



DWYER HARRIS



FINANCIAL SERVICES AND CREDIT QUARTERLY UPDATE

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CONSUMER CREDIT

Responsible lending reforms

On 25 September 2020 the Treasurer [announced](#) proposed reforms to responsible lending regulation. For full details read our article [here](#). The key changes include:

- Removing responsible lending obligations from the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**), with the exception of small amount credit contracts (**SACCs**) and consumer leases.
- Authorised deposit-taking institutions (**ADIs**) will be required to continue to comply with Australian Prudential Regulation Authority (**APRA**) lending standards.
- Key elements of APRA's ADI lending standards will also be applied to non-ADIs.
- Allowing lenders to rely on the information provided by borrowers, with a 'borrower responsibility' principle.
- Loans with a business purpose component (even if not the predominant purpose) will not be subject to the new standards.
- A new cost cap for consumer leases. The cap will be equal to the sum of the base price of the goods hired, permitted delivery and installation fees, multiplied by 4% per month, up to a maximum of 48 months. An establishment fee of up to 20% of the base price of goods can also be charged.
- A common protected earnings regime for SACCs and consumer leases. Where the customer receives 50% or more of their net income from Centrelink, no more than 20% net income can be applied to SACC and consumer lease payments, with no more than 10% of that 20% being SACC repayments; and where the customer receives less than 50% of their net income from Centrelink, no more than 20% of net income can be applied to SACC and consumer lease payments.
- Debt management firms will be required to hold an Australian Credit Licence (**ACL**) when they are paid to represent consumers in disputes with financial institutions.

Changes to the NCCP Act to remove responsible lending obligations are to commence from 1 March 2021, subject to passage of legislation. The caps on consumer leases and protected income provisions will take effect 6 months following the passage of legislation, and the requirement for debt management firms to hold an ACL will be implemented through a change to the credit regulations and commence on 1 April 2021.

ASIC proposed use of product intervention power

On 9 July 2020, the Australian Securities and Investments Commission (**ASIC**) issued a consultation paper for a new use of its product intervention power. The consultation closed on 6 August 2020. The proposed product intervention order (**PIO**) is targeted at continuing credit contracts issued by certain credit providers under an arrangement where one entity provides a continuing credit contract which falls within the exempt range for continuing credit contracts (charging a fixed fee up to a maximum of \$120 in a 12 month period) and an associated entity enters into a retail services agreement with retail clients and charges various fees such as loan processing and collection of payments and ongoing management and administration. The PIO would require that the total amount of fees and charges under a continuing credit contract and under any collateral contract must not exceed the maximum charge permitted under section 6(5) of the National Credit Code or regulations made for the purposes of that subsection.

ASIC expectations when loan deferrals end

ASIC [released](#) a statement on 13 August 2020 of its expectations of retail lenders when COVID-19 loan repayment deferrals end.

ASIC expects that lenders will make reasonable efforts to contact consumers before the repayment deferral expires and continue to provide consumers with information to assist their decision-making. If a consumer does not respond to a communication, ASIC says that lenders

should try to contact the consumer using a range of communication channels.

In the case where a consumer identifies that they cannot resume full repayments, ASIC expects lenders to make reasonable efforts to interact directly with the consumer to allow for more personalised information to be obtained as part of the lender's decision. If the lender decides that it would be appropriate to offer further assistance, processes should be flexible and allow staff to offer tailored assistance. Records should be kept of assistance options. Where the consumer is not satisfied with a lender's response, lenders were reminded by ASIC that they must comply with the dispute resolution requirements set out in ASIC Regulatory Guide 165: *Internal and external dispute resolution*. If a consumer misses a payment after expiry of a repayment deferral, ASIC's view is that lenders should make reasonable efforts to contact the consumer and assess the appropriateness of further assistance.

ASIC says that it is closely monitoring how lenders are assisting consumers who may be experiencing financial difficulty due to COVID-19.

Conflicted remuneration regulations

The *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (Mortgage Brokers) Regulations 2020* (Cth) were [made](#) on 17 September 2020. The regulations include exceptions to conflicted remuneration for mortgage brokers:

- certain monetary and non-monetary benefits given by the consumer;
- monetary benefits that meet a number of specific requirements directed at ensuring the benefits are transparent and do not negatively impact consumers;
- infrequent, low-value non-monetary benefits;
- non-monetary benefits related to education and training; and
- non-monetary benefits related to IT support.

