



DWYER HARRIS



# FINANCIAL SERVICES AND CREDIT

## QUARTERLY UPDATE

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## GENERAL

### COVID-19

The Federal Government has implemented a number of urgent regulatory changes to address the economic impact of COVID-19. Developments up to 25 March 2020 are detailed in our blog post [here](#).

Because of the changes to Government and regulatory agency priorities in response to COVID-19, it is likely that the timing of many of the regulatory developments outlined in this update will be postponed.

### Hayne 2020 Consumer Protection Bill

On 31 January 2020, Treasury released the exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020* (Cth) (the **Hayne 2020 Consumer Protection Bill**) which implements 22 recommendations and 2 additional commitments from the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Banking Royal Commission**). The Hayne 2020 Consumer Protection Bill includes proposed changes to legislation across a number of different subject areas covered by our quarterly update and is referred to throughout this edition.

## CONSUMER CREDIT

### Mortgage broker reform

The *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020* (Cth) was [passed](#) on 6 February 2020 and received assent on 17 February 2020. The Act:

- introduces a best interests duty for mortgage brokers; and
- places controls on conflicted remuneration for mortgage brokers and intermediaries, with the value of upfront commissions 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.

The reforms are scheduled to commence from 1 July 2020.

The Australian Securities and Investments Commission (**ASIC**) has [conducted](#) a consultation on draft guidance about the new best interests duty for mortgage brokers. ASIC's proposed approach to the guidance is outlined in Consultation Paper 327 *Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty*.

The draft guidance is structured around the key steps common to the credit assistance process of brokers, which includes gathering information about the consumer, assessing what is in the consumer's best interests, and presenting information and recommendations. The guidance sets out ASIC's views on what the best interests duty provisions require and steps that mortgage brokers can take to minimise the risk of non-compliance. It also explains the interaction of the duty with the responsible lending obligations.

## ABA approach to credit listings flowing from COVID-19

The Australian Banking Association (ABA) has [announced](#) the approach that member banks will be taking in relation to deferral of loan repayments in the wake of COVID-19. Any Australian who is granted a 6 month deferral on loan repayments on credit products will not have their credit rating affected as a result of that deferral, provided they were up to date with repayments prior to COVID-19. For those customers who are already behind in repayments when they are granted a deferral due to COVID-19, banks will not report the repayment history information, and leave the field blank for the duration of the deferral period.

### COMMERCIAL CREDIT

## Responsible lending relief for small business

COVID-19 exemptions from the responsible lending obligations for small business customers have been put in place with new [regulations](#) made on 2 April 2020. We prepared a guide which you can download [here](#).

The key features are:

- for new credit or leases, or credit increases, there is an exemption from the requirement to assess whether the credit contract, credit increase or consumer lease is unsuitable, and from the requirement to make inquiries and verifications;
- the ban on providing credit assistance for an unsuitable credit contract, credit increase or consumer lease (or providing credit for these, in the case of a credit provider) will not apply;
- the exemption applies for 6 months from 3 April 2020;
- both credit providers and credit assistance providers are exempted;
- the borrower must have (or had in the last 12 months) existing credit or leases with the lender – these facilities do not need to be consumer (regulated) finance;
- for new loans or leases or credit increases, the finance must be partly for the purposes of a small business operated by the consumer (alone or with others) – finance that is wholly or predominantly for business will continue to be exempt from the credit legislation in any event; and
- a small business generally means a business that has either fewer than 100 employees or revenue of \$5 million or less.

## ABA COVID-19 small business relief package

The ABA announced on 30 March 2020 that it was extending the COVID-19 relief package for small business customers (reported in our blog [here](#)) to 30,000 more businesses. The \$3 million loan facilities cap has been increased to \$10 million. The package includes a 6 month deferral of loan payments with interest to be capitalised for up to \$250 billion of loans across all sectors of the economy and will apply on an 'opt-out' basis, subject to certain conditions being met. In the case of commercial property landlords, the landlord must give an undertaking that during the period of interest capitalisation, the landlord will not terminate leases or evict current tenants for rent arrears as a result of COVID-19.

