DWYER HARRIS

FINANCIAL SERVICES AND CREDIT

QUARTERLY UPDATE

January 2018

Dwyer Harris Pty Ltd ABN 56 159 256 121 www.dwyerharris.com

Suite 602, 161 Walker St, North Sydney NSW 2060 Australia

Contents

CONSUMER CREDIT 4
Consultation on small amount credit contract and consumer lease reforms 4
ASIC update on interest only home loans 4
Marketplace lending survey 4
ASIC looks at buy now, pay later services 4
FINANCIAL ADVICE 5
New example statement of advice 5
Use of 'independently owned' in financial services: ASIC confirms its position 5
ASIC updated guidance on conflicted remuneration 5
FASEA guidance 5
FINANCIAL MARKETS 6
Draft crowfunding regulations 6
ASX BBSW guidelines 6
Cyber resilience of financial markets firms: ASIC reports 6
ASIC updates market integrity rules 6
FINANCIAL PRODUCTS 6
ASIC finalises client money reporting rules 6
FINANCIAL SYSTEM 7
The Royal Commission 7
Licence application times blowout 8
FINTECH 8
Tax changes to support fintech 8
Regulatory sandbox expansion 8
ASIC review of regulatory sandbox 10
INSURANCE 10
Consultation on Insurance Contracts Regulations 10
Life insurance claims data 10
Government responds to Senate report on general insurance industry 10
MANAGED INVESTMENTS 11
ASIC changes funds management guidelines 11
MUTUALS 11
Law reform for mutuals 11
PAYMENTS 12
New Cheques Regulations 12
PRIVACY 12
Comprehensive credit reporting to be compulsory 12
NDB guidance finalised 12
GDPR 12
Australian Government Agencies Privacy Code 13
PRUDENTIAL STANDARDS 13
Basel III bank capital framework finalised 13

APRA consultation on Appointed Actuary and actuarial advice to insurers 13
SUPERANNUATION 14
Life insurance code 14
Expert to review fees and costs disclosures 14
APRA consultation on superannuation prudential framework 14
Review of early release of superannuation benefits 14
AML/CTF 14
No AUSTRAC compliance report required for 2017 14
AML/CTF Act amendments enacted 14
DISPUTES AND ENFORCEMENT 15
Progress of AFCA 15
Whistleblowers Bill introduced 15
Design and distribution obligations and product intervention power 15
Deferred prosecution scheme launched for serious corporate crime and foreign bribery laws toughened 17
EDR review – compensation scheme 17
Consultation on ASIC fees-for-service 17
Financial Services and Credit Panel 17
ASIC's directions powers 18
ASIC Enforcement Review looks at bigger penalties 18
BBSW cases – NAB and ANZ settle; case continues against Westpac 18
Class action launched against Westpac over insurance 19
Volkswagen Financial Services pays penalty 19
Westpac refunds interest only customers 19
Good to Go Loans and Web Moneyline EUs 19
Fees for no service refund programs by big 4 and AMP 19
Citibank refunds 20
Youi sales practices 20
$1 million fine for breach of best interests duty 20
CommInsure pinged for misleading advertising 20
Tabcorp penalties decision 20
Swann Insurance refunds 21
NAB refunds 21

CONSUMER CREDIT

Consultation on small amount credit contract and consumer lease reforms

Treasury has released an exposure draft of a Bill to amend the consumer credit legislation to implement the further reforms to small amount credit contracts (**SACCs**) and consumer leases.

The *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017* (Cth) was issued for comment on 23 October 2017, and comments closed on 3 November 2017.

The changes reflect the Government's response to the Review of the Small Amount Credit Contract Laws which was announced in November 2016, and include: a cap on the total payments that can be made under a consumer lease; requiring SACCs to have equal repayments and equal payment intervals; not allowing SACC credit providers to charge monthly fees in respect of the residual term of a loan where a consumer pays out the loan early; preventing lessors and credit assistance providers from door-to-door selling of leases; and anti-avoidance measures applicable to SACC loan and consumer lease providers.

ASIC update on interest only home loans

On 11 October 2017, ASIC provided an update on its targeted review of interest only home loans. ASIC has completed the first stage of its review. This involved data collection from 16 home loan providers. ASIC found that while major banks have cut back their interest only lending, other lenders have partially offset this decline by increasing their share. The review also found that borrowers who used brokers were more likely to obtain an interest only loan, and that borrowers approaching retirement age continue to be provided with a significant number of interest only owner-occupier loans. The second stage of the ASIC review will involve reviews of individual loan files from lenders and mortgage brokers. ASIC will be checking to ensure that lenders are providing interest only home loans in "appropriate circumstances".

Marketplace lending survey

ASIC released its second survey of the marketplace lending industry on 14 December 2017. Marketplace lending is also known as 'peer to peer' lending.The survey found that:

- During the 2016–2017 financial year the marketplace lending industry continued to grow, with $300 million in loans written to consumers and SMEs. This was nearly double the figure for 2015–16.
- Provider revenue is predominantly tied to loan origination and paid by borrowers.
- There was a rise in overall default rates, to 2.2%.
- Complaints are generally low.
- There was an increase in reported breaches and instances of fraud and cyber incidents.

ASIC looks at buy now, pay later services

It has been reported that ASIC is investigating "buy now, pay later" products such as Afterpay. ASIC has also published an information page on its Money Smart site about them.

These products are usually exempt from the consumer credit legislation because there is no interest or other charge for providing the credit.

According to Fairfax Media, Afterpay "makes about 80 per cent of its revenue from fees charged to merchants, and the remainder mainly from late payment fees, which are $10 per late payment and another $7 if the payment is not made within a week."

ASIC plans to collect data from buy now, pay later providers in the first quarter of 2018. The purpose of this exercise is to determine the size and demographics of the industry and participants, and to identify any consumer harms.

FINANCIAL ADVICE

New example statement of advice

On 7 December 2017 ASIC released a new example Statement of Advice (**SOA**) for life insurance. The new example SOA is part of updates to Regulatory Guide 90 *Example Statement of Advice: Scaled advice for a new client* (RG 90). ASIC says that the design is based on behavioural research into how consumers read and understand the information in SOAs.

