



DWYER HARRIS



FINANCIAL SERVICES AND CREDIT

QUARTERLY UPDATE

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CONSUMER CREDIT

Buy now pay later

The Australian Securities and Investments Commission (**ASIC**) has conducted a review of the “buy now pay later” industry and [published](#) its findings in a report. These arrangements are not subject to the national credit legislation. However they are regulated by the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**).

According to ASIC, the industry has grown fivefold from 400,000 to 2 million customers in the financial years 2015-16 to 2017-18. Total balances outstanding as of 30 June 2018 were \$903 million.

The report found that some buy now pay later arrangements resulted in the price of goods being inflated, although this did not appear to apply for lower priced goods under \$2000 and for goods sold at merchants that do not negotiate prices, such as online stores or department stores.

ASIC identified “a real risk” that some buy now pay later arrangements can increase the amount of debt held by consumers and contribute to financial overcommitment, but less than 10% of customers surveyed had been charged missed payment fees more than once on the same transaction in each quarter, compared to 19% of credit card holders who had problematic debt.

ASIC has suggested that its proposed product intervention power should be extended to all credit facilities regulated under the ASIC Act, including buy now pay later arrangements. ASIC also flagged that these products should perhaps be required to comply with the national credit legislation, but ASIC has not yet formed a view that this is necessary. ASIC intends to continue monitoring the industry.

Senate inquiry

On 17 October 2018, the Senate referred an [inquiry](#) into credit and financial services “targeted at Australians at risk of financial hardship” to the Senate Economics References Committee. The Committee is due to report by 22 February 2019. Submissions closed on 9 November 2018. The terms of reference require the Committee to consider:

- the impact on individuals, communities, and the broader financial system of the operations of:
 - payday lenders and consumer lease providers,
 - unlicensed financial service providers including “buy now, pay later” providers and short term credit providers, and
 - debt management firms, debt negotiators, credit repair agencies and personal budgeting services;
- whether current regulation of these service providers meets community standards and expectations and whether reform is needed to address harm being caused to consumers;
- the present capacity and capability of the financial counselling sector to provide financial counselling services to financially stressed and distressed members of the community; and
- any other matters.

Credit card practices

On 18 December 2018 ASIC [released](#) *Report 604 Credit card lending in Australia – An update* (REP 604). It details the changes being made by lenders to help consumers with credit card debt. The report is a follow up to an earlier ASIC *Report 580 Credit card lending in Australia* (REP 580) released in July 2018. After the earlier report, ASIC engaged with major credit providers, who committed to change some of their practices. These include taking proactive steps to help consumers with problematic credit card debt, fairer approaches for balance transfers, and lowering the amount by which consumers can exceed their credit limit.

ACCC mortgage pricing inquiry

The Australian Competition and Consumer Commission (ACCC) [released](#) on 11 December 2018 the final report of its Residential Mortgage Price Inquiry, which monitored the prices charged by the five banks affected by the government's Major Bank Levy between 9 May 2017 and 30 June 2018. The ACCC found that high search costs or effort required by borrowers to find better prices reduces their willingness to shop around, but many borrowers who negotiate with their bank can get a much better price. The ACCC found no evidence that the five banks changed prices specifically to recover the cost of the Major Bank Levy during the price monitoring period. The ACCC believes that the new Consumer Data Right will make it easier for consumers to compare available interest rates.

COMMERCIAL CREDIT

Australian Business Securitisation Fund

The Federal Government [announced](#) on 14 November 2018 a \$2 billion Australian Business Securitisation Fund which will invest in warehouse facilities and securitisations backed by small and medium enterprise (SME) loans. The intent is to enable more funding to smaller banks and non-bank lenders to on-lend to SMEs on more competitive terms. The fund will be administered by the Australian Office of Financial Management.

On 21 December 2018, the Government [released](#) for public consultation an exposure draft of the *Australian Business Securitisation Fund Bill 2018* (Cth) and explanatory materials, and an investment mandate for the Australian Business Securitisation Fund.