In relation to the second kind of benefit, the requirements include that the benefits are not volume-based benefits or campaign-based benefits. For certain residential property loans, if a benefit is linked to the amount borrowed, the value of any commissions paid within the first year of the loan must be linked to the amount drawn down by the borrower, calculated in accordance with the regulations. Clawback arrangements in relation to monetary benefits must also meet certain requirements.

The regulations also prescribe circumstances in which conflicted remuneration must not be accepted and must not be given.

FHLDS expanded

The Treasurer [announced](#) on 3 October 2020 that an additional 10,000 places will be provided from 6 October 2020 to support the purchase of a new home or a newly built home under the First Home Loan Deposit Scheme. The additional guarantees will be available until 30 June 2021.

COMMERCIAL CREDIT

Foreign investment and lenders

Proposed changes to Australia's foreign investment legislation have been released by Treasury in [July](#) and [September](#) 2020. In the September tranche of changes, the current exemption for lenders and their security trustees will be modified so that the exemption does not apply to a lender or its security trustee taking security over "National Security Assets".

COMPETITION

ACCC authorises ABA members to co-ordinate relief

On 14 August 2020, the Australian Competition and Consumer Commission (ACCC) [granted](#) conditional authorisation to the Australian Banking Association (ABA) until 14 August 2021 for current and future member banks (and suppliers and/or agents, where relevant) and their subsidiary banks to discuss, agree, and give effect to any contract, arrangement or understanding between them for the benefit of their customers with the broad purpose of providing financial relief and assistance to customers in any sector of the economy or customer segment, supporting government initiatives, and ensuring high levels of customer service and access to banking. The ABA had originally applied for authorisation in March 2020. The authorisation came into effect on 5 September 2020.

Authorisation is subject to two conditions. The ABA must notify the ACCC where coordination by member banks involves their suppliers or agents that compete with each other or with member banks, and the ABA must notify the ACCC of any arrangement arising from the approved conduct, prior to its implementation.

CONSUMER PROTECTION

The definition of “consumer” is broadening

The definition of “consumer” in the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) will be amended with effect from 1 July 2021. This will increase the upper limit of transactions for the definition of consumer from \$40,000 to \$100,000. The amendments were [made](#) in the *Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020* (Cth).

CORPORATE

ALRC report on corporate criminal responsibility

The Australian Law Reform Commission (ALRC) report on corporate criminal responsibility was [tabled](#) in Parliament on 31 August 2020. The ALRC has made 20 recommendations for reform. These include:

- No immediate change to individual liability mechanisms, but the Government should consider undertaking a review of the effectiveness of individual accountability mechanisms for corporate misconduct within five years of commencement of the proposed new Financial Accountability Regime.
- Corporate conduct should be regulated primarily by civil regulatory provisions, with the criminal law reserved for the most serious misconduct.
- Systemic law breaking should be addressed through new criminal laws that address systems of conduct or patterns of behaviour that result in multiple contraventions of civil penalty provisions – where the corporation is “reckless” as to whether the system or pattern would result in civil contraventions.
- A proposed list of factors to be considered when sentencing a corporation (for both criminal and civil penalties), including whether there was a corporate culture conducive to compliance at the time of the offence.
- New non-monetary penalty options (e.g. publication or disclosure, community service, corrective action, and being barred from participating in certain commercial activities).

ALRC review of framework for corporations and financial services regulation

The ALRC has been given a [referral](#) for an inquiry and report on changes to the *Corporations*

*Act 2001 (Cth) (the **Corporations Act**) and the *Corporations Regulations 2001 (Cth) (the **Corporations Regulations**)* to simplify and rationalise the law, in particular in relation to the use of definitions in corporations and financial services legislation; the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards; and how the provisions contained in Chapter 7 of the Corporations Act and in the Corporations Regulations could be reframed or restructured so that the legislative framework for financial services licensing and regulation is clearer, coherent and effective; ensures that the intent of the law is met; gives effect to the fundamental norms of behaviour being pursued; and provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors.*

The inquiry is part of the Government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Banking Royal Commission**). The ALRC is required to deliver interim reports by November 2021, September 2022, and August 2023, and the final report is due by 30 November 2023.

