DWYER HARRIS

FINANCIAL SERVICES AND CREDIT

QUARTERLY UPDATE

January 2017

CONSUMER CREDIT

SACC and consumer lease reforms to go ahead

On 28 November 2016 the Federal Government released its response to the final report of the independent review of the small amount credit contract (**SACC**) laws.

The Government has adopted most of the recommendations of the review. The recommendations are summarised in our July 2016 issue of the *Financial Services and Credit Quarterly Update*. They include an extension of credit price controls to consumer leases, as well as additional restrictions on SACCs.

It is intended that the changes will apply 12 months following the passage of legislation. Legislation is expected to be "progressed" during 2017.

The Government also announced that it will conduct a further review of the SACC and consumer lease laws within 3 years from the commencement of the changes.

Direct debit fees banned for SACCs

From 1 February 2017, for a new SACC contract, it will no longer be lawful to charge direct debit processing fees. Such fees were previously permitted by an ASIC Class Order, CO 13/818. The review of SACC laws recommended that direct debit fees should be incorporated into the existing SACC fee cap. The Class Order has now been repealed, with a transition provision that excludes SACCs in force before the repeal.

COMMERCIAL FINANCE

Unfair contract terms for small business commences

The new laws on unfair contract terms for small business commenced on 12 November 2016.

If a term in a standard form small business contract is "unfair" under the new law, it will be void, which means that a party would not be able to enforce that term.

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A small business contract is one where at least one of the parties is a small business and the upfront price payable under the contract is no more than $300,000 (or $1 million if the contract is for more than 12 months). A “small business” is one that employs less than 20 people.

The contract must also be “standard form” – in other words, a contract prepared by one party and where the other party has limited or no ability to negotiate the terms.

Existing contracts as of 12 November 2016 are affected only when they are renewed or varied after commencement.

A term is unfair if:

- it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- it is not reasonably necessary to protect the “legitimate interests” of the party advantaged by the term; and
- it would cause detriment (financial or otherwise) to a party if it were to be applied or relied on.

Contract terms will be exempt where they define the main subject matter of the contract (e.g. what the small business is buying) or set the upfront price payable under the contract (e.g. the purchase price).

Examples of contract terms that may be unfair include terms which:

- permit only one party to terminate, vary the terms, or renew;
- penalise only one party for a breach or termination;
- permit one party to vary the upfront price payable without the right of another party to terminate;
- permit one party unilaterally to vary services to be supplied, or determine whether the contract has been breached or to interpret its meaning;
- limit one party’s liability for its agents;
- let one party assign the contract to the detriment of another party without consent; or
- limit one party’s right to sue another.

On the commencement date the Australian Competition and Consumer Commission (**ACCC**) published a report which gives a breakdown of common terms of concern identified in selected industries, and discusses the kinds of changes that businesses have made.

FINANCIAL ADVICE

Financial adviser professional standards

The *Corporations Amendment (Professional Standards of Financial Advises) Bill 2016* (Cth) was introduced on 23 November 2016.

The Bill will require financial advisers providing personal advice to retail clients on more complex financial products to hold a degree (or higher or equivalent) qualification, undertake a professional year, pass an exam, undertake continuous professional development (**CPD**) and comply with a code of ethics. There will be transitional arrangements for existing providers.

There will also be a restriction introduced on the use of the titles "financial adviser" and "financial planner" which will limit their use to persons who are authorised to provide personal financial advice to retail clients on relevant financial products.

ASIC will set the minimum standards for the degree, professional year, exam and CPD.

Record keeping

ASIC's Class Order CO 14/923 imposes obligations on all financial services licensees who give personal advice to retail clients. The order requires that licensees ensure that records are kept in relation to the provision of the personal advice.

ASIC amended this class order on 20 October 2016 by the *ASIC Corporations (Amendment) Instrument 2016/1006*.

The amendments extend the requirement to authorised representatives of the licensee and require authorised representatives to give records to the licensee on request. This applies even if the authorised representative is no longer authorised by the licensee at the time of the request.

During the 6 month period until 26 April 2017, ASIC says that it will take a "facilitative compliance approach" if licensees make a good faith attempt to comply with their obligations under the amended provisions, but cannot do so because of factors such as the requirement to make systems changes.

Charging advice fees without providing advice

ASIC's Report 499 *Financial advice: Fees for no service* released on 27 October 2016 sets out instances where customers of major financial institutions were charged fees for ongoing advice services but had not been provided with services, either because the adviser had not been allocated to the customer, or the adviser allocated failed to deliver the service.

ASIC estimates that compensation for these failures could be over $178 million plus interest. Refunds and compensation have already been paid or agreed to be paid to over 27,000 customers of the big four banks and AMP.

