FINANCIAL SERVICES AND CREDIT
QUARTERLY UPDATE

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Contents

CONSUMER CREDIT

Credit card reforms

From 1 July 2018, credit card limit increase invitations have been prohibited across the board for both new and existing credit card contracts. Credit limit increase invitations must not be given to a customer even if the customer has previously consented to receiving them. Full details of this and the other credit card reforms can be found in our article here.

A second credit card reform which will commence on 1 January 2019 provides that a credit card contract will be deemed unsuitable for the consumer if the consumer could not repay the credit limit within the period prescribed by ASIC. On 4 July 2018, ASIC issued a consultation paper (CP 303) which proposes a period of three years. The closing date for submissions is 31 July 2018.

ASIC review of credit cards

On 4 July 2018 released a report (REP 580) on credit card lending in Australia. The report follows a review by ASIC of 21.4 million credit card accounts opened between July 2012 and June 2017. According to the report,18.5% of consumers are struggling with credit card debt. ASIC also found that consumers were being provided with credit card products that did not “meet their needs”. As an example, ASIC cites consumers who carry balances over time on high interest rate products, when lower rate products would save them money. ASIC estimates that these consumers could have saved approximately $621 million in interest in 2016–17 if they had a card with a lower interest rate. ASIC also examined the practice of balance transfers, and found that over 30% of consumers end up increasing their debt by 10% or more after transferring a balance.

FINANCIAL ADVICE

Draft code of ethics

The Financial Adviser Standards and Ethics Authority (**FASEA**) has released a draft code of ethics for financial advisers. Consultation closed on 1 June 2018. FASEA is required by the *Corporations Act 2001* (Cth) (the **Corporations Act**) to make a Code of Ethics to ensure that advisers are compliant under section 921E of the Corporations Act.

The draft code provides that an adviser must act, at all times and in all cases, in a manner that is demonstrably consistent with the principles set out in the code, in the discharge of their professional duties. It requires that an adviser must always act to realise and promote the values of trust, confidence, honesty, fairness, and diligence. The code sets out standards of ethical behaviour, standards of client care, standards of quality process, and standards of professional commitment.

ASIC consults on compliance schemes for financial advisers

ASIC issued a consultation paper CP 300 *Approval and oversight of compliance schemes for financial advisers*. Submissions closed on 28 June 2018.The proposals in the consultation paper cover the process for applying for approval of a compliance scheme and ASIC’s expectations for the governance and administration, monitoring and enforcement processes, and ongoing operation of compliance schemes. CP 300 also covers how ASIC proposes to exercise its powers to revoke the approval of a compliance scheme, or to impose conditions on approval, and proposals to modify the law to empower monitoring bodies to obtain information from Australian financial services licensees and authorised representatives.

Guidance for tax and BAS agents

ASIC has issued updated guidance for accountants who provide services on SMSFs to cover the financial services licensing exemption for tax and BAS agents. The guidance explains the relationship between this exemption and the exemption for providing tax advice on financial products. It also clarifies what accountants can do when referring a client to a licensee or representative for financial advice.

ASIC reviews SMSF advice

On 28 June 2018 ASIC released reports on its reviews of SMSF advice and SMSF member experiences (Report 575 *SMSFs: Improving the quality of advice and member experiences* and Report 576 *Member experiences with self-managed superannuation funds*).

ASIC says that it reviewed 250 client files randomly selected based on Australian Taxation Office (**ATO**) data and assessed compliance with the Corporations Act's best interests duty and related obligations. ASIC found that in 91% of files reviewed the adviser did not comply with the best interests duty. For 10% of files reviewed, ASIC says that the client was likely to be "significantly worse off in retirement" due to the advice, and in 19% of cases, clients were "at an increased risk of financial detriment due to a lack of diversification."

ASIC also conducted market research and an online survey of SMSF members which found that 38% of respondents thought that running an SMSF was more time consuming than expected, 32% found it more expensive than expected, and 29% believed that SMSFs had the same level of protection as prudentially regulated superannuation funds in the event of fraud.

ASIC expressed concern at the growing use of one-stop-shops where the adviser has a relationship with a developer or a real estate agent whose products the person is encouraged to invest in. ASIC believes that this puts people at increased risk of getting poor advice.

FINANCIAL MARKETS

ASIC guidance on financial markets licences

ASIC issued updated regulatory guidance on the licensing regime for financial markets on 4 May 2018. The updated Regulatory Guide 172 *Financial markets: Domestic and overseas operators* (**RG 172**) has a two-tiered market licence regime. This follows changes made in March 2017 to the Corporations Act provisions on market licensing. Tier 1 market venues are those which are, or are expected to become, significant to the Australian economy or the efficiency and integrity of, and investor confidence in, the financial system. Tier 2 licences will be for the remainder of licensed financial markets. RG 172 now also includes more detailed and clearer expectations on technological resourcing and risk management.

New ASIC guidance on market integrity

ASIC has published two new regulatory guides, RG 265 and RG 266 on market integrity rules, which consolidate and replace seven other regulatory guides covering the same area.

ASIC consultation on short selling

ASIC has issued a consultation paper on proposals relating to naked and covered short selling. ASIC proposes to grant legislative relief to allow market-makers of some exchange-traded products to naked short sell units in an exchange traded fund or a managed fund in the course of making a market in those products. ASIC also proposes to grant legislative relief, in the context of corporate actions, to allow naked short sales of unissued products during deferred settlement trading, and to allow naked short sales in connection with an initial public offering selldown through a special purpose vehicle. The consultation paper also proposes a change in the relevant time that short positions are calculated and to remake various short selling class orders which are due to sunset (i.e., expire). Submissions closed on 20 June 2018 and the final new instrument is proposed to be issued before 1 October 2018.

New BBSW regime commences

The new BBSW calculation methodology, now administered by ASX, commenced on 21 May 2018. On 12 June 2018 ASIC announced that it had finalised and published benchmarks rules, a significant benchmarks declaration, and a regulatory guide in a further series of measures towards establishing a comprehensive regulatory regime for financial benchmarks. The rules, declaration and regulatory guide are available on ASIC's website.

Capital requirements for market participants

ASIC released a consultation paper Consultation Paper 302 (**CP 302**) on 4 July 2018 proposing changes to the minimum capital requirements for market participants. ASIC proposes that futures market participants must comply with a risk-based capital regime instead of a net tangible asset requirement, and hold core capital of at least $1,000,000 at all times. ASIC also proposes that the minimum core capital requirement for securities market participants be $500,000. CP 302 further proposes new rules such as an underwriting risk requirement and the removal of redundant rules and forms to more closely align the capital requirements with the financial requirements of the Australian financial services licensing regime. Submissions on CP 302 are due by 15 August 2018.

ASIC review of retail OTC derivatives

ASIC has reviewed the practices of 57 retail over-the-counter (**OTC**) derivative issuers and identified a number of risks with the products that they offer, which include binary options, margin foreign exchange and contracts for difference. ASIC believes that the conduct of these participants fell short of expectations. ASIC has called on issuers to review and update their risk management and client money practices and assess whether their arrangements with counterparties and referrers meet their AFS licence obligations.