Review of unfair contract terms

Treasury [released](#) a discussion paper on 21 November 2018 on the impact of the unfair contract terms (UCT) protections for small business, seeking feedback from stakeholders on the impact of the extension of UCT protections to small business and whether the objective set for the original reform has been met, and also seeking views about whether any changes are required to improve the current framework. The consultation period closed on 21 December 2018.

CROWDFUNDING

ASIC updated guidance on crowdfunding

ASIC [released](#) updated regulatory guides on crowdfunding for the extension of the crowd-sourced funding framework to eligible proprietary companies, which commenced on 19 October 2018: *Regulatory Guide 261 Crowd-sourced funding: Guide for companies* (RG 261) and *Regulatory Guide 262 Crowd-sourced funding: Guide for intermediaries* (RG 262).

FINANCIAL ADVICE

ASIC consults on competence requirements for advice licensees

ASIC has [released](#) proposed updates to *Regulatory Guide 105 Licensing: Organisational competence* (RG 105). The proposals are based on the existing draft guidance published by the Financial Adviser Standards and Ethics Authority (FASEA).

New training standards from 1 January 2019

From 1 January 2019, new professional standards requirements for financial advisers began to apply and will progressively replace existing training standards. ASIC has a dedicated [webpage](#)

on the changes.

FINANCIAL MARKETS

Relief and updated guidance on short selling

In October 2018, ASIC [issued](#) a new legislative instrument that provides relief and modifications to the laws in relation to short selling, and also updated its existing guidance to reflect the legislative instrument.

Review of high frequency trading

ASIC [released](#) its latest review of the impact of high-frequency trading in the Australian equity and Australian-US dollar cross-rate markets on 16 November 2018. The review found that high-frequency traders are responsible for a quarter of all market transactions in equities and the AUD/USD cross rate, but this percentage is trending down.

FINANCIAL SERVICES

ASIC review of school banking

On 18 October 2018 ASIC [announced](#) that it will review school banking programs in primary schools. The review will:

- seek to understand how these programs are implemented and how they are marketed to school communities;
- consider how students are engaging with these programs and the accounts established through these programs while they are at school and after they leave school; and
- assess the benefits as well as the risks of school banking programs, and set out principles for appropriate conduct and good practice.

Banking Code of Practice amendments

The Australian Banking Association (**ABA**) [announced](#) on 10 October 2018 that the Banking Code of Practice will be amended to overhaul the way that banks manage a customer's estate when they have died, and end "fees for no service" across the industry. The ABA will also seek new legislation to end grandfathered payments and trail commissions for financial advisers. The ABA initiatives are in response to the findings of the Royal Commission.

FINANCIAL SYSTEM

The Royal Commission

Following the release of its interim report on 28 September 2018, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry held Round 7 hearings in Sydney from 19 to 23 November and in Melbourne from 26 to 30 November 2018. The Round 7 hearings focussed on causes of misconduct and conduct falling below community standards and expectations by financial services entities (including culture, governance, remuneration and risk management practices), and on possible responses, including regulatory reform. The hearings also considered the role of ASIC and the Australian Prudential Regulation Authority (**APRA**) in supervising the actions of financial services entities, deterring misconduct by those entities, and taking action when misconduct may have occurred. The Royal Commission's final report is due to be submitted by 1 February 2019.

INSURANCE

New draft Life Insurance Code of Practice released

On 12 November 2018, the Financial Services Council [released](#) for public consultation a draft of the new Life Insurance Code of Practice. The consultation period ended on 12 January 2019. Proposed changes to the Code include:

- Banning pressure selling of products and coercive retention tactics.
- Banning medical disclosure checking without reasonable grounds.
- Ensuring customers are no better or worse off at claim time (excluding fraud).
- Improving funeral insurance to ensure people understand what they are buying.
- Separating consumer credit insurance from credit product sales.
- Binding trustees of superannuation funds to the Code.
- Extending coverage of the Code to include all life insurance distributors.
- Reforms to underwriting, claims and mental health, including:
 - Taking individual circumstances of mental health conditions (including history and severity) into account in underwriting.
 - Including people with a mental health condition as “vulnerable”.
 - Greater protection for customers during claims interviews.
 - Plain language explanations of the reasons for non-standard terms, such as exclusions.
 - Clearer questions on application forms.

