



DWYER HARRIS



FINANCIAL SERVICES AND CREDIT

QUARTERLY UPDATE

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CONSUMER CREDIT

Best interests duty for mortgage brokers

The Australian Securities and Investments Commission (**ASIC**) has used its powers to [defer](#) the commencement date of the best interests duty for mortgage brokers for six months from 1 July 2020 to 1 January 2021.

On 24 June 2020, ASIC [published](#) its regulatory guide on the best interests obligations, Regulatory Guide 273 *Mortgage brokers: Best interests duty* (RG 273).

ASIC's regulatory approach to lending during the COVID-19 pandemic

The Australian Banking Association (**ABA**) wrote to ASIC on 9 April 2020 seeking guidance on several issues relating to lending during the COVID-19 pandemic, and also requesting regulatory relief on various matters. ASIC responded on 24 April 2020.

- **Responsible lending and hardship variations:** ASIC confirmed that changes such as converting from principal and interest to interest only, six month repayment deferrals with capitalisation of interest, and extending the loan term, can typically be achieved by varying the existing contract rather than entering into a new contract. The responsible lending obligations only apply to new contracts and credit limit increases. ASIC indicated that capitalisation of interest does not necessarily involve an increase in the amount of credit, because the National Credit Code excludes interest charges from the amount of credit.
- **Responsible lending and new loans:** the ABA sought clarification on the appropriateness of lenders making certain assumptions when making unsuitability assessments, including that persons adversely impacted by COVID-19 economic conditions are likely to regain previous income within a reasonable period after restrictions are removed, that any deterioration in asset values is unlikely to be permanent, and that the consumer's requirements and objectives relating to their COVID-19 impacted financial position are likely to be a prominent consideration. ASIC said that the provision of new credit must not be based on assumed changes where these are unlikely to be met. Lenders should not make assumptions without regard to the consumer's actual circumstances, which may indicate that a recovery of income levels is more or less likely. Rather, lenders should seek to form a justifiable view of what is likely. ASIC acknowledged that changes to asset values may be temporary, but pointed out that assets are not generally the primary basis of an assessment. As to the prominence of COVID-19 considerations, ASIC noted that there is no impediment to a high priority being given to shorter-term funding needs. ASIC said that a lender relying on assumed changes to the consumer's financial position should consider how it will respond if the assumed recovery does not occur – or only occurs over a long period of time.
- **Acting efficiently, honestly and fairly:** ASIC acknowledged that in the current situation with the volume of hardship applications being made to the banks, it will not necessarily be unfair to take more time in processing some of the applications. The mere fact that a hardship arrangement results in the consumer paying more for the credit in the longer term as a result of a hardship arrangement would not suggest a failure by the lender to act fairly.
- **Guarantor notice and acceptance:** ASIC declined a request from the ABA to grant an exemption from the requirements of section 61 of the National Credit Code, which relate to how guarantors must be notified of any proposed increase in liability, and agree to be liable for such an increase.

- **Notice of contract changes:** The ABA also requested an exemption from the requirements in sections 71 and 73 of the National Credit Code in relation to giving notice of agreed changes to a credit contract. ASIC in its response noted that these provisions don't apply to changes under the hardship provisions, and said that it would be inappropriate to grant an exemption from these requirements, as it would mean a real risk that consumers would not be properly informed about their obligations.

ASIC also advised that it will be publishing more guidance on its website to address the main questions raised about compliance in the current circumstances.

Home loan pricing report

The Australian Competition and Consumer Commission (**ACCC**) [published](#) its interim report into the market for the supply of home loans on 27 April 2020. The ACCC's inquiry was directed by the Treasurer in October 2019. The ACCC was asked to take into account prices charged for home loans since 1 January 2019. The interim report looked at prices charged for home loans by the big four banks. The report found that while the big four banks considered various factors as they decided whether to pass on the RBA's June, July and October 2019 rate cuts, recovering profits was central to their decisions to not always fully pass through the lower rates to mortgage customers. It was also noted though that headline rates did not accurately reflect the price that most big four bank customers actually paid for their home loans: the overwhelming majority of customers received discounts.