### FINANCIAL ADVICE

## Ongoing fee arrangements and disclosure of lack of independence

Under the Hayne 2020 Consumer Protection Bill, there are proposed new specific obligations on financial services licensees and authorised representatives providing personal financial product advice to retail clients under ongoing fee arrangements, which include requirements to:

- seek annual renewal from clients for all ongoing fee arrangements;
- disclose in writing the total fees that will be charged and the services that will be provided during the following 12 month period;
- obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account; and
- keep appropriate records to demonstrate compliance with the requirements for ongoing fee arrangements.

The proposed Bill will also require financial services licensees and authorised representatives who are authorised to provide personal advice to a retail client to disclose in writing to the client where they are not independent, and why that is the case.

On 10 March 2020, ASIC issued Consultation Paper 329 *Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure (CP 329)*. CP 329 sought feedback on:

- draft legislative instruments that deal with advice fee consents and independence disclosure;
- issues relating to ongoing fee arrangements, including fee disclosure statements and renewal notices; and
- a proposal to issue more guidance in Regulatory Guide 245 *Fee Disclosure Statements* which incorporates the key areas of non-compliance identified in Report 636 *Compliance with the fee disclosure statement and renewal notice obligations*.

ASIC's draft legislative instruments are based on the Hayne 2020 Consumer Protection Bill and will not commence until the legislation takes effect.

## FINANCIAL MARKETS

### ASIC capital raisings relief

ASIC is giving [temporary relief](#) to enable certain 'low doc' offers (including rights offers, placements and share purchase plans) to be made to investors, even if they do not meet all the normal requirements, in order to assist companies that need to raise funds from investors urgently because of COVID-19. The 'low doc' capital raising regime is usually not available if a company has been suspended for a total of more than 5 days in the previous 12 months. ASIC will allow 'low doc' placements, rights issues and share purchase plans where the listed company has been suspended for up to 10 days in the 12 months before the offer, but not for more than 5 days in the period commencing 12 months before the offer and ending on 19 March 2020.

### Treasury consults on stamping fee exemption for listed investment entities

Treasury has [conducted](#) a public consultation on the merits of the current stamping fee exemption in relation to listed investment entities such as real estate investment trusts, and whether the exemption should be retained, removed or modified. Stamping fees are an upfront one-off commission paid to Australian financial services licence (AFSL) holders for their role in capital raisings associated with the initial public offerings of shares. They are considered to be a form of conflicted remuneration.

## FINANCIAL SYSTEM

### Foreign financial services provider reforms

ASIC has rolled out details of the new scheme for regulation of foreign financial services providers (FFSPs).

Under a new ASIC instrument, an FFSP can apply for a foreign Australian financial services licence (**FAFSL**) if the FFSP is regulated outside Australia by certain regulatory regimes which are deemed to be equivalent to Australia's. Holders of a FAFSL will be subject to some of the obligations of AFSL holders, but with exemptions.

An FFSP will not be required to hold a FAFSL if it is engaged in 'inducing' conduct while providing certain funds management services. A separate ASIC instrument provides this fund management relief.

ASIC's existing relief will stay in place until the end of March 2022 to give existing FFSPs sufficient time to apply for relief under the new regime.

ASIC has also [issued](#) an updated regulatory guide on FFSPs.

## **Breach reporting for financial services licensees and credit licensees**

The Hayne 2020 Consumer Protection Bill expands the situations that need to be reported to ASIC by AFSL holders, which include:

- where investigations have been commenced into whether a breach has occurred or is likely to occur, and outcomes of those investigations;
- conduct constituting gross negligence or serious fraud; and
- where there are reasonable grounds to suspect that a reportable situation has arisen in relation to another AFSL holder.