FINANCIAL MARKETS

BBSW and ASX

From 1 January 2017, ASX Limited (**ASX**) is the administrator for the BBSW benchmark rate, replacing the Australian Financial Markets Association (**AFMA**). ASX will also administer BBSW related rates – including End of Day Bank Accepted Bills.

ASX was selected following a process which invited interested parties to register their interest as a potential alternate benchmark administrator for BBSW.

AFMA will continue as the calculation agent until mid-2017.

BBSW is the main short-term rate used in financial markets for pricing and valuation of Australian dollar securities and as a lending reference rate.

In mid-2017, a new BBSW calculation methodology will be rolled out, involving a volume weighted average price calculation as the primary calculation method.

Crowdfunding Bill

The Federal Government has reintroduced a Bill to provide concessional treatment for crowdfunded capital raisings.

The *Corporations Amendment (Crowd-sourced Funding) Bill 2016* (Cth) had its first reading in the House of Representatives on 24 November 2016.

The Bill will enable eligible unlisted public companies to raise up to $5 million in any 12 month period through crowdfunding platforms.

The previous Bill introduced in December 2015 lapsed when the Federal Parliament was dissolved before the July 2016 election. A summary of the provisions in that Bill can be found in our January 2016 issue of the *Financial Services and Credit Quarterly Update*.

There are a few differences from the original Bill, including:

- the assets and turnover upper limit for a company to use crowdfunding has been increased from $5 million to $25 million; and
- the cooling off period for investors has been reduced from 5 days to 48 hours.

The new crowdfunding provisions will take effect 6 months from the date the Bill receives assent.

On 1 December 2016 the Bill was referred to the Senate Economics Legislation Committee. The Committee's report is due on 13 February 2017.

FINANCIAL PRODUCTS

Managed discretionary accounts

On 29 September 2016 ASIC reissued Regulatory Guide 179 *Managed Discretionary Accounts* and made a new legislative instrument to replace the existing class order on managed discretionary accounts (**MDAs**).

There are new requirements to ensure that MDA investors are adequately informed when the MDA provider has a discretion to invest in products where recourse is not limited. In addition, there will be a requirement for specific upfront disclosure about terminating the MDA contract, fees charged within the MDA, and outsourcing of significant functions.

MDA providers who currently offer MDAs under ASIC's regulated platform no-action letter will be required to comply with the new requirements by 1 October 2018. They will also need a MDA specific licence authorisation. Other existing MDA providers will be given until 1 October 2017 to comply.

FINANCIAL SERVICES

Design and distribution obligations

A proposals paper has been released by the Federal Government on the new design and distribution obligations that are to be imposed on financial services licensees.

The paper also covers the product intervention power to be given to ASIC – on this see the Disputes and Enforcement section at the end of this update.

These changes were recommended by the Financial System Inquiry report.

Consumer credit products regulated by the *National Consumer Credit Protection Act 2009* (Cth) would not be covered by the design and distribution obligation (but would be subject to the product intervention power).

It is proposed that financial product issuers must:

- identify appropriate target and non-target markets for their products;
- select distribution channels that are likely to result in products being marketed to the identified target market; and
- review arrangements with reasonable frequency to ensure arrangements continue to be appropriate.

When determining whether a target market is appropriate for a product, issuers would be required to have regard to whether the product is satisfying the investment or risk management needs of the target market, and also the ability of consumers in the target market to understand the key features of the product.

For example, in relation to insurance products, the issuer would need to consider whether consumers in the target market would derive any benefit from the product.

The proposals paper includes a long list of factors that product issuers would be forced to consider when determining whether a distribution channel and marketing approach is appropriate for a product. These include:

- The customers that the distribution channel and marketing approach will reach and whether they are consistent with the identified target market for the product.
- The risks in a distribution channel or marketing approach that may prevent or limit the product being distributed to the identified target market and steps to mitigate those risks.
- The complexity of the product and whether the distribution channel or marketing approach will enable customers to understand the product.
- Arrangements that the distributor has in place to ensure its representatives know and understand the product.
- The extent of consumer engagement through the distribution channel.
- How the distributor intends to market the product and if that form of marketing is appropriate for the product.

Issuers would have to notify their distributors of the identified target and non-target market for the product.

Issuers would also be required to periodically review products with reasonable frequency to ensure that the identified target market and the selected distribution channel continue to be appropriate for their products.

Issuers will have to put in place procedures to monitor the performance of their products and collect relevant data to support the product reviews. They will also have to advise ASIC if a review identifies that a distributor is selling a product outside of the intended target market and the steps that the issuer intends to take in order to address the issue.

The paper proposes that product distributors would be required to:

- have reasonable controls to ensure products are distributed in accordance with the issuer's expectations;
- comply with reasonable requests for information from the issuer related to a product issuer's product review (including data collection); and
- put reasonable controls in place to ensure that products are distributed in accordance with the issuer's expectations.