Extended relief for online meetings and electronic document execution

The Federal Government [announced](#) on 31 July 2020 that it is extending temporary regulatory relief in respect of online meetings and electronic document execution for a further six months and it has [released](#) draft legislation for comment that would make these changes permanent.

Extended relief on continuous disclosure

On 23 September 2020 the Federal Government [announced](#) that it would continue to provide regulatory relief for businesses that have been impacted by COVID-19 by extending temporary continuous disclosure provisions that apply to companies and their officers for a further six months until 23 March 2021.

FINANCIAL ADVICE

Financial counsellors exemption for small business

On 14 August 2020, an ASIC instrument was [registered](#) to extend relief given to financial counselling agencies from the requirement to hold an Australian financial services licence. An earlier instrument [issued](#) in 2017 had given relief to these agencies when providing financial counselling to consumers for the predominant purpose of assisting them in financial difficulty. The new instrument extends relief to financial counselling agencies when providing financial counselling to small businesses (those businesses with less than 100 employees).

Financial Planners & Advisers Code of Ethics 2019 Guide

The Financial Adviser Standards and Ethics Authority (**FASEA**) [released](#) on 5 October 2020 a consultation draft of the Financial Planners & Advisers Code of Ethics 2019 Guide.

FINANCIAL MARKETS

ASIC relief for IPOs

ASIC has a [published](#) relief instruments to facilitate companies undertaking an initial public offering (**IPO**). In each case relief is provided subject to the issues meeting certain conditions.

- *ASIC Corporations (Amendment) Instrument 2020/721* is designed to facilitate voluntary escrow arrangements under an IPO so that the relevant interests of an issuer, professional underwriter or lead manager arising from the escrow agreement will be disregarded for the purposes of the takeover provisions, but not the substantial holding provisions, in the Corporations Act.

- *ASIC Corporations (IPO Communications) Instrument 2020/722* provides relief for non-promotional communications to security holders and employees of a company proposing to undertake an IPO before lodging a disclosure document with ASIC.

ASIC has also updated its regulatory guidance, Regulatory Guide 5: *Relevant Interests and Substantial Holding Notices* in relation to voluntary escrow arrangements, and Regulatory Guide 254 *Offering securities under a disclosure document* in relation to advertising and publicity for offers of securities that require a disclosure document.

ASIC COVID-19 relief for capital raisings and financial advice

ASIC has [extended](#) the temporary relief for capital raisings and financial advice due to the continuing uncertain impacts of COVID-19 (from 2 October 2020 to 1 January 2021) and the financial advice relief related to the COVID-19 early release of superannuation scheme (from 15 October 2020 to 15 April 2021).

Restriction on retail offers of stub equity in takeovers

In September 2020 ASIC [modified](#) the Corporations Act to prevent stub equity offers of scrip in a proprietary company being made to large numbers of retail target holders in takeover bids and schemes of arrangement. This followed an ASIC consultation process. ‘Stub equity’ typically consists of securities or interests in an unlisted bid or holding vehicle that provides offerees the option to retain continued economic exposure to the performance of the underlying business of an entity as an alternative to another form of consideration (such as cash) that does not provide the same exposure.

FINANCIAL SERVICES

ASIC no-action position on right-of-use assets

On 7 July 2020 ASIC [issued](#) a temporary no action position for Australian financial services licensees in relation to potential breaches of the financial resource requirements for licensees, arising from recent changes to the accounting treatment of lease assets.

New ASIC instrument on litigation funding

From 22 August 2020, operators of litigation funding schemes have been required to hold an Australian financial services licence, and litigation funding schemes are generally subject to the managed investments scheme regime in Chapter 5C of the Corporations Act.

On 21 August 2020, ASIC [issued](#) the *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* to manage the transition to the new regime. The instrument includes relief from certain requirements including:

- the obligation to give a product disclosure statement to passive members of the scheme;
- the obligation to regularly value scheme property;
- the statutory withdrawal procedures for members who withdraw from a class action under court rules; and
- the requirement to disclose detailed fees and costs information and information about labour standards or environmental, social or ethical considerations.