FINANCIAL SYSTEM

The Royal Commission

Since our last Quarterly Update in April, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) has conducted rounds 2, 3 and 4 of its hearings.

The round 2 hearings took place from 16 to 27 April in Melbourne and covered financial advice. Topics included fees for no service, investment platform fees, inappropriate financial advice and improper conduct by financial advisers, and the disciplinary regime for the financial advice profession.

The round 3 hearings were held in Melbourne from 21 May to 1 June and considered loans to small and medium enterprises. The topics covered were responsible lending to small businesses, the approach to enforcement and monitoring of loans, product and account administration, unfair contract terms legislation, and the Code of Banking Practice.

The round 4 hearings looked at issues affecting Australians in remote and regional communities, including farming finance, natural disaster insurance, and interactions between Aboriginal and Torres Strait Islander people and financial services entities. They were held in Brisbane from 25 to 29 June and in Darwin from 2 to 6 July.

Written submissions in response to the hearings to date are published on each of the hearings pages.

The Royal Commission also continues to publish a number of background papers on topics it is examining, which can be accessed here

The Royal Commission is required to submit an interim report by no later than 30 September 2018, and provide a final report by 1 February 2019.

Relaxing ownership restrictions for banks

A draft Bill has been released for comment by Treasury which would allow for an increase in the current ownership limit for banks from 15 to 20%, and introduce a streamlined approval path for new and recent entrants, where assets are under a specified amount, to allow them the time they need to test and grow their business before they need to consider diversifying ownership. The *Financial Sector (Shareholdings) Amendment (Relaxing Ownership Restrictions) Bill 2018* (Cth) follows the announcement in the 2017-18 Budget that the Government would look to relax the legislative 15% ownership cap so as to reduce barriers for innovative new entrants into the banking sector.

The proposed streamlined approval path would apply to owners of domestically incorporated companies that are applying to become a financial sector company, or those recently registered or authorised. If the owners meet a fit and proper test and comply with ongoing conditions, they will be able to exceed the 20% shareholding limit. The *Financial Sector Shareholdings Act 1998* (Cth) currently requires a person to apply to the Treasurer for approval to hold a stake of more than 15% in a financial sector company (either at the time of market entry or following a change of ownership), with approval granted if the relevant Minister determines it to be in the national interest.

Submissions closed on 4 May 2018.

ASIC industry funding

Legislation for the industry fees-for-service funding of ASIC passed through the Federal Parliament on 28 June 2018 and commenced on 1 July 2018. This is the second phase of the ASIC industry funding model. Fees-for-services relate to fees ASIC charges for specific activities, including licence applications or variations and applications for registration. Further information on the industry funding model is available on the ASIC website here.

The *ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018* (Cth) made on 29 June 2018 makes a number of minor technical amendments to the existing industry levy regulations.

ASIC consultation on relief for foreign financial services providers

On 1 June 2018 ASIC released a consultation paper (**CP 301**) which proposes a modified licensing regime for foreign financial service providers carrying on a financial services business in Australia with wholesale clients. CP 301 proposes that foreign providers could apply for a modified form of Australian financial services licence (**AFSL**). Currently foreign providers of services to wholesale clients are given relief by ASIC from having to hold an AFSL.This relief is due to sunset on 27 September 2018, but ASIC says that it will extend this until 30 September 2019. A further transition period to 30 September 2020 is proposed if ASIC proceeds with foreign AFS licensing. Submissions are due by 31 July 2018.

Boosting financial capability

The Federal Government has announced that it will establish a new body to boost the advancement of financial capability across Australia. The new body will be a not-for-profit public company and will manage and distribute the $40 million in community benefit payments that form part of the settlement agreements between ASIC, ANZ and NAB relating to the manipulation of the Bank Bill Swap Rate, and $10 million committed by the Government to developing women's financial capability in the Federal Budget. It will be overseen by a board chaired by Paul Clitheroe AM and also including Elaine Henry OAM and Air Commodore Robert Brown AM. It is envisaged that where ASIC accepts enforceable undertakings in future, it may agree to further community benefit payments to be paid to the company.

FINTECH

Open Banking

On 9 May 2018, the Federal Government announced that it had agreed to the recommendations of the Review into Open Banking. This includes the creation of a general Consumer Data Right. Open Banking will be phased in. Major banks will be required to make data available on credit and debit card and deposit and transaction accounts by 1 July 2019 and mortgages by 1 February 2020. Data on all products recommended by the Review will be available by 1 July 2020. Other banks will be required to implement Open Banking 12 months after the major banks. The Australian Competition and Consumer Commission (**ACCC**) will be given the power to adjust these timeframes.

Over the coming months, Treasury will consult on draft legislation, the ACCC will consult on draft rules, and CSIRO's Data61 will consult on technical standards.

Unlike Open Banking in the UK, the Australian Open Banking standards will allow for read access only, not write access. This means that third-parties will be able to access data but not allowed to initiate transactions on consumers' banking accounts.

The Open Banking initiative is part of a broader response from the Federal Government to reform the law in relation to data access and use, following the report of the Productivity Commission. For further details of this response, see under PRIVACY below.

Misleading or deceptive conduct in ICOs

ASIC issued a statement on 1 May 2018 advising that it had received on 19 April delegated powers from the ACCC to take action under the Australian Consumer Law relating to crypto-assets. This delegation enables ASIC to take action against misleading or deceptive conduct in marketing or selling of initial coin offerings (**ICOs**), even if the ICO does not involve a financial product.

ASIC has also updated its guidance on ICOs and crypto-currency, INFO 225. In the guidance ASIC confirms its view that Bitcoin is not a financial product, but explains how other crypto-currencies or digital assets (which it calls collectively "crypto-assets") could be financial products.

ASIC said that it was issuing inquiries to ICO issuers and their advisers where ASIC identifies conduct or statements that may be misleading or deceptive, in addition to its inquiries where it identifies potentially unlicensed conduct.

For further analysis, please see our blog article here.

INSOLVENCY

Ipso facto clauses

Amendments to the Corporations Act which took effect on 1 July 2018 stay the enforcement of "ipso facto" clauses against relevant entities. The ipso facto stay applies to clauses in contracts which entitle a party to enforce a right under a contract, agreement or arrangement on the occurrence of various insolvency-related trigger events, regardless of the counterparty's continued performance of its obligations under the contract.

There are exceptions to these provisions which are set out in the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* (Cth).

