



DWYER HARRIS



FINANCIAL SERVICES AND CREDIT

QUARTERLY UPDATE

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CONSUMER CREDIT

AFIA announces a Buy Now Pay Later Code of Practice

On 19 December 2019, the Australian Financial Industry Association (**AFIA**) announced that it would start a six-week public consultation on a Code of Practice for Buy Now Pay Later (**BNPL**) providers in mid-January 2020, for implementation in mid-2020.

The consultation is in response to Report 600 *Review of buy now pay later arrangements* from the Australian Securities and Investments Commission (**ASIC**) and from findings of the Senate Economics Reference Committee, which recommended the development of a Code of Practice for the BNPL market.

Lenders appointed for First Home Loan Deposit Scheme

The National Housing Finance and Investment Corporation has [announced](#) the full list of lenders appointed to the initial panel of residential mortgage lenders to offer guaranteed loans under the Federal Government's new First Home Loan Deposit Scheme (**FHLDS**), which commenced on 1 January 2020. The list includes National Australia Bank (**NAB**), Commonwealth Bank of Australia and 25 non-major lenders.

ASIC updates guidance on responsible lending

ASIC [released](#) updated guidance RG 209 *Credit licensing: Responsible lending conduct* on 9 December 2019, which deals with responsible lending obligations contained in the *National Consumer Credit Protection Act 2019* (Cth) (**NCCP Act**). In announcing the changes, ASIC noted that the updated guidance includes a stronger focus on the legislative purpose of the obligations, more detail on where a licensee might undertake more (or less) inquiries and verification steps, new examples about a range of different credit products and different kinds of consumer circumstances, and more detailed guidance on the effect of spending reductions and the use of benchmarks.

New Banking Code of Practice gets ACCC and ASIC authorisation

The Australian Banking Association (**ABA**) [announced](#) on 21 November 2019 that the Australian Competition and Consumer Commission (**ACCC**) had authorised the changes to the Banking Code of Practice, as recommended by the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Banking Royal Commission**).

On 17 December 2019, ASIC also [approved](#) the revised Banking Code of Practice. The previous version of the Banking Code of Practice, which commenced on 1 July 2019, will continue until the new version commences on 1 March 2020.

New unsecured debt collection industry guidelines

The ABA has [released](#) new debt collection guidelines which outline the process that banks should follow before they sell any unsecured debt, and also what should happen once that debt is sold. This voluntary industry guideline will commence from 1 March 2020 and complements the Banking Code of Practice.

ACCC inquiry into home loans pricing transparency

On 14 October 2019, the Federal Government [directed](#) the ACCC to commence an inquiry into home loan pricing. The inquiry will investigate issues such as the rates paid by new versus existing customers, how the cost of financing for banks has affected bank decisions on interest rates, why interest rate cuts by the Reserve Bank of Australia (**RBA**) are not always passed on in full, and what prevents consumers from switching to cheaper home loans.

The ACCC is expected to produce a preliminary report by the end of March 2020, with a final report due by 30 September 2020.

ACCC proposes to grant authorisation for mortgage broking disciplinary rules

The ACCC [announced](#) on 10 December 2019 that it is proposing to grant re-authorisation to the Mortgage and Finance Association of Australia to allow it to continue enforcing disciplinary rules among its members.

ABA consultation on credit card use in gambling

The ABA [released](#) a consultation paper on the use of credit cards for gambling in December 2019. Currently, credit cards can be used when gambling online. However, patrons in a gambling venue of a licensed venue or casino cannot use credit cards or make ATM cash advances on their credit card. Submissions are due by 4 March 2020. In the United Kingdom, the Gambling Commission has [announced](#) a ban on the use of credit cards for gambling, to commence on 14 April 2020.

FINANCIAL ADVICE

ASIC report on financial advice provided by superannuation funds

On 3 December 2019, ASIC [released](#) Report 639 *Financial advice by superannuation funds*, which examines the ways in which superannuation funds help members obtain financial advice, and the quality of personal advice obtained through the funds.

ASIC report on compliance with fee disclosure statement and renewal notice obligations

ASIC [released](#) Report 636 *Compliance with the fee disclosure statement and renewal notice obligations* on 28 November 2019. ASIC reviewed whether the fee disclosure documents provided to clients complied with the law and if not, the nature of the failures. The report found that consumers receiving financial advice could be at risk of receiving wrong information about advice fees, or in some cases, being charged fees after ongoing fee arrangements have terminated.