In addition, ASIC issued a no-action position in relation to the obligation under Chapter 2C of the Corporations Act to set up and maintain a register of members of a registered litigation funding scheme.

ASIC warns about registered scheme asset valuations

ASIC has [reminded](#) responsible entities of registered schemes of their obligation to ensure that valuations of their managed fund assets are regular and reasonably current, having regard to the nature of the assets.

ASIC says that reviewing valuation practices among investment managers is one of its focus areas for this financial year.

ASIC has noted that during COVID-19, responsible entities may face additional challenges in valuing illiquid assets due to the increased economic and financial uncertainties. If valuations are uncertain for a material proportion of a scheme's assets, ASIC says that the responsible entity should consider whether it is in a position to establish a reliable unit price and, if unable to do so, may need to temporarily suspend entry and exit from the scheme. ASIC may take regulatory action against responsible entities that do not comply with their obligations to provide fair and reasonable valuations of fund assets.

ASIC updates guidance on fee and costs disclosure

ASIC has [released](#) updates to the fees and costs disclosure regime for issuers of superannuation and managed investment products in Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements* and the associated legislative instrument (*ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070*).

FINANCIAL SYSTEM

Electronic transactions amendments

Amendments were [made](#) on 23 July 2020 to the *Electronic Transactions Regulations 2000* (Cth) (**ETR**). The ETR lists a number of sections in Commonwealth legislation which are excluded from the *Electronic Transactions Act 1999* (Cth) (**ETA**). The amendments have removed some of these exclusions, which means that the ETA can now be relied on under those legislative provisions for sending electronic copies instead of paper, and electronic execution, when applicable. In relation to financial services and credit, the amendments will allow credit providers to use electronic communications to provide guarantees, copies of guarantees, and information regarding any increase in liabilities under guarantees under the National Credit Code. The amendments have also added some items to the list of excluded provisions, which means that the ETA can no longer be relied on for these items. These include certain sections of the *Banking Act 1959* (Cth) in relation to the production of books and records.

FINTECH

ASIC guidance on regulatory sandbox

ASIC has [released](#) guidance on the enhanced regulatory sandbox (**ERS**), which commenced on 1 September 2020. The ERS expands on the ASIC sandbox and allows for a longer testing period (of up to 24 months) for a broader range of financial services and credit activities and for a wider range of businesses (including existing licensees).

Senate fintech/regtech report

In September 2019, the Senate established a Select Committee on Financial Technology and Regulatory Technology. The Committee is chaired by Senator Andrew Bragg. The interim report of the Committee was [tabled](#) on 2 September 2020. The report contains 32 recommendations. Some of the recommendations which are particularly relevant to the financial services sector include:

- the Corporations Act and other relevant legislation and regulations be amended in order to allow for the electronic signature and execution of legal documents;
- relevant regulations be amended in order to enable the witnessing of official documents via videoconferencing or other secure technological means;
- the Digital Identity reforms led by the Digital Transformation Agency be accelerated in order to deliver a national, economy-wide framework for the operation of a federated digital identity ecosystem as soon as possible;
- the Australian Government release the final Treasury report on Initial Coin Offerings when it is completed;
- the Australian Government provide the Council of Financial Regulators (**CFR**) with a competition mandate and that the CFR regularly report on competitive dynamics in the Australian financial services market;
- the Australian Government establish a framework for the CFR, supported by Austrade, to regularly consider and report on Australia's external competitive position in financial services, including measuring technology adoption and innovation;
- the Australian Government establish a market basis for determining the success of Australia's financial regulators in supporting a pro-innovation and pro-competition culture in financial services;
- the Australian Government establish a culture of innovation and competition in financial services by supporting self-regulation where innovative products emerge, whilst ensuring strong consumer protection;
- New Payments Platform Australia regularly report on implementation progress of the NPP roadmap in order to drive wider access to the platform;
- if the ACCC finds poor industry adherence to its best practice guidance for foreign currency conversion services and international transaction fees, the development of a market code of best practice to promote integrity and transparency within the foreign exchange market should be considered;
- the Australian Government establish a new national body to consolidate regulatory responsibilities in relation to the implementation of the Consumer Data Right (**CDR**);
- the ACCC, or the new proposed national CDR body, finalise the rules for intermediary and third party access to CDR banking data by late 2020, and enable intermediaries to enter the CDR ecosystem as soon as possible thereafter;
- the Australian Government work with the banking industry to establish and implement targeted campaigns to educate consumers on the CDR and the opportunities that Open Banking provides;
- the Australian Government maintain existing regulatory arrangements in relation to digital data capture;
- the Australian Government expand the CDR to include other financial services, starting with the superannuation sector and then including sectors such as general insurance; and
- the Australian Government foster a culture where superannuation funds invest more widely, including in Australian startups, without undermining the sole purpose test.

