



DWYER HARRIS



FINANCIAL SERVICES AND CREDIT

QUARTERLY UPDATE

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CONSUMER CREDIT

Licensing for debt management firms commences

From 1 July 2021, debt management service providers are required to hold an Australian credit licence covering their activities. There is transitional relief for providers who have applied for a licence and joined the Australian Financial Complaints Authority (**AFCA**) by 30 June 2021.

CONSUMER PROTECTION

Review of Banking Code

On 6 July 2021 the Australian Banking Association (**ABA**) [announced](#) a new independent review of the Banking Code of Practice. Mike Callaghan will conduct the review. The Banking Code of Practice is reviewed every three years. A report is due by November 2021.

Product intervention order powers expanded

The *Treasury Laws Amendment (2021 Measures No. 4) Act 2021* (Cth) [commenced](#) on 1 July 2021. It amends the *Corporations Act 2001* (Cth) (the **Corporations Act**) and the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**) so that the Australian Securities and Investments Commission (**ASIC**) is not prohibited from making a product intervention order that has conditions relating to fees, charges, or other consideration payable by a consumer.

CORPORATE

Modernising business communications

On 21 April 2021 the Treasurer [announced](#) the Federal Government's commitment to modernising laws within the Treasury portfolio so they are technology neutral, with a first phase of reforms to include:

- expanding the range of documents that can be validly signed electronically;
- increasing the range of documents that can be sent electronically to shareholders and amending requirements to contact lost shareholders;
- improving flexibility for customers when changing address and consenting to electronic communication with credit providers;
- removing prescriptive requirements for notices to be published in newspapers, where suitable alternatives have been identified; and
- addressing provisions in Treasury legislation where only non-electronic payment options are in place.

On 25 June 2021, Treasury [released](#) the *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021* (Cth) for consultation. The Bill includes a statutory mechanism for companies to execute documents electronically. It provides that when a company executes a document, persons may sign the document electronically, the fixing of the seal can be witnessed electronically, separate copies of the document may be used by each person required to execute the document, and the document may be executed by the sole director of a proprietary company that does not have a company secretary.

The Bill also includes provisions which allow all companies and registered schemes to hold physical and hybrid meetings. Wholly virtual meetings may also be used if they are expressly required or permitted by the Constitution, regardless of whether the Constitution was amended before or after the commencement of the reforms.

The Bill also allows for documents relating to meetings to be signed and given using electronic means, regardless of whether the meeting is a virtual, physical or hybrid meeting.

The Bill also includes a provision for a member or group of members with more than 5% of the voting power to require a listed company or registered scheme to appoint an independent person to observe or report on a poll.

Submissions on the draft legislation are due by 16 July 2021. The Government intends to finalise legislation for this first phase of reforms by the end of 2021.

FINANCIAL ADVICE

Reforms commence

On 1 July 2021 the financial advice reforms in the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* (Cth) commenced. The reforms include:

- requiring financial services providers that receive fees under an ongoing fee arrangement to provide clients with a document each year which outlines the fees they will be charged and the services they will be entitled to in the following 12 months, and which seeks annual renewal for all ongoing fee arrangements;
- requiring the provider to obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account;
- requiring a financial services licensee or authorised representative to give a written disclosure of lack of independence where applicable if they are authorised to provide personal advice to a retail client; and
- providing that a superannuation trustee can only charge advice fees to a member where certain conditions are satisfied and removing a superannuation trustee's ability to charge fees under an ongoing fee arrangement for financial product advice from MySuper products.

ASIC [issued](#) a new information sheet (INFO 256) on 15 June 2021 in relation to ongoing fee arrangements. It answers frequently asked questions in relation to the reforms to ongoing fee arrangements, the disclosure statements and ongoing fee consents which came into effect on 1 July 2021.

FSC green paper

The Financial Services Council (FSC) [released](#) a green paper on affordable and accessible financial advice on 19 April 2021. The green paper proposes that the safe harbour steps to comply with the best interests duty be abolished, that advice be reclassified as either "general information" or "personal advice", and that statement of advice requirements be replaced with short, concise and consumer oriented letters of advice.