Use of 'independently owned' in financial services: ASIC confirms its position

On 14 November 2017 ASIC announced that it has updated regulatory guidance to confirm restrictions on the use of terminology that implies independence. Regulatory Guide 175 *Licensing: Financial product advisers – conduct and disclosure* (RG 175) has been amended to include guidance that terms such as 'independently owned', 'non-aligned' and 'non-institutionally owned' are restricted under the *Corporations Act 2001* (Cth) (the **Corporations Act**). The guidance in reflects ASIC's previous announcement of its position on the use of independently owned terms, when ASIC gave firms six months to comply. That compliance period ended on 31 December 2017. The update to RG 175 also reflects the introduction of amendments to the Corporations Act to restrict the use of the titles 'financial adviser' and 'financial planner'. These restrictions commence on 1 January 2019 for new advisers. Existing advisers have until at least 1 January 2021 to meet their initial training requirements.

ASIC updated guidance on conflicted remuneration

ASIC has updated Regulatory Guide 246 *Conflicted and other banned remuneration* (RG 246) (previously titled *Conflicted remuneration*). ASIC says that the updated guidance reflects a range of regulatory changes since the guide was issued in 2013. The updated guidance was released on 7 December 2017.

The document now includes guidance on the operation of the life insurance remuneration reforms, which commenced on 1 January 2018. The guidance has also been updated to reflect:

- amendments to the grandfathering arrangements for the ban on conflicted remuneration;
- the exclusion for basic banking products; and
- the stamping fee and brokerage exclusions.

The updated RG 246 also includes additional guidance on the exclusion for benefits paid by the client, and examples of when conference benefits are likely to be conflicted remuneration.

FASEA guidance

The Financial Adviser Standards and Ethics Authority (**FASEA**) has released proposed guidance on the qualifications that existing financial advisers will need to meet to comply with the requirements in the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth). FASEA proposes that an AQF7 qualification or an AQF8 qualification will be required. An AQF7 qualification is equivalent to a three-year full time university degree and an AQF8 qualification is equivalent to a postgraduate certificate. Under the legislation, an existing provider must have met the requirements by 1 January 2024.

FINANCIAL MARKETS

Draft crowfunding regulations

Treasury has released exposure draft regulations dealing with the application of the crowd sourced funding (**CSF**) framework to proprietary companies. Legislation has been introduced to allow proprietary companies to use equity crowdfunding. The draft regulations also include some refinements of the existing CSF regime for public companies. Submissions are due by 2 February 2018.

ASX BBSW guidelines

The Administrator of BBSW, ASX, has published its BBSW Trade and Trade Reporting Guidelines. They provide guidance on the trading of bank bills during the rate set window and set out how these trades should be reported to the ASX to support the timely calculation and publication of BBSW.

Cyber resilience of financial markets firms: ASIC reports

On 30 November 2017 ASIC released Report 555 *Cyber resilience of firms in Australia's financial markets*. The report analyses self-assessments from over 100 stockbrokers, investment banks, market operators, post-trade infrastructure providers and credit rating agencies. ASIC found that there was insufficient investment in cyber resilience measures. It also found that there was nonetheless a growing understanding that cyber risk is a strategic, enterprise-wide issue. There was however a disparity between large firms and small and medium firms. Larger firms demonstrated a relatively high degree of cyber resilience. Small and medium firms were working towards developing their cyber resilience by investing in cyber security, but ASIC thinks "there is a long way to go".

ASIC updates market integrity rules

On 17 November 2017 ASIC made market integrity rules which consolidate 13 of the existing 14 rule books into 4 rule books to create a common set of rules for securities markets and a common set of rules for futures markets. In the updated rules, ASIC also clarified obligations for:

- participants' management requirements and responsible executives;
- dealing 'as principal';
- block trades and large portfolio trades; and
- record keeping requirements.

Most market operators and market participants will be required to comply with the consolidated market integrity rules from 7 May 2018.

FINANCIAL PRODUCTS

ASIC finalises client money reporting rules

ASIC released the ASIC Client Money Reporting Rules 2017 on 10 October 2017. The rules deal with record-keeping, reconciliation and reporting obligations for financial services licensees that hold derivatives retail client money. The rules will commence on 4 April 2018. They are part of the client money reforms introduced by the Federal Government to prevent licensees from using money from retail derivative clients for general purposes such as working capital.

FINANCIAL SYSTEM

The Royal Commission

The Federal Government announced on 30 November 2017 that it would establish a Royal Commission into alleged misconduct of Australia's banks and other financial services entities. The following day, a former High Court Judge, the Hon. Kenneth Hayne AC, was announced as the Royal Commissioner.

According to the Prime Minister, "Instead of the inquisition into capitalism that some have called for, the Royal Commission will take a conventional, focussed approach. It will not be a never-ending lawyers' picnic."

On 14 December 2017, the Governor-General signed Letters Patent formally appointing Mr Hayne. The terms of reference for the Royal Commission are set out within the Letters Patent. They are available on the website which has now been established for the Royal Commission, which can be accessed here.

The terms of reference provide that the Royal Commission must inquire into:

- whether any conduct by financial services entities (including by directors, officers or employees, or anyone acting on behalf of them) might have amounted to misconduct and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency;
- whether any conduct, practices, behaviour or business activities by financial services entities fall below community standards and expectations;
- whether the use by financial services entities of superannuation members' retirement savings, for any purpose, does not meet community standards and expectations or is otherwise not in the best interests of those members;
- for any findings in relation to the above, whether they:
    - are attributable to the particular culture and governance practices of a financial services entity or broader cultural or governance practices in the industry or subsector; or
    - result from other practices, including risk management, recruitment and remuneration practices;
- the effectiveness of mechanisms for redress for consumers of financial services who suffer detriment as a result of misconduct by financial service entities;
- the adequacy of:
    - existing laws and policies of the Commonwealth (taking into account law reforms announced by the Government) relating to the provision of banking, superannuation and financial services;
    - the internal systems of financial services entities; and
    - forms of industry self-regulation, including industry codes of conduct,

  to identify, regulate and address misconduct in the industry, to meet community standards and expectations, and to provide appropriate redress to consumers;
- the effectiveness and ability of regulators of financial services entities to identify and address misconduct by those entities;
- whether any further changes to the legal framework, practices within financial services entities, or the financial regulators, are necessary to minimise the likelihood of misconduct by financial services entities in future (taking into account any law reforms announced by the Government);
- overseas developments relevant to the above; and
- any matter reasonably incidental to the above.

