Financial Services and Credit Monthly Update
February 2024

CONSUMER CREDIT

Independent review of credit reporting framework

The Federal Government has initiated an independent review of credit reporting provisions within the Privacy Act 1988 (Cth) (the **Privacy Act**) and the National Consumer Credit Protection Act 2009 (Cth) (the **NCCP Act**). The review will be conducted by Heidi Richards. The focus is on assessing the effectiveness and efficiency of the credit reporting provisions in the Privacy Act and the NCCP Act. The review is scheduled to report by 1 October 2024.

Credit reporting rule

The Office of the Australian Information Commissioner (**OAIC**) is consulting on the draft Privacy (Credit Related Research) Rule 2024 to replace the Privacy (Credit Related Research) Rule 2014 when it sunsets on 1 October 2024. The existing rule relates to section 20M of the Privacy Act, which prohibits a credit reporting body from using or disclosing de-identified credit reporting information. The rule allows for use of such information in limited cases, subject to conditions in the rule. The OAIC proposes to remake the existing rule with minor changes and updates. Comments are due by 11 March 2024.

COMPETITION

Australian Competition Tribunal authorises ANZ's proposed takeover of Suncorp Bank

The Australian Competition Tribunal (**ACT**) has granted authorisation for ANZ's proposed acquisition of Suncorp Bank. The ACT overturned the previous decision of the Australian Competition and Consumer Commission which declined the authorisation due to its concern that the proposed acquisition would further entrench an oligopoly market structure dominated by the major banks.

The ACT was satisfied the proposed acquisition would not result in a substantial lessening of competition in the relevant market and that the small increase in the market share of ANZ would not have a meaningful impact on the likelihood of the major banks engaging in successful coordination. Furthermore, the ACT found the proposed acquisition would have real and tangible benefits to the public, outweighing any detriment from competition reduction.

FINANCIAL SERVICES

ASIC reminds licensees of consequences of unlicensed conduct

The Australian Securities and Investments Commission (**ASIC**) has reminded Australian financial services (**AFS**) licensees to ensure that the financial services provided to their clients are authorised under their AFS licence. Pursuant to ASIC Regulatory Guide 277 Consumer remediation, licensees are required to compensate clients for any unlicensed financial services, and ASIC expects the licensee to return the affected client back to the position they would have been in, or as close as possible, had the breach not occurred.

FOREIGN INVESTMENT

New foreign investment Bill aimed at boosting housing supply

The Federal Government has introduced the Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024 (Cth) with the aim of lifting Australia's supply of affordable housing. The proposed changes seek to impose the following measures:

- higher fees for the purchase of established homes, to encourage foreign buyers to invest in new housing developments;
- increased penalties for owners who leave properties vacant, in order to incentivise foreign

investors to place their unused properties on the rental market; and
- reduced application fees for foreign investment in build to rent projects.

PRUDENTIAL

APRA speaks on 2024 priorities for superannuation industry

At the Conexus Chair Forum on 1 February 2024, the Deputy Chair of the Australian Prudential Regulation Authority (**APRA**) Margaret Cole gave a speech on APRA's 2024 priorities for the superannuation sector, which include building resilience in the industry and improving outcomes for fund members.

In regard to cyber risks, Ms Cole reminded superannuation funds of their obligations under Prudential Standard CPS 234 Information Security and said that APRA expects trustees to have clear oversight of their organisations' cyber resilience, and board capabilities to do so. She also said that APRA will not hesitate to enforce against entities with significant deficiencies in their information security and cyber controls.

Ms Cole also reminded the industry of the upcoming Prudential Standard CPS 230 Operational Risk Management which comes into effect in July 2025. She urged superannuation funds to now start preparing for CPS 230 implementation for several reasons. These include CPS 230 imposing ultimate accountability on boards for operational risk management; substantial work being required to ensure compliance with CPS 230 once it is effective; and the significant work involved with upgrading operational resilience to the levels required under CPS 230.

Financial Accountability Regime delays

APRA and ASIC have written to authorised deposit-taking institutions (**ADIs**) about the commencement and implementation of the Financial Accountability Regime (**FAR**) for ADIs. The FAR is due to commence for ADIs on 15 March 2024. However, because of the delay in finalising the Minister Rules, the regulators say that they recognise that industry may need more time after 15 March to submit applications to register new accountable persons and to comply with core or enhanced notification obligations. APRA and ASIC advise that they expect ADIs to submit their registration applications and make the relevant notifications as promptly as possible and by no later than 30 June 2024.

APRA consultation on changes to superannuation standard

APRA is seeking feedback on proposed amendments to Prudential Standard SPS 114 Operational Risk Financial Requirement and its associated guidance. The consultation letter and proposed changes follow the feedback provided in response to APRA's 2022 Discussion Paper.

APRA updates reporting guidance on large exposures

APRA has released an update on the guidance for general insurers to follow when reporting on large exposures under GRF 117.0 and GRF 117.0(G). The update introduces standard wordings to be used in the reporting forms.

AML/CTF

AUSTRAC consultation on draft outsourcing guidance

The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is seeking submissions on its draft guidance on outsourcing in the context of engaging external providers to assist in satisfying anti-money laundering and counter-terrorism financing obligations. Submissions are due by 18 March 2024.

DISPUTES AND ENFORCEMENT

First IDR reporting period for third tranche firms

Under the new IDR reporting standards, "third tranche" firms are required to submit their first report to ASIC in the submission window from 1 January to 29 February 2024, covering the six-month reporting period 1 July to 31 December 2023.