Charitable investment fund raising

On 28 September 2016 ASIC reissued its Regulatory Guide RG 87 *Charitable schemes and school enrolment deposits*. This guide sets out ASIC policy on relief from the fund raising, managed investment and licensing provisions of the *Corporations Act 2001* (Cth) for charities and schools that wish to raise funds to assist them meet their objectives.

The changes follow a review by ASIC of the exemptions.

The main changes include prohibiting charitable investment fundraisers from issuing at-call or short-term investments with a term of less than 31 days to retail investors. This change commenced on 1 January 2017.

Charitable investment fundraisers that wish to issue investments to retail investors not associated with the charity will no longer be exempt from the requirement to hold an Australian financial services licence. This change will commence on 1 January 2018.

An existing class order dealing with school enrolment deposits has been repealed and replaced with no substantive changes. Schools will continue to be able to accept enrolment deposits without the requirement to comply with the relevant provisions of the *Corporations Act 2001* (Cth).

FINANCIAL SYSTEM

Review of the four major banks

On 24 November 2016 the House of Representatives Standing Committee on Economics tabled its report entitled *Review of the Four Major Banks*. The report followed public hearings with the heads of the four major banks held in October.

The report makes a number of recommendations which if adopted will affect the whole financial services sector. These include:

- a one stop Banking and Financial Sector Tribunal for dispute resolution;
- a requirement that significant breaches of the financial services laws be publicly reported;
- periodic reviews and recommendations to improve competition in the banking sector;
- forcing deposit product providers to provide "open access" to customer and small business data by July 2018;
- making it easier to get a banking licence;
- mandatory independent reviews of the risk management frameworks of the major banks;
- new powers for ASIC to collect data about internal dispute resolution schemes of AFSL holders; and
- a public reporting regime for the wealth management industry.

Please see our briefing paper for further details.

Consultation on ASIC industry funding

The Treasury has released for comment a proposals paper and a supplementary technical paper on the industry funding model to be introduced for ASIC. Submissions closed on 16 December 2016.

The Government announced on 20 April 2016 that it would introduce an industry funding model for ASIC, commencing in the second half of 2017.

Treasury's paper provides an updated proposed model following extensive consultation in 2015.

Additional public consultation will be held before legislation is introduced into the Parliament.

The new proposed model includes the recovery of all of the costs of ASIC's regulatory activities from industry.

The Commonwealth Director of Public Prosecution's litigation costs for criminal actions to enforce the law referred by ASIC would not be recovered through the industry funding model, however.

The design objectives for the industry funding model are that it should be simple, certain, proportional, commercially-based and with efficient processing

The paper proposes that ASIC's activities can be broken up into two categories: ongoing regulatory activities and user-initiated service costs.

Ongoing regulatory activities, such as the cost of regulating financial advisers (approximately 88% of ASIC's regulatory costs), would be recovered through a levy. User-initiated service costs, such as licensing, would be recovered by fees for service.

Banking Regulation proposed changes

On 30 September 2016 Treasury released an exposure draft of the *Banking Regulation 2016* (Cth). The current *Banking Regulations 1966* (Cth) will expire on 1 April 2017. Submissions closed on 28 October 2016.

According to the Explanatory Statement released with the draft regulation, the key changes are:

- consolidating the *Banking Regulations 1966* (Cth*)* and the Banking *(Unclaimed Moneys) Regulations 1993* (Cth) into a single Regulation;
- repealing redundant provisions;
- repealing spent or redundant associated regulations, including those due to sunset in the next two years;
- using more consistent language throughout the Regulation, for example referring to 'accounts' throughout the Regulation rather than using various similar terms; and
- making language and formatting changes to reflect contextual changes and align with current drafting practices, such as referring to 'sections' rather than 'regulations'.

These changes do not change the substantive meaning or operation of the provisions.

FINTECH

Regulatory sandbox

ASIC has finalised and published details of its licensing exemption for fintech businesses in Regulatory Guide 257 *Testing fintech products and services without holding an AFS or credit licence*, released on 15 December 2016.

The terms of the exemptions are set out in legislative instruments made by ASIC:

- *ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175*; and
- *ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176*.

ASIC's original draft proposals for the exemption had been released for comment in May 2016. One of the key changes from the original proposal is that the exemption will now cover Australian Credit Licences (**ACLs**), as well as Australian Financial Services Licences (**AFSLs**).

The exemption does not extend to being a credit provider (for ACLs) or being a product issuer (for AFSLs).

The exempted products are:

- Deposit products (maximum $10,000 balance for retail clients).
- ADI issued payment products (maximum $10,000 balance for retail clients).
- Personal property and home contents insurance (maximum of $50,000 insured for retail clients).
- Liquid investments, for listed Australian securities or simple schemes (maximum $10,000 exposure for retail clients).
- Consumer credit contracts with a loan size of between $2,001 and $25,000, a maximum annual cost rate of 24% and where the contract is not a reverse mortgage, a small amount credit contract, or consumer lease.

