DWYER HARRIS

FINANCIAL SERVICES AND CREDIT
QUARTERLY UPDATE

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Contents

COMMERCIAL CREDIT

Productivity Commission report on small business finance

The Productivity Commission has published a research report titled *Small business access to finance: The evolving lending market*. The report found that:

- a surge of new lenders and products into the market appears to be rapidly changing the options for small and medium enterprises (**SMEs**). Some of these options rely on emerging technologies that help lenders quickly assess the creditworthiness of SMEs;
- changes to prudential rules have made lending to SMEs less attractive for the major banks;
- regulation of business-to-business lending is relatively light-handed and has facilitated the entry of new players;
- there is now a broader range of lending options beyond traditional property-secured loans for SMEs, such as borrowing against alternative collateral; and
- the SME market is well covered by various lenders and products, but there appears to be a gap for unsecured finance between $250,000 and $5 million, with few lenders willing to offer these loans.

CONSUMER PROTECTION

Unfair contract terms draft legislation

On 23 August 2021, Treasury released exposure draft legislation for making unfair contract terms (**UCTs**) unlawful. Submissions closed on 20 September 2021. The legislation proposes to:

- make UCTs unlawful and give courts the power to impose a civil penalty;
- provide more flexible remedies to a court when it declares a contract term unfair by:
    - giving courts the power to determine an appropriate remedy, rather than the term being automatically void;
    - clarifying that the remedies available for “non-party consumers” also apply to “non-party small businesses”; and
    - creating a rebuttable presumption provision for UCTs used in similar circumstances;
- increase the eligibility threshold for the protections for small business from less than 20 employees to less than 100 employees, and introduce an annual turnover threshold of less than $10 million as an alternative threshold for determining eligibility;
- remove the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be covered by the UCT regime;
- improve clarity around the definition of standard-form contract, by providing further certainty on factors such as repeat usage of a contract template, and whether the small business had an effective opportunity to negotiate the contract; and
- enable certain clauses that include “minimum standards” or other industry-specific requirements contained in relevant Commonwealth, state or territory legislation to be exempt from the protections.

Banking Code report on guarantees

The Banking Code Compliance Committee (**BCCC**) published a report on 12 August 2021 on the outcome of its inquiry into compliance with the guarantee obligations in the Code of Banking Practice. The BCCC found that while banks had adequate written policies and processes to comply, banks:

- lacked effective record management practices;
- conducted inadequate or ineffective monitoring of compliance controls and dealt with non-compliant guarantees on a case-by-case basis;

- too heavily relied on legal advice when considering whether to enforce a non-compliant guarantee; and
- lacked guarantee-related data capability.

The BCCC made 23 recommendations for improved industry practice. Overall, the BCCC said it had "serious concerns" about guarantee practices and expected banks to take immediate action.

Banking Code update

A new version of the Code of Banking Practice was published on 5 October 2021. The COVID-19 Special Note has been removed and there are updates in Chapter 48.

CORPORATE

Electronic meetings and document execution

The Federal Government has passed legislation to provide a temporary extension until 31 March 2022 allowing for electronic or alternative technologies to be used for meetings of directors and shareholders and members of registered schemes, execution of documents, the keeping of minutes, and providing notices and other documents relating to meetings.

The Government has also announced its intention to make these changes permanent. On 30 August 2021, Treasury released exposure drafts of legislation which would give effect to a permanent change.

FINANCIAL ADVICE

Better Advice draft regulations

Treasury has released exposure draft regulations and a draft legislative instrument supporting the *Financial Sector Reform (Hayne Royal Commission Response - Better Advice) Bill 2021* (Cth) (the **Better Advice Bill**). Comments were due by 15 October 2021. The Better Advice Bill was introduced on 24 June 2021 to implement a recommendation of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**) to establish a single disciplinary body and new registration system for financial advisers. It also adopts a recommendation of the Independent Review of the Tax Practitioners Board to introduce a single disciplinary and registration system for financial advisers that provide tax (financial) advice services, and follows the Government's decision to wind up the Financial Adviser Standards and Ethics Authority and transfer its functions to the Government. The Better Advice Bill and the supporting regulations and legislative instrument are planned to come into force on 1 January 2022.