Digital Business Plan

The Federal Government has [announced](#) funding of almost \$800 million for a JobMaker Digital Business Plan. Key elements include:

- \$256.6 million to develop a Digital Identity system to enable more secure and convenient engagement with government services, and in future, the private sector.
- Funding to enable the full implementation of the Modernising Business Registers program, to allow businesses to view, update and maintain their business registry data in one location.
- More funding to support the rollout of the CDR to the banking and energy sectors.
- \$22.2 million to support small business operators take advantage of digital technologies.
- \$11.4 million for a new regulatory technology commercialisation initiative to improve

- compliance and directly support Australian digital technology firms.
- \$9.6 million to support fintechs to export financial services and attract inward investment.
 - \$6.9 million for two blockchain pilots directed at reducing business compliance costs.
 - Mandating the adoption of electronic invoicing by 1 July 2022 for all Commonwealth government agencies.
 - Consulting on making permanent the temporary reforms to allow companies to hold virtual meetings and execute documents electronically.
 - Reviewing the regulatory architecture applying to the payments system.
 - Reforming the regulation around stored-value facilities in line with the recommendations of the CFR.

FUNDS

ASIC relief for hardship withdrawals from frozen funds

ASIC has [announced](#) relief measures for managed funds to facilitate withdrawals by members facing financial hardship during the COVID-19 pandemic. The relief measures have been issued in a legislative instrument that extends to all responsible entities (**REs**) of registered managed investment schemes that have become 'frozen funds'. ASIC previously granted hardship relief to REs of frozen funds on a case-by-case basis only.

INSURANCE

Add-on insurance – ASIC consults

ASIC has [proposed](#) a product intervention order (**PIO**) for the sale of add-on insurance and warranty products sold with motor vehicles, following an earlier Consultation Paper 324 *Product intervention: The sale of add-on financial products through caryard intermediaries* (CP 324) released in October 2019. The proposed PIO takes account of submissions received on CP 324 and would ban the arranging or issue of add-on motor vehicle financial risk products, except as permitted by ASIC in the order. Products covered would include warranties, consumer credit insurance, 'GAP' insurance, mechanical breakdown insurance and purchase protection insurance, and tyre and rim insurance, among others. The PIO would impose a four day period between purchasing a car and purchasing an add-on insurance or warranty product. Manufacturer warranties, statutory warranties and comprehensive insurance would be exempt.

The prohibitions would also not apply if the product is issued for no consideration, or in the case of a new product issued when a loan or lease is extended (if the client acquired the same product at the beginning of the loan or lease), or when personal advice is given by a financial services licensee.

An intermediary will also be prohibited from requiring a retail client to sign an acknowledgement to the effect that if the client chooses not to obtain the product, the client is likely to be required to make payment from their own moneys instead of claiming under the product.

The proposed PIO contains special provisions relating to mechanical risk products, which include mechanical breakdown insurance and warranty products. The PIO will prohibit the arranging or issue of such products unless certain levels of cover are provided.

INSOLVENCY

Extension of temporary relief for financially distressed businesses

The Federal Government [announced](#) on 7 September 2020 an extension of regulatory relief for businesses impacted by COVID-19 by continuing temporary insolvency and bankruptcy protections until 31 December 2020. The Government will also make regulations to extend the

temporary increase in the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands they receive. The temporary relief for directors from any personal liability for trading while insolvent will also be extended.