For AFSL products there are no individual exposure or client limits for wholesale or sophisticated clients. However, the total maximum exposure of all clients must not exceed $5 million.

Testing businesses relying on the exemption can provide services to up to 100 retail clients. (There is no limit on the number of wholesale clients.)

The licensing exemption applies for one 12-month period.

The exempt business must inform clients that:

- it does not hold a licence;
- the service is being tested under the fintech licensing exemption; and
- some of the normal protections associated with receiving services from a licensee will not apply.

Financial services businesses will also need to provide the following information to retail clients before they provide financial services:

- name and contact details;
- information about the kinds of products and services provided;
- information about any remuneration (including commission);
- information about relationships between the business and the product issuer that may influence the services; and
- information about dispute resolution systems.

Where providing personal advice to retail clients on financial products, a business will also need to comply with the best interests duty and related obligations.

Credit businesses must provide the consumer with the following before providing any credit assistance:

- the information normally contained in a credit guide (other than a credit licence number);
- a quote; and
- a proposal document.

If providing credit assistance, the business will also need to comply with the responsible lending obligations.

A business relying on the exemption must have arrangements in place for compensating clients for losses or damage they suffer from non-compliance or misconduct. A professional indemnity insurance policy must have a limit of at least $1 million for any one claim and for aggregated claims, and the business must take reasonable steps to obtain runoff cover for a period of 12 months.

Businesses must also have in place a dispute resolution system consisting of internal dispute resolution procedures that comply with ASIC standards, and be members of an ASIC-approved external dispute resolution scheme.

Before relying on the fintech licensing exemption, a business must provide ASIC with written notice of its intention to rely on the relief. There is no prescribed notification form, but the notification must include the matters set out in RG 257.

Data usage and access

The Productivity Commission draft report into *Data Availability and Use* released on 3 November 2016 proposes a new regulatory regime for data access. The report was open for submissions until 12 December.

The Commission thinks that data should be classified into 4 broad data types, with access and use rights depending on the data type.

- **Non-personal/non-confidential**: this information would be open access and could be used for such things as market analysis.
- **De-identified**: this would only be available to "trusted users" for applications such as scenario development and testing, program or policy analysis and evaluation, and broad service delivery.
- **Identifiable**: identifiable information would only be available to "trusted users" and the individual concerned.
- **Confidential/protected**: the release of confidential and protected information would be determined by a "data custodian".

A new Data Sharing and Release Act would regulate access to data and apply to all digital data held in both the public and private sector.

A central government agency, the National Data Custodian, would have overall responsibility for the framework. Accredited Release Authorities (**ARAs**) would assist data custodians to improve the curation and quality of datasets to be released, including de-identification of data, and to update and maintain datasets. An ARA would also decide whether a dataset was available for public release or limited to sharing with trusted users.

A "Comprehensive Right" is proposed for individuals to access digitally held data about themselves. The Comprehensive Right would give the following rights to an individual in relation to their data:

- Continuing shared access with the data holder.
- Access to the data provided directly by the individual or collected in the course of other actions, or created by others.
- Requesting edits or corrections for reasons of accuracy.
- Being informed about the intention to disclose or sell data about them to third parties.
- Appealing automated decisions.
- Directing data holders to copy data in machine-readable form either to the individual or to a nominated third party. The Comprehensive Right would therefore let an individual direct a financial institution to transfer data about the individual to another financial institution or financial service provider.

The Commission also proposes that individuals should have a right to opt out of data collection. This would be subject to exceptions, such as for data collected or used as a condition of continued delivery of a product or service to the individual. However the right to demand a stop to the collection of data would not extend to stopping the use of data collected on the individual up to the point when the individual opts out.

The draft report calls for all non-sensitive public sector data to be released in accordance with agreed standards. It also recommends a process by which public and private datasets could be nominated and designated as National Interest Datasets.

INSURANCE

Life Insurance Code of Practice

The Life Insurance Code of Practice commenced on 1 October 2016. There is a transition period until 30 June 2017 for life insurers and other industry participants who are subject to the Code, when they will become bound by the Code. Financial advisers or planners and superannuation trustees will not be subject to the Code.

The Code sets out standards of practice, disclosure and principles of conduct for life insurance services.

It includes timeframes for insurers to respond to claims, complaints and requests for information.

The Code will be monitored by an independent committee and insurers may be sanctioned if they do not correct breaches of the Code.

Life insurance claims handling

On 12 October 2016 ASIC released its report on its investigation into the handling of claims in the life insurance industry.