INSURANCE

Parliamentary inquiry into life insurance industry

The Parliamentary Joint Committee on Corporations and Financial Services tabled its report on the life insurance industry on 31 March 2018. The report makes numerous recommendations. Some of the key recommendations include:

- Life insurance be included in the Open Banking regime.
- Consumer protection legislation be extended to life insurance contracts.
- ASIC's proposed product intervention powers be amended to include funeral insurance and to enable interventions in relation to remuneration.
- That the Banking Executive Accountability Regime should be extended to life insurance and life insurers.
- ASIC should conduct random audits of 20% of the life insurance adviser population over a three-year period.
- ASIC should be given the power to undertake enforcement action in relation to systemic or systematic breaches of codes of practice in the financial services sector.
- ASIC conduct a review of payments and benefits between participants in the life insurance industry, and the Government consider further regulation of payments between life insurance industry participants following ASIC review.
- ASIC and APRA conduct an audit of all superannuation trustees to identify payments, including soft dollar benefits, between life insurers and trustees in connection with default life insurance.
- The life insurance industry should have a balance of affiliated and non-affiliated products on their approved product lists.
- Increased responsibilities for superannuation trustees and regulators to alert consumers to duplicate life insurance and the effect of life insurance policies on account balances.
- Improvements to protocols for requesting and providing medical information.
- Consideration of imposing a moratorium on life insurers using predictive genetic information, unless the consumer provides information to a life insurer to demonstrate that they are not at risk of developing a disease.
- That the Government review the financial services exemption for insurance claims handling processes in Corporations Regulation 7.1.33.
- A legal requirement that an insurer who rejects an application for insurance or denies a claim should be required to provide written reasons.
- Updates to the Life Insurance Code of Practice to require definitions in policies to reflect current medical knowledge and research, and to require standardised definitions across all types of policies, clear and simple language and definitions, and clear explanations of which associated conditions arising from the initial condition will be covered by the policy.

Terrorism Insurance Act review

Treasury has asked for submissions related to the triennial review of the Terrorism Insurance Scheme. In particular, Treasury is seeking views on whether the risk of cyber terrorism causing physical property damage should be included in the scheme by removing the scheme regulations for computer crime and over-riding policy exclusions for cyber terrorism; and on the extent of coverage available for terrorism incidents causing harm to people including armed assault. Submissions closed on 30 June 2018.

Unfair contract terms – insurance contracts

On 27 June 2018 Treasury released a proposals paper on the extension of the unfair contract term (**UCT**) provisions to contracts of insurance. The Government is seeking stakeholder views. The proposal involves amending the *Insurance Contracts Act 1984* (Cth) to allow the UCT laws to apply to insurance contracts regulated by the Act, with some modifications for specific features of insurance contracts. Submissions close on 27 July.

MANAGED INVESTMENTS

Asia Region Funds Passport

Australia, Japan, Korea, New Zealand and Thailand signed a memorandum of cooperation (**MOC**) on the establishment and implementation of the Asia Region Funds Passport, which took effect on 30 June 2016.

The *Corporations Amendment (Asia Region Funds Passport) Act 2018* (Cth) received assent on 29 June 2018 and gives effect to agreements made under the MOC and prepares Australia for the Passport. It establishes a new Chapter 8A in the Corporations Act, which implements the common regulatory arrangements in the MOC, and sets out the process by which Australian managed investment schemes may be registered by ASIC as passport funds, the process whereby foreign passport funds may notify ASIC of their intention to offer interests in their funds to Australian investors, and when ASIC may reject such notifications.

New Chapter 8A also provides a mechanism to incorporate the passport rules in Annex 3 of the MOC into Australian law by a legislative instrument. These rules form a common set of obligations on all operators of passport funds, Australian and foreign.

On 29 June 2018, Treasury released draft regulations and explanatory materials for comments. Submissions are due by 13 July 2018.

Corporate Collective Investment Vehicle draft Bill

On 13 June 2018, Treasury released for public consultation the first tranche of the *Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018* (Cth) and explanatory materials. There was a previous draft Bill issued in August 2017 for comment. The new draft Bill includes revisions from the last consultation. Comments are due by 11 July. The Corporate Collective Investment Vehicle (**CCIV**) will be an internationally recognisable investment vehicle which can be readily marketed to foreign investors, including through the Asia Region Funds Passport. There will be a second tranche of consultations on the regulatory framework for CCIVs, covering external administration, applying the Corporations Act Chapter 7 financial services regime to CCIVs, and penalty provisions.

PAYMENTS

Treasury consults on gift card expiry dates

In May 2018 Federal Treasury conducted a public consultation on possible uniform national regulation for the minimum length of time that a gift card should last. This follows from legislation introduced in 2017 in New South Wales requiring a minimum three year expiry. A Regulation Impact Statement released by Treasury proposed three options: retaining the status quo; a prohibition on gift card expiry dates; and a three year minimum expiry date. A minimum three year expiry period is the preferred policy option at this time.

PRIVACY

Data access reforms

On 1 May 2018 the Minister Assisting the Prime Minister for Digital Transformation, the Hon Michael Keenan MP, announced the Federal Government's response to the Productivity Commission's inquiry into Data Availability and Use.

The key elements of the response are:

- **Consumer Data Right:** The Australian Government will introduce a Consumer Data Right to allow consumers to access particular data in a useful digital format. Consumers will also be able to direct a business to transfer that data to a data recipient. Implementation of the Consumer Data Right will be rolled out by industry sector, commencing with the banking, energy and telecommunications sectors. (For the banking sector, see the item on Open Banking under FINTECH above). The Consumer Data Right will be introduced primarily through changes to the *Competition and Consumer Act 2010* (Cth).

- **Governance:** A new office of National Data Commissioner will be created and a new National Data Advisory Council will advise the National Data Commissioner on ethical data use, technical best practice, and industry and international developments. The Government will introduce a new data sharing and release framework to streamline the way public data is shared and released. Accredited Data Authorities will engage with data custodians and users on matters relating to data availability and use. Data sharing agreements between data custodians, Accredited Data Authorities and data users will be a key part of the governance framework.

- **Designated datasets:** The Government will establish a framework to identify datasets whose availability and use will generate significant community-wide benefits. The Government will consider the best way to facilitate sharing and use of these datasets.

- **Improving Australia's current data system:** The Government will continue to take a system-wide approach to improving the availability and use of data, to optimise the use and reuse of public sector data.

- **New legislation:** A new Data Sharing and Release Act will be the basis of the new system for data sharing and release in Australia. This legislation will establish institutional and governance arrangements, including Accredited Data Authorities and a trusted user framework to facilitate better sharing of data.

Consumer Data Right

Treasury published on 9 May 2018 an information paper on the Consumer Data Right which will be a core element of the new national governance regime for use and access to data (see article above). The paper explains in more detail how the Consumer Data Right is expected to work, starting with Open Banking.

The Consumer Data Right will cover all customers, including individuals, and businesses of any size. This differs from the recommendations of the Productivity Commission report into data access and use, which had proposed that the right only be available to individuals and small to medium sized businesses.

Data will become subject to the Consumer Data Right through a reciprocity mechanism – those who want access to data will be required to share equivalent data.

Consumer consent will be a key element of the Consumer Data Right regime. Implied consent will not be sufficient. Records of consents will be part of the datasets under the Consumer Data Right regime, so that consumers will be able to keep track of what they consented to. High risk uses such as for marketing may require special consent.

Data protection and privacy will also be important. Data recipients will have to be accredited, and the holding and transfer of data will be subject to security standards.

There will be regulatory roles for the ACCC, the Office of the Australian Information Commissioner (**OAIC**) and the new Data Standards Body.

On 23 May 2018, the Treasurer announced that Mr Andrew Stevens had been selected as the Interim Chair of the Data Standards Body for the Consumer Data Right. The Data Standards Body will be established within Data61 at CSIRO and will develop the data sharing standards for the new regime.