Better Advice Bill

The *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2020* (Cth) was [introduced](#) on 24 June 2021. The Bill would expand the role of the Financial Services and Credit Panel within ASIC to operate as the single disciplinary body for financial advisers. It also creates additional penalties and sanctions for financial advisers who breach their obligations, introduces a new registration system for financial advisers, and transfers functions from the Financial Adviser Standards and Ethics Authority to the Minister and ASIC. The Bill has been referred to the Senate Economics Legislation Committee for report by 28 July 2021.

ASIC concerns about finfluencers

In a recent Senate hearing, ASIC has [expressed](#) concern about so-called "finfluencers" giving unlicensed financial advice, and said that this is a topic that ASIC is looking at very closely.

FINANCIAL MARKETS

ASIC information sheet on activist short-selling

On 1 June 2021 ASIC [published](#) Information Sheet 255 *Activist short selling campaigns in Australia*, describing the impact of this activity on markets, better practices for activist short sellers and other persons involved, and some of the actions that ASIC may take in response to these campaigns.

ASIC consults on crypto-asset ETPs

A consultation paper was [released](#) by ASIC on 30 June 2021 in relation to exchange traded products (ETPs) and other investment products that give retail investors exposure to crypto-assets. Consultation Paper 343 proposes to establish factors which would be the basis for identifying crypto-assets that may be appropriate underlying assets for an ETP, and to establish a new category of permissible underlying asset for crypto-assets. One of the factors for an appropriate crypto-asset would be a robust and transparent pricing mechanism. ASIC also proposes to provide good practice guidance for responsible entities on the custody of crypto-assets, risk management systems in relation to crypto-assets, and PDS disclosures for registered managed investment schemes that hold crypto-assets. Submissions on the paper are due by 27 July 2021.

Proposed changes to market integrity rules

Consultation Paper 342 [released](#) by ASIC on 30 June 2021 proposes amendments to the Securities Market Integrity Rules, the Futures Market Integrity Rules and other ASIC made rules. ASIC says that some of the amendments are necessary to reflect recent changes to the Corporations Act, while others are designed to reduce the regulatory burden on market participants, streamline rules across rule books, and remove ambiguity in existing drafting. The consultation period ends on 6 August 2021.

When debentures can be called secured notes

ASIC Class Order [CO 12/1482] *When debentures can be called secured notes* is scheduled to expire on 1 April 2022. On 1 July 2021 ASIC [released](#) Consultation Paper 344 with its proposals to re-make the order.

Financial market infrastructure regulatory reforms

The Federal Government announced in the 2021-22 Federal Budget that it would introduce a financial market infrastructure (FMI) regulatory reform package to ensure financial regulators have sufficient powers to intervene to manage a crisis and pre-emptively identify and manage risks. FMIs include financial markets, clearing and settlement facilities, benchmark administrators and derivative trade repositories.

On 8 June 2021, the Government [released](#) the report of the review by the Council of Financial Regulators (CFR) into FMI regulatory reforms and confirmed that the Government's reform package will be consistent with the CFR's recommendations, and include the following:

- introducing a crisis management regime that will allow the Reserve Bank of Australia (RBA) to manage a failure at a domestic clearing and settlement facility. These powers will be supported by a \$5 billion standing appropriation, with Ministerial agreement, to provide temporary funding to a CS facility if that were necessary to ensure continuity of services;
- enhancing the supervisory and licensing powers of ASIC and the RBA in respect of FMIs; and
- streamlining and clarifying certain regulatory powers.

FINANCIAL PRODUCTS

Class order relief for term deposits extended

ASIC has [extended](#) by three years its class order relief allowing for 31 day notice term deposits of up to five years to be treated as basic deposit products under the Corporations Act.

FINANCIAL SERVICES

Extension of class order relief for foreign financial services providers

The Federal Budget on 11 May 2021 included an announcement that the Federal Government would consult on options to restore the previous regulatory exemptions from holding an Australian financial services licence for foreign financial service providers (**FFSPs**), and on options to create a fast track licensing process for FFSPs who wish to have permanent operations in Australia.