On the same day, APRA sent letters to life insurers and superannuation trustees setting out its expectations for improvements to oversight and handling of insurance claims.

ASIC and APRA worked closely together during the ASIC review, which involved examining 15 insurers covering more than 90% of the market. The review analysed data on term life cover, total and permanent disablement (TPD), trauma and income protection insurance.

The review was prompted by media reports in March 2016 about the life insurance claims handling practices of CommInsure.

ASIC's review did not find evidence of cross-industry misconduct, but did identify issues of concern in relation to higher claims denial rates and claims handling procedures for particular types of policies. Not surprisingly, the report found that the most common disputes were about the evidence that insurers required to assess claims, and delays in claims handling.

Higher claims denial rates were found to occur when insurance was sold directly to consumers with no financial advice.

ASIC and APRA will establish a consistent public reporting regime for claims data and claims outcomes which will include claims handling timeframes and dispute levels across all policy types.

ASIC recommends in the report that the insurance claims handling exemption from the financial services conduct provisions in the *Corporations Act 2001* (Cth) be removed, so that ASIC would be able to regulate insurance claims handling.

ASIC also announced that it will conduct a major review of life insurance sold without personal advice, known as direct life insurance.

The report recommends that the insurance sector:

- review the currency and appropriateness of insurance policy definitions;
- examine and ensure that advertising and representations about cover align with the definitions in the policy, and report any discrepancies to ASIC;
- ensure that claims timeframes are consistent with industry standards and expected claims timeframes and are adequately communicated to policyholders; and
- ensure that incentives and performance measurements for claims handling staff and management do not conflict with the obligation to assess each claim on its merit.

Life insurance conflicted remuneration

The *Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016* (Cth) introduced on 12 October 2016 amends the *Corporations Act 2001* (Cth) to implement the life insurance reform package announced in November 2015.

The Bill removes the exemption for certain life risk insurance products from the ban on conflicted remuneration, where life insurance is sold with either personal or general financial advice. The Bill also allows regulations to prescribe when a benefit paid in relation to life insurance is conflicted remuneration, even if no advice is provided.

The Bill empowers ASIC to make a legislative instrument to permit benefits in relation to life insurance to be paid, provided certain requirements are met relating to the quantum of allowable commissions and clawback arrangements.

The Bill also applies the ban on volume-based payments to life insurance and includes transitional arrangements.

Draft regulations to support the Bill were released by Treasury on 19 October 2016. Submissions closed on 4 November 2016. The draft regulations:

- prescribe circumstances where benefits paid in relation to life risk insurance products are considered to be conflicted remuneration, such as where information is given in relation to these products;
- prescribe circumstances where ‘clawback’ does not apply (e.g. where a policy is cancelled automatically due to the age of the insured); and
- exempt benefits paid in relation to life risk insurance products issued after the commencement of the reforms where those products are substantially related to previously issued products.

PAYMENT SYSTEMS

Apple Pay – collective bargaining

The ACCC released a draft determination proposing to deny authorisation to the Commonwealth Bank, Westpac, National Australia Bank and Bendigo and Adelaide Bank to bargain with and boycott Apple on Apple Pay. The ACCC is seeking submissions on its draft determination before making a final decision. A final decision is expected in March 2017.

PERSONAL PROPERTY SECURITIES

Migrated registrations

On 30 January 2017 the transitional grace period will end for public registers of security interests that were automatically transferred over to the Personal Property Securities Register (the **PPSR**) in 2012.

Over 35 registers were transferred to the PPSR when it commenced in 2012.

The grace period applies for transferred registrations on the PPSR which included, or omitted to include, data that is required for a registration on the PPSR, whether or not the data was recorded in the previous register.

One well known example is where about 27,000 registrations transferred from the former ASIC Register of Company Charges with multiple secured parties were migrated with only one secured party listed in the secured party group.

If any defect in registration is not corrected by 30 January 2017, the registration may no longer protect the security interest of the secured party.

PRIVACY

Mandatory data breach notification

The *Privacy Amendment (Notifiable Data Breaches) Bill 2016* (Cth) was introduced in the House of Representatives on 19 October 2016.

Under the proposed law, an eligible data breach will have to be reported to the affected individual and notified to the Australian Information Commissioner. An eligible data breach will be where a reasonable person concludes there is a likely risk of serious harm from unauthorised access or disclosure.

The law will apply to:

- entities subject to the Australian Privacy Principles (APP entities), including government agencies and private sector organisations;
- credit reporting bodies holding credit reporting information;
- credit providers holding credit eligibility information; and
- tax file number recipients holding tax file numbers.