Relief extended

The Australian Securities and Investments Commission (**ASIC**) has extended until 15 April 2022 the COVID-19 relief measures allowing for financial advisers to give a record of advice rather than a statement of advice.

FINANCIAL MARKETS

Social media 'pump and dump' campaigns

On 23 September 2021 ASIC issued a warning about "a concerning trend of social media posts being used to coordinate 'pump and dump' activity in listed stocks, which may amount to market manipulation in breach of the Corporations Act 2001." ASIC said that it had recently observed "blatant attempts to pump share prices, using posts on social media to announce a target stock,

a designated time to buy and a target price or percentage gain to be reached before dumping the shares." ASIC noted that market manipulation is illegal and can attract a fine of over $1 million and up to 15 years imprisonment. ASIC said that market participants should take active steps to identify and stop potential market misconduct. ASIC expects participants to promptly submit suspicious activity reports where they see this type of activity, and says that listed entities should report any suspicious activity they detect in their listed securities to the Australian Securities Exchange or ASIC.

FINANCIAL PRODUCTS

Anti-hawking

The changes to the hawking prohibition commenced on 5 October 2021 and ASIC released its finalised update regulatory guide RG 38 *The hawking prohibition* on 23 September 2021.

The *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021* (Cth) made on 5 August 2021 and effective from 5 October 2021 amend the *Corporations Regulations 2001* (Cth) to include exceptions to the hawking prohibition. The Regulation provides that an offer, request or invitation will not breach the hawking provisions if it is made in the course of contact initiated by the consumer for any purpose and the offer, request or invitation relates to a basic banking product or a term deposit with a maximum term of 5 years (if the consumer can withdraw funds during that 5 years by providing the product issuer with 31 days or less notice). Contact is consumer initiated if the consumer takes positive steps to contact the offeror and the contact is not made in response to previous contact initiated the offeror (e.g. returning a missed phone call).

The other exceptions to the hawking prohibition provided in the Regulation are:

- Offers relating to listed securities or listed interests in managed investment schemes made by financial services licensees over the phone.
- Offers for the issue or sale of securities made by a financial services licensee through whom the client has bought or sold securities in the last 12 months.
- Offers for the issue or sale of interests in managed investment schemes made by a financial services licensee through whom the client has acquired or disposed of an interest in a managed investment scheme in the previous 12 months.
- Crowd source funding offers.
- Offers, invitations or requests relating to employee share schemes.
- Offers of medical indemnity insurance which are made to healthcare or medical professionals.
- Offers, requests or invitations in relation to interests in insolvency litigation funding schemes and litigation funding arrangements.
- Offers for the issue or sale of a financial product that is substantially similar to a financial product that the consumer already holds with the offeror (such as offers to renew an insurance policy).

The *ASIC Corporations (Amendment and Repeal) Instrument 2021/799* (**2021/799**) was made on 21 September 2021 and took effect on 1 October 2021. 2021/799 makes consequential amendments to a number of existing ASIC legislative instruments by updating statutory references to the prohibition on the hawking of financial products.

2021/799 also repeals two ASIC legislative instruments, the *ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184* (**2017/184**) and the *ASIC Corporations (Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839* (**2019/839**). 2017/184 had provided relief from the hawking prohibition so that it did not apply to securities and interests in managed investment schemes, while 2019/839 had prohibited unsolicited telephone sales of direct life insurance and consumer credit insurance unless the consumer was provided with personal advice by the offeror or a person acting on the offeror's behalf.

Design and distribution obligations

The product design and distribution obligations (**DDO**) commenced on 5 October 2021.

The Federal Government announced through the Treasury in August 2021 that it intended to make a number of amendments to DDO to achieve the intended operation of DDO. The proposed changes will seek to:

- Clarify that margin lending to corporates is exempt from DDO.
- Clarify employees of licensees are not subject to their own separate set of DDO.
- Ensure 31-day term deposits fall within the DDO regime.
- Provide consistency in the application of retail and wholesale investor definitions across the *Corporations Act 2001* (Cth) (the **Corporations Act**) by ensuring it extends to the DDO regime.
- Exempt foreign cash settled immediately from the DDO regime.
- Exempt non-cash-payment facilities from the DDO regime except for certain facilities, specifically credit and debit card facilities and stored value facilities.
- Remove the requirement for distributors to report whether they have received a complaint or acquired information requested by the issuer, including where there are nil complaints or nil information. Distributors will still be required to report complaints and other requested information that they receive to issuers.
- Clarify that where a product disclosure statement (PDS) is given in the course of providing personal advice as required by law, this conduct is within the scope of excluded conduct.
- Expand the employer exemption to ensure that employers are not regulated as distributors when providing a PDS for their default fund product to employees.
- Exempt the Government's Cashless Debit Card and the BasicsCard from the DDO regime.