Ending grandfathered conflicted remuneration

The *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019* (Cth), which removes the grandfathering arrangements for conflicted remuneration and other banned remuneration from 1 January 2021, was [enacted](#) on 28 October 2019.

On 29 November 2019, the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019* (Cth) were [registered](#). These regulations amend the *Corporations Regulations 2001* (Cth) so that conflicted remuneration in relation to financial product advice that remains payable on or after 1 January 2021 will be rebated to affected retail customers by means of payments or other monetary benefits. The regulations also place record-keeping requirements on those AFS licensees who are required to rebate conflicted remuneration.

New disciplinary regime for financial advisers

On 11 October 2019, the Federal Government [announced](#) that it was accelerating the establishment of a new disciplinary system and single disciplinary body for financial advisers as recommended by the Banking Royal Commission. A new, ASIC-enforced Code of Ethics applies from 1 January 2020 and a new single disciplinary body will be established by early

2021.

ASIC [announced](#) on 14 November 2019 that relief for licensees under the current scheme has taken effect. All AFS licensees will be exempt for three years from the obligation in the *Corporations Act 2001* (Cth) (the **Corporations Act**) to ensure that their financial advisers are covered by an ASIC-approved compliance scheme and from the associated notification obligations.

ASIC [outlined](#) its approach to advice licence obligations for the Code of Ethics on 26 November 2019.

ASIC reports on what consumers think about financial advice

On 26 August 2019, ASIC [released](#) Report 627 *Financial advice: What consumers really think*. The report presents independent research on the overall use of financial advisers, motivators and barriers to seeking personal advice, and consumer attitudes towards the financial advice industry.

According to the research, while 41% of Australians intend to get personal financial advice in the future, many of them will not proceed because of perceived barriers such as high costs, significant distrust of the industry, and a perception that financial advice is only for the wealthy.

The research also found that 27% of Australians had received financial advice in the past, and 12% of Australians received advice in the past 12 months. Furthermore, consumers generally sought financial advice for investments such as shares and managed funds, retirement income planning, growing their superannuation and budgeting or cash flow management. The report highlighted that the use of digital advice (also known as robo-advice) is still very low.

FINANCIAL SYSTEM

ASIC draft guidance on financial product design and distribution obligations

ASIC [released](#) draft guidance on 19 December 2019 for the new financial product design and distribution obligations. These obligations come into effect in April 2021 and will require financial product firms to develop products that are designed to meet the needs of the consumers in their intended target market.

ASIC's proposed approach to the guidance is outlined in Consultation Paper 325 *Design and Distribution Obligations*, which is principles-based but also incorporates working examples.

ASIC is seeking public input by 11 March 2020.

APRA update on BEAR product responsibility

On 13 December 2019, the Australian Prudential Regulation Authority (APRA) [announced](#) that it is delaying consultation on the implementation of product responsibility requirements under the Banking Executive Accountability Regime (BEAR). APRA said that it will provide a further update on its revised approach to implementing product accountability in the first half of 2020.

Enhancement to unfair contract term protections

Treasury [announced](#) on 13 December 2019 that it is seeking feedback on policy options to address the issues identified by the Federal Government's [review](#) of the new unfair contract term (UCT) protections for small business contracts conducted in late 2018. The consultation also seeks views on whether any enhanced UCT protections for small business contracts should be extended to consumer and insurance contracts, for consistency purposes.

ACCC report on customer loyalty schemes

On 3 December 2019, the ACCC [released](#) its final report on customer loyalty schemes, which recommends that loyalty schemes better inform consumers, improve their data practices, and stop automatically linking members' payment cards to their loyalty scheme profiles. The report also calls for broader changes to consumer and privacy law on issues including email alerts on expiring points, customer profiling, targeted advertising, and privacy and data collection policies.

National online power of attorney register

The Council of Attorneys-General [announced](#) on 29 November 2019 that agreement has been reached to establish a national register of enduring powers of attorney.

Mortgage broker reforms, funeral insurance, unfair contract terms for insurance contracts

The Federal Government [introduced](#) the *Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2019 Measures)) Bill 2019* (Cth) on 28 November 2019. The Bill will implement some of the Government's responses to the Banking Royal Commission, including:

- a best interests duty for mortgage brokers;
- controls on conflicted remuneration for mortgage brokers and intermediaries (upfront commissions to be linked to the amount drawn down by borrowers instead of the loan amount, the banning of campaign and volume-based commissions and payments, and capping soft dollar benefits);
- funeral expenses policies to be regulated as financial products; and
- a ban on UCTs in standard insurance contracts.