On 11 June 2021, ASIC [announced](#) that it would provide a 12 month extension from 31 March 2022 to 31 March 2023 for the passporting exemptions and limited connection exemption for FFSPs, and that it would delay the commencement of the new funds management exemption until 1 April 2023. ASIC also announced that it was pausing its consideration of licence applications that were partly complete, pending any legislative changes arising from Treasury's upcoming consultation.

Amended class order relief for exchange traded funds

ASIC has amended its Class Order [CO 13/721] *Relief to facilitate quotation of exchange traded funds on the AQUA Market*. The amendment removes the requirement for an authorised participant to be an Australian resident for tax purposes.

'General advice' – ASIC research supports no name change

ASIC [announced](#) on 4 May 2021 that, based on research it had commissioned, it would not be making recommendations to the Government in relation to changing the label of general advice. The Financial System Inquiry Final Report and the Productivity Commission Inquiry Report into Competition in the Australian Financial System both recommended that general advice should be re-labelled to ensure that consumers are able to clearly distinguish between personal advice and general advice. The research found that there was no evidence to suggest that changing the general advice label, including adding the word "only" to the general advice label, would have any measurable effect on consumers' perceptions about the nature of the advice given.

ASIC consults on litigation funding schemes

ASIC [released](#) a consultation paper Consultation Paper 345 *Litigation funding schemes: Guidance and relief* on 9 July 2021 in relation to proposed guidance and relief for litigation funding schemes. Submissions are due by 20 August 2021.

FINANCIAL SYSTEM

Sedgwick review final report

The final report of the Sedgwick review into retail banking product commissions and payments has been [delivered](#). A review by Stephen Sedgwick AO was originally commissioned in 2016 by the ABA, which made recommendations in relation to remuneration practices and provided for a three-year process to implement reforms. A further review was commissioned in late 2020 to undertake an independent assessment of the scale and effectiveness of implementation of the reform program. The final report found that industry policies had changed in line with earlier

recommendations.

ALRC review – initial stakeholder views

The Australian Law Reform Commission (**ALRC**) is conducting a review of the legislative framework for corporations and financial services regulation. The ALRC has [released](#) a background paper summarising initial stakeholder views. Not surprisingly, there is consensus that the law in this area is too complex and in need of simplification. An interim report from the ALRC is expected by 30 November 2021.

BEAR – small, medium and large ADIs

Under the Banking Executive Accountability Regime (**BEAR**), the obligations depend in part on the size of the authorised deposit taking institution (**ADI**).

The *Banking Executive Accountability Regime (Size of an Authorised Deposit-taking Institution) Determination 2021* was [made](#) on 30 March 2021. It replaces a 2018 instrument and sets out the methodology to determine the size of an ADI as small, medium or large, by considering the total assets of the ADI as reported to the Australian Prudential Regulation Authority (**APRA**). Under the new determination, a small ADI is an ADI that has a total asset size less than or equal to \$10 billion, or a new ADI for which it is not yet possible to work out this amount because they have not yet submitted a final report to APRA; a medium ADI is an ADI that has a total asset size greater than \$10 billion but less than \$107 billion; and a large ADI is an ADI that has a total asset size greater than or equal to \$107 billion.

Breach reporting draft guidance

On 22 April 2021 ASIC [issued](#) draft guidance on the breach reporting reforms due to commence on 1 October 2021, and a draft information sheet on the new notify, investigate and remediate obligations set to apply to financial services licensees who are financial advisers and credit licensees who are mortgage brokers. Comments were due by 3 June 2021.

FINTECH

Senate committee report and issues paper

On 28 April 2021, the Senate Select Committee on Australia as a Technology and Financial Centre [tabled](#) its second interim report and made a number of recommendations. It has since [published](#) an issues paper seeking submissions by 30 June 2021 on several topics including the regulation of crypto currency and digital assets, “debanking”, the policy environment for neobanks, options to replace the Offshore Banking Unit, and Australia as a technology and financial centre.

INSOLVENCY

Minimum amount for statutory demand increased

The *Corporations Amendment (Statutory Minimum) Regulations 2021* (Cth) [made](#) on 27 May 2021 increases the dollar amount at which a creditor can issue a statutory demand to a company that owes the creditor money from \$2,000 to \$4,000, to account for the impact of inflation.