New reporting standard

APRA [announced](#) on 23 October 2018 a new reporting standard for life insurance, *LRS 750.0 Claims and Disputes*. The standard makes it mandatory for life insurers to report data on claims and disputes. The first public release of data is due in early 2019.

Terrorism Insurance Act review

The terrorism insurance scheme was set up in 2003 under the *Terrorism Insurance Act 2003* (Cth). The Act includes measures to allow the re-emergence of a private reinsurance market for terrorism risk. The responsible Minister must prepare a report every three years reviewing whether the scheme should continue. The 2018 [review](#) recommends that the Act remain in force and that the scheme remain in place.

Disclosure in general insurance

Treasury [released](#) a discussion paper on 16 January 2019 on disclosures in general insurance. The paper follows on the Senate Economics References Committee report into the general insurance industry in August 2017, which made 15 recommendations in relation to the transparency of pricing, disclosure, and competition in the general insurance industry. Submissions are due by 28 February 2019.

MUTUALS

Mutual capital instruments

The Federal Government [released](#) for public consultation on 26 November 2018 an exposure draft of a Bill to introduce a new mutual capital instrument (**MCI**) in the *Corporations Act 2001* (Cth) (the **Corporations Act**) for eligible mutual entities. Submissions closed on 24 December.

Mutual entities will be eligible to issue MCIs if they are registered as public companies, do not have voting shares (other than MCIs) quoted on a prescribed financial market, and are not a

registered entity within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). An eligible mutual entity will also need to provide in its constitution:

- that it intends to be an MCI mutual entity for the purposes of the Corporations Act;
- that all MCIs it issues must be fully paid;
- that dividends in respect of MCIs are non-cumulative;
- the rights attached to MCIs with respect to participation in surplus assets and profits; and
- that debts owed to a holder of an MCI by way of a dividend are to rank ahead of all other debts owed to members in a winding up but rank below all other debts.

PAYMENTS

Gift card draft regulations

Exposure draft regulations have been [released](#) to support the *Competition and Consumer Amendment (Gift Cards) Bill 2018* (Cth). The Bill will set three year minimum expiry dates for gift cards, require gift cards to display expiry dates, and ban post-purchase fees. The regulations will exempt certain types of gift cards and circumstances from some or all of the Bill's requirements, allowing normal business activities to occur, including temporary marketing promotions, secondary markets, free gift cards and time-limited goods and services. The regulations will also exempt some post-purchase fees from the ban. Submissions closed on 31 October 2018.

Non-cash payment facilities exemption extended

ASIC has [extended](#) the financial services licensing exemption for non-cash payment facilities which is set out in *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211*. The exemption in this instrument was due to expire in March 2019. This expiry date has now been removed. The exemption applies to facilities such as traveller's cheques, loyalty schemes and road toll facilities, prepaid mobile arrangements, some single use gift vouchers and low value payment products.

PRIVACY AND DATA

Consumer Data Right

The Federal Treasurer [announced](#) on 21 December 2018 a revised timeline for the introduction of Open Banking and the Consumer Data Right.

- From 1 July 2019, the big four banks will be required to publicly share product data about credit and debit cards, deposit accounts and transaction accounts.
- Also from 1 July 2019, the ACCC and Data 61 will launch a pilot program with the big four to test the performance, reliability and security of the Open Banking system.
- Consumers and fintechs will be invited to participate in these pilots and the ACCC and Data61 will also work closely with other banks who have expressed an interest in participating in Open Banking earlier than originally envisaged.
- On 1 February 2020, product and consumer data for mortgage accounts will be made available.
- Once the ACCC is comfortable with the robustness of the system, banks will publicly share consumer data about credit and debit cards, deposit accounts and transaction accounts, by no later than 1 February 2020.
- From 1 July 2019, the ACCC will begin formally engaging with parties interested in accreditation.