Mandatory comprehensive credit reporting draft regulations

Treasury has released draft regulations in relation to mandatory comprehensive credit reporting (**CCR**). The *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Regulations 2018* (Cth) exclude from the mandatory CCR regime margin lending facilities, accounts with formal overdrafts, accounts that are being run down, novated leases and charge cards. Accounts that are being run down are those where the type of credit can no longer be issued, the number of accounts is less than 10,000 and the total number of accounts is less than 3% of the total credit accounts held by the licensee.

The draft regulations also set out additional circumstances when credit information must be supplied to a credit reporting body. These include where there is new repayment history information or default information and the licensee has previously supplied mandatory credit information for that account, and when an account has opened or reopened with a member of a banking group for which the licensee is the head, after the second bulk supply.

A condition will also be imposed on a credit reporting body that it must not disclose credit information received under the mandatory regime if the information was received through the mandated regime and provided by a credit provider which is a signatory to the Principles of Reciprocity and Data Exchange (**PRDE**), when the PRDE would have the effect of restricting some or all of the information supplied. The effect of this regulation will be to incorporate the requirements of the PRDE. If the credit provider who has supplied the information is not a signatory to the PRDE, there will be no restrictions on the on-disclosure of the credit information supplied other than the restrictions in the *Privacy Act 1988* (Cth) (the **Privacy Act**) and the Privacy (Credit Reporting) Code.

Notifiable data breaches report

On 11 April 2018 the OAIC released the first quarterly report on data breach notifications received under the Notifiable Data Breaches scheme. The scheme commenced on 22 February 2018. The OAIC reported that it received 63 data breach notifications during the first six weeks of the scheme. In contrast, in the 2016–17 financial year, the OAIC received 114 data breach notifications on a voluntary basis. About half of the reported data breaches were due to human error. Most of the other breaches were reported to be the result of malicious or criminal attack. The top five sectors included health service providers (24% of notifications), legal, accounting and management services (16%), finance (13%), private education (10%), and charities (6%). 78% of eligible data breaches were reported to involve individuals' contact information. About 60% of data breach notifications involved the personal information of between one and nine individuals and 90% related to breaches involving the personal information of less than 1,000 individuals.

Data analytics and privacy

The OAIC has released a *Guide to data analytics and the Australian Privacy Principles*. The guide introduces key concepts when considering data analytics and privacy, and outlines how the Australian Privacy Principles apply to data analytics. It also identifies risk points and tips to help organisations comply.

Data analytics is defined by the OAIC as processes or activities which are designed to obtain and evaluate data to extract useful information. It covers several terms and concepts such as 'big data', 'data integration', data mining' and 'data matching'.

The OAIC makes best practice recommendations for organisations to protect personal information when conducting data analytics processes. These include:

- using de-identified data where possible;
- embedding good privacy governance into the organisation, taking a privacy by design approach;
- conducting privacy impact assessments for data analytics projects;
- being open and transparent about privacy practices;
- knowing what is being collected (rather than using all the data for unknown purposes);
- taking care with sensitive information;
- making notices as clear and effective as possible;
- establishing whether uses and disclosure are compatible with the original purpose of collection;
- providing options to individuals about use and disclosure;
- ensuring that marketing activities comply with APP 7 (direct marketing);
- ensuring the accuracy of information; and
- protecting information in line with the organisation's risk assessments.

De-identification and the Privacy Act

The OAIC has also released a guide on *De-identification and the Privacy Act*. The OAIC describes de-identification as a privacy-enhancing tool, because information that is properly de-identified is not personal information, and therefore not subject to the Privacy Act. Information will be de-identified where the risk of an individual being re-identified in the data is very low in the relevant release context (or data access environment) – i.e., where there is no reasonable likelihood of re-identification occurring. De-identification involves the removal of direct identifiers and then either the removal or alteration of other information that could potentially be used to re-identify an individual, and/or the use of controls and safeguards in the data access environment to prevent re-identification.

The OAIC recommends that entities also refer to the De-Identification Decision-Making Framework produced by the OAIC and CSIRO-Data61 and seek specialist expertise for more complex de-identification matters.

Privacy (Credit Reporting) Code changes

On 29 May 2018, the Acting Australian Information Commissioner approved a variation of the Privacy (Credit Reporting) Code (the **CR Code**). The Australian Retail Credit Association submitted an application to the Commissioner for variation of the CR Code on 26 April 2018. The submission followed a review of the CR Code initiated by the Australian Information Commissioner and conducted by PricewaterhouseCoopers. The changes address the following issues raised in that review:

- the timing of issuance of section 21D notices and the possible inconsistency between the relevant provisions in the Privacy Act and the CR Code;
- clarifying the permitted methods of delivery of section 21D notices and where to deliver those notices;
- determining how the ‘maximum amount of credit available’ is calculated and consistent categorisation of credit contracts in determining the maximum amount of credit available;
- determining ‘the day credit is terminated or otherwise ceases to be in force’ to ensure accurate disclosures of consumer indebtedness;
- improving and clarifying mechanisms for correction of information;
- clarifying the definition of ‘month’ for purposes of reporting repayment history information (**RHI**) in respect of whether the time is to be calculated using business and/or non-business days;
- clarifying the impact of the application of a ‘grace period’ when calculating the first RHI period; and
- clarifying the scope of prohibition for developing a tool to facilitate a credit provider’s direct marketing.

PRUDENTIAL

Prudential inquiry into Commonwealth Bank

The panel appointed by APRA to conduct a prudential inquiry into the Commonwealth Bank (**CBA**) delivered its final report to APRA on 30 April 2018. In conjunction with the report, APRA has also obtained an enforceable undertaking from CBA given under section 18A of the *Banking Act 1959* (Cth). The panel consisted of Dr John Laker AO, Professor Graeme Samuel AC, and Jillian Broadbent AO.

The inquiry was commissioned following a series of incidents in the recent history of CBA which have damaged its reputation and public standing, including misconduct by financial advisers in Commonwealth Financial Planning, fees for no service in financial advice, and breaches of anti-money laundering requirements.

The focus of the inquiry was on non-financial risks, namely operational risk, compliance risk, and conduct risk. The panel adopted a methodology structured around the themes of governance, accountability and culture.

Governance

In relation to governance, the panel found that at all levels, the degree of attention and priority afforded to the governance and management of non-financial risks in CBA was not to the standard it would have expected in a domestic, systemically important bank.

For example, the panel found that the Board of CBA demonstrated “significant shortcomings in the governance of non-financial risks” and “did not have the right balance of both summarised and detailed reporting” in risk areas, nor did it until recently insist on improvement.

At the Executive Committee level, the panel observed “a complacent culture, a lack of accountability for non-financial risk management and lax remuneration practices”.

The panel found that risk management for operational, compliance and conduct risks was dominated by a “tick the box”, process-driven mentality. This meant that potentially serious non-financial risk issues were not identified early and addressed.

The “Three Lines of Defence” model had not been implemented effectively. CBA had allowed business units to tailor the model for their own purposes rather than adopting a standard approach. In some cases the second line of defence (the independent risk management and compliance function) was seen to be performing the first line of defence role of the business.