Under the Bill, the mortgage broker and intermediary reforms will commence from 1 July 2020, the UCT reform for insurance contracts will commence from 5 April 2021, and the funeral expenses reform will commence on assent.

ASIC claims overreliance on disclosure can cause consumers harm

On 14 October 2019, ASIC and the Dutch Authority for the Financial Markets [published](#) a joint [report](#) *REP 632 Disclosure: Why it shouldn't be the default*. The report considered the effectiveness of disclosure for financial products on consumer outcomes, and cites case studies from the Netherlands, the UK and the US. It finds that disclosure and warnings can be ineffective and at times even backfire, contributing to more consumer harm.

ASBFEO insolvency practice inquiry

On 10 October 2019, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) [announced](#) an inquiry into the insolvency system to establish if the system encourages practitioners to restructure small or family businesses to turn them around when they are facing financial difficulties.

FINTECH

FinTech and RegTech Senate Inquiry Issues Paper

On 23 October 2019, the Senate Select Committee on Financial Technology and Regulatory Technology, which is currently conducting an inquiry into Australia's FinTech and RegTech industries, [released](#) an issues paper.

INSURANCE

ASIC bans telephone hawking of life insurance and CCI

On 4 December 2019, ASIC [implemented](#) a ban on unsolicited 'cold call' telephone sales of direct life insurance and consumer credit insurance with the *ASIC Corporations (Hawking - Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839*, which took effect from 13 January 2020.

ASIC also updated Regulatory Guide 38 *The hawking provisions* to reflect the ban.

APRA consults on proposed private health insurance capital framework

APRA [released](#) a discussion paper on 3 December 2019 which sets out a proposed structure for the future private health insurance capital framework.

Making handling and settlement of insurance claims a financial service

Treasury [released](#) exposure draft legislation and regulations on 29 November 2019 to remove the exclusion of insurance claims handling and settlement services from the definition of 'financial service' in the Corporations Act, as well as tailoring the application of the existing financial services regime to the new financial service of handling and settling an insurance claim. Feedback was due by 10 January 2020.

APRA proposing changes to prudential standard for insurance in superannuation

APRA [released](#) proposed revisions to Prudential Standard SPS 250 *Insurance in Superannuation* on 25 November 2019 for consultation. The proposed revisions include a requirement for a process that enables beneficiaries to easily opt-out of insurance cover. The revisions also implement recommendations of the Banking Royal Commission that any status attributed to a beneficiary in connection with the provision of insurance is fair and reasonable, and for independent certification that insurance arrangements are in the best interests of beneficiaries. It will also be required that the level and type of insurance cover does not inappropriately erode the retirement income of beneficiaries.

New General Insurance Code of Practice

On 31 October 2019, the Insurance Council of Australia Board [approved](#) a new General Insurance Code of Practice, to be launched in early 2020. All signatories are required to be compliant by 1 January 2021.

ASIC reviews implementation of Voluntary Code of Practice by superannuation industry

On 13 December 2019, ASIC [released](#) Report 646 *Insurance in superannuation: Industry implementation of the Voluntary Code of Practice* on the superannuation industry's progress in improving consumer outcomes in relation to life insurance provided through superannuation.

TPD insurance claims

ASIC [released](#) Report 633 *Holes in the safety net: a review of TPD insurance claims* on 17 October 2019. The report found industry wide problems with the design and the claims handling process for total and permanent disability (TPD) insurance, often held through superannuation. The report identified issues including restrictive policy definitions, a high rate of denied claims, burdensome handling processes, and a lack of claims data to help effectively manage the risk

of consumer harm.

PAYMENTS

New Payments Platform development roadmap for third party payments

NPP Australia [released](#) a development [roadmap](#) on 28 October 2019. It includes developing capability to enable third party payment initiation (direct debit) with consent on the New Payments Platform (**NPP**). The roadmap also includes structured data capabilities, which will support B2B payments and commercialisation opportunities such as payroll, superannuation, and e-invoicing, and a business service to support the domestic leg of inbound cross-border payments.