"Misconduct" as used in the terms of reference is defined as including conduct that:

- constitutes an offence against a Commonwealth, State or Territory law, as existed at the time of the alleged misconduct; or
- is misleading and/or deceptive; or
- is a breach of trust or duty, or unconscionable conduct; or

- breaches a professional standard or a recognised and widely adopted benchmark for conduct.

A “financial services entity” covered by the Royal Commission is defined as an authorised deposit-taking institution (**ADI**), an insurer, an Australian financial services licence holder or authorised representative, registrable superannuation entity (**RSE**) licensees and connected persons, or persons or entities who act or hold out as intermediaries between borrowers and lenders. However it does not include any entity that is a Commonwealth company or entity.

Licence application times blowout

ASIC has changed its service charter standard for applications for new or varied Australian financial services licences and credit licences. The target timeframe for processing licence applications has increased substantially. ASIC now aims to make a decision within 150 days of receiving a complete application in at least 70% of cases (previously 60 days), and within 240 days of receiving a complete application in at least 90% of cases (previously 120 days). The change in the service charter was reported in ASIC’s Report 553 *Overview of licensing and professional registration applications: July 2016 to June 2017* released at the end of November 2017.

FINTECH

Tax changes to support fintech

Draft legislation was released by Treasury on 31 October 2017 for changes to the tax laws which provide concessional tax treatment for Venture Capital Limited Partnership (**VCLPs**) and Early Stage Venture Capital Limited Partnership (**ESVCLPs**).

Currently, finance (banking, providing capital, leasing, factoring and securitisation) and insurance are ineligible activities for the purposes of the venture capital tax concessions. This prevents VCLPs and ESCVLPs making investments in these sectors and therefore limits sources of venture capital for start-up fintech firms.

The changes will allow ESVCLPs and VCLPs to be able to invest in companies that have finance or insurance activities as their predominant activities, provided that they are “early stage” companies. An early stage company will be defined as one which, among other things, has recently been incorporated, has expenses of $1 million or less and assessable income of $200,000 or less.

Regulatory sandbox expansion

Draft legislation and regulations have been released for the introduction of the “enhanced” ASIC regulatory sandbox for financial services and credit businesses. The sandbox allows for testing of financial and credit products and services, subject to conditions, for a limited period of time, without the need to obtain a financial services or credit licence. It is reported that there have been few companies using the sandbox since it was announced late in 2016, which is one of the reasons why the proposed changes seek to widen the scope of the exemptions currently offered.

The draft legislation will extend the regulation-making powers in the Corporations Act (for financial services) and the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) (for credit) so that regulations can be made to provide conditional exemptions from the Australian Financial Services Licence (**AFSL**) and Australian Credit Licence (**ACL**) requirements for the purposes of testing financial and credit services and products. Currently the sandbox is in the form of an ASIC legislative instrument rather than regulations.

The draft regulations propose to extend the duration of the sandbox exemption to 24 months from the current 12 months. The 24 month period cannot be extended, paused or reset.

The regulations will set out which kinds of financial services and products and credit activities will fall within the sandbox exemption.

AFSL exemption

The eligible financial services that can be tested under the AFSL exemption will include:

- for eligible financial products: financial product advice, applying for or acquiring the product, and arranging for the issuing, varying or disposing of the product;
- issuing varying or disposing of non-cash payment facilities; and
- providing a crowdfunding service.

The eligible financial products for the AFSL exemption will depend on whether the client is a wholesale client or retail client. For wholesale clients, all financial products other than derivatives and margin lending facilities will be eligible. For retail clients, the eligible financial products will be:

- deposit-taking facilities and non-cash payment facilities issued by an ADI regulated by the Australian Prudential Regulation Authority (**APRA**);
- general insurance products (other than consumer credit insurance) issued by an APRA-regulated general insurer;
- life insurance issued by an APRA-regulated life insurer;
- superannuation products issued by an APRA-regulated superannuation fund;
- interests in simple managed investment schemes;
- Commonwealth debentures, stocks and bonds;
- unlisted domestic or international securities; and
- securities eligible for crowdfunding.

There will be exposure limits for the AFSL exemption for retail clients that will apply on a per client, per provider basis. Retail clients will not be permitted to invest more than: $10,000 as a result of a financial service relating to general financial products; $85,000 as result of financial services relating to general insurance products; $300,000 as a result of financial services relating to life insurance products; and $40,000 as result of financial services relating to superannuation.

There will also be a limit on the number of retail clients. A person relying on the AFSL exemption will not be allowed to have more than 100 retail clients for each financial service provided in relation to a kind of financial product.

An aggregate exposure limit of $5 million across all clients will be imposed. For this cap, any credit activity under the ACL exemption will also be counted.

The conditions for the exemption include providing information to clients before supplying the service, notifying clients if certain events occur, maintaining membership of a dispute resolution scheme and having compensation arrangements, and acting in the best interests of the client. A statement of advice will have to be given when personal advice is provided to a retail client, and the client money obligations must be complied with when dealing with client money.

ACL exemption

For the ACL exemption, the eligible credit activities that can be tested include the provision of credit contracts and credit services relating to contracts with a term not exceeding 4 years and with a credit limit of more than $2,000 and less than $25,000. Reverse mortgages and contracts secured over consumer household property will not be eligible. The ACL exemption will be limited to 100 consumers for each kind of credit activity. The conditions of the ACL exemption include compliance with the dispute resolution and compensation arrangements of licensees. The exempt person is also required to comply with the responsible lending obligations, the limits on fees and charges in the National Credit Code and the unfair contract terms rules under the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**), among other things.

Common requirements

There will be some common requirements that apply for both the AFSL exemption and the ACL exemption.

Persons seeking to rely on the sandbox exemption will have to notify ASIC and the exemption will commence 14 days after lodging.

ASIC will have the power to provide a notice cancelling an exemption from the sandbox. The grounds for cancellation could include non-compliance with the terms of the exemption, or where ASIC reasonably believes that it may be necessary having regard to the person's failure to act fairly, efficiently or honestly, among other grounds. The person will be able to appeal ASIC's decision to the Administrative Appeals Tribunal.

