DWYER HARRIS

FINANCIAL SERVICES AND CREDIT
QUARTERLY UPDATE

January 2016

CONSUMER CREDIT

Interim report for SACC/consumer lease review

The panel for the review of the small amount credit contract (**SACC**) and consumer lease laws published an interim report on 22 December 2015. The panel has now been given until the end of February 2016 to complete its report and is seeking additional submissions on the interim report. Submissions are due by 22 January 2016.

The interim report focuses on areas where the panel believes that further evidence would be helpful. It includes a range of policy options. The panel has made a number of observations in the interim report. These include:

- The responsible lending obligations do not appear sufficient to prevent financial harm to consumers who use SACCs.
- High levels of repeat borrowing appear to be causing financial harm to consumers.
- The structure of the SACC and industry costs appear to promote repeat borrowing.
- The effect of the monthly fee is that SACC providers do not have to give a consumer a discount for early payment.
- The high cost of consumer leases appears to be causing consumers financial harm.

From the general approach taken in the interim report, it seems likely that the panel will recommend additional regulation for both SACCs and consumer leases, including some form of price control for consumer leases.

Interest only loans

ASIC has announced a further investigation into interest only mortgage lending. This will focus on third party channels. ASIC's report into interest only lending released in August 2015 highlighted the growth of this type of loan. Despite ASIC concerns, interest only lending continues to grow. Figures released by APRA in November show that in the year ending 30 September 2015, for banks with more than $1 billion of residential term loans, 43.6 per cent of new loans by loan amount were interest-only – an increase of more than 17.6 per cent from the prior year, growing at a faster

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rate than principal and interest loans.

COMMERCIAL FINANCE

Unfair contracts

The unfair contracts legislation for small business has been passed by both houses of Parliament and received assent on 12 November 2015. The amendments will take effect from 13 November 2016. Commercial financiers should review their standard terms and conditions prior to commencement of the new provisions to identify any contract terms at risk of being unfair.

FINANCIAL ADVICE

Financial adviser standards

On 3 December 2015, Treasury released for comment an exposure draft of the *Corporations Amendment (Professional Standards of Financial Advisers) Bill 2015 (Cth)*. Submissions closed on 4 January 2016. The Bill will introduce professional standards for financial advisers including a degree qualification, a professional year and passing an exam. From 1 July 2016, an independent industry-established standard setting body will be responsible for developing and setting standards. The new education and training requirements will be effective from 1 July 2017.

FINANCIAL MARKETS

Crowdfunding

On 3 December 2015 the Federal Government introduced its bill for regulation of crowd-sourced equity funding (**CSF**), the *Corporations Amendment (Crowd-Sourced Funding) Bill 2015 (Cth).*

An exposure draft of the accompanying regulations was released for comment on 22 December 2015. The *Corporations Amendment (Crowd-Sourced Funding) Regulation 2015 (Cth)* sets out certain details of the proposed new CSF regime, including:

- classes of securities that may be offered under CSF;
- minimum content requirements for the CSF offer document; and
- the checks that a CSF intermediary must conduct in relation to each CSF offer.

Under the Bill, an eligible CSF company will be an unlisted public company, limited by shares, with a majority of directors in Australia, and its principal place of business in Australia. Its gross assets and annual revenue must be less than $5 million and it must not have a substantial purpose of investing in other entities or schemes.

The types of securities which may be used are to be prescribed in regulations. The draft regulations refer to fully-paid ordinary shares.

There will be an issuer cap of $5 million in any 12 month period.

The issuer will have to prepare a CSF offer document, with the required content to be prescribed in regulations. The draft regulations set out the following matters to be included:

- a risk warning;
- information on the company making the offer and its directors and managers;
- information on the company's business and financial records;
- information about the offer, including the securities being offered and rights attaching to them;
- information about investor rights including the cooling off period; and
- information about any public company concessions available to the company.