An AFSL holder will have to report to ASIC within 30 calendar days after it reasonably knows that there are reasonable grounds to believe a reportable situation has arisen, and within 10 calendar days of the outcome of investigations.

The Bill will also introduce an equivalent breach reporting regime for Australian credit licensees.

Licensees will be obliged to undertake reference checking and information sharing, and to investigate misconduct by financial advisers and mortgage brokers and appropriately remediate affected clients.

## **Hawking of financial products**

As part of the Hayne 2020 Consumer Protection Bill, hawking of financial products will be prohibited. This will apply to insurance products, superannuation products, and other financial products including managed investment schemes and securities. The definition of hawking for a financial product will be clarified to include selling of a financial product during a meeting, call or other contact initiated to discuss an unrelated financial product.

## **Financial Regulator Assessment Authority**

The exposure draft of the *Financial Regulator Assessment Authority Bill 2020* (Cth) was [released](#) on 31 January 2020. The Financial Regulator Assessment Authority will be established to independently review the effectiveness of each financial regulator in discharging its functions and meeting statutory objectives, and the authority will then report back to the Government on its findings.

## **Implementation of the Financial Accountability Regime**

Treasury [released](#) a proposals paper for the Financial Accountability Regime (**FAR**) on 22 January 2020. The FAR is an extension of the Banking Executive Accountability Regime (**BEAR**) to all entities regulated by APRA and will be jointly administered by APRA and ASIC.

The FAR will require financial entities to clarify responsibilities attaching to particular officers and positions. As a result, individuals will be held to account for failure to perform their obligations.

The consultation period closed on 14 February 2020. The Government intends to implement the FAR by the end of 2020. This timetable may be affected by the impact of COVID-19.

## **ACCC authorisation for assistance to smaller lenders**

The Australian Competition and Consumer Commission (the **ACCC**) has [granted](#) interim authorisation for Australian Securitisation Forum (**ASF**) members to work together to assist smaller lenders maintain liquidity and issue loans to consumers and small businesses in response to the COVID-19 pandemic. The Federal Government has announced a \$15 billion Structured Finance Support Fund designed to assist smaller authorised deposit-taking institutions (**ADIs**) and non-ADI lenders to access funding at competitive prices. The interim authorisation allows ASF members to coordinate their input regarding administration of the scheme.

## **FINTECH**

### **Fintech sandbox**

The *Treasury Laws Amendment (2018 Measures No. 2) Act 2020* (Cth) was [passed](#) on 10 February 2020. It expands on the sandbox introduced by ASIC in 2016. The sandbox allows fintechs to test new products and services for 24 months without obtaining a financial services licence or a credit licence from ASIC and includes a range of consumer protections such as limits on the products and services that can be tested and limits on the financial exposures of retail clients.

### **National Blockchain Roadmap**

On 7 February 2020, the Government [released](#) the National Blockchain Roadmap, which outlines how the Government will work with industry and researchers over the next 5 years to use blockchain technologies for the benefit of the economy. The roadmap sets out the Government's strategy across regulations and standards; skills, capability and innovation; and international investment and collaboration.

## **INSURANCE**

### **Unfair contract terms reform for insurance contracts**

The *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020* (Cth) will ban unfair contract terms in standard insurance contracts from 5 April 2021.

### **Funeral expenses facilities**

The *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020* (Cth) extends the consumer protection provisions of the financial services law to apply to funeral expenses facilities. A funeral expenses facility is a scheme or arrangement for the payment of money when a person dies, for the purpose of paying all or part of the expenses of, and incidental to, the person's funeral, burial or cremation. The changes apply from 1 April 2020. ASIC [issued](#) an information sheet for providers of funeral expenses facilities on 31 March 2020.

## Cap on vehicle dealer commissions

The Hayne 2020 Consumer Protection Bill provides ASIC with the power to impose a cap on the amount of commissions that may be paid to vehicle dealers for add-on insurance products and insurance-like products such as warranties.