ASIC review of regulatory sandbox

ASIC has reviewed the current regulatory sandbox and released the review on 12 December 2017. ASIC proposes to continue the current licensing exemptions. However these exemptions will be superseded if the proposed legislation and regulations are implemented (see article above).

ASIC has released a consultation paper on the review, and the consultation period ends on 27 February 2018.

According to ASIC, only 4 fintech businesses have used the exemption to date, but more than a dozen other fintech businesses have contacted ASIC about using the exemption.

INSURANCE

Consultation on Insurance Contracts Regulations

Treasury released an exposure draft of the *Insurance Contracts Regulations 2017* (Cth) on 23 October 2017. Submissions closed on 10 November. The purpose of the Regulations is to replace the *Insurance Regulations 1985* (Cth) before they 'sunset'. (Under the *Legislation Act 2003* (Cth), legislative instruments (with some exemptions) are automatically repealed according to a timetable set out in the Act. The *Insurance Contracts Regulations 1985* (Cth) will be automatically repealed on 1 April 2018). The revised regulations do not alter the substantive meaning or operation of the existing regulations but do update the drafting and formatting style, simplify some definitions, and remove redundant provisions.

Life insurance claims data

On 9 November 2017 APRA and ASIC released initial industry-aggregate results from their new data collection pilot on life insurance claims.

Government responds to Senate report on general insurance industry

On 18 December 2017, the Federal Government announced its response to the final report of the Senate Economics References Committee's inquiry into Australia's general insurance industry. The Senate Committee tabled its report on 10 August 2017. The Government agreed with 8 of the 15 recommendations, did not agree with one recommendation, and noted the others. The agreed recommendations include:

- requiring insurers to disclose the previous year's premium on renewal notices and explain premium increases on request;
- providing for component pricing of premiums to policyholders;
- an independent review of the current standard cover regime;

- developing standardised definitions of key terms for general insurance;
- reviewing the utility of Key Facts Sheets; and
- removing the current exemption for general insurers from the unfair contract terms laws.

MANAGED INVESTMENTS

ASIC changes funds management guidelines

On 26 October 2017 ASIC released Consultation Paper 296 *Funds management* (CP 296). ASIC is seeking feedback on its proposed guidance in relation to managed investment schemes, corporate collective investment vehicles (**CCIVs**) and passport funds under the Asia Region Funds Passport. There are 6 draft new and updated ASIC regulatory guides dealing with establishing and registering a fund; compliance and oversight; holding assets; constitutions; ASIC discretionary powers; and foreign passport funds.

ASIC says it will also develop an information sheet on funds management governance considerations.

MUTUALS

Law reform for mutuals

The Federal Government has announced its acceptance of all recommendations of the inquiry into Reforms for Cooperatives, Mutuals and Member-owned Firms, conducted by Greg Hammond (the **Hammond Review**).

Probably the most important of the 11 recommendations of the Hammond Review are:

- The Corporations Act be amended to expressly permit mutuals registered under the Act to issue capital instruments without risking their mutual structure or status.
- A definition of a mutual company also be included in the Corporations Act.

The other Hammond Review recommendations were as follows:

- Government support (i) the ability of mutually owned ADIs to directly issue CET1 instruments, and (ii) APRA giving priority to the consideration of amendments to its prudential standards to permit them to do so.
- Government support (i) the ability of mutual friendly societies and mutual private health insurers to directly issue CET1 instruments, and (ii) APRA considering the amendment of its prudential standards to permit them to do so.
- Government encourage APRA to facilitate the issue of capital instruments by prudentially regulated mutuals by (i) assisting industry to develop standard template forms for member equity interests (**MEIs**), other capital instruments and documentation, and (ii) developing minimum service standards (including an agreed process, framework and timetable) for the timely assessment of capital instruments proposed to be issued, and accountability mechanisms for the service standards.
- Government encourage ASIC to facilitate the issue of capital instruments by unlisted transferring financial institutions by developing minimum service standards (including an agreed process, framework and timetable) for the timely consideration of applications for exemption from the demutualisation provisions in the Corporations Act (and under the demutualisation guidelines under the *Banking Act 1959* (Cth) (the **Banking Act**)), and accountability mechanisms for the service standards.
- Government consider the continued effectiveness of Part 5 of Schedule 4 of the Corporations Act and the demutualisation guidelines implemented under the Banking Act, and the exercise of ASIC's discretions under them, to determine whether any amendments to legislation or regulations are necessary or desirable.
- Government encourage ASIC to have further dialogue with affected mutually owned ADIs and industry to determine whether the use of an offer information statement with enhanced disclosure would be appropriate for small scale offers of converting capital

instruments.
- Tax regulations be promptly amended to treat Tier 2 Capital instruments convertible into MEIs in the same manner as Tier 2 Capital instruments convertible into ordinary shares.
- Government encourage ASIC to provide regulatory guidance on the duties of directors of mutuals.
- Government encourage ASIC to review the policy basis for the dual regulation of certain offers of securities by State and Territory cooperatives with a view to implementing legislative changes to eliminate this barrier to the raising of capital by those cooperatives.

For those recommendations for action by ASIC and APRA, the Treasurer has written to ASIC and APRA encouraging them to support these recommendations.

PAYMENTS

New Cheques Regulations

Treasury released an exposure draft of the *Cheques Regulations 2017* (Cth) which will remake the *Cheques Regulations 1987* (Cth) (the **Regulations**), due to sunset on 1 April 2018. The consultation process has now been completed. The exposure draft proposes design changes to the Regulations which are not intended to alter the substantive meaning or operation of the relevant provisions.

PRIVACY

Comprehensive credit reporting to be compulsory

Legislation will be made for mandatory comprehensive credit reporting (**CCR**). The Federal Treasurer announced the change on 2 November 2017, but it had been foreshadowed in the May Budget, when the Government committed to mandating CCR if credit providers did not meet a threshold of 40 per cent data reporting by the end of 2017. According to the Treasurer, the current figure is less than 1 per cent. The Government wants the new regime to come into effect by 1 July 2018. It says that CCR will improve the capacity of lenders to meet their responsible lending obligations. The four major banks will be required to have 50 per cent of their credit data ready for reporting by 1 July 2018, increasing to 100 per cent by 1 July 2019. Smaller lenders will be given additional time. The details are yet to be announced.