Also on 21 December 2018, the ACCC [released](#) the Consumer Data Right Rules outline for Open Banking. The ACCC previously published a Rules Framework in September 2018 and announced then that it would publish draft Rules for consultation in December 2018. However, the ACCC decided instead to publish a Rules Outline setting out the ACCC's position in relation to version one of the Rules. The Rules Outline highlights a number of areas where the ACCC is further considering the implications of the revised timeline for the scope of version one of the Rules.

The standards body for the Consumer Data Right, CSIRO's Data61, has [released](#) a second draft of technical standards that participants will be required to meet for the sharing of data with consumers.

Treasury has also [prepared](#) a first version of the Privacy Impact Assessment (PIA) for the Consumer Data Right to be created as part of Open Banking, and is consulting on the draft PIA.

PRUDENTIAL

APRA's BEAR expectations

APRA has [published](#) an information paper to assist authorised deposit-taking institutions (ADIs) meet their obligations under the Banking Executive Accountability Regime (BEAR). The information paper is aimed at assisting ADIs prepare to implement the BEAR, and helping the largest ADIs refine and embed the regime. APRA says that it will address enforcement-related issues, including the disqualification of accountable persons and civil penalties under the BEAR, in another paper. APRA's BEAR [webpage](#) also includes templates and forms which can be used.

APRA seeks to increase the loss-absorbing capacity of ADIs to support orderly resolution

APRA [announced](#) in November 2018 proposed changes to the application of the capital adequacy framework for ADIs to support orderly resolution in the event of failure. The APRA discussion paper seeks feedback from interested stakeholders on the proposals. The 2014 Financial System Inquiry recommended that APRA implement a framework for loss absorbing and recapitalisation capacity in line with emerging international practice, sufficient to facilitate the orderly resolution of Australian ADIs and minimise taxpayer support.

APRA ends interest-only benchmark for residential mortgage lending

APRA [announced](#) on 18 December 2018 that it will remove its supervisory benchmark on interest-only residential mortgage lending by ADIs.

Information security standards

In November 2018 APRA released the final version of its prudential standard on information security. For more information see our article [here](#).

Review of private health insurance capital framework

APRA has commenced a [review](#) of the capital standards for private health insurers to ensure they remain sufficient to protect policyholders.

SUPERANNUATION

Productivity Commission report

The Productivity Commission report into superannuation was [released](#) on 10 January 2019. The report recommends that members should be defaulted once only and moved to a new fund only when they choose. Members should be empowered to choose their own super product from a “best in show” shortlist, which would be set by a competitive and independent process, and all MySuper and choice products should have to earn the right to remain in the system under elevated outcomes tests. The Productivity Commission also recommends that trustee boards need to appoint skilled board members, better manage unavoidable conflicts of interest, and promote member outcomes without fear or favour. It also recommends that regulators have clearer roles, accountability and powers to confidently monitor trustee conduct and enforce the law when it is breached.

Review of early release of superannuation benefits

On 21 November 2018, Treasury [released](#) an issues paper with findings and draft proposals for reform of the rules governing the early release of superannuation benefits on compassionate and severe financial hardship grounds. The consultation seeks views on proposals that would relax aspects of the current early release regime and provide more scope for individuals to obtain early release of their superannuation, proposals to strengthen the integrity of the current arrangements and ensure that superannuation is accessed as a last resort in cases of hardship, and proposed changes to the administration of the rules governing early release on compassionate and severe financial hardship grounds. The consultation period ends on 15 February 2019.

Changes to prudential requirements for superannuation

On 11 November 2018, APRA [released](#) a package of changes to prudential requirements for registrable superannuation entity (RSE) licensees. It includes an outcomes assessment that will require RSE licensees to annually benchmark and evaluate their performance in delivering outcomes to all members – covering both MySuper and choice products. It also requires RSE licensees to meet strengthened requirements for strategic and business planning, including management and oversight of fund expenditure and reserves. These requirements are set out in new Prudential Standard *SPS 515 Strategic Planning and Member Outcomes*. The new measures will commence on 1 January 2020.