COMMERCIAL CREDIT

JobMaker plan concessional loans

A \$250 million plan targeted at the entertainment, arts and screen sectors [announced](#) on 25 June 2020 includes \$90 million in concessional loans to assist creative economy businesses to fund new productions and events that stimulate job creation and economic activity. The loans will be delivered through commercial banks, backed by a Commonwealth guarantee.

FINANCIAL ADVICE

Temporary financial advice relief for COVID-19

Three temporary relief measures have been [introduced](#) by ASIC with the purpose of assisting industry to provide affordable and timely financial advice during the COVID-19 pandemic.

- **Early access to super:** advice providers will not have to give a statement of advice (**SOA**) to clients when advising on early access to super, and registered tax agents will be allowed to advise on this without having to hold an Australian Financial Services Licence (**AFSL**). A no-action letter has also been issued to allow a greater scope of personal advice by (or on behalf of) superannuation trustees (known as 'intra-fund advice'). The relief is subject to conditions including a requirement to provide a record of advice (**ROA**) and a fee cap of \$300. Providers must establish that the client is eligible for early release of super and the client must have approached the provider for the advice.
- **Timeframe for time-critical SOAs:** advice providers will have up to 30 business days (instead of 5) to give an SOA after time-critical advice is given.
- **Giving ROA:** an ROA will be able to be provided to existing clients even if their personal circumstances have changed as a result of COVID-19.

FINANCIAL MARKETS

ASIC expectations for equity markets

On 14 May 2020, ASIC published a letter to equity market participants [outlining](#) its expectations. ASIC requests that participants take reasonable steps to ensure the number of trades matched from their orders are capable of being handled by their internal processing and risk management systems and, if applicable, their clearing and settlement operations, and support the fair and orderly operation of Australian equity markets. ASIC has also revoked directions issued to nine large equity markets participants on 15 March 2020 to limit the number of trades executed each day.

Stamping fee exemption ends

On 21 May 2020 the Treasurer [announced](#) that the Federal Government would extend the ban on conflicted remuneration to listed investment companies and trusts (**LICs**), with effect from 1 July 2020. This follows a Treasury consultation on the merits of the current stamping fee exemption in relation to LICs. Stamping fees are an upfront one-off commission paid to financial services licensees for their role in capital raisings associated with the initial public offerings of shares. The Treasurer said that extending the ban on conflicted remuneration to LICs will address risks associated with the potential mis-selling of these products to retail consumers, improve competitive neutrality in the funds management industry, and provide long term certainty. Regulations were [made](#) on 25 June 2020 to implement the change.

COVID-19 advertising by managed investment schemes

ASIC says that it has put responsible entities of managed investment schemes on notice that they must ensure their advertising provides clear, balanced and accurate information. In a media [release](#) on 15 June 2020, ASIC reported on risk based surveillance it had conducted of advertising material, website disclosure and product disclosure statements from managed funds during the COVID-19 pandemic. ASIC had serious concerns with unbalanced comparisons, safety and stability representations, and withdrawal representations.

ASIC guidance on internal market making

On 15 April 2020, ASIC [published](#) updated guidance on best practices for internal market making in non-transparent, actively managed funds that are traded on exchange markets. The guidance is found in Information Sheet 230, *Exchange traded products: Admission guidelines*.

FINANCIAL PRODUCTS

DDO delayed

ASIC has used its powers to [defer](#) the commencement of the new design and distribution obligations (**DDO**) for financial and credit products. The start date has moved six months from 5 April 2021 to 5 October 2021. ASIC has also said that it expects to release guidance on DDO sometime in the third quarter of 2020.

How ASIC will use its product intervention power

ASIC has [released](#) a regulatory guide detailing how it will use its product intervention power (**PIP**). Regulatory Guide 272 *Product intervention power (RG 272)* also explains the objective and scope of the PIP, and how a product intervention order (**PIO**) is made.