NDB guidance finalised

The Office of the Australian Information Commissioner (**OAIC**) has finalised its regulatory guidance on the new notifiable data breach (**NDB**) requirements which come into effect on 22 February 2018. The resources can be accessed here.

The OAIC has published guidance on:

- entities covered by the NDB scheme
- data breaches involving more than one organisation
- identifying eligible data breaches
- exceptions to the notification obligations
- assessing a suspected data breach
- notifying individuals about an eligible data breach
- what to include in an eligible data breach statement
- the Australian Information Commissioner's role in the NDB scheme

GDPR

The European Union (**EU**) privacy law, the General Data Protection Regulation (the **GDPR**), has new data protection requirements that will apply from 25 May 2018. The GDPR may apply to an Australian business if it has an establishment in the EU, offers goods and services in the EU, or monitors the behaviour of individuals in the EU. The OAIC has released guidance on the GDPR as it may apply to Australian businesses.

Australian Government Agencies Privacy Code

The Australian Government Agencies Privacy Code (the **Code**) was registered on 27 October 2017. It commences on 1 July 2018. The Code applies to all Australian Government agencies subject to the Privacy Act 1988 (except Ministers). It requires agencies to:

- have a privacy management plan;
- appoint a Privacy Officer, or Privacy Officers, and ensure that particular Privacy Officer functions are undertaken;
- appoint a senior official as a Privacy Champion to provide cultural leadership and promote the value of personal information, and ensure that the Privacy Champion functions are undertaken;
- undertake a written Privacy Impact Assessment (**PIA**) for all ‘high privacy risk’ projects or initiatives that involve new or changed ways of handling personal information;
- keep a register of all PIAs conducted and publish this register, or a version of the register, on their websites; and
- take steps to enhance internal privacy capability, including by providing appropriate privacy education or training in staff induction programs, and annually to all staff who have access to personal information.

PRUDENTIAL STANDARDS

Basel III bank capital framework finalised

The Basel Committee on Banking Supervision has announced finalisation of the Basel III bank capital framework.

According to APRA, the key elements of the final framework include:

- changes to the standardised approach to credit risk capital for real estate;
- restrictions on model risk estimates by banks using the internal ratings based approach to credit risk capital;
- removal of provisions for banks to use internal models to determine their operational risk capital requirements; and
- introduction of a floor to limit the reduction in capital requirements available to banks using capital models, relative to those using standardised approaches.

There will be an implementation timetable commencing in 2022. APRA says that it will consider an appropriate effective date for revisions to its prudential standards in light of the Basel Committee’s announcement, and expects to begin consultation on those revisions in early 2018.

APRA consultation on Appointed Actuary and actuarial advice to insurers

APRA released a consultation package on 28 September 2017 dealing with the role of the Appointed Actuary within general, life and private health insurers. It follows a discussion paper from 2016 where APRA proposed changes to the role of the Appointed Actuary and actuarial advice within insurers. The consultation package responds to the submissions on the June 2016 discussion paper. It also proposes replacing three industry-specific actuarial prudential standards with a cross-industry standard (CPS 320). Submissions on the package have now closed.

SUPERANNUATION

Life insurance code

On 18 December 2017 the Insurance in Superannuation Working Group released the Insurance in Superannuation Voluntary Code of Practice for superannuation trustees. The code will come into effect from 1 July 2018. It includes a framework for the maximum amount of superannuation contributions that should be used for automatically provided life insurance premiums. The code also provides for simpler processes for members to opt out of automatic life insurance, and simplified disclosure and improved superannuation fund member communications about insurance. The code has requirements to reduce multiple insurance policies by cancellation of some insurance cover when member accounts are inactive and insurance exists, as well as requirements for timely assistance to members during claims, and standards for handling of premium adjustment amounts between insurers and trustees.

Expert to review fees and costs disclosures

Darren McShane has been appointed by ASIC to conduct an expert review of fees and costs disclosure in superannuation and managed investments. The review is expected to be completed by June 2018. ASIC says that the aim of the review is to ensure that legislative modifications and regulatory guidance issued by ASIC will best meet in practice the objective of improving fees and costs transparency for consumers.

APRA consultation on superannuation prudential framework

On 13 December 2017 APRA released a consultation package on proposed changes to the prudential framework for RSEs. The proposed measures include:

- changes to SPS 220 Risk Management relating to strategic and business planning and fund expenditure policies and processes;
- a new prudential standard, SPS 225 Outcomes Assessment, requiring RSE licensees to annually assess the outcomes provided to members using a broader range of measures;
- new prudential practice guides to assist RSE licensees with their strategic and business planning and the outcomes assessment; and
- amending SPS 250 to require RSE licensees to provide straight-forward processes for opting-out of all insurance products.

Submissions are due by 29 March 2018.

Review of early release of superannuation benefits

Following the Government's announcement on 8 December 2017 of a Treasury review of the rules governing the early release of superannuation benefits, including for victims of crime compensation, Treasury has released an issues paper for public consultation. The paper is open for submissions until 12 February 2018.

AML/CTF

No AUSTRAC compliance report required for 2017

Reporting entities will not be required to provide an AML/CTF compliance report for 2017. AUSTRAC announced the waiver on 8 November 2017. The reason for the waiver is that AUSTRAC is introducing an improved report for 2018. AUSTRAC says that the new annual compliance report will be co-designed with industry.

AML/CTF Act amendments enacted

The *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth) has been enacted and is scheduled to commence on 14 June 2018. The Act amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) following the statutory review of the Act in 2016. The amending Act expands the objects of the AML/CTF Act to reflect the domestic objectives of anti-money laundering and counter-terrorism financing regulation. It also extends the scope of the AML/CTF Act to include regulation of digital currency exchange providers. The amending Act will also:

- clarify due diligence obligations relating to correspondent banking relationships and broadening the scope of these relationships;
- qualify the term 'in the course of carrying on a business';
- allow related bodies corporate to share information;
- expand the range of regulatory offences for which the AUSTRAC Chief Executive Officer (**CEO**) is able to issue infringement notices;
- allow the CEO to issue a remedial direction to a reporting entity to retrospectively comply with an obligation that has been breached;
- give police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments and establish civil penalties for failing to comply with questioning and search powers;
- clarify certain powers and obligations of the CEO; and
- de-regulate the cash-in-transit sector, insurance intermediaries and general insurance providers.