The panel concluded that CBA’s management of operational and compliance risk was inadequate and required significant improvement. The function had a heavy procedural bias, evidenced by rules-based policies that fostered a form over substance approach to risk management.

The panel recommended that CBA build up the capabilities and subject matter expertise of operational and compliance risk staff through training and continued recruitment. It also recommended that CBA elevate the stature of the head of compliance function by making the head of compliance a member of the Executive Committee and/or the recommended Non-Financial Risk Committee.

In relation to issue identification and escalation, the panel found that CBA has difficulty identifying broad, systemic issues in its businesses and in resolving identified issues as a result of organisational complacency, low senior level oversight, and weak project execution capabilities. The panel noted that the CBA Board did not receive any metrics or analysis on customer complaints. The panel found that CBA took an adversarial and legalistic approach to issues raised by regulators. It recommended strengthening engagement with regulators to build positive working relationships in solving risk and customer related issues.

In relation to financial objectives and privatisation, the panel found that there was an imbalance between the “voice of finance” on the one hand, and the “voice of risk” and the “customer voice” in some areas, particularly investment prioritisation and trade-off decisions in which financial objectives were implicitly prioritised over the customer voice. As an example of this, the panel referred to the practice of CBA systematically selling consumer credit insurance to customers for which the product was unsuitable. The panel recommended that CBA leadership should champion the “should we?” question in all interactions with customers and key decisions relating to customers.

Accountability

The panel reported that a lack of accountability was a common theme underlying several of the issues observed in its inquiry. The panel assessed CBA as having a poor track record in relation to accountability and found that the level of accountability observed fell a long way short of the standard set by its own delegations policy.

Issues with accountability contributed to an inability to identify who was accountable when things went wrong, inadequate remuneration outcomes for adverse risk and compliance outcomes, weak issue escalation management and closure, insufficient oversight at the executive committee level, and inadequate business unit supervision of functions performed elsewhere in the group.

The panel found that there were “significant weaknesses” in the implementation and oversight of the remuneration process in CBA, particularly for adjusting remuneration as result of poor risk and customer outcomes.

Culture

The panel identified some common cultural themes which have inhibited sound risk management in CBA, including widespread complacency, reactivity rather than pre-emption regarding risk, a collegial, high trust environment leading to overconfidence and over collaboration, and “aiming to be a values-led institution, but an over-reliance on good intent”. These cultural issues are examined in detail in the report.

Remediation initiatives and panel recommendations

A total of 35 recommendations were made in the report. In summary, the recommendations focus on what the final report described as five key levers to promote change in CBA:

- more rigorous Board and Executive Committee level governance of non-financial risks;
- exacting accountability standards reinforced by remuneration practices;
- a substantial upgrading of the authority and capability of the operational risk management and compliance functions;
- injection into CBA’s DNA of the “should we?” question in relation to all dealings with decisions on customers; and
- cultural change to support enhanced risk identification and remediation, moving the dial from reactive and complacent to empowered, challenging and striving for best practice.

Enforceable undertaking

Under the enforceable undertaking entered into on 30 April 2018, CBA agreed to submit a remedial action plan to APRA within 60 days responding to the recommendations in the final report of the prudential inquiry, and to appoint an independent reviewer approved by APRA to report to APRA every three months from 30 September 2018 on compliance with the enforceable undertaking and the remedial action plan.

CBA also agreed in the enforceable undertaking to provide a report to APRA by 30 June 2018 setting out how the findings in the final report have been reflected in remuneration outcomes, and to reflect and give significant weight to the accountability for completing items in the remedial action plan with the performance scorecards of the senior executive team, and other staff as relevant.

The enforceable undertaking notes that APRA intended to apply a capital adjustment to CBA’s minimum capital requirement by having an add-on of $1 billion to CBA’s operational risk capital requirement effective from the date of the enforceable undertaking (30 April 2018), and CBA undertook only to apply for removal of all or part of the capital adjustment when it believes it can demonstrate compliance with the enforceable undertaking and the remedial action plan to the satisfaction of APRA.

CBA response

CBA announced its response to the report on 28 June 2018. CBA’s Remedial Action Plan has been endorsed by APRA. CBA says that the Remedial Action Plan provides a detailed program of change outlining how CBA will improve the running of its business, management of risk and working with regulators. CBA says that its Board had determined that there should be collective and individual accountability for both current and former executives for the findings in the APRA report and that there would be more than $60 million in remuneration consequences, which would include reductions to variable remuneration and partial or full lapsing of outstanding deferred variable remuneration awards.

Bill for changes to APRA governance

The *Treasury Laws Amendment (APRA Governance) Bill 2018* (Cth) introduced into the House of Representatives on 24 May 2018 will allow for the appointment of two full-time APRA members as Deputy Chairs, instead of the current one full-time APRA member. The Bill will also allow for the appointment of someone who is a full-time APRA member or to be a full-time APRA member as the chair of APRA or a Deputy Chair of APRA. Under the existing law, the Governor-General can only appoint a current full-time APRA member as the Chair of APRA or the Deputy Chair of APRA.

Restricted ADI framework

APRA announced on 4 May 2018 that it had formally established a new Restricted ADI framework for financial entities to become registered as an authorised deposit-taking institution (**ADI**) in Australia. The announcement includes an information paper which sets out the framework. Under the new framework, eligible entities can seek a Restricted ADI licence. This will allow the entity to conduct a limited range of business activities for two years while the entity builds its capabilities and resources. The framework has eligibility criteria, minimum initial and ongoing requirements and modified application of the prudential and reporting standards during the restricted phase of operation.

On 7 May 2018 APRA announced that it had authorised volt bank limited as the first restricted ADI, and volt Corporation Limited as a non-operating holding company, under the *Banking Act 1959* (Cth).

APRA plans to remove investor lending benchmark

APRA wrote to ADIs on 26 April 2018 to advise that it was prepared to remove the investor lending growth benchmark if the board of an ADI is able to provide assurance on the strength of the ADI's lending standards. The 10% benchmark on investor loan growth was introduced in 2014. Boards will be expected to confirm that lending has been below the investor loan growth benchmark for at least the past 6 months, lending policies meet APRA's guidance on serviceability, and that lending practices will be strengthened where necessary. The investor loan growth benchmark will continue to apply to ADIs that do not provide the required commitments to APRA.

APRA also expects ADIs to develop internal portfolio limits on the proportion of new lending at very high debt-to-income levels, and policy limits on maximum debt-to-income levels for individual borrowers.

APRA says that its approach has been taken in close consultation with the other members of the Council of Financial Regulators, and that the change reflects improvements that ADIs have made to lending standards.

Wayne Byres' speech: 'Beyond the BEAR Necessities'

APRA Chairman Wayne Byres spoke on 'Beyond the BEAR Necessities' at the UNSW Centre for Law Markets and Regulation Seminar in Sydney on 2 May 2018.

In his speech, Mr Byres said that financial institutions need to think beyond the necessities of Banking Executive Accountability Regime (**BEAR**) if they wish to truly demonstrate accountability. He said that APRA had an interest in failings in governance, culture and accountability that indicate a lax attitude to risk-taking, which might ultimately impact the soundness of the financial institution itself. Mr Byres observed that in many ADIs, there is collective responsibility for various aspects of its business, but this creates the risk of leading to no individual accountability. Clarity of accountability was the foundation of the BEAR, and to the extent that BEAR provided a catalyst to untangle complexity and provide clear accountability for putting things right, Mr Byres said that it can only be a good thing.