The PIP empowers ASIC to make individual or market-wide PIOs for financial products and credit products. A PIO could be an order that a product is only sold a particular way, or subject to certain conditions. It can also be an order that a product is only sold to a particular class of persons, or an order banning the issue of a product altogether.

ASIC can only make a PIO if it is satisfied that a product or class of products has resulted, will result or is likely to result in significant consumer detriment.

In RG 272 ASIC explains the concept of 'consumer detriment' and when it is 'significant'. ASIC also discusses what things may result in significant consumer detriment, and when there may be a risk of such detriment to consumers. ASIC notes the factors that it is required by law to take into account when considering if there has been, will be, or is likely to be significant consumer detriment resulting from a product or class of products.

FINANCIAL SYSTEM

Royal Commission legislation deferred

The Federal Government on 8 May 2020 [announced](#) a six month deferral of implementing commitments associated with the Banking Royal Commission, due to the impact of COVID-19. The updated timetable will mean that measures which had been slated for introduction to the Parliament by 30 June 2020 will now be introduced by December 2020, and measures originally scheduled for introduction by December 2020 will now be introduced by 30 June 2021. Commencement dates in exposure draft legislation issued before the COVID-19 pandemic will also be extended by an additional six months.

ASIC to form expert group on youth financial wellbeing

ASIC [announced](#) on 8 May 2020 that it would be establishing a national expert group on youth financial wellbeing "to help identify the most relevant and significant issues impacting young people's financial lives and shape work in this area."

VOI rule changes deferred

The Australian Registrars National Electronic Conveyancing Council (**ARNECC**) has [announced](#) that proposed amendments to the verification of identity (**VOI**) regime, which would require subscribers to first apply the VOI standard before utilising reasonable steps, will no longer form part of Model Participation Rules (**MPR**) Version 6. The original implementation timeline proposed a date of 3 August 2020 for MPR Version 6. This will no longer apply and ARNECC says that it is unlikely that a take-effect date will be implemented in 2020. ARNECC will advise an updated implementation timeline once a pathway out of the pandemic situation is clear and feedback has been fully evaluated.

Litigation funders required to hold an AFSL

The Treasurer [announced](#) on 22 May 2020 that litigation funders would be subject to greater regulatory oversight by being required to hold an AFSL and to comply with the managed investment scheme regime. Currently, litigation funders are exempt from having to hold an AFSL and from being categorised as a managed investment scheme.

Electronic execution and witnessing

In response to COVID-19, emergency measures have been implemented in [Victoria](#) and [Queensland](#) which modify the requirements for witnessing and execution of certain documents.

Temporary changes to the Banking Code

On 25 June 2020, two temporary changes were made to the Banking Code of Practice to reflect that the COVID-19 pandemic may affect banking services. The changes have been [approved](#) by ASIC. The two changes provide that:

- In certain circumstances banks may not always be able to meet the timelines for customer communication outlined in some provisions of the Banking Code of Practice.
- A bank's obligations when lending to small business customers, to engage in a fair, reasonable and ethical manner, and to exercise the care and skill of a diligent and prudent banker, will be informed by the circumstances and effects of COVID-19 generally.

FINTECH

Upgraded regulatory sandbox

Regulations were made in May 2020 to introduce the upgraded regulatory sandbox for financial products and credit products. The regulations are the *Corporations (FinTech Sandbox Australian Financial Services Licence Exemption) Regulations 2020* (Cth) and the *National Consumer Credit Protection (FinTech Sandbox Australian Credit Licence Exemption) Regulations 2020* (Cth). The regulations commence on 1 September 2020.

The changes to the regulatory sandbox allow for a period of up to 24 months to test products. However there are conditions of the exemption. These include restrictions on the types of products which are eligible, client exposure limits and aggregate exposure limits of the product provider. Persons relying on the exemption also have obligations in relation to disclosure, dispute resolution, client money, and statements of advice and responsible lending obligations where applicable. These conditions are detailed in the regulations.

