



FINANCIAL SERVICES AND CREDIT QUARTERLY UPDATE

July 2017

CONSUMER CREDIT

ASIC and interest-only loans

On 3 April 2017 ASIC [announced](#) it would be conducting targeted industry surveillance to examine if lenders and mortgage brokers are inappropriately recommending interest-only loans.

Credit card reforms

In the 2017 Federal Budget the Government announced its commitment to proceed with credit card reforms that will:

- require that affordability assessments be based on a consumer's ability to repay the credit limit within a reasonable period;
- prohibit unsolicited offers of credit limit increases;
- simplify how interest is calculated; and
- require online options to cancel cards or to reduce credit limits.

These reforms were first floated a year earlier by the Government in its 2016 [response](#) to the Senate Inquiry into the credit card market.

Legislation to introduce these reforms will be introduced by the end of the calendar year, [says](#) the Treasurer.

Marketplace lending report

ASIC has conducted a survey of the marketplace lending (also known as "peer to peer lending") market and published a [report](#) on its findings on 1 June 2017.

The report involved a survey of 9 lenders. ASIC found that the lenders had written \$156 million in loans during the 2016 financial year.

The survey found that most revenue was generated from loan origination rather than loan fees. Complaints were generally very low. 65% of the investment by volume came from wholesale investors. Only a small proportion of total loans outstanding (4%) were secured.

ACCC looks into mortgage pricing

The Australian Competition and Consumer Commission (ACCC) will undertake a residential mortgage pricing [inquiry](#) until 30 June 2018. As part of the inquiry, the

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ACCC will be able to require relevant authorised deposit-taking institutions (ADIs) to explain changes or proposed changes to residential mortgage pricing, including changes to fees, charges, or interest rates by those ADIs.

COMMERCIAL FINANCE

ABA response to Carnell Report recommendations

The “Carnell Report”, the report of the Australian Small Business and Family Enterprise Ombudsman, Kate Carnell, into the small business lending practices of the major banks and other lenders, was [released](#) on 3 February 2017.

The Australian Bankers’ Association (ABA) [published](#) its response to the recommendations of the Carnell Report on 20 April.

The ABA has proposed “covenant light” credit contracts for small business. For new or renewed standard form credit contracts to small business customers, the ABA says that the banks will remove all general adverse material change clauses and limit specific events of non-monetary default to:

- unlawful behaviour;
- insolvency, bankruptcy, administration or other creditor enforcement;
- misrepresentation;
- use of the loan for a non-approved purpose;
- dealing with loan security property improperly or without consent;
- a change in beneficial control of a company, except as permitted;
- loss of a licence or permit to conduct business; and
- failure to provide proper accounts or to maintain insurance (after a reasonable period).

Banks will also remove financial indicator covenants as default triggers. However this will not apply for loans for property investment, property development or specialised lending transactions including margin lending, loans to SMSFs, bailment, invoice discounting, development finance, foreign currency loans, and tailored cash flow lending.

Banks will continue to have the right to value existing security assets during the life of the loan, but the “covenant light” contracts will not specify loan to valuation ratio as a trigger for enforcement.

A “small business” under the ABA’s proposal will be one which has less than 20 employees (or 100 for a manufacturing business) and less than \$10 million in annual business turnover, and where the total credit exposure of the business group, including related entities, is less than \$3 million. This would be measured at the initiation of the loan facility.

The ABA also supports the proposal that for small business loans, banks must provide borrowers with decisions on rollover at least 90 days before the loan matures. However, banks will not be required to rollover the loan on the same terms.

Disclosure is to be improved by banks providing a summary document of the clauses and covenants that may trigger defaults or other detrimental outcomes for borrowers, and by the use of simpler, more clearly written loan contracts for small business customers.

Banks are also developing guidelines for valuation practices and for the appointment of investigative accountants and receivers, administrators and liquidators for small business and farmers.

Second report of review of the four major banks

The second [report](#) of the review by the House of Representatives Standing Committee on Economics into the four major banks was tabled on 21 April 2017.

The second report draws on the March 2017 public hearings held by the Committee with the chief executives of each of the four major banks. In these public hearings, the Committee scrutinised the banks over their response to the recommendations of the first report and and to the Carnell Report’s recommendations about the use of non-monetary default clauses in small business loans.

The second report supports the recommendation in the Carnell Report to abolish non-monetary default clauses for small business loans.

COMPETITION

Productivity Commission review of competition in financial system

On 8 May 2017, the Treasurer asked the Productivity Commission to review

competition in Australia's financial system.