## Deferred sales model for add-on insurance

The Hayne 2020 Consumer Protection Bill proposes to introduce an industry-wide deferred sales model for all add-on insurance products except for policies of comprehensive motor insurance. The deferral period will give consumers time to consider the merits of the insurance offered as well as alternative products in the market.

## Use of the terms 'insurance' and 'insurer'

Another part of the Hayne 2020 Consumer Protection Bill would make it a strict liability offence for a business to describe a product or service that they offer as insurance, if the product or service is not insurance and it is likely in all the circumstances that it could be mistakenly believed to be insurance. It would also be a strict liability offence for a business to describe itself as an insurer if the business could mistakenly be believed to offer insurance, and either the product is not insurance or the person is not appropriately registered or authorised under the relevant insurance legislation.

## Duty of disclosure to insurer

The Hayne 2020 Consumer Protection Bill proposes to impose a new duty of disclosure on consumers to insurers, which will replace the existing duty of disclosure in the *Insurance Contracts Act 1984* (Cth) (the **Insurance Contracts Act**). For consumer insurance contracts, consumers would have a duty to take reasonable care not to make a misrepresentation to an insurer. This new duty aims to safeguard consumers against having their claims declined for inadvertently failing to disclose their past circumstances, or because insurers have failed to ask the right questions.

## Avoidance of life insurance contracts

The Hayne 2020 Consumer Protection Bill proposes to amend the Insurance Contracts Act so that an insurer may only avoid a life insurance contract on the basis of non-disclosure or non-fraudulent misrepresentation if it can show that it would not have entered into a contract on any terms with the insured.

## ACCC authorisation for insurers working together

The ACCC has [announced](#) that it has authorised insurance companies and brokers working together to implement relief measures for small businesses. The measures include allowing existing eligible business customers suffering hardship as a result of the COVID-19 pandemic being able to defer their insurance premium payments for up to 6 months, and providing for insurance premium refunds to eligible business customers for any insurance policy cancelled as a result of the pandemic.

## ACCC authorisation for private health insurers

The ACCC has [granted](#) interim authorisation for private health insurers to coordinate on providing financial relief to policyholders during the COVID-19 pandemic and providing broader coverage to include COVID-19 treatment, tele-health and medical treatment at home.

## PAYMENTS

### RBA postpones payments review

The Reserve Bank of Australia (**RBA**) announced on 26 March 2020 that it was putting on hold the Review of Retail Payments Regulation announced in November 2019.

### Senate Committee reports on cash restrictions Bill

On 28 February 2020, the Senate Economics Legislation Committee [released](#) its report on the *Currency (Restrictions on the Use of Cash) Bill 2019* (Cth) and recommended that the Bill be passed, subject to 7 recommendations of the Committee. The Bill was slated to take effect on 1 January 2020, but the Government has indicated that the Bill is not intended to be retrospective and so the date will be amended if the Bill is passed.

## PRIVACY AND DATA

### Inquiry into the Consumer Data Right

On 23 January 2020, the Government [announced](#) the Inquiry into Future Directions for the Consumer Data Right (the **Inquiry**) which will examine ways that the Consumer Data Right (**CDR**) can further support innovation and competition, including how the CDR can be:

- expanded beyond its current “read” access to include “write” access to enable customers to apply for and manage products (including, for Open Banking, by initiating payments) through application programming interfaces;
- leveraged with other frameworks to enhance security, efficiency and the consumer experience including the New Payments Platform (**NPP**);
- used to overcome behavioural and regulatory barriers to allow consumers to switch between products and providers; and
- enhanced by considering global developments with respect to similar reforms, such as the European Union’s Payment Services Directive 2 (**PSD2**).

The Inquiry will be led by Scott Farrell, who undertook the initial review which gave rise to the CDR regime. An Issues Paper was [released](#) by the Inquiry on 6 March 2020, with submissions to close on 23 April 2020.

The focus of the Inquiry will be on the future purpose, use and vision for the CDR, rather than its current implementation or the sectors to which it should be next applied to. The Inquiry will report on its findings by September 2020.