DISPUTES AND ENFORCEMENT

Progress of AFCA

Legislation to introduce the new Australian Financial Complaints Authority (**AFCA**), which will replace the Financial Ombudsman Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal (**SCT**), was introduced into the Federal Parliament on 14 September 2017, as reported in the last issue of our quarterly update.

The draft legislation, the *Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017* (Cth) was then referred to the Senate Economics Legislation Committee, and the Committee tabled its report on the Bill on 17 October 2017. The Committee recommended that the Bill be passed. Labor Senators on the Committee however proposed that the SCT should not be abolished.

In November 2017, Treasury released a consultation paper on the establishment of AFCA. Submissions on the paper have now closed.

AFCA is scheduled to commence on 1 July 2018.

Whistleblowers Bill introduced

Exposure draft legislation for whistleblower reforms was released by Treasury on 23 October 2017. A draft Bill was then introduced into the Senate on 7 December 2017. The Bill amends the Corporations Act to strengthen and consolidate whistleblower protections for the corporate and financial sector. It also amends tax laws to create whistleblower protection for disclosures of information by individuals about breaches of the tax laws or misconduct in relation to an entity's tax affairs. The Bill also repeals the existing financial sector whistleblower regimes (e.g. under the Banking Act) and clarifies transitional arrangements. The amendments are proposed to commence for whistleblower disclosures from 1 July 2018. We will provide a more detailed analysis of the changes once the final form of the legislation is known.

Design and distribution obligations and product intervention power

The Financial System Inquiry (**FSI**) recommended that the Government introduce "design and distribution obligations" for financial products and a temporary product intervention power for ASIC, and the Government adopted these recommendations. On 21 December 2017 Treasury published an exposure draft of legislation to introduce these reforms, the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* (Cth). Submissions are due by 9 February 2018.

Design and distribution obligations

The proposed design and distribution obligations will apply to financial products regulated by the Corporations Act and not to credit products regulated by the NCCP Act. However the obligations will generally only apply to financial products which require a PDS, or disclosure to investors under Chapter 6D (Fundraising) of the Corporations Act. The following products will also be exempt: MySuper products, margin lending facilities, securities to which an employee share scheme applies, and ordinary shares.

Under the proposed legislation, the key product design and distribution obligations to be imposed on offerors and distributors of financial products will be as follows:

- Offerors will have to make a “target market determination” for the financial product, develop a plan for reviewing the target market determination, and comply with the plan.
- Offerors and distributors will be prohibited from dealing and providing advice in relation to a product unless a target market determination is in place.
- Offerors and distributors will be required to take reasonable steps to ensure that dealings in, and advice provided in relation to, a product are consistent with the most recent target market determination.
- Distributors will have to notify the product’s offeror, and the offeror then notify ASIC, if there is a significant dealing in a product that is not consistent with the product’s target market determination.
- Offerors and distributors will have to maintain records and information relating to their obligations.

ASIC will be given more powers to enforce the new arrangements, and a person who suffers loss or damage because of a contravention of the obligations will be able to recover the loss or damage by civil action.

It is proposed that the new obligations will apply to existing financial products from 24 months after the new law receives Royal Assent, and will apply to new financial products from 12 months after the law receives Royal Assent.

Product intervention power

The product intervention power will amend both the Corporations Act and the NCCP Act to allow ASIC to proactively intervene in relation to financial and credit products by making orders to prohibit specified conduct relating to the product. ASIC will be required to consult affected parties before making intervention orders, and all orders made will be published.

The provisions will apply to financial products available for acquisition by retail clients by way of issue, and to all credit products that may be provided in the course of engaging in a credit activity, including credit contracts and mortgages and guarantees in relation to those contracts.

The product intervention power will generally apply to the issue of a financial product and not the sale of a financial product. It will not apply to any product that has already been issued or entered into.

ASIC will be able to exercise the power when it is satisfied that a product or class of products has resulted, or is likely to result, in "significant detriment" to consumers. Intervention orders will last up to 18 months unless extended by the Minister. Using the power, ASIC will be empowered to require that a person must not engage in specified conduct in relation to the product, including on conditions.

There will be new civil and criminal penalties for contravention of the design and distribution obligations and the product intervention power.

Deferred prosecution scheme launched for serious corporate crime and foreign bribery laws toughened

On 7 December 2017, the Federal Government introduced the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) into the Senate. If passed into law, the legislation will introduce a Deferred Prosecution Scheme (**DPS**) as an option for dealing with certain serious corporate crimes. A serious corporate crime will include anti-money laundering and counter-terrorism financing offences, foreign bribery offences, market misconduct offences in the Corporations Act (including market manipulation and insider trading), falsification of books, and breaching sanctions imposed on overseas entities. Under the DPS scheme, the Commonwealth Director of Public Prosecutions (**CDPP**) can make an offer to an entity (not an individual) that the CDPP considers has engaged in a serious corporate crime, to negotiate an agreement to comply with a series of conditions, invariably involving full cooperation against any co-offenders, and if those commitments are met, then the entity will not be prosecuted by the CDPP. Importantly, if passed the law will also significantly toughen Australia's foreign bribery laws by introducing a new offence of failure of a body corporate to prevent bribery by an associate. The definition of an associate is very broad and includes subsidiary companies. An Australian company is liable where an associate of the company commits bribery for the profit or gain of the company. The company has a defence if it can establish that it had in place adequate procedures designed to prevent the commission of the foreign bribery offence by its associates. In addition, the offence of bribing a foreign public official has been made easier to prosecute by broadening the offence and removing some of the requirements for prosecution.

EDR review – compensation scheme

A supplementary final report of the review into external dispute resolution (**EDR**) (the Ramsay review) has been released. The review recommends the introduction of a limited and carefully targeted compensation scheme of last resort (**CSLR**) for future unpaid compensation in parts of the financial services sector where there is evidence of a significant problem of compensation not being paid. The review notes that most unpaid EDR determinations by value (90%) relate to financial advice. Therefore the review panel recommends that the CSLR should initially be restricted to financial advice failures where a financial adviser has provided personal or general advice on relevant financial products to a consumer or small business. However it is also recommended that the CSLR should be designed to be scalable to cover other types of financial services if significant problems with unpaid compensation arise in the future. The review panel determined that the CSLR should act as the final safety net to ensure consumers and small businesses are able to receive compensation after all other avenues have been exhausted.