INSURANCE

Exemptions for deferred sales model for add-on insurance products

A deferred sales model for add-on insurance products was introduced by the *Financial Sector*

Reform (Hayne Royal Commission Response) Act 2020 (Cth). The regime is due to commence on 5 October 2021.

The Treasurer [announced](#) on 8 July 2021 that the Government will exempt from the deferred sales model the following classes of insurance products: compulsory third party (CTP) insurance for motor vehicles; third party property damage, fire and theft insurance for motor vehicles; comprehensive insurance for boats, motorcycles, motorhomes, caravans, and trucks; insurance sold within superannuation (including group life insurance); postage and delivery of consumer goods insurance; home building insurance; home and contents insurance; and landlord insurance. Relief will also be provided for wholesale style insurances available to businesses.

Terrorism Insurance Act review

Treasury [released](#) a consultation paper on 2 July 2021 as part of the triennial review of the *Terrorism Insurance Act 2003* (Cth). Submissions are due by 30 July 2021.

Exemption for some claims intermediaries

Regulations were [made](#) on 15 April 2021 to exempt certain people from regulation as a financial service when handling insurance claims as an intermediary. The exemption applies to mortgage brokers and intermediaries, insurance brokers, qualified accountants, veterinarians, travel agents, financial advisers, financial counsellors, property managers, estate managers and public trustees.

PAYMENTS

ePayments Code proposed changes

ASIC has [released](#) a consultation paper on proposed updates to the ePayments Code. CP 241 issued on 21 May 2021 proposes changes to a number of parts of the ePayments Code including compliance monitoring and data reporting, mistaken internet payments, small business protections, unauthorised transactions, and complaints handling. It also sets out options for modernising the ePayments Code, to reflect changes in the field of electronic payments since the ePayments Code's last review. Submissions were due by 2 July 2021. For further information please see our recent article [here](#).

Consultation on review of retail payments regulation

On 28 May 2021 the RBA released a Consultation Paper setting out the proposed policy actions following the review by the Payments System Board of retail payments regulation. An Executive Summary was also [released](#). The key actions are as follows:

- The RBA would state an explicit expectation that the major banks will continue to issue dual network debit cards (**DNDCs**), with both schemes to be provisioned in all relevant form factors offered by the issuer (such as in mobile wallets as well as physical cards).
- The RBA's interchange standards would be amended to set a lower cents-based interchange cap for single network debit card (**SNDC**) transactions than for DNDC transactions, reducing the cents-based debit interchange cap from 15 cents to 10 cents for DNDCs (and all prepaid cards) and 6 cents for SNDCs.
- The RBA would state an expectation that all acquirers and payment facilitators (which provide card acceptance services to merchants) will offer and promote least cost routing (**LCR**) functionality to merchants in the device-present (in-person) environment.
- The RBA would state an expectation that the industry will follow a set of principles regarding the implementation of LCR in the device-not-present (online) environment.
- The RBA would explicitly prohibit schemes from engaging in "tying conduct" involving their debit and credit card products.

- Requiring schemes to publish interchange fees on transactions on foreign-issued cards on their websites.
- Requiring schemes to provide the RBA with access to their scheme fee schedules and all scheme rules, and to notify the RBA promptly of any changes to these, and to provide quarterly data on scheme fee revenue and rebates to the RBA.
- The Board is not proposing to require any buy now, pay later providers to remove their no-surcharge rules. It considers that a policy case could emerge in the future and will keep this issue under review.