An “eligible data breach” will have to be notified. Eligible data breaches are of 2 kinds:

- unauthorised access or disclosure of the information where a reasonable person would likely conclude that the access or disclosure would result in serious harm to any of the individuals to whom the information relates; and
- loss of the information in circumstances where unauthorised access or disclosure is likely to occur and if that were to occur, a reasonable person would likely conclude that the access or disclosure would result in serious harm to any of the individuals to whom the information relates.

It is not an eligible data breach if:

- the entity takes action in relation to the access or disclosure, or loss;
- it does so before it results in serious harm to any affected individuals; and
- a reasonable person would conclude

that the access or disclosure would not be likely to result in serious harm to any of the affected individuals.

A particular individual does not need to be notified of the access, disclosure or loss (even if it is an eligible data breach) if:

- the entity takes action in relation to the access or disclosure, or loss;
- it does so before it results in serious harm to the particular individual; and
- a reasonable person would conclude that the access or disclosure would not be likely to result in serious harm to the particular individual.

If an entity has reasonable grounds to suspect an eligible data breach but is not aware of reasonable grounds to believe that the circumstances amount to an eligible data breach, the entity must carry out a reasonable and expeditious assessment of whether there are reasonable grounds to believe that there is an eligible data breach, and must take all reasonable steps to ensure the assessment is completed within 30 days.

Where more than one entity jointly and simultaneously holds the same particular record of personal information, only one assessment needs to be undertaken into a single eligible data breach, regardless of how many entities hold the record of the information.

If the entity is aware of reasonable grounds to believe there has been an eligible data breach in the entity, it must prepare a statement and give a copy to the Australian Information Commissioner as soon as practicable.The statement must set out:

- the identity and contact details of the entity (and may identify other entities involved);
- a description of the eligible data breach;
- the kind or kinds of information concerned; and
- recommendations about steps that individuals should take in response.

When an entity has prepared a statement to the Commissioner following an eligible data breach it must as soon as practicable:

- take such steps as are reasonable to notify the content of the statement to each affected individual (if it is practicable to do this);
- take such steps as are reasonable to notify the content of the statement to each individual at risk from the breach (if it is practicable to do this); and
- if neither or the above applies, publish the statement on its website and take reasonable steps to publicise the contents of the statement.

The Bill includes exceptions from the data breach obligations, including:

- for enforcement bodies – if it would be likely to prejudice enforcement activities;
- to the extent of inconsistency with secrecy provisions in other legislation; and
- upon a declaration by the Australian Information Commissioner, having regard to the public interest and any relevant advice from enforcement bodies.

Where more than one entity holds the same particular record of personal information, only one statement must be prepared and notified for a single eligible data breach, regardless of how many entities hold the information compromised in the eligible data breach.

Collecting AML/CTF information from third party sources

AUSTRAC has released draft guidance on the privacy implications of collecting know your customer (**KYC**) information from sources other than the customer.

As a result of recent amendments to the AML/CTF rules, from 16 September 2016 reporting entities have the option of collecting KYC information from sources other than the customer. AUSTRAC undertook a privacy impact assessment on the amendments.

AUSTRAC recommends that reporting entities which decide to collect personal information from sources other than the customer should ensure that only personal information which is reasonably necessary for one of its functions is collected from third party sources and only when it is unreasonable or impracticable to collect the information directly from the individual. They should also check whether there have been appropriate and timely notifications and consents from affected individuals, and re-evaluate the use of bundled consents.

PRUDENTIAL STANDARDS

Updated APRA guidance on residential mortgage lending

On 24 October 2016 the Australian Prudential Regulation Authority (**APRA**) released proposed revisions to Prudential Practice Guide APG 223 *Residential mortgage lending* (**APG 223**). The changes include measures either announced by APRA or communicated to authorised deposit-taking institutions (**ADIs**) since December 2014. Written submissions on the proposed revisions were due by 19 December 2016.

APRA says that it does not expect the APG 223 revisions will result in material changes to existing lending practices. The revised guide includes more detailed guidance on:

- quantitative serviceability parameters including the application of interest rate buffers and floors;
- haircuts for non-salary income such as rental income;
- treatment of interest-only loans and estimation of living expenses; and
- meeting responsible lending obligations, monitoring serviceability policy overrides, and treatment of self-managed superannuation fund loans and other specific loan types.

APG 223 was originally released on 5 November 2014 and summarises APRA's expectations for sound residential lending practices. In December 2014 APRA announced additional measures relating to loan serviceability.

APRA also released for consultation with ADIs its proposed new reporting requirements for residential mortgage lending data. Written submissions on these proposed requirements are due by 10 February 2017.

Risk culture – APRA views

APRA released an information paper on risk culture in October 2016.

By way of background, APRA Prudential Standard CPS 220 *Risk Management* came into force in January 2015, introducing a requirement for each board of APRA-regulated ADIs and insurers to ensure that it formed a view of the risk culture in the institution, and the extent to which that culture:

- supports the ability of the institution to operate consistently within its risk appetite;
- identifies any desirable changes to risk culture; and
- ensures the institution takes steps to address those changes.