Extension of disclosure relief

ASIC has [extended](#) the disclosure relief given to superannuation trustees under ASIC Class Order 14/541 which had been due to expire on 1 January 2019. The relief is an exemption from section 29QC of the *Superannuation Industry (Supervision) Act 1993* (Cth) (the **SIS Act**), which provides that when a superannuation fund trustee gives information to APRA under an APRA reporting standard, and the trustee gives the same or equivalent information to another person, or on a website, the fund trustee must ensure that the information is calculated in the same way as the information given to APRA.

Discussion paper on retirement income products disclosure

Treasury [released](#) a consultation paper on a disclosure fact sheet for retirement income products on 10 December 2018. The consultation paper proposes a standardised, simplified document that outlines key metrics and features to help consumers compare different retirement income products. The consultation period ends on 28 March 2019.

AML/CTF

Draft rules amendments for casinos

AUSTRAC has [released](#) draft amendments to the AML/CTF Rules to implement a requirement of the National Consumer Protection Framework for Online Wagering. The amendments will reduce the customer verification period for online gambling accounts from 90 days to a maximum of 14 days. Comments on the draft rules are due by 24 January 2019.

Rules amendments for reporting

A new compilation of the AML/CTF Rules was [published](#) on 21 December 2018 and contains amendments to Chapter 11. The amendments provide that a registered remittance affiliate of a registered network provider, who provided only items 31 or 32 of section 6 of the AML/CTF Act designated services, is exempt from reporting for the 2018 calendar year.

DISPUTES AND ENFORCEMENT

Consumer law protection amendments

The *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) has been passed by the Federal Parliament and received [assent](#) on 25 October 2018. The Act implements certain recommendations of the Australian Consumer Law Review [Final Report](#).

The Act amends the *Competition and Consumer Act 2010* (Cth) (the **CCA**) to:

- allow private litigants to rely on admitted facts from earlier proceedings;
- clarify the operation of unsolicited services provisions and unsolicited consumer agreements in a public place;
- ensure that fees or charges associated with pre-selected options must be included in the single price (e.g., if an airline pre-selects a \$30 baggage fee for customers booking a \$500 flight, this amendment requires the airline to display the headline price as \$530 from the beginning of the booking process);
- strengthen the ACCC's powers to obtain information about product safety;
- enable third parties to give effect to a community service order; and
- clarify the scope of the exemption from the consumer guarantees for the transport or storage of goods.

The Act also amends the CCA and the ASIC Act to:

- extend the unconscionable conduct protections to publicly listed companies; and
- enable the ACCC and ASIC to investigate possible unfair contract terms.

The Act also amends the ASIC Act to correct inconsistent terminology for financial products that involve interests in land, and clarify the application of consumer protections to financial products.

Additional funding to prosecute financial misconduct

The Federal Government [announced](#) on 16 November 2018 that it would be providing an additional \$51.5 million to the Commonwealth Director of Public Prosecutions and the Federal Court of Australia to enable further prosecutions of criminal misconduct by banks and other financial institutions and to ensure that civil claims are dealt with effectively and expeditiously.

The Government has also asked the Attorney-General's Department to conduct a review of whether the Federal Court's criminal jurisdiction should be expanded to include corporate crime.

Any criminal prosecutions for misconduct by banks and other financial institutions are currently heard in State courts. The Government also announced that it will establish a Committee of Regulatory Enforcement Strategy chaired by the Attorney-General's Department and comprising representatives from the relevant agencies that regulate the financial services sector.

Stronger penalties being introduced

The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* (Cth) was [introduced](#) into Federal Parliament on 26 October 2018. The Bill amends the Corporations Act, the ASIC Act, the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**) and the *Insurance Contracts Act 1984* (Cth) to introduce a stronger penalty framework in response to a number of recommendations from the ASIC Enforcement Review Taskforce report. The Explanatory Memorandum states that the amendments in the Bill:

- update the penalties for certain criminal offences in ASIC administered legislation, including:
 - increasing the maximum imprisonment penalties for certain criminal offences;
 - introducing a formula to calculate financial penalties for criminal offences;
 - removing imprisonment as a penalty and increasing the financial penalties for all strict and absolute liability offences;
- introduce ordinary criminal offences that sit alongside strict and absolute liability offences;
- modernise and expand the civil penalty regime by increasing financial penalties for contraventions and making a wider range of offences subject to civil penalties;
- harmonise and expand the infringement notice regime;
- introduce a new test that applies to all dishonesty offences under the Corporations Act;
- introduce relinquishment as a remedy available in civil penalty proceedings;
- clarify that the courts are to give priority to compensating victims over ordering the payment of financial penalties; and
- clarify that contraventions of section 184 of the Corporations Act can occur even when the relevant corporation gains an advantage from the contravention.

ASIC regulatory costs

ASIC has [published](#) a summary of the levies payable by industry sectors to recover ASIC's 2017-2018 financial year regulatory costs. Invoices will be issued in early 2019.

ASIC study on enforceable undertakings

On 25 October 2018, ASIC [released](#) a study on the deterrent effect of enforceable undertakings (EUs) undertaken by a University of New South Wales team. The study found that the majority of peer providers interviewed did perceive a deterrent effect when EUs were entered into by competitors.

ASIC reports on regulatory relief

On 6 December 2018 ASIC [released](#) its report outlining decisions on relief applications under the Corporations Act and the NCCP Act, covering the period April to September 2018.

ASIC review of IDR procedures

On 10 December 2018 ASIC [released](#) research on the consumer experience of internal dispute resolution (IDR) procedures across the financial services sector. ASIC found that 17% of Australians aged 18 or older had considered making a complaint to a financial firm in the preceding 12 months, that 8% went on to make a complaint, and that nearly half of those who did not make a complaint reported that they did not think it would make a difference or it was not

worth their time. According to the research, common obstacles encountered by complainants included difficulty in finding contact details to make a complaint, not having the IDR process explained well at first contact, and uncertainty on the waiting period for a decision. ASIC says that only 45% of complainants who received an unfavourable outcome received an explanation of the decision made against them by the firm and only 21% of complainants whose complaints were not resolved in the required timeframe had the external dispute resolution process explained to them.

ASIC recommends that financial firms closely review the research findings and consider whether their complaints procedures need to be reformed to improve the experience for consumers and to ensure that identified problems are remedied effectively and promptly, and warns that firms should also prepare to engage with ASIC about its review of the complaints handling standards and requirements. ASIC has set up a specialist team to conduct onsite monitoring of the IDR functions at the big four banks and AMP.

From February 2019, ASIC will be consulting publicly on a review of existing IDR guidance set out in *Regulatory Guide 165, Licensing: Internal and external dispute resolution*. ASIC will also be consulting on the data collection and reporting framework for financial firms to report IDR performance data to ASIC on an ongoing basis.

APRA enforcement strategy review

On 12 November 2018 APRA [announced](#) terms of reference for a review of its enforcement strategy. The Review will be led by APRA Deputy Chair John Lonsdale. Mr Lonsdale will be assisted by an independent advisory panel comprising Dr Robert Austin, Sarah Court and Professor Dimity Kingsford Smith. The review will examine APRA's current enforcement strategy and infrastructure and how it interacts with APRA's core supervisory approach. The final report of the review is due by 31 March 2019.

Westpac BBSW penalty

On 9 November 2018, the Federal Court [ordered](#) Westpac to pay a pecuniary penalty of \$3.3 million for contravening section 12CC of the ASIC Act through its involvement in setting BBSW in 2010. The Court also ordered that an independent expert agreed between ASIC and Westpac be appointed to review whether Westpac's current systems, policies and procedures are appropriate, and to report back to ASIC within 9 months. Westpac was also ordered to pay ASIC's costs for the penalty hearing.

APRA takes action against IOOF

On 7 December 2018 APRA [announced](#) a range of actions it was taking in relation to IOOF entities, directors and executives, alleging a failure to act in the best interests of superannuation members.