ASIC accepts undertaking from buy now, pay later provider Elepay

ASIC has accepted a court enforceable undertaking from buy now, pay later provider Elevare Pay Easy Pty Ltd, trading as Elepay. Elepay offers a range of products including buy now, pay later products and short-term loans which are financial products for the purpose of the design and distribution obligations (**DDO**) under the Corporations Act 2001 (Cth) (the **Corporations Act**). Despite being required to provide a target market determination (**TMD**) before offering such products to consumers under the DDO, Elepay did not have TMDs for seven credit products distributed to consumers between 5 October 2021 and 15 March 2023.

ASIC has accepted Elepay's proposed undertaking that it would obtain an independent expert report on:

- whether the affected clients fell within the target market of clients under the TMDs which Elepay later issued on 15 March 2023;
- the fees and charges paid to Elepay by clients

who are outside of the target market under the TMDs; and

- whether the later issued TMDs comply with the DDO and the steps required for Elepay in case of non-compliance.

For any clients who fall outside the TMDs, Elepay has undertaken to notify them, cease charging any fees and charges and refund any paid fees and charges.

ASIC speaks on 2024 enforcement priorities in superannuation sector

At the Conexus Chair Forum on 1 February 2024, ASIC Deputy Chair Sarah Court delivered an address on ASIC's enforcement priorities in the superannuation sector in 2024, which focus on three key themes: member services failure; greenwashing as part of misleading conduct; and failure to protect superannuation balances. Ms Court said that these themes reflect areas of genuine harm identified through intelligence and surveillance and should indicate where the sector needs to lift performance.

Regarding member service, Ms Court said that ASIC expects trustees to communicate proactively with members, deal responsibly with members' money and deliver good value for money regardless of the member's membership phase. She said that ASIC has observed that many superannuation funds are falling short of these expectations.

On greenwashing and misleading conduct, Ms Court said that ASIC's focus for 2024 would be on net zero statements and targets made with no merit; the use of terms like 'carbon neutral', 'clean' or 'green' that are unfounded; and the use of inaccurate labelling or vague terms in sustainability-related funds.

As to the protection of superannuation balances, Ms Court said that members should be confident that their superannuation savings are not eroded by unnecessary or inappropriate fees and charges, and that their invested products are designed to maximise retirement outcomes and sufficient balance risk. She said that ASIC's recent enforcement indicated that the sector was falling short of this expectation.

Suspected scam self-managed super fund operators charged with criminal offences

Two Melbourne men who allegedly operated a self-managed super fund scam targeting Australian investors have been charged with various criminal offences following an ASIC investigation. The investigation revealed multiple suspected fraudulent investment websites which operated between November 2020 and July 2021 under various names and that the website operators fraudulently used the Australian financial service licence of two legitimate companies without their knowledge or consent.

ASIC pauses supply of Shield Master Fund's products

ASIC has imposed interim stop orders on four product disclosure statements (**PDSs**) for classes of units of the Shield Master Fund, a registered managed fund promoted by Keystone Asset Management Ltd (**Keystone**) which prevent Keystone from dealing with such classes of units. The stop orders arose from ASIC's concerns that the PDSs may be defective and not worded or presented in a clear, concise, and effective manner in order to protect retail investors. If Keystone fails to make submissions addressing ASIC's concerns in a timely manner, ASIC will consider imposing final stop orders.

Block Earner engaged in unlicensed financial services conduct

The Federal Court has found that fintech company Web3 Ventures Pty Ltd trading as Block Earner engaged in unlicensed financial services conduct when offering consumers its Earner fixed yield crypto-asset based product between March and November 2022. In one of its first decisions on the application of financial services law to crypto-backed products, the Court determined that the Earner product fell within the definition of a managed investment scheme and a facility for making a financial investment which required Block Earner to have an Australian financial services licence when offering the product.

The Court, however, rejected ASIC's allegation that Block Earner's variable yield crypto-asset based offering was a financial product on the ground that it had characteristics of a managed investment scheme, investment facility or derivative.

ASIC no-action position on unfair contract terms for institutional markets

Before the commencement of the unfair contract terms regime (**UCT**) reforms in November 2023, the Australian Financial Markets Association filed an urgent application for no-action relief, citing concerns that the amended UCT regime applied to certain sophisticated participants in the financial markets who were not consumers or small businesses intended to be covered by the regime.

ASIC has now issued a limited class no-action letter stating that ASIC does not intend to take action for breaches of the UCT regime for standard form contracts with institutional investors or wholesale clients.

Scholz bankrupted

ASIC has bankrupted "finfluencer" Tyson Scholz after he failed to pay ASIC's legal fees in its action against him last year for providing financial services without a licence.

ASIC issues stop order against Urban Rampage

An interim stop order has been issued by ASIC against Coral Coast Distributors (Cairns) Pty Ltd (**CCD**) to prevent CCD having customers at its Urban Rampage retail stores enter agreements to pay for goods on credit through Centrepay deductions. ASIC's concern is that consumers in CCD's target market are low income recipients of Centrelink benefits, residing in remote Indigenous communities, without access to other forms of credit. According to ASIC, these consumers are vulnerable and at risk of financial hardship and many may currently be experiencing financial distress.

ASIC wins appeal in case against ACBF and Youpla

The Full Federal Court has upheld ASIC's appeal against ACBF Funeral Plans Pty Ltd (**ACBF**) and Youpla Group Pty Ltd (**Youpla**). The court found that ACBF, primarily targeting Aboriginal consumers, misrepresented itself as Aboriginal owned or managed. ACBF's funeral expenses insurance policy, the ACF Plan, only reimbursed funeral-related expenses up to a selected benefit amount, rather than providing a lump sum payment. ASIC has also taken proceedings against five former directors and officers of ACBF and Youpla for breaches of their duties. A long-term resolution program has been established for people impacted by the collapse of Youpla, called the Youpla Support Program. Commencing on 1 July 2024, the program will provide resolution payments to certain former Youpla members.

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