PRIVACY AND DATA

Consumer Data Right and Open Banking update

- On 30 April 2021, the Treasury and the Data Standards Body [released](#) design papers on the development of rules and standards to implement a peer-to-peer data access model in the energy sector and an opt-out data sharing model for joint accounts in the banking and energy sectors.
- Following the release of those design papers, exposure draft amendments to the Consumer Data Right (CDR) Rules were [released](#) by Treasury on 1 July 2021. The amendments would introduce a sponsored tier of accreditation and a CDR representative model, allow consumers to share their data with trusted professional advisers, allow participants to share CDR insights (with consumer consent) for specific purposes, and create a single consent data sharing model for joint accounts. Submissions are due by 30 July 2021.
- The ACCC [released](#) a compliance guide to the CDR on 3 May 2021 which is designed to assist data holders in the banking sectors to understand and comply with their obligations.
- The Privacy Commissioner has [released](#) updates to the CDR Privacy Safeguard Guidelines to align them with amendments made to the *Competition and Consumer Act 2010* (Cth) and the CDR Rules.
- Under the timetable for rollout of the CDR in banking, on 1 July 2021: consumer data sharing for Phase 1 products commenced for non-major ADIs; consumer data sharing for Phase 2 and 3 products commenced for reciprocal data holders; and product reference data for Phase 3 products commenced for non-major ADIs.

Mandatory credit reporting regulations and exemption

The *National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2021* (Cth) were [made](#) on 27 May 2021. The purpose of the regulations is to support the mandatory credit reporting (MCR) regime. The Regulations prescribe:

- additional circumstances where a credit provider that is subject to the MCR regime must make ongoing supplies of repayment history information;
- additional circumstances where a credit reporting body is restricted from disclosing information it has received under the MCR regime;
- information that must be included in statements given to the Treasurer by credit providers and credit reporting bodies that are subject to the regime; and
- civil penalty provisions in the new regime that are subject to an infringement notice.

In the *ASIC Credit (Mandatory Credit Reporting) Instrument 2021/541* [made](#) on 11 June 2021, ASIC has determined that five kinds of accounts are not eligible credit accounts for which an eligible licensee must supply mandatory credit information to credit reporting bodies. The accounts are:

- margin lending facilities;
- accounts without formal overdrafts;
- accounts that are being 'run down' – i.e., where the type of credit is no longer offered,

the number of accounts is less than 10,000, and the total number of accounts is less than 3 percent of the total credit accounts held by the banking group of which the eligible licensee is a part;

- novated leases; and
- charge cards as defined in regulation 62(2) of the *National Consumer Credit Protection Regulations 2010* (Cth) (the **Credit Regulations**). The determination only applies to charge card contracts that are entered into by those credit providers specified in regulation 62(1) of the Credit Regulations.

PRUDENTIAL

Draft guidance on managing the financial risks of climate change

On 22 April 2021 APRA [released](#) for consultation its draft guidance to banks, insurers and superannuation trustees on managing the financial risks of climate change, *Prudential Practice Guide CPG 229 Climate Change Financial Risks (CPG 229)*. Designed to assist APRA-regulated entities in managing climate-related risks and opportunities as part of their existing risk management and governance frameworks, it covers APRA's view of sound practice in areas such as governance, risk management, scenario analysis and disclosure. APRA is seeking stakeholder feedback by 31 July 2021 and the final guide is expected to be released by the end of 2021.

Draft guide on remuneration

APRA [released](#) a draft prudential practice guide on remuneration 30 April 2021. The guide sets out principles and better practice examples to assist entities in meeting the requirements proposed in the new prudential standard, *CPS 511 Remuneration (CPS 511)*. APRA is seeking submissions by 23 July 2021.

Roadmap for new capital framework

On 2 June 2021 APRA [sent](#) a letter to ADIs outlining a roadmap to the revisions to the capital framework for ADIs which are due to commence on 1 January 2023.

FAQ on FHLDS and FHG

APRA has [published](#) a FAQ on the treatment of loans issued under the Family Home Guarantee (FHG) and First Home Loan Deposit Scheme (FHLDS) programs, clarifying the regulatory capital requirements and the correct reporting approach.

New price caps apply under the FHG and FHLDS from 1 July 2021.

Prudential treatment of crypto-asset exposures: Basel Committee proposals

On 10 June 2021 the Basel Committee on Banking Supervision [issued](#) a public consultation on preliminary proposals for the prudential treatment of banks' crypto-asset exposures. Central bank digital currencies are not within the scope of the consultation.

The proposals split crypto-assets into two broad groups:

- **Group 1 crypto-assets** - these include certain tokenised traditional assets and stablecoins and would be eligible for treatment under the existing Basel Framework (with some modifications and additional guidance).