### Consumer Data Right Rules and participation of non-major ADIs

The ACCC has [made](#) the *Competition and Consumer (Consumer Data Right) Rules*, which came into effect on 6 February 2020. The Rules require the 4 major banks to share product reference data (**PRD**) with accredited data recipients, and also give legislative force to consumer data sharing obligations in banking that become mandatory from 1 July 2020. PRD includes information such as interest rates, fees and charges, and eligibility criteria for banking products like credit cards and mortgages.

The ACCC is proposing a revised timetable for the commencement of consumer data sharing by the non-major authorised deposit-taking institutions (**ADIs**) so that mandatory consumer data sharing obligations for non-major ADIs will commence on 1 July 2021 for all product phases. This departs from the original timetable that gave non-major ADIs a 12 month delay for each stage of consumer data sharing compared to the major banks.

The revised timetable also allows additional time for the commencement of direct to consumer data sharing.

## CDR exemption guidelines

On 20 March 2020 the ACCC released guidelines for persons seeking an exemption from the CDR obligations under section 56 of the *Competition and Consumer Act 2010* (Cth).

## OAIC releases CDR Privacy Safeguard Guidelines

On 24 February 2020, the Office of the Australian Information Commissioner (**OAIC**) [released](#) the CDR Privacy Safeguard Guidelines to help businesses participating in the CDR system understand their privacy obligations to consumers. The OAIC finalised the guidelines following consultation with industry, the ACCC and other stakeholders.

The CDR Privacy Safeguard Guidelines build on the existing privacy framework in Australia and complement the ACCC's CDR Rules. There are 13 privacy safeguards for the security and integrity of the CDR regime, which set out the privacy rights and obligations for users of the regime.

## Consultation on Mandatory Comprehensive Credit Reporting Regulations

Treasury [released](#) an exposure draft of the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2020* (Cth) (the **CCR Regulations**) on 14 February 2020. The draft Regulations accompany the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019* (Cth). The mandatory comprehensive credit reporting regime proposed by the Bill would have initially required a large ADI to supply 50% of its consumer credit information to credit reporting bodies within 90 days of 1 April 2020. The Bill has not passed Parliament and the timeframes for the Bill are now likely to be affected by the COVID-19 pandemic.

## Credit Reporting Code (Version 2.1)

Amendments to the *Privacy (Credit Reporting) Code 2014* (the **CR Code**) [commenced](#) on 14 February 2020. The amendments make the following changes:

- Writs and summons are no longer be considered publicly available information, and cannot be listed on credit reports.
- Credit reporting bodies (**CRBs**) are no longer able to use pre-ticked direct marketing consents.
- When requested by an individual, CRBs must notify other CRBs of that individual's ban period request.
- A repayment history information code 'X' will be introduced, which is intended to more accurately indicate when a payment is 180 days or more overdue.

## COVID-19 and privacy

The OAIC has [published](#) guidance on the management of personal information in the context of the COVID-19 pandemic.

## PRUDENTIAL

### APRA reporting standards changes

APRA [announced](#) changes to reporting standards effective 1 April 2020 in response to COVID-19 which it has summarised as follows:

- a temporary extension of the notification period for changes to accountability statements and maps under the BEAR;
- a new reporting standard for ADIs and registered financial corporations (**RFCs**) regarding lending to small and medium enterprises (**SMEs**), to support the Coronavirus SME Guarantee Scheme;
- early implementation of APRA's November 2019 proposal to standardise reporting due dates for ADI quarterly forms, only where that represents an extension of due dates, and extending this to RFCs;
- deferral of the introduction of Reporting Standard ARS 730.1 ABS/RBA Fees Charged and Reporting Standard ARS 722.0 ABS/RBA Derivatives until the March 2021 reporting period;
- deferral of APRA's proposal to determine certain ADI data non-confidential until further notice; and
- a continuation of parallel reporting of Reporting Standards ARS 331.0 Selected Revenues and Expenses (ARS 331.0); RRS 331.0 Selected Revenue and Expenses (RRS 331.0) and the ABS Quarterly Business Indicators Survey (QBIS) until the June 2020 quarter.