Insolvency reforms for small business

On 24 September 2020 the Federal Government [announced](#) proposed changes to Australia's insolvency framework for small businesses. The Treasurer claims that the reforms will cover around 76 per cent of businesses subject to insolvencies today. The proposed commencement date is 1 January 2021, subject to passing of legislation. Draft legislation has been [released](#) for comment. Key elements of the reforms include:

- The introduction of a new debt restructuring process for incorporated businesses with liabilities of less than \$1 million.
- Moving from a "creditor in possession" model to a "debtor in possession" model, to allow eligible small businesses to restructure their existing debts while remaining in control of their business.
- A 20 business day period for the development of a restructuring plan by a small business restructuring practitioner, followed by 15 business days for creditors to vote on the plan.
- A new, simplified liquidation pathway for small businesses to allow faster and lower cost liquidation.

The aim is to provide an alternative to the voluntary administration regime for small non-complex businesses and to reduce the complexity and cost of the administration process, providing a greater role for the company directors during the process, and allowing them to retain control over the company. The changes are intended to encourage more small businesses to seek debt restructuring earlier.

PERSONAL PROPERTY SECURITIES

Consultation on PPS and financial products

The Attorney-General's Department has [issued](#) a consultation paper on the practical impact of the *Personal Property Securities Act 2009* (Cth) on the trading of financial products. It is seeking comments on whether the current provisions in the legislation should be amended, the reasons for any proposed changes, and the nature of any proposed changes.

PRIVACY AND DATA

Consumer Data Right update

- **Consumer data launch:** The Consumer Data Right (**CDR**) launched on 1 July 2020 with customers of the four major banks enabled to share their consumer data from some personal accounts (e.g. savings accounts and term deposits) via requests from accredited persons. From 1 November 2020 customers of the four major banks will be able to share their consumer data from home loans and personal loans, via requests from accredited persons. Joint accounts, closed accounts, direct debits, scheduled payments and payees will also be available.
- **Pushed Authorisation Request (PAR) exemptions granted to major banks:** On 13 August 2020, the ACCC [granted](#) exemptions to defer the scheduled commencement date for implementation of the Pushed Authorisation Request (**PAR**) component in the Data Standards by three months until 1 February 2021.
- **Product reference data clarification:** The ACCC and Data Standards Body (**DSB**) published [guidance for data holders](#) that voluntarily share product reference data prior to 1 October 2020.

- **Joint accounts guidance:** The ACCC and DSB, in conjunction with the ABA and some of its members, has published some [joint accounts guidance scenarios](#) to help guide data holders and accredited data recipients as they implement joint account-related rules and data standards.
- **Support Portal:** The [Support Portal](#) is now live. In collaboration with the DSB, the ACCC will be regularly updating this knowledge base with information about the CDR.
- **FAQs:** the ACCC has published frequently asked questions for [accredited data recipients](#) and [data holders](#) about the CDR on-boarding process on the CDR website and CDR [Support Portal](#).
- **Mandatory consumer data sharing for non-major ADIs:** these obligations commence on 1 July 2021. The ACCC is ready to begin on-boarding for data holders that would like to start data sharing early.
- **Draft On-boarding guide:** A draft [On-boarding guide](#) has been made available on the ACCC website for review and feedback.
- **CDR Rules update:** The ACCC has made [amendments](#) to the CDR Rules to permit the use of accredited intermediaries to collect data, through an expansion of the rules relating to outsourced service providers.
- **Consultation on proposed changes to the CDR Rules:** The ACCC is consulting on proposed changes to the CDR Rules that would allow for the entry of a greater number and type of businesses in the CDR. The ACCC has published a [consultation paper](#) outlining the key proposals. Submissions are due by 29 October 2020.

PRUDENTIAL

APRA lending relief

On 8 July 2020 APRA [announced](#) an extension of its temporary capital treatment for bank loans with repayment deferrals. In March 2020, APRA provided relief to ADIs that offered borrowers impacted by COVID-19 an option to defer repayments for up to six months. APRA allowed those ADIs to not treat the repayment deferral period as an arrears period for capital adequacy and regulatory capital purposes. The extension will allow this to continue for a maximum period of 10 months from the start of the repayment deferral, but until no later than 31 March 2021.

