government and community. Central to this is efficiently collecting the right amount of tax in a way that is well designed, tailored, transparent and, most of all, easy.
- 6 focus areas that are responsive to the environment and showcase the ATO's strengths in innovation, working with integrity, fairness, and compassion, including:
 - the continued strengthening of debt collection
 - evolving the use of data to strengthen decision-making and digital capability and streamline interactions with taxpayers
 - enhancing counter fraud measures and cybersecurity
 - sustaining multinational and large taxpayer performance
 - blueprinting a future small business digitalised tax experience.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

Online Courses

[Carbon Markets Institute](#) - <https://carbonmarketinstitute.org/education-and-training/>

- Carbon Market Fundamentals Training
- Carbon Farming Banker Training

[Bright Law](#) - <https://learn.brightlaw.com.au/collections>

- The Hawking Prohibition: financial services marketing (January 2024) – 36 min video; \$330.
- Privacy Law for Financial Services Providers – a course of 4 videos; \$440.
- Responding to Regulatory Investigations – draft policies on responding to regulatory investigations, either with or without notice; \$66

[Financial Education](#) - <https://www.financialeducation.com.au/courses/>

[FINSIA](#) - <https://www.finsia.com/education>

- Certificate in Climate Risk - <https://www.finsia.com/education/qualifications/certified-professional-banker/the-certificate-in-climate-risk>
- Professional Refresher Packages - <https://www.finsia.com/professional-refresher>
- The Ethics of Artificial Intelligence - <https://www.finsia.com/the-ethics-artificial-intelligence>

Events and Webinars

September 2024

- a. FUND BUSINESS – **9th Investment Data and Technology Summit** (Sydney – 4 September) – more info [here](#).
- b. JANA – **Annual Conference 2024** (Melbourne – 5 September) – more info soon.
- c. AUSTRALIAN INVESTMENT COUNCIL – **Australian Investment Conference 2024** (Gold Coast – 4-5 September) – more info [here](#).
- d. ALLENS, HERBERT SMITH FREEHILLS and KING & WOOD MALLESONS – **The M&A Conference 2024** (Webinar – 10 and 12 September) – more info [here](#).
- e. FINSIA – **Through the Looking Glass: Emerging Markets** (Webinar – 10 September) – more info [here](#).
- f. CREW – **Marketing of Financial Products and Services** (Webinar – 11 September) – more info [here](#).
- g. INTERNATIONAL BUSINESS REVIEW – **Investment Operations Challenges Forum** (Sydney – 11-12 September) – more info [here](#).
- h. AUSTRALIAN INVESTMENT COUNCIL – **Principles of Venture Capital** (Sydney – 16 September) – more info [here](#).
- i. FINSIA – **Angel Investing 101** (Webinar – 17 September) – more info [here](#).
- j. FINANCIAL STANDARD – **Best Practice Forum Series: Managed Accounts** (Melbourne and live-streamed – 19 September) – more info [here](#).
- k. INTERNATIONAL BUSINESS REVIEW – **Member Engagement, Communications and Experience in Financial Services 2024 Forum** (Sydney – September 24) – more info in 2024.
- l. AUSTRALIAN INVESTMENT COUNCIL – **Principles of ESG** (Sydney – 24 September) – more info [here](#).
- m. AUSTRALIAN INVESTMENT COUNCIL – **Principles of Private Equity** (Sydney – 25 September) – more info [here](#).

October 2024

- a. AUSTRALIAN INVESTMENT COUNCIL – **Principles of Venture Capital** (Brisbane – 1 October) – more info [here](#).
- b. IQ INTERNATIONAL – **Carbon Capture Summit Australia 2024** (Perth – 9-10 October) – more info [here](#).
- c. FINSIA – **Demystifying Structured Giving and Investing for Impact** (Webinar – 10 October) – more info [here](#).
- d. FSC – **Investment Performance Training Course** (Melbourne -16-18 October) – more info [here](#).
- e. INTERNATIONAL BUSINESS REVIEW – **Foundational Investment Finance Workshop 2024** (Melbourne – 17 October) – more info [here](#).
- f. FSC – **Investment Performance Training Course** (Sydney -22-24 October) – more info [here](#).
- g. INTERNATIONAL BUSINESS REVIEW – **Foundational Investment Finance Workshop 2024** (Sydney – 23 October) – more info [here](#).
- h. INTERNATIONAL BUSINESS REVIEW – **Asset Allocation Strategies 2024 Forum** (Sydney – 28-29 October) – more info [here](#).