On 31 March 2020, APRA also [announced](#) that it was postponing the implementation of Reporting Standard HRS 605.0 Private Health Insurance Reforms Data Collection (HRS 605.0) to allow private health insurers to focus their resources on handling the impacts of COVID-19.

### **APRA approach to RBA term funding facility**

On 30 March 2020 APRA [confirmed](#) its regulatory approach to the Term Funding Facility (**TFF**) announced by the RBA. The TFF commits the RBA to make funding available to ADIs equivalent to 3% of an ADI's total credit outstanding to Australian resident households and non-related businesses. APRA says it will allow ADIs to include the benefit of this when calculating their Liquidity Coverage Ratio, Minimum Liquidity Holdings Ratio and Net Stable Funding Ratio from 31 March 2020, to the extent that they have the necessary unencumbered collateral to access the TFF.

### **APRA guidance on dividends**

APRA [wrote](#) to ADIs and insurers on 7 April 2020 advising that it expects ADIs and insurers to limit discretionary capital distributions in the months ahead, to ensure that they instead use buffers and maintain capacity to continue to lend and underwrite insurance. This includes prudent reductions in dividends, taking into account the uncertain outlook for the operating environment and the need to preserve capacity to prioritise these critical activities.

### **APRA suspends issuance of new licences**

APRA [announced](#) on 7 April 2020 that it has temporarily suspended the issuance of new APRA licences, except in the rare case that the granting of a licence is necessary for APRA to carry out its mandate.

### **APRA letter on climate change**

APRA [released](#) a letter on 24 February 2020 addressed to all APRA-regulated entities advising of its plans to develop a prudential practice guide focused on climate-related financial risks, which will assist entities in complying with their existing prudential requirements.

APRA also plans to design a climate change vulnerability assessment for ADIs. The vulnerability assessment will involve entities estimating the potential physical impacts of climate change on their balance sheet and the risks of a global transition to a low-carbon economy.

The letter also outlines APRA's intention to update superannuation Prudential Practice Guide

SPG 530 *Investment Governance*, which aims to assist a registrable superannuation entity (RSE) licensee to comply with requirements in relation to formulating and implementing an investment strategy, including in relation to environmental, social and governance considerations.

## APRA's policy and supervision priorities

On 30 January 2020, APRA [announced](#) its policy and supervision priorities for the next 12 to 18 months, which include fulfilling the 4 strategic goals of its Corporate Plan: (1) maintaining financial system resilience; (2) improving outcomes for superannuation members; (3) improving cyber-resilience in the financial sector; and (4) transforming governance, culture, remuneration and accountability across all APRA-regulated entities. These priorities have now been affected by the COVID-19 pandemic.

## SUPERANNUATION

### ASIC's review of superannuation trustees' PYSP communications

ASIC has [released](#) the findings from its recent review of superannuation trustees' communications with their members about the *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* (Cth) (PYSP) reforms in REP 655 *Review of member communications: Protecting Your Superannuation Package (PYSP) reform*.

### Advice fees in superannuation

The Hayne 2020 Consumer Protection Bill would remove a superannuation trustee's capacity to charge advice fees from MySuper products while still permitting superannuation trustees to charge fees for intra-fund advice (as administration fees). The draft legislation would also remove the capacity of superannuation trustees to charge advice fees to members (other than fees for intra-fund advice) unless certain conditions are satisfied.

### Regulation of superannuation

The Hayne 2020 Consumer Protection Bill proposes to adjust APRA and ASIC roles in relation to superannuation so that APRA remains responsible for prudential and member outcomes regulation in superannuation while ASIC is the conduct and disclosure regulator. Also, ASIC will be given joint responsibility with APRA for enforceable provisions in the *Superannuation Industry (Supervision) Act 1993* (Cth) which have consumer protection and member outcomes. ASIC and APRA issued a joint [letter](#) to superannuation trustees on 14 February 2020 about how regulatory oversight will operate, assuming the reforms become law.