[Legislation](#) to enable the upgraded regulatory sandbox (the *Treasury Laws Amendment (2018 Measures No. 2) Act 2020* (Cth)) received assent in February 2020. The legislation gave additional powers for regulations to grant exemptions under the *Corporations Act 2001* (Cth) (the **Corporations Act**) (for financial products) and under the *National Consumer Credit Protection Act 2009* (Cth) (for credit products) to enable testing of those products, unconditionally or subject to specified conditions.

INSURANCE

ACCC authorises insurance co-ordination

Life insurers have been permitted to co-ordinate so that frontline health workers are not excluded from coverage due to potential or actual exposure to COVID-19. The ACCC [granted](#) the interim authorisation on 14 April 2020. It applies only to new policies and does not include co-ordination on pricing. The ACCC [announced](#) on 10 June 2020 that it was proposing to extend the relief.

ASIC tells industry its expectations

ASIC has [written](#) to general insurance and life insurance companies to explain its expectations on how they should be responding to the COVID-19 pandemic.

The key points covered include:

- keeping commitments under insurance codes of practice;
- flexibility when dealing with consumers;
- handling claims and complaints;
- communications to consumers about coverage; and

- maintaining data on COVID-19 claims.

General Insurance Code of Practice

On 7 May 2020 the Insurance Council of Australia (ICA) [announced](#) changes to the implementation of the new 2020 General Insurance Code of Practice due to the impact of COVID-19. Insurers will bring forward by six months (to 1 July 2020) or earlier where possible, key consumer provisions in Parts 9 (Supporting customers experiencing vulnerability) and 10 (Financial hardship) of the new Code. Full technical compliance with Parts 9 and 10 must be achieved by 1 January 2021. The ICA said that insurers also remained committed to publishing their family violence policy on their websites by 1 July 2020. The Board of the ICA approved deferral of the adoption of the remaining parts of the 2020 Code by six months to 1 July 2021, but this does not prevent insurers from adopting the Code sooner.

Living the Code report

On 1 June 2020 the General Insurance Code Governance Committee [published](#) a report on compliance with the General Insurance Code of Practice titled *Living the Code: Embedding Code obligations in compliance frameworks*. The report contains 22 recommendations on how to make the General Insurance Code of Practice “a living and successful document with valuable outcomes”, including a consumer-centric culture that values honesty and fairness, setting the tone from the top, and robust governance processes.

PAYMENTS

ASIC relief on hawking and product disclosure requirements

ASIC has [granted](#) temporary 6 month relief from some of the requirements of the financial services laws in relation to debit cards, basic deposit products and linked non-cash payment facilities.

The relief is set out in the *ASIC Corporations (COVID-19 – Distribution of Debit Cards) Instrument 2020/401* made on 24 April 2020.

The purpose of the instrument is to facilitate the issue of debit cards by authorised deposit-taking institutions (**ADIs**) to existing customers so that they can access their deposits other than by cash withdrawals, and make payments by card.

The instrument includes an exemption from the anti-hawking provisions of the Corporations Act for an eligible product offered to an eligible account holder in an unsolicited meeting at a place where the ADI carries on business, and where the offer includes an offer to issue a debit card. An eligible product is a basic deposit product or a facility for making non-cash payments that is related to a basic deposit product (which would include a linked debit card). An eligible account holder is an existing customer of the ADI who holds a basic deposit product with the ADI, but not a debit card.

The instrument also includes an exemption from the anti-hawking provisions for similar offers made during unsolicited telephone calls. An ADI will be able to make the offer to a customer who is on the No Contact/No Call register. If the customer is not on the register, the ADI will have to give the customer the opportunity to be added to the register, or to specify the time and frequency of future contacts.

The instrument exempts ADIs from having to provide a PDS for eligible products. This is subject to conditions. The ADI will have to provide certain information to the customer and ask the customer if the customer wants to receive more information about amounts payable if the customer acquires the product. The information that must be provided to the customer can be given, in the case of a debit card, when the card is given to the customer, and otherwise when

the eligible product is issued. If the ADI chooses to provide a PDS, it can be given at the same times.