The terms of reference provide that the report to the Government should:

- consider the level of contestability and concentration in key segments of the financial system (including vertical and horizontal integration, and the related business models of major firms), and its implications for competition and consumer outcomes;
- examine the degree and nature of competition in the provision of personal deposit accounts and mortgages for households and of credit and financial services for small and medium sized enterprises;
- compare the competitiveness and productivity of Australia's financial system, and consequent consumer outcomes, with that of comparable countries;
- examine barriers to and enablers of innovation and competition in the system, including policy and regulation; and
- prioritise any potential policy changes with reference to existing pro-competition policies to which the Government is already committed or considering in light of other inquiries.

The terms of reference also say that the Commission should have regard to the Government's "existing wide-ranging financial system reform agenda".

The Commission commenced the inquiry on 1 July 2017 and the final report is due to be provided to the Government within 12 months.

ACCC funding for inquiries into financial system competition

The Government announced in the 2017 Federal Budget that it will provide \$13.2 million over four years from 2017-18 to the ACCC to establish a unit in the ACCC to undertake regular inquiries into specific financial system competition issues.

FINANCIAL ADVICE

ASIC's new interpretation of financial adviser "independence"

Under the *Corporations Act 2001* (Cth) (the **Corporations Act**), financial advisers are banned from describing themselves as "independent" or "impartial" and similar, unless they don't receive commissions or

other benefits and operate without conflicts of interest.

ASIC has now [decided](#) that this prohibition extends to descriptions of the ownership of the business, such as "independently owned" or "non-aligned". Some financial adviser practices which are not owned by major institutions have described themselves in this way.

ASIC is updating its regulatory guide RG 175 to give further guidance on this point.

FINANCIAL MARKETS

Financial benchmarks reform

On 26 June 2017 Treasury [released](#) exposure draft Bills which will require administrators of "significant" benchmarks" to have a "benchmark administrator" licence and comply with new regulatory requirements. Submissions close on 24 July 2017.

Crowdfunding

In the 2017 Federal Budget the Government announced that it would extend the regime for crowd-sourced equity funding to proprietary companies. Exposure draft legislation was [released](#) for comment by Treasury on 9 May 2017. Submissions closed on 6 June.

Meanwhile, crowdfunding for public companies commences on 29 September 2017. Regulations for the new regime have now been [issued](#), and ASIC has [released](#) draft guidance for fundraising companies and CSF intermediaries.

FINANCIAL SYSTEM

Sedgwick review into remuneration

The final report by Stephen Sedgwick into the retail banking remuneration was published on 19 April 2017. Mr Sedgwick was appointed by the ABA to review product sales commissions and product based payments in retail banking.

The review concluded that there is not sufficient evidence of significant systemic risks of poor outcomes for customers to support an outright ban on all product based payments in retail banking. However, there were some current practices which carried an unacceptable risk of promoting behaviour that is inconsistent with the interests of customers.

The review recommends a number of changes, including the following:

- Banks should remove variable reward payments and campaign related incentives that are directly linked to sales or the achievement of sales targets.
- Eligibility to receive any variable reward payment should be based on an overall assessment against a range of factors reflecting the responsibilities of each role.
- There should be credible behavioural or equivalent values gateways applied when determining if an individual can access any rewards (for example ethical behaviour, and customer focus).
- Variable rewards should not include any accelerators and should ultimately amount to a relatively small proportion of fixed pay.
- Banks should examine their workplace culture and redress any bias towards sales in preference to ethical behaviour and customer service.
- Banks should examine their performance management systems and make changes to ensure that embedded signals and incentives to staff are aligned with the above recommendations.
- In relation to mortgage brokers, banks should cease volume-based incentives that are additional to upfront and trail commissions, and also cease soft dollar payments and the practice of increasing incentives when engaging in sales campaigns.
- Remuneration of aggregators and mortgage brokers should not directly link payments to loan size.

The review also recommended that the ABA should commission an independent review to report in three years about progress. This review should examine whether the government should legislate to extend ASIC's intervention powers to address conflicted remuneration if the industry cannot or does not address them.

The review also recommends that ASIC should investigate whether upfront commissions paid to introducers and referrers is justified.

ABA background check protocol

The ABA [released](#) a new conduct background check protocol on 9 June 2017. The protocol will require banks to ask job applicants a series of fact-based questions about employment history and

conduct. The protocol is to be implemented by major banks from 1 July 2017 and by other banks by 1 October 2017.

FINTECH

Open access to data

On 8 May 2017, the Federal Government tabled the Productivity Commission's final report into Data Availability and Use.

The Commission's proposed reforms include appointing a National Data Custodian to accredit public entities to release data to trusted users, to designate National Interest Datasets, and provide guidance on privacy, de-identification and security.