Crowdfunding platforms (**CSF intermediaries**) will have to hold an AFSL and will have gatekeeper obligations, including the conduct of prescribed checks on issuers to a reasonable standard. A CSF intermediary must also not publish a CSR offer document if not satisfied of certain matters – including if it has reason to believe the issuer company has knowingly engaged in misleading or deceptive conduct. The CSF intermediary will have other obligations, such as the display of a risk warning on the platform, providing an application facility with an investor risk acknowledgment and a communication facility, prominently displaying investors' cooling off rights and any fees and interests, and obligations in relation to dealing with client money.

Investor protections in the Bill include a $10,000 cap per investor, per issuer in any 12 month period, via the same CSF intermediary, and a cooling off right which is unconditional, and exercisable within 5 business days.

Issuers will have certain corporate governance concessions for up to 5 years from the normal requirements of public companies. These include an exemption

from the requirement to hold an AGM. Financials need only be provided online, and the issuer will not be required to appoint an auditor until it has raised at least $1 million.

FINANCIAL PRODUCTS

Client money protection

The Federal Government on 21 December 2015 released a policy paper on proposed changes to legislation to enhance protection of client moneys. The Government proposes to limit the exemption that allows use of client money to meet derivatives obligations so that the exemption does not apply to retail clients, except in certain circumstances.

Farm management deposits

Exposure draft legislation was published by Treasury in November 2015 for amendments to the Farm Management Deposit (**FMD**) scheme. The legislation would amend the scheme, among other things, to increase the deposit limit from $400,000 to $800,000, remove restrictions on financial institutions preventing FMD accounts being used as a farm business loan offset, and to introduce early access provisions for farmers in severe drought.

INSURANCE

Retail life insurance reforms

Treasury released draft legislation on 3 December 2015 to implement some of the retail life insurance reforms which have been agreed with industry. The *Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2015 (Cth)* gives ASIC the power to determine the acceptable benefits payable in relation to life risk insurance products. Benefits paid in relation to life risk insurance products may be clawed back by a life insurer from a licensee in the first two years of the policy where the policy is cancelled or not renewed, or the sum insured is decreased.

The new legislation is proposed to start on 1 July 2016, with transitional provisions until 30 June 2018.

PAYMENT SYSTEMS

Payment surcharges regulation

Legislation to control pricing of surcharges by merchants on card transactions has been introduced by the Federal Government, following its response to recommendations in the Financial System Inquiry report. The *Competition and Consumer Amendment (Payment Surcharges) Bill 2015 (Cth)* was introduced in the House of Representatives on 3 December 2015.

Payment surcharges will be excessive where the surcharge is for a kind of payment covered by a Reserve Bank standard or regulations, and the amount of the surcharge exceeds the permitted surcharge referred to in the standard or the regulations.

PRIVACY

Data breach notification

A consultation draft has been released of the proposed new legislation for reporting of serious privacy breaches. Submissions are due by 4 March 2016.

The *Privacy Amendment (Notification of Serious Data Breaches) Bill 2015 (Cth)* would require reporting of a serious data breach to the Australian Information Commissioner and the affected individuals.

The obligation to report would apply to personal information, credit reporting information, credit eligibility information, and tax file number information.

A “data breach” is defined as where there has been unauthorised access to, or unauthorised disclosure of, personal information about one or more individuals, or where such information is lost in circumstances that are likely to give rise to unauthorised access or unauthorised disclosure.

A “serious data breach” is defined as a data breach where there is a real risk of serious harm to the individual to whom the information relates as a result of the data breach. “Serious harm” includes physical, psychological, emotional, economic and financial harm, as well as harm to reputation. The risk of serious harm must be real, not remote. Regulations may define other situations as serious data breaches.

The report must be made as soon as practicable. If an entity suspects but is not certain that a serious data breach has occurred, it would have 30 days to assess whether notification is required.

Failure to report a breach when required will be an interference with the privacy of

an individual. This means that the Information Commissioner will be able to investigate, make determinations, seek enforceable undertakings, and pursue civil penalties for serious or repeated interferences with privacy.