### No other duty of Registrable Superannuation Entities

The Hayne 2020 Consumer Protection Bill proposes to impose a new licence condition on RSEs which prohibits such trustees from having duties other than those arising from or in the course of the performance of its duties as a trustee of a superannuation fund.

### Superannuation flexibility for older Australians

Treasury has [released](#) a draft Bill and Regulations to allow people aged 65 and 66 to make voluntary super contributions without meeting the work test, and to allow people aged 70 to 74 to receive spouse contributions.

### ASIC concerns about superannuation advice by real estate agents

ASIC [wrote](#) to real estate institutes on 3 April 2020 raising concerns that some real estate agents are advising tenants unable to pay their rent to consider applying for early release of

their superannuation. ASIC is concerned that this conduct may constitute unlicensed financial advice, or not be in the best interests of individuals, in contravention of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

## AML/CTF

### AUSTRAC information on COVID-19

The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) has [published](#) information on its website relating to COVID-19, including how to comply with KYC requirements during the COVID-19 pandemic. The due date for 2019 Compliance Reports has been extended to 30 June 2020.

### AML/CTF amendments approved by Senate Committee

The Senate Legal and Constitutional Affairs Legislation Committee [released](#) its report on the *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019* (Cth) and recommended that the Bill be passed.

## DISPUTES AND ENFORCEMENT

### Stronger Regulators (2019 Measures)

The *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020* (Cth) was passed on 6 February 2020 and received assent on 17 February 2020. The Act implements a number of recommendations from the ASIC Enforcement Review Taskforce Report and will:

- harmonise and align ASIC's various search warrant powers with those contained in the *Crimes Act 1914* (Cth);
- provide ASIC with access to telecommunications intercept material for the investigation and prosecution of serious corporate law offences;
- strengthen ASIC's licensing powers to ensure that credit and financial services licensees, and the people who control them, are fit and proper to be carrying on a credit or financial services business; and
- extend ASIC's banning powers to ban individuals from performing functions in a credit or financial services business.

### Stronger Regulators (2020 Measures)

Treasury [released](#) the exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2020 Measures)) Bill 2020* (Cth) on 31 January 2020. The Bill proposes to provide ASIC with powers to give directions to financial services and credit licensees in order to address or prevent risks to consumers. ASIC can exercise the powers if it has reason to suspect that a licensee has or will contravene the financial services or credit legislation.

The Bill is consistent with the recommendations of the ASIC Enforcement Review Taskforce and provides a non-exhaustive list of directions that ASIC may give, which includes:

- to not authorise persons as authorised representatives of the licensee;
- to not accept new clients;
- to not transfer a specific asset to another person;
- to conduct a review or audit of the activities or records of an authorised representative;
- to appoint, engage or deploy persons to carry out specific tasks;
- to assess the extent of the contravention, identify impacted persons and establish and implement a remediation program; and

- any steps ancillary to the above conduct.

Licensees can appear at a hearing before ASIC and make submissions to ASIC on the matter before a direction is validly issued, unless ASIC considers that a delay in issuing the direction would be prejudicial to the public interest. In such cases, ASIC can issue an interim direction in similar terms, which will expire at the end of a 21 day period.

For licensees that are regulated by APRA, ASIC must consult with APRA before making a direction. However, a failure to consult will not invalidate ASIC's direction.

## ASIC document production guidelines

ASIC [released](#) its document production guidelines and Information Sheet 242 *Document production guidelines* on 2 March 2020. The guidelines are in relation to the production of books, including documents and any other record of information, to ASIC in connection with investigations or surveillance activities. The guidelines explain:

- the preferred methods for producing books to ASIC in electronic and hard copy form;
- the benefits of producing books in accordance with the guidelines;
- the consequences of not following the guidelines; and
- how ASIC requests books to be produced when using a litigation support system.