On 1 October 2021 the *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* was made to give temporary effect to these changes until the changes are legislated.

ASIC has also published an information sheet (INFO 264) on DDO for financial advisers and Australian financial services licensees who are advice licensees which explains how DDO applies when personal advice is given.

FINANCIAL SERVICES

Foreign providers

The Federal Government announced in the 2021-22 Budget that it would consult on options to restore the previously established regulatory relief for Foreign Financial Service Providers (**FFSPs**) and options to create a fast-track licensing process for those that wish to establish more permanent operations in Australia.

On 9 July 2021, Treasury released a consultation paper with options on providing Australian licensing relief to FFSPs already similarly licensed and regulated in other jurisdictions that want to enter the Australian market, as well as to FFSPs not based in Australia that provide financial services to their Australian clients. The paper also explores fast-tracking the licensing process for FFSPs that require a licence to operate in Australia. Submissions closed on 30 July 2021.

Litigation funding reforms

Exposure draft legislation has been released by Treasury in response to recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services in its report on litigation funding and the regulation of the class action industry. The proposed legislation

would enhance court oversight over the distribution of class action proceeds and establish a rebuttable presumption that a return to the general members of a class action litigation funding scheme of less than 70 percent of their gross proceeds is not fair and reasonable. It would also require that plaintiffs must consent to become members to a class action litigation funding scheme before funders can impose their fees or commission on them.

FINANCIAL SYSTEM

FAR draft Bills

Treasury released an exposure draft Bill for the Financial Accountability Regime (**FAR**) on 16 July 2021. The FAR extends the Banking Executive Accountability Regime (**BEAR**) to all APRA-regulated entities regulated by the Australian Prudential Regulation Authority (**APRA**), with joint administration from APRA and ASIC. On 2 September 2021, Treasury released an exposure draft Bill for consequential amendments for the FAR which makes amendments to Commonwealth laws to establish the FAR and provides for transitional arrangements for the repeal of the BEAR.

INSOLVENCY

Draft regulations for small business insolvency reforms

Treasury has released draft regulations which make consequential amendments to support the the small business insolvency reforms that commenced on 1 January 2021.

Consultation on corporate trusts and insolvency

Treasury has released a consultation paper on how companies which structure themselves through a trust, or businesses which have a corporate trustee, are to be dealt with during insolvency. The consultation period ends on 10 December 2021.

INSURANCE

Deferred sales model for add-on insurance products

The deferred sales model for add-on insurance products commenced on 5 October 2021.

The *ASIC (Information under the Deferred Sales Model for Add-On Insurance) Instrument 2021/632* was made on 26 July 2021 and also commenced 5 October 2021. This instrument sets out the information to be given to a customer, and the form and manner in which the information is to be given, in order to start an add-on insurance deferral period.

The *Australian Securities and Investments Commission Amendment (Deferred Sales Model) Regulations 2021* (Cth) were made on 16 September 2021 and commenced on 5 October 2021. The Regulations amend the *Australian Securities and Investments Commission Regulations 2001* (Cth) (the **ASIC Regulations**) to prescribe when a consumer is taken to have entered a commitment to acquire certain classes of products or services. The Regulations also amend the ASIC Regulations to exempt specific classes of add-on insurance products from the deferred sales model. There are exemptions for comprehensive motor vehicle or vessel insurance products, compulsory third party motor vehicle insurance products, home and contents insurance products, home building insurance products, landlord insurance products, limited motor vehicle or vessel insurance products, transport and delivery insurance products, travel insurance products, business-related add-on insurance products, and superannuation-related add-on insurance products.

ASIC released its regulatory guide RG 275 *The deferred sales model for add-on insurance* on 28 July 2021.