Comprehensive credit reporting rules authorised by ACCC

The Australian Retail Credit Association Ltd (**ARCA**) has received a 5 year authorisation from the ACCC for its Principles of Reciprocity and Data Exchange (**PRDE**). The PRDE is a set of rules for the exchange of credit liability information between credit reporting bodies and credit providers.

The PRDE includes reciprocity provisions: credit providers can only receive consumer credit information from credit reporting bodies up to the same level at which they are willing to supply information.

Authorisation was sought from the ACCC because the PRDE might be regarded as anti-competitive, in breach of the *Competition and Consumer Act 2010 (Cth)*.

AML/CTF

New rules in relation to beneficiaries and PEPs

The AML/CTF Rules have been amended to remove some anomalies where reporting entities may have been required to identify beneficial owners or politically exposed persons even though the reporting entity was not required to identify the customer.

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2015 (No. 2) (Cth)* was made on 1 November 2015.

SUPERANNUATION

Governance reforms will not go ahead

The proposed reforms to introduce a minimum of one-third independent directors for registrable superannuation entity licensees will not proceed because the Government does not have sufficient votes to pass the Bill through the Senate.

DISPUTES AND ENFORCEMENT

Make It Mine penalty decision

The penalty decision in the Make It Mine Finance case was handed down by Justice Beach of the Federal Court on 18 November 2015 (*Make It Mine Finance Pty Ltd, in the matter of Make It Mine Finance Pty Ltd (No 2)* [2015] FCA 1255).

In an earlier decision by Justice Beach in April 2015, Make It Mine Finance (**MIM**) was found to have contravened a number of requirements in the credit legislation. These included breaches of the key disclosure requirements in the National Credit Code and of licensing and responsible lending obligations under the NCCP Act.

In the penalty decision the judge ordered MIM to pay a civil penalty of $1.25 million. This was made up of $500,000 for the key disclosure breaches, $250,000 for the licensing breaches and $500,000 for the responsible lending breaches.

The disclosure and responsible lending breaches affected more than 20,000 contracts each. The licensing breaches (which involved unauthorised credit activity) involved a smaller group of about 3,600 contracts in 2010 and 2011.

The judge did not give much weight to the theme of “truth in lending” in ASIC’s submissions. He was critical of the owner and director of MIM, Mr Andre Lang, for his failure to take on board the advice of his lawyers and his attempts to blame his lawyers. He also made adverse comments about “vacuous” statements of the “good corporate citizen” variety made by MIM.

When deciding the amount of the penalties, the judge said that the guiding principle is deterrence, but not so much that would lead to oppression or punishing the person twice for the same conduct.

GE Money rate advertising

GE Money has responded to concerns raised by ASIC about its rate advertising for personal loans. The ads included claims that the rate offered was one of the best rates in the market, when the products were subject to risk based pricing under which some consumers may have been offered higher rates of interest. GE Money has changed its advertising to address ASIC’s concerns.

ANZ paying $13 million

ANZ bank is paying about $13 million to certain customers holding a Progress Saver Account (**PSA**). These accounts pay bonus interest in a month if deposit and withdrawal requirements for that month are met.

According to ASIC, ANZ misaligned the monthly cycle used to determine whether a PSA holder was eligible for bonus interest payments and the monthly cycle used to calculate bonus interest payments. This issue arose when PSA holders made qualifying deposits or disqualifying withdrawals near the end of their monthly interest cycle.

As a result, PSA holders may have made a qualifying deposit or disqualifying withdrawal on the last day of the previous monthly cycle while believing that it was the first day of a new monthly cycle.

CBA refunding $80 million

The Commonwealth Bank offers a "Wealth Package" product which includes fee waivers, interest concessions and other benefits. Over a period since 2008, these benefits were not uniformly applied by the bank - the bank used manual staff processes to apply many of the discounts. Following a customer complaint which CBA reported to ASIC, the bank investigated the issue. It engaged Ernst & Young to review and provide recommendations to improve its controls and advise on remediation. As a result, refunds of about $80 million will be made to customers. Commencing in October 2015, all affected customers will be progressively contacted about their refund. ASIC announced the refund program by press release on 25 November 2015.

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