The Commission recommends new Commonwealth legislation to give effect to these reforms - a *Data Sharing and Release Act* - as well as a timeframe to have that legislation passed by the end of 2018.

A taskforce has been established within the Department of the Prime Minister and Cabinet to develop the Government's response.

Individuals and small/medium businesses would be given a new Comprehensive Right in relation to their own data. This right would include:

- The right to view, request edits or corrections, and be advised of the trade to third parties of information held on them.
- The right to have a machine-readable copy of their data provided either to them or directly to a nominated third party, such as a new service provider.

For datasets designated as national interest, all restrictions to access and use contained in a variety of national and state legislation, and other program-specific policies, would be replaced by new arrangements under the *Data Sharing and Release Act*.

Open banking

The Government confirmed in the 2017 Federal Budget that it will introduce an open banking regime.

An open banking regime would force ADIs to share product and customer data when requested by the customer.

There will be an independent review into

the most appropriate implementation model for an open banking regime, with the review to report by the end of 2017.

Other fintech initiatives in Budget

The 2017 Federal Budget included a number of initiatives designed to encourage innovation in fintech, which are summarised below.

The Government has proposed to relax the legislative 15% ownership for banks, which would enable more closely held banks to be licensed. It is also committed to removing the prohibition on the use of the term "bank" by ADIs with less than \$50 million in capital. The Government believes that these changes will improve competition by encouraging new entrants.

From 1 July 2017, purchases of digital currency are no longer subject to GST. Digital currency such as bitcoin will be treated like money for GST purposes. This will remove the double taxation incurred on the purchase and use of digital currency. Treasury has [released](#) draft legislation to implement the change with retrospective effect. Submissions close on 26 July.

To assist in raising capital, the Government will extend crowdsourced equity funding to proprietary companies (see Crowdfunding item under Financial Markets above).

The regulatory sandbox introduced by ASIC will be expanded to allow for a greater range of products and services that can be offered during the sandbox period, including the issue of consumer credit and offering of deposit payment products. The testing period will be increased from 12 months to 24 months.

Regtech

ASIC has announced a package of "regtech" initiatives. It plans to set up a regtech industry liaison network, and will carry out new technology trials using regtech applications. It is also planning a regtech hackathon later in 2017.

These initiatives are covered in a new ASIC report on regtech [released](#) on 26 May. ASIC invited feedback on the report (submissions closed on 4 July).

INSOLVENCY

Insolvency law reform to create safe harbour

The *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* (Cth) was [introduced](#) into the House of Representatives on 1 June 2017.

The Bill amends the Corporations Act to create a safe harbour for company directors from personal liability for insolvent trading if the company is undertaking a restructure outside formal insolvency.

The Bill will also make 'ipso facto' clauses unenforceable while a company is restructuring under administration or under a compromise or arrangement aimed at avoiding being wound up in insolvency, or when a managing controller has been appointed.

An ipso facto clause in a contract allows one party to terminate or modify the operation of a contract upon the occurrence of some specific event, regardless of otherwise continued performance of the counterparty.

INSURANCE

Life commissions regulation

ASIC [issued](#) a legislative instrument on 31 May 2017 to control life insurance commissions. The instrument comes into effect on 1 January 2018.

The instrument follows amendments to the Corporations Act in 2017 which made life insurance products subject to the ban on conflicted remuneration, but enabled ASIC to exempt insurance commissions subject to a cap and clawback provisions.

A commission cap of 60% will apply to commissions paid in the first year of a life insurance policy. A cap of 20% will apply in relation to trailing commissions for subsequent years. The 60% cap will be transitioned over a two-year period, commencing with an 80% cap on 1 January 2018.

The clawback provisions provide that if a policy is cancelled or not continued in the first year of the policy, 100% of the commission will be clawed back, and if the policy is cancelled or not continued in the second year of a policy, 60% of the commission will be clawed back.

ASIC consults on new SOA for life insurance

A consultation paper on a new example statement of advice for life insurance has been [released](#) by ASIC.

ASIC was asked to consider how to make statements simpler and more effective. The closing date for submissions is 31 July 2017.

Insurance for northern Australia - monitoring by ACCC

The Federal Government has allocated \$7.9 million over four years from 2017-18 to the ACCC to monitor and report on prices, costs and profits in the insurance market for home, contents and strata insurance in northern Australia.

MANAGED INVESTMENTS

Affordable housing Budget initiatives

In the 2017 Budget the Government announced that it will enable Managed Investment Trusts (**MITs**) to invest in affordable housing. To receive concessional taxation treatment, the affordable housing must be available for rent for at least 10 years.