TPD insurance follow up report

On 2 August 2021 ASIC released a report which updated its work on total and permanent disability (**TPD**) insurance. The report deals with how insurers are addressing issues identified in ASIC's Report 633 *Holes in the safety net: A review of TPD insurance claims*.

General Insurance Code of Practice

The 2020 version of the General Insurance Code of Practice came into effect on 5 October 2021.

PAYMENTS

Payments System Review report

The final report of the Payments System Review was released on 30 August 2021. The review was commissioned by the Federal Government in September 2020 and was required to report on the regulatory architecture of the Australian payments system. The report made 15 recommendations. The Government is considering and will consult on the recommendations before providing its response. The recommendations include a proposal to appoint a payments industry convener and to introduce a mandatory licensing framework for participants in the payments system. It also recommends that the ePayments Code become mandatory. For further information see our article here.

PRIVACY AND DATA

Credit Reporting Code: ARCA consultation on changes

The Australian Retail Credit Association (**ARCA**) has drafted proposed changes to the *Privacy (Credit Reporting) Code 2014* (**CR Code**) following the enactment of the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (Cth) in February 2021. The legislation provides for a new form of financial hardship information to be included in the credit reporting system from 1 July 2022, among other reforms. ARCA has made an application to the Office of the Australian Information Commissioner to approve the changes to the CR Code.

CDR Rules amendments

Amendments to the Consumer Data Right (**CDR**) rules, known as the version 3 rules, have been registered. The *Competition and Consumer (Consumer Data Right) Amendment (2021 Measures No. 1) Rules 2021* (Cth) include changes intended to:

- facilitate greater participation in the CDR regime by participants and consumers;
- provide greater control and choice to consumers in sharing their data;
- promote innovation of CDR offerings including intermediary services; and
- enable services to be more effectively and efficiently provided to customers.

The amended rules implement a "sponsored accreditation model" designed to reduce the cost of accreditation. They also establish a "CDR representative model" to allow eligible participants to access the CDR and use data without the need for accreditation in circumstances where they offer CDR-related services to consumers as a representative of an accredited data recipient.

The amendments also allow consumers to nominate persons as trusted advisers to whom an accredited person may disclose the consumer's data outside the CDR regime. The classes of trusted advisers are professions such as accountants, lawyers, financial advisers and mortgage brokers.

A new concept of a "CDR insight" has been introduced to allow CDR consumers to consent to their data being shared outside the CDR regime for prescribed purposes that are considered low risk and that are designed to limit the data shared to only what is necessary for the consumer to receive a service.

The amendments also provide for joint accounts to be in scope for data sharing under the CDR by default (a "pre-approval" setting), with mechanisms by which a joint account holder may adjust or change the pre-approval option. Any joint account holder may withdraw a consent for data sharing on an account at any time. There is to be a staged implementation of rules relating to joint accounts.

Under the amended CDR Rules, an accredited person will now be able to rely on unaccredited outsourced service providers to collect CDR data.

Privacy CDR updates

Updates have been issued for the *Guide to privacy for data holders* and *Guide to developing a CDR policy* to reflect amendments to the *Competition and Consumer Act 2010* (Cth) and the CDR Rules.

PRUDENTIAL

Preparing for negative interest rates

On 12 July 2021 APRA released for consultation its draft expectations regarding preparedness of authorised deposit-taking institutions (**ADIs**) for zero and negative interest rates. While considered highly unlikely, APRA considers the risks arising from an ADI's lack of preparedness for zero and negative interest rates to be material, and expects ADIs to take reasonable steps to prepare for scenarios in which the cash rate and/or market interest rates may fall to zero or become negative. At a minimum, this would include developing tactical solutions to implement zero and negative market interest rates and cash rate by 30 April 2022. Tactical solutions are typically shorter-term fixes, involving workarounds on the periphery of existing systems, along with overrides in downstream systems. Comments were due on the consultation paper by 31 October 2021.

APRA's approach to licensing and supervising new ADIs

On 11 August 2021, APRA released its finalised approach to licensing and supervising new ADIs following an earlier consultation. This includes the concept of a restricted ADI licence option for a new ADI.