Consultation on ASIC fees-for-service

On 22 November 2017 Treasury released a consultation paper on ASIC fees-for-service. Next year, from 1 July 2018, fees-for-service will apply to recover ASIC regulatory costs that are directly attributable to a single, identifiable, entity. The currently charged fees for these activities do not reflect the costs to ASIC of undertaking them. Many only have a nominal fee. The consultation paper seeks feedback on the proposed fees-for-service model, the methods of ASIC stakeholder engagement and accountability, and competition and innovation aspects. The consultation period has now ended.

Financial Services and Credit Panel

ASIC has announced the members of its Financial Services and Credit Panel (**FSCP**) and released regulatory guidance on the FSCP. The FSCP is a pool of industry participants that ASIC will draw upon when forming individual sitting panels. A sitting panel will be formed of two members from the FSCP and an ASIC staff member and will hold administrative hearings and decide whether to make banning orders against individuals for misconduct in providing financial services to retail clients or engaging in credit activities.

ASIC's directions powers

The ASIC Enforcement Review taskforce has issued a Consultation Paper following a review of ASIC's existing powers to modify an AFS or credit licensee's ongoing systems and conduct after the relevant licence has been granted. Submissions on the paper have now closed.

The taskforce believes that ASIC's existing powers to require licensees to adopt internal systems or to restrict their activities have shortcomings.

- The resources and procedural requirements necessary to impose additional licence conditions, or to suspend or cancel a licence, can result in delay.
- Applying to a court for an injunction involves significant time, resources and costs.
- Enforceable undertakings must be agreed to by a licensee and are generally negotiated as an alternative to ASIC exercising its administrative powers or initiating court proceedings.

The taskforce proposes that ASIC should, to the extent practicable, be able to require compliance with AFS or credit licence obligations in real time, and be given powers to direct licensees to take or refrain from taking actions where appropriate for this purpose.

ASIC Enforcement Review looks at bigger penalties

The ASIC Enforcement Review taskforce has released a consultation paper on penalties for corporate and financial sector misconduct. The paper proposes expanding the range of civil penalty provisions and increasing the maximum civil penalty amounts in the Corporations Act and the NCCP Act. The maximum amounts proposed for individuals is 2,500 penalty units or $525,000 and for corporations, the greater of 12,500 penalty units ($2.65 million) or three times the benefit gained or loss avoided, or 10% of annual turnover.

The review has also proposed increasing the penalties under the ASIC Act to align with planned changes to the Australian Consumer Law. In addition, the review proposes that ASIC would be able to seek disgorgement remedies (i.e., removal of benefits illegally obtained or losses avoided) in civil penalty proceedings brought under the Corporations Act, the NCCP Act or the ASIC Act. The review also proposes increasing maximum terms of imprisonment and fine amounts for other criminal offences. Finally, the review proposes that ASIC would be able to deal with a wider range of offences through infringement notices.

The consultation paper was released on 23 October 2017 and submissions closed on 17 November 2017.

BBSW cases – NAB and ANZ settle; case continues against Westpac

National Australia Bank (**NAB**) and Australia and New Zealand Banking Group (**ANZ**) have settled the proceedings brought against them by ASIC in relation to their bank bill trading business and participation in the setting of BBSW. ASIC announced on 20 November 2017 that NAB and ANZ had entered into enforceable undertakings with ASIC as part of the resolution of the proceedings. The Federal Court made declarations on 10 November 2017 that ANZ and NAB had attempted to engage in unconscionable conduct in connection with the supply of financial services in attempting to seek to change where BBSW was set, on certain dates. The Court also declared that NAB and ANZ had failed to do all things necessary to ensure that they provided financial services honestly and fairly. The Court imposed penalties of $10 million on each of ANZ and NAB. Under the enforceable undertakings, the banks are also required to each pay $20 million to the benefit of the community and $20 million towards ASIC's investigation and other costs. Westpac has not settled its BBSW case with ASIC.

Class action launched against Westpac over insurance

A class action has commenced against Westpac, represented by Shine Lawyers. The lawyers claim that persons who obtained insurance issued by Westpac Life on the recommendation of financial advisers at Westpac, St George Bank, Bank of Melbourne, BankSA or BT Advice “have been routinely charged higher premiums than persons who obtained identical insurance issued by Westpac Life on the recommendation of independent financial advisers.” The class action claims that “Westpac should not have preferred its own interests at the expense of those customers, and that they should be compensated for the excess premiums.”

Volkswagen Financial Services pays penalty

Volkswagen Financial Services has paid a penalty of $216,000 for 20 infringement notices issued by ASIC for alleged misleading statements. The statements were made as part of a ‘1% you can’t ignore’ advertising campaign where advertisements said that particular Volkswagen models were available for purchase on finance for a set weekly payment.

According to ASIC, some advertisements contained a fine-print disclaimer and others did not display any further information. For those advertisements with the disclaimer, ASIC says that they did not give “sufficient prominence to important conditions applying to the stated finance offers and did not adequately explain how some of these conditions operated.” ASIC considered that these advertisements were misleading because they did not clearly or prominently disclose that a large balloon payment was payable at the end of the finance contract, and that the finance contract was only for a period of 48 months. ASIC says that the ads also did not adequately explain the term ‘GFV balloon’ used in the ads and did not adequately inform the consumer that a dealer administration fee may be imposed. For ads without the disclaimer, ASIC’s view was that the ‘click through’ facility on some websites was not an adequate means of correcting the misleading overall impression.

Westpac refunds interest only customers

ASIC has announced that Westpac is providing interest refunds or discounts to 13,000 owner occupiers who have interest only home loans. A Westpac system error resulted in interest only home loans not automatically switching to principal and interest repayments at the end of the interest only period. Westpac is refunding the additional interest paid from when the loan was contracted to convert to principal and interest repayments, and discounting the interest rate for the remaining term of the loan. ASIC says that the error has affected some interest only home loans for owner occupiers going back to 1993.