SUPERANNUATION

Productivity Commission draft report

The Productivity Commission has released the draft report of its review into the efficiency and competitiveness of Australia's superannuation system. The report was requested by the Treasurer in June 2017. Submissions on the draft report close on 13 July 2018.

The report makes a number of recommendations which if adopted would substantially change the superannuation system. These include:

- Default superannuation accounts should only be for members who are new to the workforce or who do not already have a superannuation account, and do not nominate a fund.
- A single shortlist of up to 10 superannuation products should be presented to all members who are new to the workforce or who do not have a superannuation account, from which they can choose a product, but members should not be prevented from choosing another fund (including an SMSF). Members who fail to make a choice within 60 days would be defaulted to one of the products on the shortlist. There should be an independent expert panel to run a competitive process for listing superannuation products on the online shortlist.
- Authorisation rules for MySuper should be further strengthened.
- More regulation of super fund trustees, requiring them to have a board performance assessment process, skills matrix, third party evaluation of the performance of the board and capability at least every three years, and removing legislative restrictions on the appointment of independent directors to trustee boards.
- Accounts would be sent to the ATO once they meet a definition of 'lost', and the ATO would be empowered to auto consolidate 'lost' accounts into a member's active account, unless a member actively rejects consolidation.
- MySuper regulations should be extended to limit exit and switching fees to cost recovery levels for all new members and new accumulation and retirement products.
- Insurance through superannuation should only be provided to members under the age of 25 on an opt-in basis, and trustees should be required to cease all insurance cover on accounts where no contributions have been obtained for the past 13 months, except with the express permission of the member. There should also be a formal independent review of insurance in superannuation.

New Bill to address non-payment of superannuation and other matters

The *Treasury Laws Amendment (2018 Superannuation Measures No.1) Bill 2018* (Cth) introduced into the Parliament on 28 May 2018 provides for a one-off 12 month amnesty to encourage employers to self-correct historical superannuation guarantee non-compliance and will enable certain employees with multiple employers to apply for an employer shortfall exemption certificate which prevents their employer from having a superannuation guarantee shortfall if they do not make contributions for a period. The Bill also amends tax laws to ensure that a superannuation entity's non-arm's length income includes income where expenditure in gaining or producing it was not an arm's length expense and to ensure that, in some cases involving limited recourse borrowing arrangements, the total value of a superannuation fund's assets is taken into account in working out individual members' total superannuation balances.

Protecting Your Super Package

The Federal Government announced in the Budget a Protecting Your Super Package to commence on 1 July 2019. The package includes:

- Protecting small balance accounts (below $6,000) from erosion by capping administration and investment fees on these accounts at 3% per annum, and banning exit fees for all superannuation accounts.
- Tailoring insurance arrangements in superannuation by ensuring that cover is offered on an opt-in basis for accounts of young members below the age of 25, inactive accounts that have not received a contribution in 13 months (where the member has not elected to retain existing cover), and low balance accounts below $6,000.
- Transferring all inactive superannuation accounts with balances below $6,000 to the ATO to protect them from further erosion. The ATO will use data-matching processes to reunite these accounts with a member's active account where possible.

Exposure Draft legislation and supporting materials for the package were published on the Treasury website for public consultation and the *Treasury Laws Amendment (Protecting Your Superannuation Savings Package) Bill 2018* (Cth) was introduced into Parliament on 21 June 2018.

SMSF auditors

ASIC has announced that it has cancelled the registration of 117 SMSF auditors because they did not lodge their annual statements. In November 2017, ASIC sent a final warning to 404 SMSF auditors who had not lodged annual statements. 287 of those auditors lodged their annual statements and the remainder had their registration cancelled.

ASIC has also completed a review to identify unlicensed accountants recommending that clients set up self-managed superannuation funds. The review found no systemic concerns around the provision of unlicensed SMSF advice but did identify significant levels of inaccurate and out of date information on websites and in promotional material of accountants reviewed. Since 1 July 2016, accountants must be covered by an Australian financial services licence in order to advise clients to set up an SMSF.

APRA review of superannuation board governance practices

On 17 May 2018 APRA released the findings of its thematic review into board governance practices in the super industry. The review assessed registrable superannuation entities (**RSEs**) against Prudential Standard SPS 510 Governance (SPS 510), introduced on 1 July 2013. The review covered 29 licensees. Based on its findings, APRA has recommended that RSE licensees should:

- consider the optimal composition of their boards in the context of their business and strategic plans;
- consider the extent to which the use of independent experts signals a skills deficiency on the board;
- have sound board renewal and succession planning processes that strike an appropriate balance between ensuring continuity and bringing in diversity and fresh perspectives; and
- develop a robust and objective board assessment process that considers the performance of individual directors, as well as the board as a whole.

Retirement income covenant position paper

Treasury has released a position paper on the introduction of a retirement income covenant in the *Superannuation Industry (Supervision) Act 1993* (Cth). The covenant will require trustees to develop a retirement income strategy for their members and codify the requirements and obligations for superannuation trustees to consider the retirement income needs of their members, expanding individuals' choice of retirement income products and improving standards of living in retirement. Submissions on the consultation closed on 15 June 2018.

Early release of superannuation administration changes

The Federal Government has announced that from 1 July 2018, responsibility for the administration of the early release of superannuation benefits on compassionate grounds is being transferred from the Department of Human Services to the ATO. Under the new process the ATO will provide electronic copies of approval letters to superannuation funds at the same time as to the applicant.

Three year audit cycle for some SMSFs

Treasury has released a consultation paper seeking feedback on a proposal to change the annual audit requirement to a three yearly requirement from 1 July 2019 for SMSFs with a history of good record-keeping and compliance.

AML/CTF

Draft rule amendments

AUSTRAC has released for public consultation draft amendments to the AML/CTF Rules. These include draft amendments to Chapters 4 and 15, which will exempt reporting entities from certain identification requirements in respect of corporate customers which are custodians. The amendments also include draft amendments to Chapter 38, which deals with an exemption from ACIP for the sale of shares of for charitable purposes. The amendment would remove the requirement for the distribution of proceeds of the sale of a security to occur in the same year that they are received by the ancillary fund. The draft amendments can be accessed here.

DISPUTES AND ENFORCEMENT

AFCA entity approved

It was announced by the Minister for Revenue and Financial Services on 1 May 2018 that Australian Financial Complaints Limited has been authorised to operate the Australian Financial Complaints Authority (**AFCA**). Financial firms will be required to become members of AFCA by 21 September 2018. Existing members of FOS and CIO must also retain their existing membership of the FOS or CIO scheme until further notice. Consumers will be able to lodge complaints with FOS and CIO up to and including 31 October 2018. AFCA will then commence on 1 November 2018. Complaints made to the FOS and CIO schemes before 1 November 2018 and which remain unresolved at that date will be dealt with by AFCA on the basis of rules that applied when the complaint was originally made.