Final remuneration standard

On 27 August 2021, APRA released its final prudential standard on remuneration, CPS 511 *Remuneration*. The standard will come into effect from 1 January 2023 and there will be a phased implementation starting with large ADIs. The standard will require entities to apply material weight to non-financial metrics such as complaints, breaches and regulatory and audit findings when determining variable remuneration for employees. It will also require entities to reduce variable remuneration when warranted by poor risk conduct and imposes new minimum deferral requirements for variable remuneration coupled with malus and clawback provisions. CPS 511 also requires increased board oversight, transparency and accountability on remuneration outcomes.

Final guidance on credit risk management

On 19 August 2021 APRA released Prudential Practice Guide APG 220 *Credit Risk Management* (**APG 220**). APG 220 is new APRA guidance to assist ADIs comply with the new

prudential standard, APS 220 *Credit Risk Management*. It includes examples of better practices identified by APRA in recent supervisory reviews.

SPS 530 Investment Governance proposed changes

APRA released proposed revisions to Prudential Standard SPS 530 *Investment Governance* on 29 September 2021. The proposed revisions focus on enhancements to stress testing, valuation and liquidity management practices. APRA's consultation runs until 16 February 2022.

APRA policy priorities

On 24 September 2021, APRA announced that it had reprioritised its policy agenda for the remainder of the year, to enable APRA-regulated entities to focus on implementing key policy reforms, as well as managing the impacts of COVID-19. APRA says that in the fourth quarter of 2021, APRA's policy priorities will centre on completing key reforms to strengthen financial resilience, including:

- completing the bank capital reforms;
- consulting on reforms to the insurance capital framework;
- consulting on new standards for financial contingency planning and resolution; and
- updating superannuation standards for Insurance in super and Investment governance.

APRA is also planning to release final guidance on managing the financial risks of climate change and an Information Paper setting out a framework for the use of macroprudential policy tools.

APRA said that it would defer some other policy releases originally scheduled for 2021 to 2022. These include standards for operational resilience, remuneration disclosure requirements, interest rate risk in the banking book and offshore reinsurance.

Buffer requirements for home lending adjusted

On 6 October 2021 ASIC announced that expects ADIs to adopt a more prudent setting for the mortgage serviceability buffer used to test borrowers' capacity to repay. APRA said that ADIs should be operating with a buffer of at least 3.0 percentage points over the loan interest rate.

SUPERANNUATION

Financial and auditing requirements for superannuation funds

Treasury released a draft Bill on 13 August 2021 setting out financial reporting and auditing obligations in relation to registrable superannuation entities (**RSEs**). It requires RSE licensees to prepare and lodge financial reports for each financial year and half-year with ASIC, to publish the financial report, directors' report and auditor's report for a financial year on the RSE's website, and provide details of how to access these reports with the notice of the annual members meeting, and to provide a copy of the financial reports for a financial year and half-year to members and beneficiaries on request. It also amends the requirements for the auditor of an RSE.

Insurance in superannuation

On 21 September 2021, APRA released a letter to industry on an update to its proposed revisions to Prudential Standard SPS 250 *Insurance in Superannuation* and Prudential Practice Guide SPG 250 *Insurance in Superannuation*.

ASIC information on distribution of super products

On 15 October 2021 ASIC released updated information for employers and trustees about changes affecting the distribution of superannuation products. Employers must now ensure that superannuation guarantee contributions are paid on time to their employees' superannuation fund of choice. The information can be found in ASIC Information Sheet 89, *Communicating with employees about superannuation fund choice: what you can and cannot do* (INFO 89). ASIC has also updated Information Sheet 241: *Prohibition on influencing employer's superannuation fund choice* (INFO 241).

AML/CTF

Proposed rule changes

In August 2021 AUSTRAC released proposed amendments to the *Anti Money Laundering and Counter Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) (the **AML/CTF Rules**) which add Chapters 79 and 80, and amend Chapters 21 and 48. Submissions closed on 27 August.

Chapter 79 would allow a reporting entity to carry out the applicable customer identification procedure on a customer, an agent of the customer or a beneficial owner of the customer after opening an account, provided that no transaction (other than an initial deposit made at the time of the account opening) is conducted in relation to the account.

Proposed Chapter 80 would exempt certain types of products which are unintentionally captured by the definition of a stored value card in the *Anti Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**).