Cash payment limit draft rules

On 25 October 2019, Treasury [released](#) the exposure draft of the *Currency (Restrictions on the Use of Cash) Rules 2019* (Cth) to accompany the *Currency (Restrictions of the Use of Cash) Bill 2019* (Cth) introduced into Parliament on 19 September 2019.

The Bill gives effect to an economy-wide cash payment limit. The rules specify the types of transactions that are proposed to be exempted from the cash payment limit.

BNPL to be examined - Payment Systems Board

In its Annual Report for 2019, the Payment Systems Board (**PSB**) refers to buy now pay later (**BNPL**) payment facilities. The report notes that merchant fees for BNPL providers are typically much higher than the fees they would pay on other payment methods like credit cards and debit cards, and that most BNPL providers also have rules that prevent merchants from levying a surcharge on the customer to recover those fees. The PSB says that the RBA will be considering if there are any policy issues associated with the growth of BNPL services, as part of its 2020 review of card payments regulation.

PRIVACY AND DATA

ACCC update on Consumer Data Right timeline

On 20 December 2019, the ACCC [announced](#) an update on the timeline for the implementation and launch of the Consumer Data Right (**CDR**) in the banking sector.

Consumers will be able to direct the four major banks to share their credit and debit card, deposit account and transaction account data with accredited service providers from 1 July 2020 (deferred from 1 February 2020). Consumers' mortgage and personal loan data from those banks will be able to be shared after 1 November 2020 (deferred from 1 July 2020).

Obligations to share product reference data (**PRD**) will remain unchanged so that:

- major banks will be required to share PRD for credit and debit cards, deposit accounts, transaction accounts, and mortgage and personal loan accounts from 1 February 2020; and
- non-major banks will be required to share PRD for credit and debit cards, deposit accounts and transaction accounts from 1 July 2020.

APRA's proposal to boost public banking data

APRA [outlined](#) plans on 5 December 2019 to determine that all data collected for its quarterly authorised deposit-taking institution (**ADI**) publications should be considered non-confidential, allowing them to be published. Consultation on APRA's proposed changes are due by 28

February 2020.

CDR rules for ‘intermediaries’ and storage

On 25 November 2019, the ACCC [announced](#) that it had commenced the process to develop additional rules to accommodate ‘intermediaries’ (third party service providers that collect CDR data from a data holder on behalf of an accredited person) into the CDR regime by mid-2020.

Also, the ACCC has clarified its position on the storage of CDR data under the lock-down rules. Storing CDR data does not require specific consent from a CDR consumer. However, where CDR data is disclosed to a third party service provider, CDR consumers must be made aware of this during the consent phase, and the outsourced service provider requirements must be met.

Right to delete Consumer Data Right data

The *Treasury Laws Amendment (2019 Measures No. 2) Act 2019* (Cth) was enacted on 28 October 2019. CDR rules must now include an obligation on accredited data recipients to delete CDR data on request from a CDR consumer.

Draft CDR Privacy Safeguard Guidelines

The Office of the Australian Information Commissioner [released](#) draft CDR Privacy Safeguard Guidelines for public consultation on 17 October 2019. The guidelines aim to assist industry in understanding their privacy obligations under the CDR framework.

PRUDENTIAL

Updated prudential standard on banking credit risk management

On 12 December 2019, APRA [released](#) an updated prudential standard on credit risk management requirements for ADIs.

The updated standard, renamed APS 220 Credit Risk Management and which will come into effect from 1 January 2021, addresses recommendation 1.12 from the Final Report of the Banking Royal Commission. It will require independent valuation of collateral, which must take into account the time taken for realisation of collateral and, to the extent possible, the likelihood of external events such as drought and flood.

The prudential standard incorporates enhanced board oversight of credit risk and the need for ADIs to maintain prudent credit risk practices over the entire credit life cycle. It also provides a more consistent classification of credit exposures.

APRA has also released a draft Prudential Practice Guide APG 220 Credit Risk Management for consultation until 12 March 2020. The draft guide is intended to complement APS 220.

Updated prudential standard on operational risk requirements for ADIs

On 11 December 2019, APRA [released](#) final operational risk requirements for ADIs which are contained in Prudential Standard APS 115 Capital Adequacy: Standardised Measurement Approach to Operational Risk (**APS 115**). The updated APS 115 comes into effect from 1 January 2021 for those ADIs currently subject to existing APS 115, and from 1 January 2022 for all other ADIs.