FX conversion services update

The ACCC has [published](#) an update on improvements to the transparency of foreign currency conversion services. The ACCC released a report on these services in September 2019. It announced in June 2020 that more than half of the 26 prominent online FX suppliers reviewed now have an online calculator on their website, or have improved their existing calculator. The ACCC believes that this will make it easier for consumers to compare the total price of FX services from different suppliers.

PRIVACY AND DATA

Consumer Data Right update

There have been a number of developments in relation to the Consumer Data Right (CDR) in the last quarter.

- In April 2020, 3 month exemptions were [granted](#) to financial services providers for the sharing of product reference data. These exemptions deferred the commencement date from 1 July 2020 to 1 October 2020. The exemptions apply to non-major ADIs as well as to non-primary brand products offered by the major banks. (The major banks have been sharing this data since July 2019).
- On 24 April 2020 a revised draft of the Consumer Data Right Rules (**CDR Rules**) was [published](#), and the amendments proposed took effect from 1 July 2020. The amendments clarify that the accounts which are in scope for the CDR from 1 July 2020 are retail accounts held by an individual. This includes accounts held by sole traders. (Joint accounts are included from 1 November 2020). The amendments also give more flexibility for the methods of withdrawing consumer consent or authorisation, and recognise that a data holder may refuse to seek authorisation or disclose data on a blocked or suspended account.
- On 8 May 2020 the ACCC and the Office of the Australian Information Commissioner (**OAIC**) jointly [released](#) the Compliance and Enforcement Policy for the CDR.
- On 8 May 2020 the ACCC [published](#) the forms to be used by data holders and accredited data recipients for the CDR Rules.
- On 25 May 2020 the ACCC [released](#) finalised guidelines on the CDR accreditation process.
- On 26 May 2020 the ACCC [launched](#) the CDR Register and Accreditation Platform (**RAAP**) and the CDR Participant Portal. The RAAP is described as the “IT backbone” of the CDR. Its functions are to create a trusted data environment where encrypted data is only shared between approved participants, and to provide a portal where business can apply to be accredited.
- On 4 June 2020 the ACCC [issued](#) an exemption for non-major ADIs from their consumer data sharing obligations until 1 July 2021 (Phase 1) and 1 November 2021 (Phase 2). The ACCC also exempted both major banks and non-major ADIs from their direct-to-consumer data sharing obligations until 1 November 2021 and deferred reciprocal data holder obligations until 1 March 2021 (Phase 1) and 1 July 2021 (Phase 2).

- On 22 June 2020 commenced [consulting](#) on draft Rules to authorise third parties who are accredited at the 'unrestricted' level to collect CDR data on behalf of another accredited person.
- From 1 July 2020, consumers have the right to direct major banks to share their credit and debit card, deposit account and transaction account data with accredited service providers. (Mortgage and personal loan data from these banks will be added from 1 November 2020).
- The official Consumer Data Right [website](#) has also been launched.

PRUDENTIAL

New start dates for some APRA standards

On 16 April 2020 APRA [announced](#) the deferral of certain prudential and reporting standards.

The following banking standards have been deferred from 1 January 2021 to 1 January 2022:

- APS 220 Credit Risk Management;
- APS 222 Associations with Related Entities;
- ARS 222.0 Exposures to Related Entities; and
- ARS 222.2 Exposures to Related Entities – Step-in Risk.

CPS 234 *Information Security*, a cross-industry standard, had third-party arrangements transitional provisions scheduled to commence on 1 July 2020. There is now a six month extension to 1 January 2021 available on a case-by-case basis.

The phase-in-dates of initial margin requirements under CPS 226 *Margining and Risk Mitigation for Non-Centrally Cleared Derivatives* have been postponed from 1 September 2020 and 2021 to 1 September 2021 and 2022 respectively.

New reporting standard – Coronavirus SME Guarantee Scheme

APRA [released](#) its new reporting standard ARS 920.0 on 17 April 2020. The standard applies to all lenders participating in the Coronavirus SME Guarantee Scheme. Reporting will occur on a weekly basis and the first due date was 1 May 2020.