Proposed amendments to Chapter 21 would exempt the issuing of an interest in a litigation funding scheme from the operation of the AML/CTF Act.

A proposed amendment to Chapter 48 expands the current exemption for providing salary packaging services to also include payroll and superannuation clearance services.

AUSTRAC banking sector risk assessments

On 6 September 2021, AUSTRAC released four Australian banking sector money laundering and terrorism financing (**ML/TF**) risk assessments covering major banks, other domestic banks, foreign subsidiary banks, and foreign bank branches operating in Australia. The overall ML/TF risk ratings for the banking sector range from medium (foreign subsidiary banks and foreign bank branches) to high (major banks and other domestic banks).

DISPUTES AND ENFORCEMENT

ASIC's approach to enforcement of October 2021 reforms

ASIC released a statement on 12 August 2021 on the approach it would be taking to enforcement of the multiple regulatory reforms commencing in October 2021, including design and distribution obligations, anti-hawking changes, the deferred sales model for add-on insurance products, reference checking and information sharing requirements for financial advisers and brokers, breach reporting reforms and new IDR requirements.

ASIC said that it recognised that these reforms would require significant changes to businesses' systems and processes and take effect at the same time industry is facing other challenges, including from COVID-19 and renewed lockdowns. ASIC would therefore take a reasonable approach in the early stages of these reforms provided industry participants are using their best efforts to comply, and ASIC would take into account the context that firms are operating in, including the scale of the changes, the challenges arising from the current operating

environment, and noting industry would receive the final guidance on two measures relatively close to the start date. This initial approach by ASIC would extend to technical or inadvertent breaches, where firms have systems changes underway and act quickly to address problems as they arise. Where firms are not acting in good faith or where ASIC detects conduct causing actual harm, ASIC said that it would not hesitate to enforce the law.

Compensation scheme of last resort

On 16 July 2021, Treasury released exposure draft legislation for the establishment of a compensation scheme of last resort. Such a scheme was recommended by the Financial Services Royal Commission. The Government has committed to establish a forward-looking and industry-funded compensation scheme which extends beyond personal advice failures. The draft legislation covers the key features of the scheme, including authorisation of an operator of the scheme, eligibility requirements, compensation available for each eligible determination of the Australian Financial Complaints Authority (**AFCA**), the levying framework to fund the scheme, and the governance of the scheme.

AFCA updates

AFCA has updated its Operational Guidelines and processes to align with the new dispute resolution requirements.

Breach reporting

On 7 September 2021, ASIC published its updated regulatory guide on breach reporting, *RG 78 Breach reporting by AFS licensees and credit licensees* (**RG 78**). The updated guide reflects the new breach reporting obligations for licensees which commenced on 1 October 2021. A consultation draft of RG 78 had been released in April 2021. Please see our article here which highlights some of the key changes from the draft to the final RG 78.

The *ASIC Corporations and Credit (Breach Reporting - Reportable Situations) Instrument 2021/716* commenced on 5 October 2021. It notionally modifies the law to exclude non-compliance with standards set out in ASIC legislative instruments on internal dispute resolution (**IDR**) (which made certain IDR standards mandatory) from the categories of situations deemed to be “significant” breaches of core obligations.

The *ASIC Credit (Breach Reporting - Prescribed Commonwealth Legislation) Instrument 2021/801* was made on 28 September 2021 and commenced on 1 October 2021. Earlier in September 2021, the Government announced that it intended to make some technical amendments to the breach reporting reforms for credit licensees to align the breach reporting requirements with those of financial services licensees under the Corporations Act. The legislative instrument provides temporary relief for three years to limit the other Commonwealth legislation covered by the core obligations for credit licensees to specified Acts. For more information see our article here.

BT and Asgard penalties

Civil penalties totalling $3 million have been imposed by the Federal Court against BT Funds Management Limited and Asgard Capital Management Limited for charging fees for no service and making misleading statements. They were also ordered to publish an adverse publicity order on their websites.