Capital treatment of First Home Loan Deposit Scheme (FHLDS) mortgages

APRA [released](#) its response to the proposed capital treatment of mortgages covered by the FHLDS on 9 December 2019. APRA will permit ADIs that use the standardised approach to

credit risk to apply a lower capital requirement to eligible FHLDS loans so that they would be treated in a comparable manner to mortgages with a loan-to-valuation ratio of 80 per cent. This would allow eligible FHLDS loans to be risk-weighted at 35 per cent under APRA's current capital requirements.

APRA consults on ADI leverage ratio requirement

On 21 November 2019, APRA [released](#) for consultation a draft prudential standard on the leverage ratio requirement, APS 110 Capital Adequacy, for ADIs.

APRA information paper on governance, culture, remuneration and accountability risks

APRA [released](#) an information [paper](#) on 19 November 2019 titled *Transforming governance, culture, remuneration and accountability: APRA's approach*.

APRA has committed to strengthening and intensifying its approach to overseeing governance, culture, remuneration and accountability (**GCRA**). The information paper sets out APRA's enhanced approach. This includes strengthening the prudential framework, sharpening supervisory focus on GCRA outcomes, and sharing APRA insights with industry and the broader public.

Increased capital requirements for banks with significant investments in subsidiaries

APRA [launched](#) a review of the capital treatment of investments by ADIs in their banking and insurance subsidiaries on 15 October 2019. It has issued a consultation paper proposing to increase the capital that ADIs must hold to offset concentrated exposures to foreign or domestic banking or insurance subsidiaries.

SUPERANNUATION

New consumer advocacy body for superannuation

On 2 December 2019, Treasury [announced](#) a consultation to establish a consumer advocacy body for superannuation. The stated aim of the advocacy body is to become the voice of consumers in policy discussions, and to support access to information to educate and assist consumers in navigating the superannuation system. Feedback was due by 13 January 2020.

ASIC updates guidance on fees and cost disclosure

On 29 November 2019, ASIC [released](#) an updated Regulatory Guide 97 *Disclosing Fees and Costs in PDSs and Periodic Statements* which deals with fees and cost disclosure for issuers of superannuation and managed investment products. The new disclosure requirements will apply to all Product Disclosure Statements (**PDSs**) issued on or after 30 September 2020.

APRA's MySuper heatmap

APRA [released](#) details of a new superannuation heatmap on 15 November 2019 which provides insights, transparency and accountability into the outcomes being delivered by MySuper products. The first heatmap was [published](#) on 10 December 2019. APRA intends to refresh the heatmap at least annually.

APRA guidance on Putting Members' Interests First legislation

On 14 November 2019, APRA [released](#) a letter to all registrable superannuation entity (**RSE**)

licensees outlining new guidance for the implementation of the *Treasury Laws Amendment (Putting Members' Interest First) Act 2019* (Cth). The guidance includes details on the dangerous occupation exception election and withdrawal templates, and answers to frequently asked questions.

ASIC warns trustees to improve member communications

ASIC [issued](#) a letter to the superannuation industry on 30 October 2019 which calls on trustees to improve their communications to members about important reforms impacting member insurance arrangements, including the recent Putting Members' Interests First reforms,.

ASIC warns consumers about SMSFs

ASIC [released](#) a factsheet, *SMSFs: Are they for you?* on 11 October 2019 for consumers and SMSF trustees deciding or reassessing if an SMSF is appropriate for them.

ATO superannuation changes industry roadmap

On 2 October 2019, the Australian Taxation Office (ATO) [released](#) the Superannuation Changes Industry roadmap, which is an overview of the changes impacting the superannuation industry up until the end of December 2020. This information will be updated by the ATO every quarter.

AML/CTF

AUSTRAC risk assessment for mutual banking sector

On 30 October 2019, the Australian Transaction Reports and Analysis Centre (AUSTRAC) [released](#) a [paper](#) titled *Australia's Mutual Banking Sector: Money Laundering and Terrorism Financing Risk Assessment*. In the paper, AUSTRAC assessed the overall money laundering and terrorism financing risk associated with the mutual banking sector to be medium. The rating is based on an assessment of the criminal threat environment, the vulnerabilities in the sector, and the consequences associated with the criminal threat.