An MIT will be able to acquire, construct or redevelop a property but must derive at least 80% of its assessable income from affordable housing (i.e., low to moderate income tenants with rent charged at a discount below the private rental market rate).

The Government will also establish a National Housing Finance and Investment Corporation (**NHFIC**) to operate an affordable housing bond aggregator. This is intended to provide cheaper and longer-term finance for community housing providers by aggregating their borrowing requirements and issuing bonds to the wholesale market.

The Budget also included an announcement that the Government will establish a \$1 billion National Housing Infrastructure Facility (**NHIF**). The NHIF will provide financial assistance to local government for infrastructure that supports new housing.

To further encourage investment in affordable housing, from 1 January 2018

there will be an additional 10% capital gains tax discount to resident individuals who invest in qualifying affordable housing.

ASIC guidance on common issues in registration of managed investment schemes

ASIC has [published](#) an information sheet to explain the common issues identified with managed investment scheme constitutions during the registration process.

PERSONAL PROPERTY SECURITIES

Amendments for PPS leases

[Amendments](#) to the definition of PPS lease in the *Personal Property Securities Act 2009* (Cth) are now in effect. The amendments to the definition mean that a lease or bailment of goods is only a PPS lease if it extends for a term of more than two years, or has an indefinite term which exceeds two years.

PRIVACY

Mandatory data breach notification guidance

The Office of the Australian Information Commissioner has [released](#) draft guidance on notifiable data breaches (i.e. mandatory data breach reporting), which comes into effect on 22 February 2018.

PRUDENTIAL STANDARDS

Banking Executive Accountability Regime

The Government announced in the 2017 Federal Budget that it will legislate a new Banking Executive Accountability Regime (**BEAR**). The BEAR will have three key components:

1. ADIs will have to advise the Australian Prudential Regulation Authority (**APRA**) before appointing senior executives and directors. Upon appointment, these people must be registered with APRA and a map of the role and responsibilities of the ADI's senior executives provided to the regulator.
2. New expectations for how banks and their executives conduct their business consistent with "good prudential outcomes", and a new civil penalty regime enforced by APRA for ADIs

that fail to meet those expectations. APRA will be given powers to remove and disqualify senior executives and directors from all APRA-regulated institutions. The civil penalty will be a maximum of \$200 million for larger ADIs and \$50 million for smaller ADIs. APRA will also be able to impose penalties if ADIs do not appropriately monitor the suitability of their executives to hold senior positions.

3. A minimum of 40% of an ADI executive's variable remuneration (60% for certain executives such as the CEO) will have to be deferred for a minimum period of four years. APRA will be given powers to require ADIs to review and adjust their remuneration policies when APRA believes such policies are producing "inappropriate outcomes".

Treasury [released](#) a consultation paper on the BEAR on 13 July 2017. Submissions are due by 3 August.

The paper says that the BEAR will apply to authorised ADIs, including subsidiaries such as insurers that are part of an ADI group.

In setting out its proposals in the paper, Treasury has drawn inspiration from the "Senior Managers Regime" introduced in March 2016 in the United Kingdom, and the "Manager-in-Charge" measures adopted by the Securities and Futures Commission in Hong Kong in April 2017.

- **Accountable persons:** The paper proposes that the executives to be covered by the BEAR ("accountable persons") would be defined to include the most senior directors and executives of an ADI, who will be held to a heightened standard of responsibility and accountability. The proposed definition of an accountable person will include a combination of prescription and principle. The prescribed element would include prescribed oversight functions such as Chair of the Risk Committee, and prescribed executive functions such as Chief Executive. The principles-based element of the definition would capture other individuals who have a significant influence over conduct and behaviour and whose actions could pose risks to the business and its customers. This might capture people such as the head of a key business area.
- **Expectations:** The BEAR will include expectations to make clear the expected conduct of ADIs and their accountable persons. The proposed

expectations for ADIs would include:

- conducting its business with integrity;
- conducting its business with due skill, care and diligence;
- dealing with APRA in an open and cooperative way; and
- taking reasonable steps to act in a prudent manner, organise and control its affairs responsibly and effectively, and ensure that the expectations and accountabilities of the BEAR are applied and met throughout the organisation.