- **Group 2 crypto-assets** – these assets include bitcoin. Since these pose additional and higher risks, they would be subject to a new conservative prudential treatment. A risk weight of 1250% would be applied to the greater of the absolute value of the aggregate long positions and the absolute value of the aggregate short positions to which the bank is exposed.

The Basel Committee on Banking Supervision is the primary global standard setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters. Its 45 members comprise central banks and bank supervisors from 28 jurisdictions.

SUPERANNUATION

First Home Super Saver Scheme

In the 2021 Federal Budget, it was [announced](#) that the maximum amount that can be released from superannuation under the First Home Super Saver Scheme would be increased from \$30,000 to \$50,000 from 1 July 2022.

Extension of relief for trustees

On 18 June 2021 ASIC [announced](#) that it had extended the existing licensing relief for public offer trustees to include all registrable superannuation entities (**RSEs**) so that they are regulated consistently with public offer trustees. From 1 July 2021, all RSEs are required to hold an AFSL with authorisations to deal in superannuation interests and to provide a superannuation trustee service. The relief granted by ASIC provides that all RSEs are not required to have a dealing authorisation to deal in a financial product (other than an interest in the superannuation fund) in the ordinary course of operating the fund.

APRA/ASIC joint guidance on fees

On 30 June 2021, APRA and ASIC [issued](#) joint guidance to superannuation trustees in relation to their obligations concerning fees charged to members' superannuation accounts.

Treasury Laws Amendment (Your Future, Your Super) Act

The *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Cth) received [assent](#) on 22 June 2021. The Act amends superannuation and corporations legislation to:

- provide that if a new employee has an existing “stapled” superannuation fund and does not choose a fund to receive contributions, their employer is required to make contributions on behalf of the employee into the stapled fund;
- ensure that employers are not in breach of various rules, or are not liable for superannuation guarantee charge, in certain circumstances;
- require APRA to conduct an annual performance test for MySuper products and other products to be specified in regulations;
- require trustees of RSEs and self-managed superannuation funds and directors of the corporate trustee of a RSE to perform their duties and exercise their powers in the best financial interests of the beneficiaries;
- reverse the evidential burden of proof for the best financial interests duty so that the onus is on the trustee of a RSE;
- allow regulations to be made to prohibit certain payments made by trustees of RSEs and prescribe additional requirements on trustees and directors of trustee companies of RSEs;
- allow contraventions of record-keeping obligations specified in regulations to be subject to a strict liability offence; and
- remove an exemption from disclosing information about certain investments under the

portfolio holdings disclosure rules.

Voluntary code on insurance in superannuation replaced by guidance

On 1 July 2021 the Association of Superannuation Funds of Australia, the Australian Institute of Superannuation Trustees and the Financial Services Council [released](#) jointly developed guidance documents to superannuation trustees on improving outcomes for vulnerable members and claims handling guidance for members with life insurance in group superannuation. The guidance documents maintain or enhance key components of the Insurance in Superannuation Voluntary Code of Practice, which is being replaced by the guidance following recent legislative and regulatory reforms.

AML/CTF

Amendments commence

Amendments to the AML/CTF legislation, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**), [commenced](#) on 17 June 2021. The amendments allow for reporting entities to rely in some circumstances on the verification of identity by another reporting entity, including under ongoing reliance arrangements. The amendments also clarify when customer due diligence is required before providing a designated service, and modify the obligations in relation to tipping off and correspondent banking relationships.

Amendments have also been [made](#) to the rules, the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth).

AUSTRAC has [released](#) a series of guidance notes to assist reporting entities with the changes.

The Minister for Home Affairs has [approved](#) a 12-month policy principles period to enable reporting entities to implement the new correspondent banking obligations. During the policy principles period, enforcement action will only be taken if the AUSTRAC CEO is satisfied that the reporting entity has failed to take reasonable steps to comply with the amended Part 8 of the AML/CTF Act. The policy principles do not prevent AUSTRAC from taking enforcement action for contraventions of provisions in Part 8 that occurred before 17 June 2021.