- i. CARBON MARKET INSTITUTE – **Australasian Emissions Reduction Summit** (Melbourne – 29-30 October) – more info [here](#).
- j. FUND BUSINESS – **11th Fund Summit** (Sydney – 30 October) – more info [here](#).
- k. AUSTRALIAN SUSTAINABLE FINANCE INSTITUTE – **Australian Sustainable Finance Summit 2024** (Sydney – 31 October) – more info [here](#).

November 2024

- a. FINSIA – **Meet the Regulators** (Sydney – 8 November) – more info [here](#).
- b. ASIC – **Annual Forum 2024** (Sydney – 14-15 November) – more info [here](#).
- c. VARIOUS – **Women in Finance Summit 2024** (Sydney – 15 November) – more info [here](#).
- d. INTERNATIONAL BUSINESS REVIEW – **AI for Customer Experience in Financial Services 2024 Summit** (Sydney – 18-19 November) – more info [here](#).

December 2024

- a. INFORMACONNECT – **Australian Carbon Capture, Utilisation and Storage Conference** (Perth – 3 December) – more info [here](#).

INTERESTING READS

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

- a. [A clearer picture of the coming Cyber Security Bill and critical infrastructure reforms](#) - the Government hopes to bring a new Cyber Security Bill to Parliament which will include ransom payment reporting obligations, new security standards for smart (IoT) devices, limits on how cyber agencies use information and the creation of a Cyber Incident Review Board. At the same time we expect see a bill to change critical infrastructure laws to regulate critical data storage systems, to introduce new consequence management and remedial powers, to simplify sharing of critical information, and to shift telecommunications sector obligations to the Security of Critical Infrastructure Act. (Ashurst – 6 August 24)
- b. [ASIC shines a light on private credit](#) – Private credit is the new black in financial services, with the global market for this asset class topping US\$2.1 trillion in 2023, according to International Monetary Fund figures. As the market has ballooned, there have been calls for much greater market supervision of this opaque asset class. (FINSIA – 7 August 24)
- c. [Instos stare down greenwashing risk in private market allocations](#) – Reflecting on recent court cases against Active Super and Mercer Super on greenwashing, legal experts have identified potential ripple effects on private markets and institutional investors in these funds. (Investor Daily – 15 August 24)
- d. [Is the banking system ready for a major nation state attack?](#) – Experts say the recent CrowdStrike software defect demonstrates how poorly prepared some businesses are to respond to wide-ranging cyber threats. It's essential for financial services businesses to work out the risk of a full system failure, how much this would cost and practice for this scenario. (FINSIA – 21 August 24)
- e. [The convergence of ESG and Fintech: A new frontier for sustainable investment](#) – In today's world, where rapid technological innovation is reshaping our era, the urgent need to address global climate change has never been more pressing. (FINSIA – 21 August 24)

- f. [Seizing opportunities in the energy transition](#) – This guide comprehensively breaks down the key elements of the energy transition—providing specific actions for corporates, including large energy buyers, investors and infrastructure developers. It is based on the latest market, legal and regulatory developments, and will be updated regularly as changes unfold. (Allens Lawyers – 23 August 24)
- g. [Chalmers offers concessions to secure bipartisan support for RBA overhaul](#) - Treasurer Chalmers says the new dual-board structure for the RBA should be operational by early next year after he made a number of concessions in order to secure bipartisan support. (Investor Daily – 23 August 24)

Published by True Oak Investments Ltd (ABN 81 002 558 956, AFSL 238184).

This Regulatory Update is a summary of relevant legislative and regulatory information sourced from publicly available Government and Regulator announcements and eNewsletters produced by and for the financial services industry. The information contained within is not legal or compliance advice and should not be relied upon as such. Specific legal or compliance advice about your specific circumstances should always be sought separately before taking any action based on information in this publication.