Good to Go Loans and Web Moneyline EUs

Good to Go Loans has entered into an enforceable undertaking with ASIC to cease offering a called OACC2. This product fell outside the definition of a small amount credit contract, but ASIC says that on the same day that the consumer entered into an OACC2 loan, the agreement was modified to repay the loan at higher regular repayment amounts over a shorter period of time. The Enforceable Undertaking requires Good to Go Loans to write off all outstanding OACC2 loans, notify the relevant credit reporting body that the loans have been settled, and not enter into the OACC2 loan product with any new consumers. A similar enforceable undertaking has been entered into by Web Moneyline for the same product.

Fees for no service refund programs by big 4 and AMP

ASIC has published an update on the ‘fees-for-no-service’ refund programs of AMP, ANZ, CBA, NAB and Westpac. ASIC reports that these institutions have now paid or offered customers $215.9 million of an estimated $219.5 million in refunds and interest for failing to provide general or personal advice to customers while charging them ongoing advice fees. The refund programs were the result of ASIC’s October 2016 Report 499 *Financial advice: fees for no service* (REP 499), which identified charging of fees for advice services that were not provided.

Citibank refunds

ASIC reports that Citibank has refunded more than $1 million to about 4,000 customers after allegedly misstating the bank's obligations around unauthorised transactions on customers' accounts. ASIC says that Citibank had refused customers' requests to investigate unauthorised transactions on the basis that the requests were made outside the time period permitted under the Visa and Mastercard scheme chargeback protections. Citibank told customers that requests made outside the timeframe specified by Visa and Mastercard were not required to be assessed. This was not correct, as the ePayments Code provides protections to consumers for unauthorised transactions in addition to the protections provided by Visa and Mastercard. Citibank will remediate affected consumers by providing refunds to current and former customers. The remedial action covers consumers who received letters from Citibank regarding their claims of unauthorised transactions between 1 January 2009 and 22 July 2016.

Citibank is also refunding more than $3.3 million to around 39,500 current and former credit card customers who were not refunded when their credit card accounts were closed with an outstanding credit balance. This will apply to Citibank, Virgin Money, Bank of Queensland, Suncorp and Card Services branded credit cards and for Citibank Ready Credit loan customers. ASIC says that the error occurred on accounts as far back as 1994, but did not occur every time an account was closed.

Youi sales practices

Youi has agreed to refund about $14,000 to 102 consumers and to pay $150,000 as a community benefit payment to the Financial Rights Legal Centre's Insurance Law Service. This follows ASIC concerns about its home and car insurance sales practices. ASIC says that Youi's remuneration and bonus structures incentivised sales staff to prioritise sales ahead of consumers' interests. Ernst & Young has been engaged by Youi to conduct a review of sales practices. This follows concerns that sales staff were charging consumers for insurance policies without their consent.

$1 million fine for breach of best interests duty

The first civil penalty has been imposed on a financial services licensee for breaches of the best interests duty. A civil penalty of $1 million was imposed by the Federal Court on NSG Services Pty Ltd (currently named Golden Financial Group Pty Ltd) (**NSG**), a financial advice firm, for breaches of the best interests duty introduced under the Future of Financial Advice reforms. The penalty relates to financial advice provided to retail clients by NSG advisers on eight occasions between July 2013 and August 2015. NSG agreed with ASIC on the amount of the penalty. It was also ordered to pay $50,000 in costs to ASIC, and will also pay $50,000 towards ASIC's costs of its investigation into NSG.

CommInsure pinged for misleading advertising

Following concerns raised by ASIC, CommInsure has agreed to pay $300,000 towards a consumer advice service and have its advertising sign-off processes independently reviewed.

In its investigation of CommInsure which began in April 2016, ASIC found that misleading and deceptive statements were likely to have been made on some CommInsure websites about the extent of cover for trauma if a customer suffered a heart attack.

CommInsure must report to ASIC by 30 June 2018 on the results of the review and the changes made.

ASIC has now finished its investigation into the CommInsure life insurance business.

Tabcorp penalties decision

In *Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited*

(No 3) [2017] FCA 1296 handed down on 10 November 2017, Justice Perram gave his reasons for the $45 million civil penalty that he imposed on Tabcorp on 16 March 2017. Some of the factors that His Honour identified as relevant to his decision were:

- there had been no findings against any of the Tabcorp entities in the proceedings in the past for the relevant provisions;
- the Tabcorp parent was a large listed entity with revenue in the billions;
- the AML/CTF program which had generated liability in this case had been in place for more than three years;
- the contraventions did not arise as a result of a deliberate intention to contravene the Act, but rather because of insufficient resourcing together with insufficient processes for consistent management oversight, assurance and operational execution;
- neither the Board nor senior management were aware of the deficiencies nor were either involved in the contraventions; and
- since these matters came to light, the Tabcorp entities had made a substantial investment in improving their compliance arrangements.

The judge acknowledged that "the failures were system failures" but said "that is precisely what this statute is about." He held that a penalty of $45 million "will serve to demonstrate to those in the industry that failures to comply with the Act have a very real potential to be expensive."

Swann Insurance refunds

Swann Insurance is offering to refund more than 67,000 customers around $39 million for add on insurance products purchased through car and motorbike dealers. The products include loan protection insurance, "walkaway" and gap cover products, purchase price protection insurance, tyre and rim insurance, and mechanical breakdown insurance. According to ASIC, the products affected were of little or no value to the consumers who bought them. For example, in some cases gap cover was unnecessary because it duplicated existing cover held by customers. Swann Insurance will write to all affected customers with information about the refunds being offered.

NAB refunds

National Australia Bank (**NAB**) is refunding $1.7 million to 966 home loan customers in relation to errors with mortgage offset accounts. After an internal review prompted by customer complaints, NAB found that it had not linked some offset accounts to broker originated loans over the period from April 2010 to August 2017. The customers affected will be refunded so that they are only charged interest that would have been payable if their mortgage offset account had been correctly linked from the commencement of the loan.

Contact us

Patrick Dwyer
Legal Director
patrick.dwyer@dwyerharris.com
0406 404 892

Kathleen Harris
Legal Director
kathleen.harris@dwyerharris.com
0400 133 775