AML/CTF amendment Bill

The Federal Government [introduced](#) the *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019* (Cth) on 17 October 2019. The Bill:

- broadens when reporting entities can rely on third party customer identification and verification procedures;
- bans reporting entities from providing a designated service if customer identification procedures cannot be performed;
- prohibits shell bank relationships, and requires banks to conduct due diligence assessments for all correspondent banking relationships;
- introduces new exceptions to the prohibition on tipping off, allowing sharing of suspicious matter reports and related information with external auditors and foreign members of corporate and designated business groups;
- creates a framework for the use and disclosure of financial intelligence;
- creates a single reporting requirement for the cross-border movement of monetary instruments;
- addresses barriers to the successful prosecution of money laundering offences; and
- expands the rule-making powers of the AUSTRAC CEO.

Proposed amendments to Chapter 11 of the AML/CTF Rules

On 15 October 2019, AUSTRAC [released](#) draft amendments to Chapter 11 of the AML/CTF

Rules and Explanatory Notes which remove references to the 2018 reporting and lodgement periods and sets those periods for 2019 and each successive year. The draft amendments also simplify the circumstances when registered remittance affiliates are exempted from compliance reporting obligations.

DISPUTES AND ENFORCEMENT

Treasury consults on compensation scheme of last resort

Treasury [released](#) a discussion paper on 20 December 2019 in relation to the establishment of a compensation scheme of last resort, which was recommended by the Banking Royal Commission and which would be operated by the Australian Financial Complaints Authority (**AFCA**). Submissions are due on 7 February 2020.

ASIC alleges Volkswagen Financial breached responsible lending laws

ASIC [commenced](#) proceedings in the Federal Court of Australia against Volkswagen Financial Services Australia Pty Limited (**Volkswagen Financial**) on 20 December 2019.

ASIC alleges that Volkswagen Financial breached the responsible lending provisions of the NCCP Act between 20 December 2013 and 15 December 2016, in relation to 49,380 loan contracts, by:

- not making reasonable inquiries about borrowers' living expenses for a subset of the loans;
- not taking reasonable steps to verify borrowers' living expenses for each of the loans; and
- not making an assessment regarding whether each of the loans was unsuitable for the relevant consumer.

ASIC also alleges that Volkswagen Financial contravened the requirements to engage in credit activities efficiently, honestly and fairly, and to comply with the NCCP Act.

Westpac ordered to pay \$9.15 million penalty

On 19 December 2019, the Federal Court of Australia [ordered](#) Westpac Banking Corporation (**Westpac**) to pay a penalty of \$9.15 million in respect of 22 contraventions of section 961K of the Corporations Act. The Court found that Mr Sudhir Sinha, a former Westpac financial planner, failed to act in the best interests of his clients, provided inappropriate financial advice, and failed to prioritise the interests of his clients.

ASIC sues NAB for fees for no service and fee disclosure statement failures

ASIC [announced](#) that it had commenced proceedings in the Federal Court on 17 December 2019 against NAB for alleged contraventions of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and the Corporations Act.

ASIC alleges that from 17 December 2013 to 4 February 2019, NAB:

- failed to provide ongoing financial planning services to a large number of customers while charging fees to those customers;
- failed to issue fee disclosure statements (**FDSs**), or issued defective FDSs which contained false or misleading representations in not accurately describing the fees the customer paid and/or the services the customer actually received, which had the effect of terminating the ongoing fee arrangements between NAB and its customer;
- was not lawfully entitled to continue to charge the fees after termination of the

- arrangements with customers;
- failed to establish and maintain compliance systems and processes to detect and prevent these FDS failures; and
- contravened its overarching obligations as an AFS licence holder to act efficiently, honestly and fairly.

ASIC also claims that NAB engaged in unconscionable conduct from at least 31 May 2018 by continuing to charge ongoing service fees when it knew that it had not delivered the services and had issued defective FDSs, or at least knew that there was a real risk that it had engaged in this conduct. ASIC claims that NAB did not stop charging fees to its customers until 4 February 2019.

ASIC sues TAL Life Limited for handling of insurance claim

On 17 December 2019, ASIC [announced](#) that it commenced proceedings in the Federal Court against TAL Life Limited (**TAL**) for alleged breaches of the ASIC Act, the Corporations Act and the *Insurance Contracts Act 1984* (Cth), regarding a claim made by a consumer under her income protection policy in January 2014 after she was diagnosed with a medical condition.