The expectations of accountable persons would be to:

- act with integrity, due skill, care and diligence and be open and cooperative with APRA; and
- take reasonable steps to ensure that:
 - the activities or business of the ADI for which they are responsible are controlled effectively and comply with relevant regulatory requirements and standards;
 - any delegations of responsibilities are to an appropriate person and discharged effectively; and
 - the expectations and accountabilities of the BEAR are applied and met in the area for which they are responsible.
- **Remuneration:** The remuneration component of BEAR will require the deferral of an ADI executive's variable remuneration. The remuneration provisions will only apply to accountable persons that perform executive functions (not persons who perform oversight roles). It is proposed that variable remuneration will include that part of total remuneration that is discretionary and conditional on performance and the delivery of results. The 60% deferral rate for variable remuneration will apply to all Chief Executive Officers of ADIs. APRA is to be given enhanced powers to direct ADIs to review and adjust remuneration policies, which would include the power to reduce variable remuneration of an executive accountable person if that person does

not meet the new expectations of BEAR and is consequently removed and or disqualified.

- **Registration:** The paper proposes that accountable persons will have to be registered with APRA and ADIs will be required to notify APRA in advance of the appointment of any accountable person. Upon notification to APRA, APRA would consult its register of accountable persons and advise the ADI if the candidate has previously been removed or disqualified by APRA or if APRA was aware of any other issues that could affect the suitability of the candidate. APRA will not take on the responsibility for assessing the suitability of accountable persons, but the procedure is intended to give visibility to APRA of accountable persons and enable APRA to advise if it has any concerns regarding a candidate.
- **Accountability statements:** ADIs will also have to give APRA “accountability statements” to detail the roles and responsibilities of each accountable person. The paper suggests that one approach would be to prescribe a minimum set of responsibilities across an ADI group or subgroup that must be allocated to accountable persons.
- **APRA powers:** The paper discusses new powers to be given to APRA to remove and disqualify persons from APRA regulated institutions. It proposes one approach which would enable APRA to disqualify a person without having to apply to the Federal Court, if it is satisfied that the person is not fit and proper for the role. The paper proposes that this power should be given over all accountable persons, and it is also proposed that APRA would be able to require an ADI to inform APRA when individuals have been the subject of internal disciplinary proceedings.
- **Civil penalties:** In relation to the proposed new civil penalties announced for the BEAR, the paper proposes that APRA would be able to seek a civil penalty, among other things, where an ADI failed to meet the new expectations under the BEAR, failed to hold accountable persons to account under the BEAR, and where an ADI does not appropriately monitor the suitability of accountable persons. The paper suggests that in order to enhance the deterrent effect, it may be necessary to prevent ADIs from taking out insurance against these civil penalties.

Use of the word “bank”

Treasury has [released](#) exposure draft legislation that will enable all ADIs to use the word “bank”, regardless of their size. The *Treasury Laws Amendment (2017 Measures No. 8) Bill 2017* (Cth) will amend section 66 of the *Banking Act 1959* (Cth), which currently contains a restriction on the use of the terms “bank”, “banker” and “banking”. The amendments will provide that it is not an offence for an ADI to assume or use these terms in relation to the ADI’s financial business. However, APRA will still have the power to make a determination to stop an ADI using the term “bank”. Submissions close on 14 August.

APRA supervision of non-ADI lenders – new powers

The draft *Treasury Laws Amendment (Non-ADI Lender Rules) Bill 2017* (Cth) [released](#) by Treasury on 17 July will give APRA new powers in respect of credit provided by entities that are not ADIs. The Bill will amend the *Banking Act 1959* (Cth) to enable APRA to make rules about lending by non-ADI lenders to address financial stability risks. The amendments would also give APRA a new power to issue a direction to a non-ADI lender if it fails to comply with the rules, create penalties for non-compliance, and also give APRA new data collection powers under the *Financial Sector (Collection of Data) Act 2001* (Cth) in relation to non-ADI lenders. Submissions close on 14 August 2017.

Common prudential standards

New common (“cross industry”) prudential [standards](#) for risk management, outsourcing, business continuity management, governance and fit and proper commenced on 1 July 2017.

Securitisation prudential standard

APRA [released](#) its final revised prudential practice guide on securitisation APG 120 on 26 April 2017.

Large exposures

APRA [released](#) a consultation package on 12 April 2017 with proposed revisions to the prudential framework on large exposures for ADIs.

SUPERANNUATION

Downsizing seniors concessional contribution

From 1 July 2018, people 65 or older will be able to make a non-concessional contribution of up to \$300,000 from the proceeds of selling their home. This will be in addition to contributions currently permitted under existing rules and caps.

The allowance will apply to sales of a principal residence owned for the past ten or more years. Couples will be able to take advantage of this measure for the same home.

LRBAs

Draft legislation has been [released](#) by the Treasury to include the use of limited recourse borrowing arrangements in an SMSF member's total superannuation balance and transfer balance.