APRA also announced that it was providing an adjustment to the normal regulatory treatment of loans that are restructured. The adjustment will allow ADIs to treat a loan as a performing loan for capital and regulatory reporting purposes when the loan is restructured before 31 March 2021 with a view to putting a borrower on a sustainable financial footing.

APRA expects ADIs to have a comprehensive plan to work through the volume of impacted customers and to avoid operational constraints when the deferral periods end.

APRA will also require ADIs to provide regular disclosures on the status of their deferred, restructured and improved loans. APRA plans to publish monthly aggregate data using this information.

On 14 August 2020 APRA [released](#) a draft Attachment E to Prudential Standard APS 220 Credit Quality (**APS 220**), which modifies the application of APS 220 requirements for loans affected by COVID-19.

On 22 September 2020 APRA [issued](#) a letter to ADIs following a review of their plans for the assessment and management of loans with repayment deferrals. APRA expects that ADIs will exercise appropriate governance and monitoring over all aspects of the plan's implementation, in order to identify and respond to any material issues that may arise. Any such issues should be immediately shared with APRA and ASIC.

New licence conditions imposed by APRA

APRA [announced](#) on 2 July 2020 that it was imposing a new licence condition on the registrable

superannuation entity Colonial First State Investments Limited, following an investigation into matters referred to it by the Banking Royal Commission in 2019. The licence condition will require the entity to record how it considers members best interests and members priority covenants when making decisions that materially affect their interests. APRA also [announced](#) on the same day that it was imposing a similar new licence condition on Suncorp Portfolio Services Ltd after investigating a matter referred by the Banking Royal Commission.

APRA resumes policy and licensing work

APRA [announced](#) on 10 August 2020 that was restarting public consultations on some policy reforms, and that it will begin issuing new licences for banking, insurance and superannuation.

Public consultations will take place for:

- the cross-industry prudential standard for remuneration;
- ADI capital reforms incorporating APRA’s “unquestionably strong” framework, Basel III and measures to improve transparency, comparability and flexibility;
- insurance capital reforms to incorporate changes in the accounting framework (AASB 17); and
- the prudential standard for insurance in superannuation, and updated guidance on the sole purpose test.

Work on new licences will be phased in. From September 2020, new licence applications will be accepted and licences will be issued to applicants that are branches or subsidiaries of foreign entities with significant financial resources and a strong operational track record in a similar business. From March 2021, licences will be issued to any entity that meets the relevant prudential requirements.

APRA said that it was also reviewing the pathways to an ADI licence, including the restricted ADI licensing framework that was launched in 2018.

APRA resumes consulting on confidentiality of data

APRA has resumed its [consultation](#) on the confidentiality of data submitted by ADIs, and a proposed list of key data items to be determined non-confidential.

APRA resumes intervention on disability insurance

APRA is [resuming](#) its intervention into the life insurance market to stem losses in respect of individual disability income insurance (IDII). The program was put on hold in March 2020 because of the pandemic. From 1 October 2020, IDII providers are subject to upfront capital penalties until APRA is assured that they have taken adequate and timely steps to address sustainability concerns.

Supervision Risk and Intensity Model

APRA has [introduced](#) a new model to assess risk and determine supervisory intensity, called the Supervision Risk and Intensity (SRI) model, to replace APRA’s Probability and Impact Rating System (PAIRS) and the Supervisory Oversight and Response System (SOARS). The SRI model will be the new common platform by which all APRA-regulated entities are assessed, and their level of supervision intensity determined.

Alignment of APRA’s standards with ComFrame

APRA [announced](#) on 12 October 2020 that it would align its prudential standards and practices with ComFrame where appropriate.

ComFrame is the Common Framework for the Supervision of Internationally Active Insurance Groups, adopted by the International Association of Insurance Supervisors (**IAIS**) in November 2019. ComFrame establishes supervisory standards and guidance focussing on the effective group-wide supervision of Internationally Active Insurance Groups (**IAIGs**), and forms part of the Insurance Core Principles.

APRA says that it intends to take a “measured approach” to the alignment of its prudential standards with ComFrame. APRA has assessed its regulated insurers and has determined that QBE Insurance Group Limited meets the IAIS’ criteria as an IAIG.