APRA FAQs on banking under COVID-19

APRA has [published](#) guidance on banking during the period of disruption caused by COVID-19 and the regulatory response to COVID-19. The frequently asked questions (**FAQs**) cover loan repayment deferrals, residential mortgage lending and market risk capital requirements. APRA plans to periodically update the FAQs.

APRA FAQs on non-centrally cleared derivatives

APRA has [published](#) FAQs on margining and risk mitigation for non-centrally cleared derivatives. These are designed to assist regulated entities to interpret Prudential Standard CPS 226 *Margining and Risk Mitigation for Non-centrally Cleared Derivatives*.

Industry funding Acts

A set of seven Acts have been enacted to amend the industry funding regime for APRA. The amendments raise the statutory upper limit on certain levy amounts that can be determined to an amount of \$10 million for the financial year commencing 1 July 2020. The amendments also allow the indexation factor used in calculating the statutory upper limit to use the most recently

published CPI figures available. The amendments authorise the Commonwealth to recover the costs of a wider range of activities that are funded by the Commonwealth and recoverable through the financial institution supervisory levy framework.

SUPERANNUATION

Early release of super

APRA has commenced a new data collection program in relation to the early release of superannuation which has been temporarily permitted in response to the COVID-19 pandemic.

APRA has also [issued](#) FAQs for superannuation trustees in relation to the early release of superannuation in the context of COVID-19.

Income protection benefits in superannuation

AFCA has [released](#) a fact sheet about income protection benefits in superannuation.

COVID-19 data collection for superannuation

On 24 June 2020 APRA [issued](#) a letter to registrable superannuation entity licensees on a new COVID-19 pandemic data collection to enable assessment of the impact of COVID-19 on the superannuation industry, and the outcomes being delivered to members. APRA also released a set of FAQs included in a collection template spreadsheet.

AML/CTF

AUSTRAC KYC exemption for early release of super

A new rule [issued](#) by AUSTRAC on 9 April 2020 provides an exemption from customer identification requirements from 15 April 2020 to 24 September 2020. The exemption is for superannuation trustees and retirement savings account (RSA) providers not having to carry out their customer identification procedure before making payments to members who are cashing in their super or RSA when the Australian Taxation Office has approved the payment.

COVID-19 identity verification procedures

AUSTRAC has [amended](#) the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* to provide for alternative customer identification procedures during the COVID-19 pandemic.

If a reporting entity is unable to identify a customer because the customer is unable to produce or provide the necessary information or evidence of identity that the customer possesses, due to COVID-19 pandemic measures, it may use alternative identity proofing processes, in accordance with its risk-based systems and controls. This could include, for example, accepting multiple types of secondary identification documents when normally a primary identification document would be required.

If the reporting entity is still unable to establish the identity of a customer using such processes, it may accept a self-attestation from the customer certifying that the information provided in relation to the customer's identity is correct. However a reporting entity must not rely on a self-attestation if it knows or has reason to believe that it is incorrect or misleading, and it must apply appropriate levels of ongoing customer due diligence to deal with money laundering and terrorism financing risk associated with customer identities established using self-attestation.

When a reporting entity's customer identification procedures require it to verify information based on the original, certified copy or certified extract of a document, but it cannot do this because of COVID-19 pandemic measures, the rules amendment allows for the reporting entity to rely on a copy of the document, in accordance with its risk-based systems and controls.

The rules amendments define "COVID-19 pandemic measures" as any measures implemented or recommended by an Australian government body, or any reasonable measures adopted by a reporting entity or other person, to prevent the spread of COVID-19. This would include reasonable measures adopted in a foreign country where a person is located.

KYC changes for family and domestic violence victims

Family and domestic violence has been added to the [AML/CTF Rules](#) as circumstances in which reporting entities may rely upon alternative procedures to identify and verify a customer.

DISPUTES AND ENFORCEMENT

ASIC work schedule and priorities

On 14 April 2020 ASIC [published](#) a comprehensive list of changes to its regulatory work and priorities in light of COVID-19. An updated schedule was [published](#) in June 2020.