The proposed changes are part of the Federal Government's superannuation reforms which are summarised [here](#).

ASIC extends start dates for Stronger Super reforms

The choice product dashboard obligations will require registrable superannuation entities (RSE) licensees to publish key information about choice investment products on the fund's website. The product dashboard requirements for choice products were due to take effect on 1 July 2017 but have now been [deferred](#) for two years until 1 July 2019. Under regulations, a product dashboard must be included as part of a periodic statement if the RSE licensee is required to make publicly available a product dashboard for the investment option. The portfolio holdings disclosure obligation will require RSE licensees to publish information about the fund's portfolio holdings on the fund's website. The first reporting date was due to be 31 December 2017 but has been extended to 31 December 2019.

TAX

Bank levy - Federal

The Government has introduced a major bank levy that will apply from 1 July 2017 to ADIs with liabilities of at least \$100 billion. The \$100 billion threshold will be indexed to GDP.

The levy will be calculated quarterly as 0.015% of an ADI's licensed entity liabilities as of each APRA mandated quarterly reporting date (i.e., an annualised rate of 0.06%).

The levy will not apply to additional Tier 1 capital and deposits of individuals, businesses and other entities protected by the Financial Claims Scheme.

The Government claims that the levy will provide a more level playing field for smaller banks and non-bank competitors.

Bank levy – South Australia

ADIs that offer services in South Australia and which are liable for the Commonwealth major bank levy will also be liable for a South Australian major bank levy from 1 July 2017.

The State levy applies at a rate of 0.015% of South Australia's share of the total value of bank liabilities subject to the Commonwealth levy at the end of each quarter.

The South Australian share is to be based on South Australia's share of the national economy (for 2017-18, it will be 6.06%).

Transparency Information

ASIC [reports](#) that following a review it has intervened in relation to 21 superannuation trustees to improve 'Transparency Information' (TI) on their super fund websites. TI comprises remuneration, governance and other information related to the fund. Superannuation funds must disclose TI on a website and keep it up to date.

AML/CTF

Draft AML rules

Draft amendments to the *AML/CTF Rules* have been [released](#) by AUSTRAC in response to the review of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) which was completed last year. Submissions closed on 22 May. Included in the proposed amendments are a revised customer due diligence procedure for beneficial owners and a proposed description of the role and functions of the AML/CTF Compliance Officer.

AUSTRAC red flag guide for financial planners

AUSTRAC has developed a new tool called “Financial crime red flags – a guide for financial planners” to assist financial planners to detect possible criminal activity by customers and report suspicious activity under the *AML/CTF Act*. The poster and risk assessment are available on the AUSTRAC [website](#).

Risk assessment of securities and derivatives sector

AUSTRAC [released](#) a report on 12 July 2017 on its risk assessment of the securities and derivatives sector. The report found that the risk of criminal exploitation of this sector was at the high end of “medium”. The highest reported threat to the sector was fraud. According to the report, a significant number of customer email accounts and trading accounts have been hacked and, in some cases, money stolen. Equal second as the highest areas of suspected criminal activity were money laundering and insider trading and market manipulation.

AUSTRAC risk assessment of stored value cards

AUSTRAC has also [conducted](#) a risk assessment of stored value cards, such as travel and retail gift cards.

DISPUTES AND ENFORCEMENT

New EDR scheme

The Government is introducing a new framework for dispute resolution. The Australian Financial Complaints Authority (AFCA) from 1 July 2018 will replace the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal. Financial services and credit licensees will be required to be members and bound by its decisions, and the body will be industry funded.

AFCA will hear individual consumer, investor and small business disputes of higher values than are permitted under the existing schemes.

A consultation paper together with draft legislation and regulations was [issued](#) by Treasury on 17 May 2017. Submissions closed on 14 June 2017.

Self-reporting – views from the ASIC enforcement review

The ASIC Enforcement Review was established in October 2016 to examine the adequacy of the ASIC enforcement regime.

On 11 April 2017, it published a consultation paper on self-reporting of contraventions by financial services and credit licensees. Submissions closed on 12 May.

The paper says that the self-reporting regime is not a mechanism for determining the guilt or innocence of individuals and to use it as such would undermine procedural fairness and due process. It rejects the proposal in a recent parliamentary committee review of the major banks that ASIC be notified within 5 days of lodging a breach report of the consequences for senior executives involved in the breach. However, it supports the recommendation from the same review that there should be annual publishing of breach report data at a licensee level.

The paper also supports extending the breach reporting requirements to credit licensees.

Also supported is creating civil penalties for failure to comply with the breach reporting obligations. The review taskforce believes that criminal penalties are not appropriate for minor infractions and that the criminal penalty amounts are too low.