Dover case decision

On 27 November 2019, the Federal Court of Australia handed down [judgment](#) in *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932. The Court found that Dover Financial Advisers engaged in false, misleading or deceptive conduct in relation to statements in its Client Protection Policy.

Potential civil penalty orders for Westpac's AML/CTF breaches

AUSTRAC [applied](#) to the Federal Court of Australia on 20 November 2019 for civil penalty orders against Westpac. The orders sought relate to alleged systemic non-compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) on over 23 million occasions.

It is alleged that Westpac's oversight of the banking and designated services provided through its correspondent banking relationships was deficient. Westpac's oversight of its AML/CTF program was also deficient.

AUSTRAC alleges that Westpac failed to:

- appropriately assess and monitor the ongoing money laundering and terrorism financing risks associated with the movement of money into and out of Australia through correspondent banking relationships;
- report over 19.5 million international funds transfer instructions to AUSTRAC over nearly five years for transfers both into and out of Australia;
- pass on information about the source of funds to other banks in the transfer chain;
- keep records relating to the origin of some of these international funds transfers; and
- carry out appropriate customer due diligence on transactions to the Philippines and South East Asia that have known financial indicators relating to potential child exploitation risks.

On 17 December 2019, APRA [commenced](#) an investigation into possible breaches of the *Banking Act 1959* (Cth) and APRA's prudential standards by Westpac, its directors, and/or its senior managers.

APRA will focus on the conduct that led to the matters alleged by AUSTRAC, as well as Westpac's actions to rectify and remediate the issues after they were identified.

APRA also announced that it had imposed an increase in Westpac's capital requirements of \$500 million to reflect the heightened operational risk profile of the bank.

CommInsure's telephone hawking offences

On 19 November 2019, the Colonial Mutual Life Assurance Society Limited, trading as CommInsure, [pleaded](#) guilty to 87 counts of offering to sell insurance products in the course of unlawful, unsolicited telephone calls via its agent, contrary to the anti-hawking provisions in the Corporations Act. The case follows on from ASIC's 2018 [review](#) of direct life insurance.

CommInsure was [sentenced](#) and fined \$700,000 on 28 November 2019.

ASIC guidance on whistleblower policies

ASIC [released](#) Regulatory Guide 270 *Whistleblower policies* on 13 November 2019, which sets out the components that a whistleblower policy must include to comply with the whistleblower reforms.

AFCA's Datacube complaints monitoring tool

On 7 November 2019, AFCA [launched](#) a new comparative reporting tool known as "Datacube", which allows consumers to see how financial firms such as insurers, banks, financial advisers or superannuation funds have responded to consumer complaints brought before AFCA.

ASIC personal advice case against Westpac subsidiaries

On 28 October 2019, the Full Federal Court [upheld](#) ASIC's appeal against Westpac subsidiaries, Westpac Securities Administration Limited and BT Funds Management Limited. The case concerned the meaning of 'personal advice' in the Corporations Act, including whether personal advice was provided to 15 retail customers in 2 telephone campaigns conducted by members of Westpac's Super Activation Team.

The Full Court reversed the Federal Court's decision, finding that in calls to 14 of the customers, personal advice was provided in breach of the AFS licences held by the subsidiaries, and there was a failure to comply with the 'best interests' duty.

On 25 November 2019, Westpac filed an application seeking special leave from the High Court to appeal the decision.

APRA will not appeal IOOF judgment

On 17 October 2019, APRA [announced](#) that it will not appeal the Federal Court decision of 20 September 2019 to dismiss APRA's court action against IOOF entities, directors and executives.

Court raises doubt about the validity of electronic signatures and split execution

The South Australian Supreme Court handed down judgment in the [case](#) of *Bendigo and Adelaide Bank Limited (ACN 068 049 178) & Ors v Kenneth Ross Pickard & Anor* [2019] SASC 123 on 16 July 2019. The case concerned a loan deed which was executed by company employees by the placing of the electronic signatures of two officers of the company on the deed in an attempt to satisfy the requirements of section 127 of the Corporations Act.

The Court held that for such a deed or agreement to be binding, the signatories must either sign the same physical document, or if they use electronic signatures, they must take additional steps to personally authenticate the electronic signatures appearing on the document.

As there was no evidence of personal authentication by the signing officers, the loan deed was invalidated and the lender could not recover under a guarantee annexed to the loan deed.

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