AFCA board members

The Minister for Revenue and Financial Services also announced four further appointments to the board of AFCA on 1 May 2018. They are:

- Industry directors: Ms Claire Mackay, financial planner, and Mr Andrew Fairley, lawyer; and
- Consumer directors: Ms Erin Turner, consumer advocate, and Mr Alan Wein – lawyer, mediator and advocate.

The AFCA board will have a total of 11 directors, consisting of an independent chair and an equal number of industry and consumer directors. The Minister will appoint a minority of the inaugural AFCA board. The Hon Helen Coonan has been previously announced as the

Independent Chair of AFCA.

AFCA transitional relief

ASIC has granted transitional relief until 1 July 2019 for financial firms to update mandatory disclosure documents and periodic statements with the contact details of AFCA. The relief is set out in the ASIC Corporations (AFCA transition) Instrument 2018/447 and in the ASIC Credit (AFCA transition) Instrument 2018/448. ASIC has also updated its guidance in RG 165.

The relief instruments allow for references to the old external dispute resolution (**EDR**) scheme to continue after 1 November 2018 (when AFCA commences) until 1 July 2019 for financial services and credit guides, provided that where the provider has a website, the provider makes available on the website current information about the AFCA scheme and how that scheme may be accessed, and that the documentation describing dispute resolution (other than documents required by legislation) is also up to date.

In RG 165, ASIC says that financial service providers and lenders must also:

- ensure that IDR final response letters and 'delay letters' issued on or after 21 September 2018 and before 1 November 2018 include references to both the relevant predecessor EDR scheme and AFCA; and
- ensure that such letters issued on or after 1 February 2019 include references to AFCA but not the predecessor EDR schemes.

Letters issued between 1 November 2018 and 1 February 2019 may continue to include references to both the predecessor EDR scheme and AFCA, provided it is clear that only AFCA can receive complaints after 1 November 2018.

ASIC guidance on AFCA

ASIC has released a new regulatory guide on AFCA: Regulatory Guide 267 *Oversight of the Australian Financial Complaints Authority* (RG 267). The guide sets out how ASIC will administer its powers and perform its oversight role over AFCA.

ASIC enforcement review

In April 2018 the Federal Government released the report of the ASIC Enforcement Review Taskforce and the Government's response to the report.

There are 50 recommendations in the report, covering:

- self-reporting of contraventions;
- harmonising and enhancing search warrant powers;
- ASIC access to telecommunications intercept material;
- industry codes in the financial sector;
- strengthening ASIC's licensing powers;
- ASIC's power to ban individuals;
- penalties for corporate and financial sector misconduct; and
- ASIC's directions powers.

The Government agreed, or agreed in principle, to the recommendations.

Government responds to Senate report on white-collar crime

On 23 March 2017 the Senate Economics References Committee provided its report on the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct and white-collar crime. The report included recommendations that overlapped with recommendations in the ASIC Enforcement Review Taskforce report (see above). The Federal Government decided to provide its response to the Senate Committee's report alongside its response to the ASIC Enforcement Review Taskforce Report in April 2018.

The Government did not support the committee's recommendation that the Government consider reforms to provide greater clarity regarding evidentiary standards and rules of procedure that apply in civil penalty proceedings involving white-collar offences. However, the Government accepted the recommendation that the Government consider making infringement notices available to ASIC, which was also recommended in the ASIC Enforcement Review Taskforce report. The Government also accepted recommendations to increase civil penalties, with penalties to be set as a multiple of the benefit gained or loss avoided, and to introduce disgorgement powers for ASIC in relation to non-criminal matters.

ASIC cross-border enforcement

ASIC has signed the IOSCO Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (**EMMoU**), an enhanced standard for cross-border enforcement cooperation. ASIC says that by signing the EMMoU, it can assist foreign regulators by compelling physical attendance for testimony, obtaining and sharing audit work papers, communications and other information relating to the audit and review of financial statements, and provide guidance on freezing of assets. The EMMoU also allows ASIC to request reciprocal assistance of this kind from other EMMoU signatories.

ASIC relief applications

ASIC released on 15 June 2018 its latest report outlining decisions on relief applications, REP 574, which covers the period from October 2017 to March 2018. During that period ASIC granted relief from the Corporations Act or the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**) in relation to 762 applications. ASIC approved 52% of applications. The applications approved included:

- AFS licensing relief for the operator of an electronic funds transfer payment gateway, and for a not-for-profit entity that provides mutual risk schemes for Queensland local government entities;
- pre-prospectus advertising relief to allow an applicant to communicate general information to its employees about a proposed initial public offering through a restricted list of closed-group instant messaging applications; and
- conditional relief from the responsible lending obligations to an ADI to enable it to provide limited credit assistance in the course of promoting a dual-branded credit card from a non-ADI credit card provider.

New Deputy Chairman of ASIC – enforcement role

Mr Daniel Crennan QC has been appointed as a new Deputy Chairperson of ASIC for a period of five years from 16 July 2018. Mr Crennan's appointment follows the Government's commitment to appoint an additional ASIC Commissioner with targeted enforcement experience.

CBA settles AUSTRAC litigation

CBA announced on 4 June 2018 that it had settled the civil proceedings brought by AUSTRAC. The agreement with AUSTRAC includes payment of a civil penalty of $700 million, together with AUSTRAC's legal costs of $2.5 million. The settlement includes a Statement of Agreed Facts and Admissions. CBA has admitted further contraventions of the *Anti-Money Laundering and*

Counter Terrorism Financing Act 2006 (Cth) (the **AML/CTF Act**), beyond those already admitted, including contraventions in risk procedures reporting, monitoring and customer due diligence. The proceedings brought by AUSTRAC will be dismissed. In its press release announcing the settlement, CBA noted that it had made progress in strengthening its AML/CTF Act compliance, including by hiring more than 300 additional professionals in this area, creating a specialist know your customer hub at a cost of more than $85 million, launching an upgraded financial crime technology platform, adding new controls such as enhanced digital electronic customer verification processes, and introducing a daily account base limit of $10,000 for cash deposits using IDMs.

BBSW litigation

On 8 May 2018 it was announced that the Commonwealth Bank has agreed with ASIC to settle the legal proceedings in relation to claims of manipulation of the Bank Bill Swap Rate (**BBSW**). CBA will acknowledge that it attempted to engage in unconscionable conduct in breach of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) in the course of trading on the BBSW market in Australia on five occasions between February and June 2012. CBA will also acknowledge it did not have adequate policies and systems in place to prevent that conduct. CBA has agreed to pay a $5 million penalty, a payment of $15 million to a financial consumer protection fund and a $5 million payment towards ASIC's costs. The settlement terms are subject to Federal Court approval.

CBA has also agreed to enter into an enforceable undertaking with ASIC. The undertaking will require an independent expert to review controls, policies, training and monitoring in relation to CBA’s BBSW business.

On 24 May 2018, Justice Beach of the Federal Court of Australia handed down his decision in the BBSW case against Westpac. He found that Westpac had engaged in unconscionable conduct under the ASIC Act by its involvement in settling the BBSW on four occasions. The court also found that Westpac had inadequate procedures and training and had contravened certain financial services licensee obligations. The judge described Westpac’s conduct as “against commercial conscience as informed by the normative standards and their implicit values enshrined in the text, context and purpose of the ASIC Act specifically and the Corporations Act generally.”