The paper recommends that a “co-operative” approach be encouraged when licensees report breaches as and when required.

Licensing powers reviewed

The ASIC Enforcement Review has also [released](#) a consultation paper on strengthening ASIC licensing powers to ensure that ASIC can take appropriate action to refuse granting a licence, or to suspend or cancel a licence, where the applicant or licensee is not assessed by ASIC as fit and proper. Submissions on the paper are due by 26 July 2017.

Industry codes in the financial sector

The ASIC Enforcement Review has also [released](#) a consultation paper on the role of self-regulatory initiatives such as industry codes in regulation of the financial sector.

The task force believes that the content and governance arrangements for codes should be subject to approval by ASIC, and that entities engaging in activities covered by an approved code should be required to subscribe to the code (in other words they would become mandatory rather than voluntary). Submissions on the consultation paper are due by 26 July 2017.

Enhanced search warrant powers

The ASIC Enforcement Review has [issued](#) a position and consultation paper on the harmonisation and enhancement of search warrant powers. Currently, ASIC can apply for the issuance of specific search warrants under various statutes, namely the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**), the *NCCP Act*, the *SIS Act* or *RSA Act*. However, in the last 7 years only 2 ASIC Act search warrants have been issued (none under the other statutes) and virtually all ASIC initiated search warrants are issued under section 3E of the *Crimes Act*. The preliminary positions for the Review in respect of reform of the search warrant provisions are that:

- the ASIC specific search warrant powers should be consolidated into the ASIC Act;
- the requirement under some statutes (most notably the NCCP Act) to issue a statutory notice to produce documents before a search warrant can be applied for should be abolished;
- the requirement that the warrant specify “particular books” that can be searched and seized be removed, allowing ASIC to search and seize the kind of evidential material specified in the warrant;
- similar ancillary provisions to those that exist in the Crimes Act, such as those that require an occupier of the premises to provide reasonable assistance, to be included in the ASIC Act;
- ASIC specific warrants would only be available where ASIC holds a reasonable suspicion that an indictable offence has been committed (an offence which is punishable by 12 months imprisonment or more); and
- materials obtained from ASIC search warrants would be able to be used by ASIC in any enforcement proceedings (criminal, civil or administrative), but it may be appropriate to limit access by private litigants to material seized by ASIC under search warrant.

The deadline for submissions is 26 July 2017.

Compensation scheme of last resort

The review into the financial system external dispute resolution framework had its terms of reference expanded by the Government to look into making recommendations on the establishment, merits and potential design of a compensation scheme of last resort, and to consider the merits and issues involved with providing access to redress for past disputes. The review [released](#) an issues paper on this topic and submissions closed on 28 June 2017.

Productivity Commission report into consumer law enforcement and administration

The Productivity Commission’s report into the enforcement and administration of Australian consumer law was [released](#) on 12 April 2017.

The report looked at the “multiple regulator model” where at a Federal level the Australian Consumer Law is administered by the ACCC and the corresponding provisions relating to financial services in the ASIC Act are administered by ASIC, and with enforcement and a State and Territory level by the State and Territory consumer affairs agencies.

The report found that the multiple regulator model appeared to be operating reasonably effectively. The report did not make any specific recommendations in respect of financial services, but did recommend an independent review of consumer alternative dispute resolution mechanisms.

Financial Services Panel

ASIC has proposed to develop and implement a Financial Services Panel. It [released](#) a consultation paper on the proposal on 11 April 2017.

The Panel would be responsible for determining whether ASIC should ban individuals from the financial services and credit industries in the case of misconduct. The Panel would be referred matters by ASIC where they are significant, complex or novel.

The composition of the Panel would include

financial services and credit industry participants and non-industry participants such as lawyers or academics with relevant expertise, and at least one ASIC staff member.

Submissions on the consultation paper were due by 23 May 2017.

ASIC supervisory levy

The *ASIC Supervisory Cost Recovery Levy Act 2017* (Cth) imposes a levy on entities regulated by ASIC to recover its regulatory costs.

Regulations under the Act have now been made. The *ASIC Supervisory Cost Recovery Levy Regulations 2017* (Cth) [made](#) on 27 June 2017 provide for a flat and graduated levy on entities in each industry subsector regulated by ASIC.

Flat levies will apply for regulatory costs in some sectors where these costs are approximately the same for each entity and where the administrative and regulatory burden of calculating more tailored levies outweighs the benefits. A graduated levy will apply for subsectors where ASIC regulatory costs vary significantly across regulated entities.