APRA has commenced proceedings in the Federal Court seeking the disqualification of five persons who were responsible persons of IOOF Investment Management Limited (**IIML**) and Questor Financial Services Limited (**Questor**). The individuals are Managing Director Chris Kelaher, Chairperson George Venardos, Chief Financial Officer David Coulter, General Manager – Legal, Risk and Compliance and Company Secretary Paul Vine, and General Counsel Gary Riordan. In the proceedings APRA is also seeking a declaration that IIML and Questor as RSE licensees breached the SIS Act. APRA considers that IIML, Questor and the relevant individuals did not appropriately acknowledge and address issues concerning conflicts of interest raised by APRA from 2015 to date. APRA alleges that on three occasions in 2015, Questor and IIML contravened the SIS Act by deciding to differentially compensate superannuation beneficiaries and other non-superannuation investors for losses caused by Questor, IIML or their service providers, with superannuation beneficiaries being compensated from their own reserve funds rather than the trustees' own funds or third-party compensation.

APRA has also issued a show cause notice setting out APRA's intention to direct IIML to comply with its RSE licence and to impose additional conditions on the licenses of IIML, Australian Executor Trustees Limited and IOOF Ltd.

BT case – breaches but no personal advice

On 21 December 2018 the Federal Court handed down its [decision](#) on the action brought by ASIC against two Westpac entities, Westpac Securities Administration Limited (**WSAL**) and BT Funds Management Limited (**BT Funds**).

ASIC alleged that WSAL and BT Funds breached their best interests duty in a telephone sales campaign in which they recommended that customers roll out of their superannuation funds into their Westpac-related superannuation accounts, without undertaking a proper comparison of the superannuation funds. The best interests duty only applies when personal advice is given. ASIC also alleged that the companies breached their obligation to do all things necessary to ensure that the financial services covered by their licences were provided honestly, efficiently and fairly. The Court found WSAL and BT Funds breached this obligation, but that personal advice was not provided to the relevant customers.

For personal advice to have been given, the Westpac entities would have had to consider one or more of the customers' objectives, financial situation and needs, or a reasonable person might expect Westpac to have done so. The Court found that no consideration was given, and that a reasonable person would not expect such consideration in the context in which the relevant recommendations and statements of opinions were made. Because personal advice was not given, a breach of the best interests duty did not arise.

However the Court did find that the Westpac entities failed to do all things necessary to ensure their financial services were provided efficiently, honestly and fairly, because the Westpac entities' policy directed callers to encourage customers to roll over their superannuation with limited identification of customers' personal circumstances and no consideration of customers' best interests, or an explanation of the risks, or a sufficient warning that Westpac was not considering such matters.

Financial Circle

Financial Circle, a financial services and credit business, was ordered by the Federal Court to pay penalties of \$8,980,000. [According](#) to ASIC, Financial Circle offered personal loans to consumers of up to \$5,000 that could only be obtained if the consumer agreed to receive and implement financial advice. The advice typically recommended purchasing personal insurance products and switching superannuation providers. Significant advice fees were paid to Financial Circle directly from the consumer's superannuation. The Court found that Financial Circle made false and misleading representations and engaged in misleading and deceptive conduct, engaged in unconscionable conduct, breached its licensee obligations under its AFSL, and engaged in unlicensed credit activity.

Lloyds Auctioneers penalties for excessive payment surcharges

Lloyds Auctioneers and Valuers Pty Ltd has paid [penalties](#) totalling \$37,800 under infringement notices issued by the ACCC for alleged breaches of the excessive payment surcharges law. Lloyds charged customers a 2.25% surcharge when making credit or debit card payments online for auction items purchased. The ACCC decided that these surcharges were excessive and said that they were higher than Lloyds' cost of processing those payments by as much as 1.43%.

Local Appliance Rentals fined

Local Appliance Rentals (LAR) [paid](#) \$257,500 in infringement notices and entered into an EU with ASIC following concerns raised by ASIC about LAR meeting its responsible lending obligations and its supervision of franchisees. LAR provides consumer leases under a franchise model, including in regional and remote areas which have high indigenous populations. The EU requires LAR to remediate affected consumers, appoint an independent compliance consultant, and pay a community benefit payment of \$100,000 to The Smith Family.

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