Radio Rentals penalty decision

In *Australian Securities and Investments Commission v Thorn Australia Pty Ltd* [2018] FCA 704 the Federal Court made orders for Thorn Australia Pty Ltd trading as Radio Rentals (**Thorn**) to pay a pecuniary penalty of $2 million in relation to contraventions of the responsible lending provisions of the NCCP Act. Thorn admitted to the contraventions in a statement of agreed facts and a joint submission to the Court. Thorn was also ordered to pay $200,000 towards the legal costs of ASIC. The penalty orders reflected the joint submissions.

The contraventions occurred in relation to 275,060 consumer leases entered into between 23 January 2012 and 1 May 2015. The contraventions related to a failure to make reasonable inquiries about each consumer’s financial situation, by failing to make an inquiry as to the consumer’s actual housing costs, and a failure to take reasonable steps to verify each consumer’s financial situation by verifying actual expenses.

Justice Jagot said that the maximum pecuniary penalty of 2,000 units for each contravention for 275,060 consumer leases would mean that the maximum penalty was “so large as to be meaningless.” However she found that the central requirement of deterrence demanded a material pecuniary penalty. She also noted that Thorn had between 25% to 33% of the market share for consumer leases, and that there was a substantial profit from Thorn’s consumer leasing business.

Misleading and unconscionable conduct by credit repair business

The Federal Court has found that the Australian Consumer Law was breached by credit repair business Malouf Group Enterprises Pty Ltd and its director Jordan Malouf, by making false and misleading representations and by engaging in unconscionable conduct.

The court ordered Malouf Group to pay a pecuniary penalty of $400,000, and Mr Malouf to pay a pecuniary penalty of $100,000. Malouf Group and Malouf also entered into enforceable undertakings in favour of ASIC and the ACCC, agreeing to refund a total of $1.1 million to consumers who did not have any negative listings on their credit files when they entered into contracts with Malouf Group. ASIC alleged that the Malouf Group sales tactics misrepresented the services that Malouf Group provided because it did not ascertain if the consumer had negative listings or if any negative listings were able to be removed. The Court found that Malouf Group engaged in misleading or deceptive and unconscionable conduct in inducing consumers to enter in to contracts with it.

Cash Converters pays $650,000 community benefit payment

Cash Converters has paid a $650,000 community benefit payment to the National Debt Helpline and agreed to outsource all debt collection work to a specialist third party debt collector, following an ASIC surveillance of its collections practices. ASIC has also imposed licence conditions on Cash Converters which require ASIC consent before it returns debt collection activity in-house.

The ASIC surveillance found that Cash Converters routinely breached *Regulatory Guide Debt collection guideline: for collectors and creditors* (RG 96). The guideline recommends that consumers be contacted regarding a debt not more than three times per week or ten times per month. ASIC says that Cash Converters also provided incorrect information to Equifax which may have resulted in up to 38,500 customers being reported with inaccurate amounts owing over a one-month period.

Bananacoast Community Credit Union pays infringement notices

Bananacoast Community Credit Union Pty Ltd (**BCU**) has paid infringement notices of $50,400 for what ASIC says were potentially misleading statements in several online advertisements. The advertisements offered a special interest rate for home loans and personal loans. ASIC claims that they did not clearly or prominently disclose that the consumer was required to pay for consumer credit insurance (**CCI**) for five years to receive the advertised lower interest rate. ASIC found that some advertisements included a fine-print disclaimer but others did not display any further information. Where a disclaimer was included, ASIC thought that it did not give sufficient prominence to important conditions or adequately explain how some of the conditions operated. A click through on some websites with additional information on other webpages was not adequate to correct the misleading overall impression, according to ASIC. BCU has withdrawn the advertising, offered to cancel the CCI policies and refund the premiums to customers who purchased CCI, and refunded all premiums paid where the CCI policy had already been cancelled. BCU will also honour the advertised interest rate without the requirement for customers to purchase CCI.

Fox Symes pays $37,800 for misleading advertising

ASIC announced that it had issued three infringement notices to debt management firm Fox Symes for making potentially misleading statements in its advertising. Fox Symes has paid a total of $37,800 in penalties. The statements included ‘Free Debt Assistance’,‘Reduce Debt in Minutes’ and ‘15sec Approval’. ASIC alleges that these statements misrepresented the cost and speed of Fox Symes’ debt management services.

ASIC proceedings against Westpac for alleged poor financial advice

ASIC announced on 15 June 2018 that it had commenced proceedings against Westpac in relation to alleged poor financial advice provided by one of its former financial planners, Mr Sudhir Sinha. ASIC claims that because Westpac was Mr Sinha's responsible licensee during the relevant period, Westpac is liable for the alleged breaches of the best interests obligations by Mr Sinha under section 961K of the Corporations Act. ASIC also alleges that Westpac contravened sections 912A(1)(a) and (c) of the Corporations Act, which require Westpac to do all things necessary to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly, and to comply with financial services laws. Section 961K of the Corporations Act has civil penalties for breach with a maximum penalty of $1 million per contravention.

ASIC proceedings against AMP Financial Planning for alleged insurance advice failures

ASIC announced on 27 June 2018 that it had commenced proceedings against AMP Financial Planning (**AMPFP**). ASIC alleges a failure to ensure that its authorised financial planners complied with their best interests duty.

AMPFP financial planners engaged in rewriting conduct, says ASIC: providing advice that results in the cancellation of the client's existing life, TPD, trauma and/or income protection insurance policies and the taking of similar replacement policies by way of a new application rather than by way of a transfer. ASIC says the financial planners could get higher commissions this way, and that this type of advice was inappropriate. The financial planners failed to act in the best interests of the clients and to prioritise the interests of the clients, ASIC claims. AMPFP knew or ought to have known about this, but ASIC says AMPFP failed to take reasonable steps to deal with the conduct. ASIC also alleges that AMPFP has breached its obligations to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly, to comply with the financial services laws, and to take reasonable steps to ensure that its representatives comply with the financial services laws.

Dover enforceable undertaking

On 28 June 2018, ASIC accepted an enforceable undertaking from Dover Financial Advisers Pty Ltd and its sole director, Mr Terry McMaster. The enforceable undertaking provided for Dover to cease operating its financial services business by 6 July 2018, and apply to ASIC to commence the process to cancel its AFSL, and Mr McMaster has undertaken to remove himself permanently from the financial services industry. The enforceable undertaking followed an ASIC investigation which looked at Dover's "Client Protection Policy". ASIC was concerned that the policy was contrary to the financial services laws and unfair, and that Dover lacked the organisational competency required of an AFSL holder.

CBA and ANZ enforceable undertakings over superannuation product distribution

CBA and ANZ Bank have given enforceable undertakings to ASIC in relation to the distribution of superannuation products. The relevant products were distributed under a general advice model and sold to customers after a fact-find process. ASIC was concerned that the proximity between the fact-finding process and the discussion about the products was leading staff to provide personal advice to customers about their superannuation. The enforceable undertakings prevent the banks from selling the products in conjunction with their fact-find processes.

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