APRA says that it has observed a much stronger focus of late on risk culture by the boards of regulated institutions. Its focus will be on the supervision of an institution's risk culture rather than the regulation of risk culture.

Remuneration requirements were introduced by APRA in 2010 for ADIs and insurers, and for superannuation in 2012. These provide that performance-based components of remuneration must be designed to encourage behaviour that supports the regulated institution's long-term financial soundness and the risk management framework of the institution.

In its paper APRA says that it intends to conduct a stocktake of current industry remuneration practices to gauge how well existing requirements are being implemented, and how they are interacting with the risk cultures of regulated institutions. APRA will also compare its remuneration requirements with more recent international regulatory developments and supervisory practices. APRA will engage with industry participants and experts as it formulates its views.

SUPERANNUATION

Superannuation reforms enacted

The *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 2016* (Cth) and the *Superannuation (Access Transfer Balance Tax) Imposition Act 2016* (Cth) received assent on 29 November 2016. These Acts are part of the Government's package of superannuation reforms.

Calculator changes deferred

ASIC has extended to 1 July 2018 for providers of retirement and superannuation calculators to comply with the new requirement that generic financial calculators must account for inflation.

Consistency requirements deferred

ASIC has deferred until 1 January 2019 the operation of section 29QC of the *Superannuation Industry (Supervision) Act 1993* (Cth). Section 29QC requires that if a trustee provides information to APRA under a reporting standard and gives the same or equivalent information to another person, or on a website, the trustee must ensure that the information is calculated in the same way as the information is given to APRA. The purpose of this provision is to improve comparability about superannuation products.

AML/CTF

Industry consultation on AML/CTF reform program

The Federal Government is consulting with industry on proposals to implement the first phase of recommended legislation arising from the statutory review of the AML/CTF laws. Consultation papers have also been released on regulation of digital currencies and on regulation of lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company service providers.

Submissions on the consultation papers close on 31 January 2017.

AUSTRAC risk assessment of financial planning industry

The Federal Minister for Justice announced on 21 December 2016 the report of AUSTRAC into its risk assessment of money laundering and terrorism financing within the financial planning industry.

The AUSTRAC report found a "medium" level of risk across the financial planning industry. There was a "moderate" level of exploitation by criminal entities, with minor consequences as a result of the criminal activity. The most reported offence was cyber-enabled fraud.

Help for fintech

AUSTRAC has announced that a dedicated online contact form for start-up businesses and fintech operators is now available on the AUSTRAC website. The new webpage on fintech and start-ups provides information about the AML/CTF regime and AUSTRAC's role and enables businesses to directly engage with AUSTRAC's Policy and Guidance team and seek further information.

DISPUTES AND ENFORCEMENT

Product intervention power

The proposals paper from the Federal Government on the new design and distribution obligations for financial services licensees (see under Financial Services section above) also deals with another recommendation adopted from the Financial System Inquiry for a "product intervention power" to be given to ASIC.

The proposed product intervention power would apply to all financial products made available to retail clients, including securities, insurance, investment products and margin loans, as well as credit products regulated by the *National Consumer Credit Protection Act 2009* (Cth).

ASIC would be able to make interventions in relation to a product or product feature, the types of consumers who can access the product, or the circumstances in which consumers could access the product.

Possible interventions would include imposing additional disclosure obligations, mandating warning statements, requiring amendments to advertising documents, and restricting or banning the distribution of the product.

Before using the power, ASIC would have to identify a risk of significant consumer detriment and undertake appropriate consultation, and consider the use of alternative powers.

An intervention by ASIC could last for up to 18 months. During that time, the Government would need to consider whether the intervention should be made permanent. Interventions beyond 18 months could only be made if approved by the Government. In addition, market-wide interventions by ASIC would be subject to Parliamentary disallowance.

EDR schemes review

The interim report of the *Review of the financial system external dispute resolution and complaints framework* (the Ramsay Review) was released on 6 December 2016 and is open for comments until 27 January 2017.

The draft recommendations in the interim report include:

- establishing a single industry ombudsman scheme for financial,

credit and investment disputes (other than superannuation disputes) to replace FOS and CIO;
- monetary limits and compensation which are higher than current arrangements and subject to regular indexation (for both consumer and small business matters);
- transitioning the Superannuation Complaints Tribunal into an industry ombudsman scheme;
- a superannuation code of practice for the superannuation industry;
- requiring new schemes to meet standards developed and set by ASIC;
- increased ASIC oversight of industry ombudsman schemes;
- considering the use of panels for resolving complex disputes;
- a requirement that financial firms publish information and report to ASIC on IDR activity and outcomes;
- ombudsman schemes should register and track the progress of complaints referred back to IDR; and
- debt management firms should be required to be a member of an industry ombudsman scheme.