## ASIC update on enforcement and regulatory work

On 26 February 2020, ASIC [released](#) an update on its enforcement and regulatory work since September 2019, which covers the following matters:

- ASIC's implementation of the Banking Royal Commission recommendations;
- ASIC's enhanced supervision program;
- how ASIC is using its new regulatory tools and powers to identify and address misconduct and poor consumer outcomes; and
- key elements of ASIC's enforcement work, including progress on referrals and case studies from the Banking Royal Commission.

## Enforceable code provisions of financial services industry codes

The Hayne 2020 Consumer Protection Bill proposes to allow ASIC to designate enforceable code provisions which may attract civil penalties if breached, and also creates a new mandatory code of conduct framework.

## Panthera ordered to pay \$500,000 in penalties for undue harassment

The Federal Court of Australia has [ordered](#) Panthera Finance Pty Ltd (**Panthera**) to pay \$500,000 in penalties for unduly harassing 3 consumers to pay disputed debts despite being advised that they were not liable for the debts.

## AMP ordered to pay \$5.175 million penalty

On 5 February 2020, the Federal Court [ordered](#) AMP to pay a penalty of \$5.175 million after it found that AMP had contravened section 961L of the Corporations Act 6 times. The Court found that AMP failed to take reasonable steps to ensure that its financial planners complied with the best interests duty and related obligations under the Corporations Act. The planners were found to have engaged in 'churning', which involves providing advice that results in the cancellation of existing insurance policies and the taking out of similar replacement policies by way of a new application rather than through a transfer.

AMP will also be required to undertake a review and remediation program to ensure financial

planning clients subject to churning by AMP are detected and properly remediated, and a forward looking compliance plan.

## Group CEO held to be officer of subsidiary

The High Court has [held](#) that a person who was the CEO of a corporate group was also an “officer” of a subsidiary in the group, even though he did not hold any formal office in the subsidiary. This decision in *Australian Securities and Investments Commission v King* [2020] HCA 4 confirms that it is not necessary for a person to hold or occupy a named position within a company, or a recognised position with rights and duties attached to it, in order to be “officer” for the purposes of the Corporations Act. The Court found that the CEO acting as overall boss of the group, and having assumed overall responsibility for the subsidiary, were sufficient for him to be an officer of the subsidiary.

## ASIC sues CBA – Royal Commission referrals

ASIC has commenced two separate proceedings against Commonwealth Bank of Australia (CBA) following matters referred to ASIC from the Banking Royal Commission. The actions were announced by ASIC on 16 March 2020. The first action relates to the Agri Advantage Plus Package. ASIC [alleges](#) that benefits were not provided to customers under the package, contrary to the package terms. The second action relates to a customer who notified the bank that he was a problem gambler. ASIC [alleges](#) that CBA did not take this into account and did not verify the customer’s financial situation before offering and approving a credit card limit increase.

## ASIC takes action against Colonial First State

Several Colonial State entities are the defendants in legal proceedings [commenced](#) by ASIC on 16 March 2020. The alleged conduct was the subject of a case study during the Banking Royal Commission. ASIC is alleging misleading or deceptive communications to members of the First Choice Fund about staying in that fund rather than transitioning to Colonial State’s MySuper product.

## Storm Financial directors’ duties

The full Federal Court on 27 March 2020 handed down its [judgment](#) to dismiss an appeal by Emanuel and Julie Cassimatis, former directors of Storm Financial Pty Ltd against a decision that they had breached their duties as directors under section 180 of the Corporations Act.

## ASIC suing Mayfair over advertising

ASIC has begun [proceedings](#) in the Federal Court against companies in the Mayfair 101 group. ASIC is alleging that their advertisements for debenture products are misleading or deceptive, by suggesting that they are comparable to bank term deposits.

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