Non-bank lending and financing risk assessment

AUSTRAC [released](#) a money laundering and terrorism financing risk assessment of the non-bank lending and financing sector on 25 June 2021. The assessment found that fraud was the main threat facing the sector.

Senate review

The Legal and Constitutional Affairs References Committee of the Senate is [conducting](#) a review of the adequacy and efficacy of Australia's AML/CTF regime. The deadline for submissions is 27 August 2021.

AUSTRAC guide on cuckoo smurfing

On 3 June 2021 AUSTRAC [issued](#) a financial crime guide to warn about a money laundering method known as cuckoo smurfing. According to AUSTRAC, criminals use this method to move illegal funds into Australia and to disguise the profits of their criminal activities. Cuckoo smurfing generally relies on exploiting the legitimate bank accounts of individuals and businesses in Australia. The Australian account holder will commonly be expecting genuine funds to be deposited into their account from a friend, relative or business partner overseas, and may be unaware that the funds transferred into their accounts have in fact come from criminals.

DISPUTES AND ENFORCEMENT

Changes at ASIC and FRAA

On 29 April 2021 the Treasurer [announced](#) the appointment of Mr Joseph Longo as the full-time Chairperson and Ms Sarah Court as a full-time Deputy Chairperson to ASIC for a five-year period commencing on 1 June 2021. He also announced that the Government will be issuing ASIC a new Statement of Expectations and would introduce legislation to establish the Financial Regulator Assessment Authority (**FRAA**).

The new Statement of Expectations will outline the Government's priorities for and expectations of ASIC. The Treasurer said that the statement will make clear that the Government expects ASIC, as a whole, to operate as a strategic board and that all operational matters are the responsibility of the chair, who is the accountable authority. It will also make clear that the Government expects ASIC to support Australia's economic recovery from the COVID-19 pandemic.

The FRAA will assess the effectiveness and capability of both ASIC and APRA. It will consist of three independent statutory appointees together with the Treasury Secretary. Reviews will be conducted once every two years and as directed by the Treasurer.

The *Financial Regulator Assessment Authority Act 2021* (Cth) received assent on 29 June and commenced on 1 July 2021. The Act establishes the FRAA and provides for its functions and powers. APRA and ASIC are required to cooperate with the FRAA to enable the FRAA to perform its functions and exercise its powers. This includes providing information and documents requested by the FRAA. The Act prohibits the unauthorised use or disclosure of protected information provided to the FRAA.

ASIC proceedings against Westpac over CCI

ASIC [announced](#) on 8 April 2021 that it had commenced civil penalty proceedings in the Federal Court against Westpac Banking Corporation (**Westpac**). ASIC alleges that Westpac mis-sold consumer credit insurance (**CCI**) with credit cards and other credit facilities to customers who had not agreed to buy the policies. The Credit Card Repayment Protection and Flexi-Loan Repayment Protection policies were add-on insurance products sold with credit cards and lines of credit. The action relates to the period from 7 April 2015 to 28 July 2015. ASIC claims that Westpac:

- made false or misleading representations that customers had agreed to acquire, were liable to pay for and that Westpac had a right to charge for, CCI;
- asserted a right to payment for the CCI premiums which customers were not liable to pay;
- failed to ensure that its financial services were provided efficiently, honestly and fairly when it supplied CCI to customers who had not agreed to acquire CCI and debited premiums from those customers' accounts; and
- failed to comply with the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**).

ASIC sues AMP over charging dead customers

On 26 May 2021, ASIC [filed](#) civil penalty proceedings in the Federal Court against four companies in the AMP Limited group (and one company no longer part of that group). ASIC alleges that they were involved in charging life insurance premiums and advice fees to 2,069 deceased customers over the period from May 2015 to August 2019.

Criminal charges against ME Bank

On 25 May 2021 criminal charges were [laid](#) against Members Equity Bank Limited (**ME Bank**) in the Federal Court of Australia. The case is being prosecuted by the Commonwealth Director of Public Prosecutions after a referral from ASIC. It is alleged that ME Bank breached sections 12DB(1)(g) and 12GB(1) of the ASIC Act and sections 64(1) and 65(1) of the National Credit Code between 2 September 2016 and 3 September 2018. Those sections of the National Credit Code relate to the requirement to notify changes to interest rates and repayment amounts under credit contracts regulated by the National Credit Code.