More time to respond to AFCA complaints

The Australian Financial Complaints Authority (AFCA) has [extended](#) by 9 days the time period for financial firms to respond to complaints (from 21 to 30 days). This is a temporary measure which AFCA expects will be in place for 6 months. The change took effect on 16 April 2020.

APRA delegates some enforcement powers to ASIC

On 17 June 2020 APRA [reported](#) that it had delegated some enforcement powers to ASIC in connection with the investigation into matters arising from AUSTRAC's proceedings against Westpac. APRA commenced an investigation in December 2019 in relation to possible breaches of the *Banking Act 1959* (Cth) (the **Banking Act**), including the Banking Executive Accountability Regime (BEAR) by Westpac and its directors and senior executives after AUSTRAC made allegations that Westpac had breached AML/CTF laws. As ASIC is also conducting an investigation of the matters alleged by AUSTRAC, APRA and ASIC decided that there may be overlap, and to avoid duplication, ASIC will consider whether the conduct that it is investigating also gives rise to contraventions of the obligations under the BEAR and standards of fitness and propriety under the Banking Act.

ASIC product intervention order upheld, but is being appealed

On 15 April 2020 Justice Stewart of the Federal Court gave his [decision](#) on the challenge to ASIC's product intervention order against Cigno Pty Ltd. His Honour dismissed the application by Cigno, and held that a product intervention order can be made in respect of a class of financial products even if there is only one product or no existing product. The original order made by ASIC in September 2019 concerned a short term credit model used by Cigno. Cigno has now lodged an appeal of the decision.

ASIC alleges breach of duty by Youi

Federal Court proceedings have been [commenced](#) by ASIC against insurer Youi Pty Ltd. ASIC alleges that Youi breached the insurer's duty of utmost good faith in relation to its handling of a building and contents insurance claim by a policy holder. The claim was made in January 2017 and took nearly 2 years to settle.

Restraint orders against Mayfair

Interim orders were [made](#) by the Federal Court on 16 April 2020 in ASIC's actions against Mayfair Wealth Partners Pty Ltd and Online Investments Pty Ltd. The orders prevent these companies from advertising Mayfair debenture products and from using certain words such as 'term deposit'.

Remediation for consumer credit insurance

ASIC has provided an [update](#) on actions to remediate consumers sold consumer credit insurance (CCI). In its update ASIC also noted that lenders reviewed by ASIC in its July 2019 report on CCI have all stopped selling CCI. ASIC reported that lenders and insurers paid over \$128 million to over 312,000 consumers to address ASIC's concerns and that soon, over \$32 million more will be paid to more than 122,000 consumers. ASIC said that it will shortly commence a public review of its current remediation guidance set out in Regulatory Guide 256.

Westpac appeals financial advice decision

Westpac has been granted leave to [appeal](#) to the High Court on the case dealing with the use of general advice by Westpac subsidiaries for the marketing of super consolidation.

The Full Federal Court in October 2019 unanimously overturned the original decision and found that the Westpac entities were giving personal advice to customers when calling them with the aim of persuading customers to consolidate their superannuation with Westpac.

Appeals against AFCA decisions

Two cases involving appeals against the jurisdiction of AFCA have been unsuccessful.

In *QSuper Board v AFCA Limited and Lam* [2020] [FCAFC 55](#), QSuper appealed a decision of AFCA in relation to superannuation, claiming that AFCA had exercised judicial power in contravention of the Australian Constitution. The Federal Court found that AFCA did not exercise judicial power.

In *Investors Exchange Limited v AFCA Ltd and Lornette Pty Ltd ATF Lornette Superannuation Fund* [2020] [QSC 74](#), Investors Exchange Limited (IEL) sought a judicial review of an AFCA determination. IEL argued that AFCA's determination was not open to the facts and that AFCA had not correctly interpreted the documentation provided. The Supreme Court of Queensland found that AFCA's determination was reasonable and that it had been open to the facts, and that AFCA had correctly interpreted the documentation.