The review panel made the observation (but not a recommendation) that there is merit in introducing an industry funded compensation scheme of last resort.

Cash Converters

ASIC has accepted an enforceable undertaking from Cash Converters which will involve refunds of $10.8 million to consumers who had small amount loans with Cash Converters.

ASIC was concerned that Cash Converters had failed to make reasonable inquiries into the income and expenses of consumers and did not take reasonable steps to verify expenses in accordance with the responsible lending requirements.

Cash Converters applied an internally generated assumed benchmark that ASIC says had no relationship to the real expenses of individual consumers.

Cash Converters has paid penalties totalling $1.35 million following the issue of 30 infringement notices by ASIC, and under the enforceable undertaking will refund eligible consumers $10.8 million in fees, which will be managed through a consumer remediation program overseen by an independent expert who will report to ASIC.

The loans affected were made during the period 1 July 2013 to 1 June 2016.

BMW Finance

BMW Australia Finance Limited (**BMW Finance**) has given an enforceable undertaking to ASIC for what ASIC has described as Australia's largest consumer credit remediation program. It is expected to provide at least $72 million in redress for consumers ($50 million of which is made up in loan write-offs).

As part of the enforceable undertaking, BMW Finance also agreed to pay $5 million as a community benefit to consumer advocacy and financial literacy initiatives.

The program is expected to involve at least 15,000 customers who obtained finance during the period between January 2011 and August 2016.

An independent remediation consultant will oversee the program and report to ASIC on its progress.

The enforceable undertaking relates to concerns about responsible lending failures by BMW Finance. The remediation program and enforceable undertaking follow conditions being placed on the Australian credit licence of BMW Finance in January 2016.

ACCC cartel penalties

The Federal Court has imposed penalties on ANZ and Macquarie Bank for attempted cartel conduct in relation to the benchmark rate for the Malaysian ringgit. ANZ was fined $9 million and Macquarie was fined $6 million. The banks were also ordered to pay the costs of the ACCC, which launched the action.

ASIC action against Westpac entities – best interests obligation

ASIC has commenced proceedings against subsidiaries of Westpac following an investigation into telephone sales campaigns targeting superannuation fund members. The ASIC action sets out 15 examples of alleged contraventions of the "best interests duty" arising from the campaigns. The campaigns involved recommending that customers rollout of their other superannuation funds into their Westpac related superannuation accounts. The relevant companies are not permitted to provide personal advice under their financial services licences.

Suncorp-Metway infringement notices for breaching consumer credit notification laws

ASIC announced on 22 December 2016 that Suncorp-Metway Limited (**Suncorp**) has paid infringement notice penalties totalling $270,000 together with remediation of $260,000 after ASIC found that Suncorp breached consumer protection provisions by failing to notify a number of consumers of changes in the amount of their loan repayments. In some cases, Suncorp also failed to advise the consumers of their first direct debit default. The conduct occurred between November 2015 and March 2016.

Suncorp has implemented a remediation plan refunding any default fees and any interest that customers incurred and has paid compensation where appropriate. Suncorp also wrote to all affected consumers and agreed to engage an external compliance consultant to review its processes and procedures in relation to the causes of the above breaches. The consultant's report is to be provided to ASIC.

Enforceable undertakings from NAB and CBA - wholesale spot FX

ASIC announced on 21 December 2016 that it had accepted enforceable undertakings from National Australia Bank and Commonwealth Bank of Australia in relation to their wholesale spot foreign exchange businesses. ASIC investigated the period between 1 January 2008 and 30 June 2013 and found that both banks had failed to ensure that their systems and controls were adequate to address risks relating to inappropriate conduct.

Car yard lender and broker found to have breached consumer credit laws

In a lengthy decision handed down on 30 September 2016, Greenwood J of the Federal Court found that Channic Pty Ltd (**Channic**) and broker Cash Brokers Pty Ltd (**Cash Brokers**) breached responsible lending provisions under the credit legislation and engaged in unconscionable conduct and that the loan contracts examined were also unjust transactions.

The sole director of both companies, Mr Hulbert, was also held personally liable.

The Court found that finding that Cash Brokers and Channic were no more than “wafer thin transparent membranes” between the consumer and Mr Hulbert.

The loans in question were provided to indigenous consumers to buy second hand cars from a car dealer which was also owned by Mr Hulbert.

The Court found that the credit provider, Channic, did not assess whether the loans were affordable or suited to the consumers' requirements.

In relation to responsible lending, Greenwood J commented that the obligations “are not matters of form or mere process but represent normative matters of substance. …. These normative matters are not simply a “tick the box” compliance exercise.”

A further decision will be made on civil penalties and consequential orders.

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