Loan to company was regulated by National Credit Code

In a recent decision of the Supreme Court of New South Wales, *Integrated Securities No 3 Pty Ltd v Creatrix Web Development & Online Marketing Solutions Pty Ltd* [\[2021\] NSWSC 596](#), Rein J held that a loan to a company was regulated by the National Credit Code. Integrated Securities No 3 Pty Ltd lent money to Creatrix Web Development & Online Marketing Solutions Pty Ltd (**Creatrix**). Mr Valerio was the sole shareholder and director of Creatrix. Mr Valerio and his de facto partner, Ms Pekjic, used the loan funds for a residential property development. A loan to a company (unless it is a strata corporation) is ordinarily not regulated by the National Credit Code. The loan documentation, confusingly, named Creatrix as the “Borrower” and each of Valerio and Pekjic as a “Debtor” and also a “Guarantor”. The court found that Valerio and Pekjic had a primary liability under the loan contract, and that they were therefore debtors under the contract and not merely guarantors, so the National Credit Code applied to the loan.

ASIC sues credit licensee: did not comply with AFCA determinations

ASIC has [commenced](#) proceedings in the Federal Court against Lightspeed Finance Pty Ltd and its director Mark James Fitzpatrick. Lightspeed is licensed as a credit assistance provider. ASIC alleges that they failed to comply with AFCA determinations. A failure to co-operate with AFCA is a civil penalty offence with penalties of up to \$10,500,000 for a company and \$1,050,000 for an individual.

Cigno cases

The Federal Court has [dismissed](#) the application by ASIC in relation to alleged breaches of consumer credit legislation by Cigno Pty Ltd (**Cigno**) and BHF Solutions Pty Ltd. The judge found that the lending model operated by these companies did not contravene the NCCP Act.

On 29 June 2021, the Full Federal Court [dismissed](#) an application by Cigno which had sought to overturn ASIC's first product intervention order in relation to short-term credit, made on 12 September 2019. The Court found that in assessing consumer detriment for the purposes of making a product intervention order, ASIC is entitled to consider not only the characteristics of the relevant product, but also the circumstances in which it is supplied.

Penalty for unlicensed consumer leasing

GoGetta Equipment Funding Pty Ltd (**GoGetta**) has been [ordered](#) to pay a \$750,000 penalty for engaging in unlicensed consumer leasing. GoGetta is a business financier but had entered into rental agreements with ten consumers who leased the vehicles wholly or predominantly for personal, domestic or household purposes.

ASIC proceedings against Westpac on insider trading

On 5 May 2021 ASIC [commenced](#) proceedings against Westpac alleging insider trading, unconscionable conduct and breaches of its financial services licence obligations. The action relates to its role in executing a \$12 billion interest rate swap transaction on 20 October 2016.

AFCAs complaints data

AFCAs [released](#) details of complaints during the prior financial year on 5 July 2021. AFCA received over 70,000 complaints during the period and secured more than \$240 million in compensation and refunds and almost \$32 million in remediation payments. Credit cards were the most complained about product, followed by home loans and personal transaction accounts.

Orders made against Remedy Housing

Interim orders have been [made](#) on application by ASIC against Remedy Housing Pty Ltd. ASIC is alleging that Remedy Housing is conducting an unlicensed financial services and credit business and is engaging in misleading or deceptive conduct, among other matters. Remedy Housing advertises that it can provide customers with interest-free mortgages on receipt of a \$10,000 deposit.

Westpac \$87m remediation for advice businesses

ASIC [announced](#) on 2 July 2021 that Westpac would be remediating former customers of its advice businesses whose advisers may have failed to notify the customers of corporate actions relating to ASX-listed securities that they held through platforms. The issue affected about 32,000 customers and the amount of remediation is estimated to be \$87 million.

Forex CT \$20m penalty

A \$20 million penalty has been [ordered](#) by the Federal Court against Forex Capital Trading Pty Ltd for engaging in unconscionable conduct, paying conflicted remuneration and failing to act in the best interests of clients.

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