Where a graduated levy is charged, there will be a minimum amount imposed for all entities and a variable component. The minimum amount will recover ASIC's actual costs of stakeholder engagement, policy advice, guidance, education and a portion of ASIC's capital allowance. The variable component will recover ASIC's remaining costs, including surveillance and enforcement.

There will be a maximum cap for publicly listed companies.

The regulations also set out how to determine which subsector an entity falls within.

ASIC will be required to make an annual legislative instrument specifying the formulas for calculating the amount of the levy payable by entities in each subsector.

ASIC has also [released](#) *Report 535 ASIC cost recovery arrangements 2017-18* which identifies industry sectors and explains the methodology for how the ASIC levies will be calculated. The first invoices will be issued in January 2019 for regulatory services in the 2017–18 financial year.

Macquarie Bank EU on wholesale FX

Macquarie Bank has given ASIC an enforceable undertaking (EU) in relation to its wholesale foreign exchange businesses. ASIC [alleges](#) that the bank did not ensure that its systems and controls were adequate to address risks relating to instances of inappropriate conduct identified by ASIC.

Motor Finance Wizard EU

ASIC [announced](#) on 24 May 2017 that Motor Finance Wizard had signed an enforceable undertaking and implement a wide-ranging remediation program after ASIC found that it had failed to meet its responsible lending obligations.

Macquarie Securities infringement notice penalty

Macquarie Securities (Australia) Ltd (**Macquarie**) has paid a penalty of \$505,000 to comply with an ASIC infringement notice issued by the Markets Disciplinary Panel in relation to the trading of one of Macquarie's clients. It is [alleged](#) that Macquarie contravened the Corporations Act by failing to comply with market integrity rules which:

- prohibit a Macquarie from entering orders on the market on behalf of another person where it ought reasonably suspect that the person placed the orders with the intention of manipulating the market;
- require Macquarie to have appropriate automated filters in relation to the use of automated order processing to ensure the automated processing use does not interfere with the efficiency and integrity of the markets; and
- require Macquarie to have and maintain the necessary organisational and technical resources to ensure that its conduct does not interfere with the efficiency and integrity of the market.

ASIC does not have to prove Criminal Code fault elements in civil remedies

In the decision *Gore v ASIC* [\[2017\] FCAFC 13](#), the Federal Court considered that ASIC had to prove the Criminal Code fault elements to obtain civil remedies in relation to breaching section 727 of the Corporations Act by offering securities with a current prospectus because section 727 is an offence provision and section 1308A

of the Act provides that Chapter 2 of the Criminal Code applies to all offences under the Corporations Act. The question was referred to the Full Court of the Federal Court in a subsequent case, *ASIC v Whitebox Trading Pty Ltd* [2017] FCAFC 100, where the Full Bench held that Chapter 2 of the Criminal Code does not apply to proceedings brought for a contravention of a civil provision, including a civil penalty provision.

Westpac infringement notice penalty

Westpac has paid a penalty of \$127,250 to comply with an ASIC infringement notice issued in response to an alleged breach of the ASIC derivative transaction reporting rules. ASIC [alleges](#) that during the relevant period, Westpac failed to report more than 110,000 reportable transactions.

Insurance refunds

Virginia Surety has agreed to refund over \$330,000 in insurance premiums to more than 500 customers. The refunds relate to consumer credit insurance sold to customers taking out loans at car yards. ASIC [alleges](#) that the company had stated that the life cover component of the insurance was underwritten by TAL Life, without permission of TAL. However, TAL has in any event agreed to honour the life cover and pay claims, even though customers will also receive a refund from Virginia Surety.

UBS Securities infringement notice penalty

UBS Securities Australia Limited (UBS) has paid penalties totalling \$280,000 to comply with two infringement notices issued by the Markets Disciplinary Panel in relation to the operation and monitoring of a crossing system operated by UBS, called USB PIN.

First Australian conviction for unregistered remittance service

In the first ever conviction in Australia, the directors of Tin Vuong Pty Ltd, which operated an unregistered remittance service in Melbourne and Sydney, were [convicted](#) of operating an unregistered remittance service and received suspended sentences of 24 months and 26 months imprisonment and had over \$2 million in proceeds of crime forfeited to the Commonwealth. Remittance service

providers are required to apply for registration with AUSTRAC and it is an offence to provide designated remittance services if not registered.

Draft whistleblower legislation to be released soon

In a recent [speech](#), the Minister for Revenue and Financial Services, Kelly O'Dwyer, indicated that draft whistleblower legislation will be released in the near future, providing expanded protections for whistleblowers. However, the Minister did not commit to the Government introducing a US-style reward scheme to encourage whistleblowers to come forward.

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