Penalty in Westpac case

Westpac Securities Administration Limited (**Westpac Securities**) and BT Funds Management Limited (**BT Funds**) have been ordered by the Federal Court to pay a total penalty of $10.5 million for failing to act in their clients' best interests. In February 2021 the High Court found that

Westpac Securities and BT Funds breached their best interests duty when they provided personal financial product advice in calls made to 14 customers. In assessing the amount of the penalty, the Judge noted several factors including that the campaign was deliberate and planned, the inadequacy of compliance frameworks, and that the companies had not expressed regret for the conduct, did not appear to have taken steps to remedy the compliance deficiencies, and had been tardy in progressing a remediation plan.

Allianz penalties awarded

In *Australian Securities and Investments Commission v Allianz Australia Insurance Limited* [2021] FCA 1062, Allsop CJ of the Federal Court ordered penalties of $1.5 million to be paid by Allianz Australia Insurance Ltd (**Allianz**) and AWP Australia Pty Ltd (**AWP**) in relation to the sale of travel insurance policies through Expedia websites. The Court found that Allianz and AWP engaged in misleading and deceptive conduct when selling travel insurance because they did not correctly state how premiums were calculated, and allowed insurance to be sold to ineligible customers. There are separate criminal charges which have been laid against both Allianz and AWP that allege the making of false statements.

NAB hit with $18.5 million penalty over fee disclosure statement failures

National Australia Bank Limited (**NAB**) has been ordered the Federal Court to pay an $18.5 million penalty for failures relating to misleading fee disclosure statements. NAB was also held to have contravened its obligations as an Australian financial services licence holder to act efficiently, honestly and fairly by failing to have procedures and systems in place to provide timely and effective fee disclosure statements. NAB was ordered to pay ASIC's costs.

BoQ unfair business loan terms

In *Australian Securities and Investments Commission v Bank of Queensland Limited* [2021] FCA 957, the Federal Court declared unfair several terms within small business contracts and guarantees of Bank of Queensland Limited (**BoQ**). The following terms were held to be unfair:

- unilateral variation clauses that allowed BoQ to vary the terms and conditions of its contracts without giving borrowers advance notice or an opportunity to exit the contract without penalty;
- event of default clauses that gave BoQ the right to unilaterally determine whether a default had occurred as well as call defaults based on events that did not present any material risk to BoQ and without giving borrowers an opportunity to address the issue;
- indemnification clauses that allowed BoQ to make a claim against a customer for losses caused by BoQ's mistake, error or negligence; and
- conclusive evidence clauses which meant that if BoQ issued a certificate stating an amount owing by a customer, that amount would be assumed to be correct unless the customer could prove otherwise.

The Court ordered that the unfair terms be replaced with new, fair terms in all standard form contracts from 12 November 2016.

BoQ gave an undertaking that it would not in the future use or rely upon any of the unfair terms in any standard form contracts which were in the same form as those put before the Court for small business customers.

Criminal charges against CBA over CCI

On 16 September 2021, criminal charges were filed against the Commonwealth Bank of Australia (**CBA**) in the Federal Court for the alleged mis-selling of consumer credit insurance. The charges relate to the promotion and sale by CBA of CreditCard Plus and Loan Protection policies as an add-on insurance product in branches, by telephone and online. It is alleged that

between 2011 and 2015, CBA made false or misleading representations to customers that the insurance policies had uses or benefits to those customers when part or all the benefits were not available. CBA's conduct was the subject of a case study by the Financial Services Royal Commission.

CBA adverse publicity orders

In *Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966, the Federal Court made orders requiring CBA to publish notices on its website and its newsroom acknowledging false or misleading conduct when it overcharged interest on business overdraft accounts. The notices require CBA to publish both a written and audio-visual notice on certain of its websites and ensure that each notice appears immediately upon access to the landing page as a picture tile on the websites under the heading "Notification of Misconduct by CBA" and is maintained on the websites for 90 days.

ASIC sues IAL

ASIC has commenced civil penalty proceedings in the Federal Court against Insurance Australia Limited (**IAL**). ASIC alleges that IAL failed to honour discount promises made to its customers. It says that IAL engaged in misleading or deceptive conduct and made false or misleading representations to some NRMA Insurance customers by stating that customers were eligible for certain discounts on renewal of their home and motor insurance policies and then failing to apply those discounts. The conduct relates to the period between March 2014 and November 2019 and affects almost 600,000 customers. ASIC has also called for all general insurers to review their pricing systems and controls to prevent consumer harm as a matter of priority.

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