AFCA complaints against insolvent firms

AFCA has [paused](#) processing complaints (both new and existing) against insolvent financial firms. Future complaints about insolvent financial firms will be held over until there is more clarity about the proposed compensation scheme of last resort.

Court finds contract terms unfair

Some of the terms in contracts used by Delphi Bank and Rural Bank (divisions of Bendigo and Adelaide Bank) for small business loans have been [held](#) to be unfair by Justice Gleeson of the Federal Court. ASIC commenced proceedings against Bendigo and Adelaide Bank in relation to these terms, even though it was not alleged that the bank had relied on any of the terms in a manner that was unfair or that any customers had suffered any loss or damage as a result of the terms. The bank gave an undertaking to ASIC and to the Court not to use or rely on any of the unfair terms. The relevant terms fell into four general categories: indemnification clauses,

event of default clauses, unilateral variation or termination clauses, and conclusive evidence clauses.

CBA AgriAdvantage \$5m penalty

Commonwealth Bank of Australia (CBA) has been [ordered](#) to pay a penalty of \$5 million by the Federal Court following a finding by the Court that CBA had breached the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and the Corporations Act in relation to its AgriAdvantage Plus Package. CBA was also ordered to publish a corrective notice. ASIC alleged that CBA did not provide benefits to customers in accordance with the terms of the package. CBA admitted to the allegations. The package was a basis of a case study in the Banking Royal Commission.

CBA CCI class action

Class action firm Slater and Gordon [filed](#) a class action against CBA and Colonial Mutual Life Assurance Society Limited on 9 June 2020 in the Federal Court on behalf of persons who held CCI (CBA CreditCard Plus and CBA Loan Protection) for their CBA credit card or personal loan. The class action alleges that the respondents engaged in unconscionable conduct in breach of section 12CB of the ASIC Act; engaged in misleading or deceptive conduct in breach of section 12DA of the ASIC Act; and failed to act in the best interests of, and provided inappropriate advice to, customers in breach of sections 961B and 961G of the Corporations Act.

ASIC loses appeal in Westpac responsible lending case

ASIC has lost its [appeal](#) to the Full Federal Court in the case involving Westpac's responsible lending compliance for mortgage lending. On 26 June 2020 the Court decided by a two to one majority in favour of Westpac.

ASIC's case centred on how Westpac took into account information about the expenses of prospective borrowers. ASIC alleged that Westpac was not complying with its responsible lending obligations because it did not properly take into account this information in the way that ASIC thought it should.

Justice Gleeson, one of the majority judges, found that the language of the credit legislation "does not support the degree of prescription contended for by ASIC."

The other majority judge, Justice Lee, emphasised that the responsible lending obligations were civil penalty provisions: "... One would expect that any norm which, upon contravention, attracts a civil penalty, should be expressed with clarity to ensure that those regulated are left in no doubt as to what they are required to do (or not do)." He said that if Parliament had intended to make it clear in the responsible lending provisions exactly what licensees needed to do before entering into a credit contract, "that effort miscarried."

In summary, the effect of the decision is that credit licensees are free to make their own decisions about how they will use customer information in their responsible lending assessments, as long as they comply with the requirements of the legislation to make reasonable inquiries, and take reasonable steps to verify.

ASIC recently [released](#) updated guidance on responsible lending in December 2019, after the original decision of Justice Perram. ASIC says that it will now carefully consider the Court's decision and any revisions that are necessary to its guidance.

ASIC may decide to seek leave to appeal to the High Court of Australia.

CBA and Colonial First State sued by ASIC

Civil penalty proceedings in the Federal Court have been [commenced](#) by ASIC against CBA and a CBA subsidiary, Colonial First State Investments Limited (**CFSIL**). ASIC alleges that more than \$22 million in banned conflicted remuneration was paid by CFSIL to CBA for the distribution of a superannuation product issued by CFSIL between 1 July 2013 and 30 June 2019. The case is related to a Banking Royal Commission referral to ASIC.

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