SUPERANNUATION

Super choice legislation enacted

The *Treasury Laws Amendment (Your Superannuation, Your Choice) Act 2020* (Cth) received [assent](#) on 3 September 2020. The Act amends the *Superannuation Guarantee (Administration) Act 1992* (Cth) to provide that employees under workplace determinations or enterprise agreements have the right to choose their superannuation fund.

Amended guidance on fee and costs disclosure

On 24 July 2020, ASIC [released](#) minor amendments to the fees and cost disclosure regime for issuers of superannuation and managed investment products. ASIC has also updated Regulatory Guide 97 Disclosing Fees and Costs in PDS's and Periodic Statements.

Your Future, Your Super Package

In the 2020 Budget the Treasurer [announced](#) a new Your Future, Your Super package scheduled to commence on 1 July 2021. The key elements of the reforms are:

- preventing the creation of unintended multiple superannuation accounts when employees change jobs;
- fund members to have access to a new interactive online YourSuper comparison tool;
- superannuation products to meet an annual objective performance test; those that fail will be required to inform members, and persistently underperforming products will be prevented from taking on new members; and
- increasing trustee accountability by strengthening obligations to ensure trustees only act in the best financial interests of members; and
- superannuation funds will be required to provide better information regarding how they manage and spend members’ money in advance of annual members’ meetings.

AFCA proposed rule changes on SCT complaints

The Superannuation Complaints Tribunal (**SCT**) is ceasing operations on 31 December 2020. AFCA is [proposing](#) to amend its rules to allow it to consider any remaining complaints currently with the SCT that are not finalised prior to that date, and to allow AFCA to consider any matters before the Federal Court on appeal from the SCT that are not finalised prior to SCT ceasing operations and which require remittal back to be determined again or finalised.

AML/CTF

AUSTRAC proposed rule changes

AUSTRAC [released](#) proposed amendments to Chapter 46 of the AML/CTF Rules in August 2020. Chapter 46 sets out special circumstances for customer identification procedures. The amendments are intended to create a simpler and less prescriptive chapter. They include two new general conditions that must be satisfied before a reporting entity can rely on section 33,

and there is an additional special circumstance that allows a reporting entity to carry out customer identification after opening an account, provided that no transactions other than an initial deposit are conducted in relation to the account.

Proposed reforms to crimes legislation

The *Crimes Legislation Amendment (Economic Disruption) Bill 2020* (Cth) was [introduced](#) into Federal Parliament on 2 September 2020. The Bill contains a number of measures designed to improve and clarify Commonwealth laws that target criminal business models, and aims to provide law enforcement with suitable tools to detect illicit financial flows through effective information-gathering, to confiscate relevant assets, and to prosecute responsible individuals. The Bill amends the *Crimes Act 1914* (Cth) (the **Crimes Act**), *Criminal Code Act 1995* (Cth), the *COAG Reform Fund Act 2008* (Cth) and the *Proceeds of Crime Act 2002* (the **POC Act**). The proposed amendments:

- update Commonwealth money laundering offences to address the behaviour of modern money laundering networks and seek to remove unnecessary obstacles to securing convictions and appropriate sentencing outcomes;
- clarify that the obligations imposed on investigating officials under Part IC of the Crimes Act do not apply to undercover operatives;
- provide that buy-back orders under the POC Act cannot be used by criminal suspects and their associates to buy back property forfeited to the Commonwealth or delay POC Act proceedings;
- clarify that the POC Act permits courts to make orders confiscating the value of a debt, loss or liability that has been avoided, deferred or reduced through criminal offending;
- clarify the operation of the POC Act in relation to the restraint and confiscation of property located overseas;
- strengthen information-gathering powers under the POC Act by increasing penalties for non-compliance and clarifying the circumstances in which information gathered under these powers can be disclosed and used; and
- expand the Official Trustee in Bankruptcy's powers to deal with property, gather information and recover costs under the POC Act.

The amendments to money laundering offences extend the offences to persons who cause a dealing with money or other property to occur, or engage in conduct in relation to money or other property. The intent is to capture the controllers of money laundering networks who do not typically deal with money or other property directly and instead send instructions to another person to locate, move or otherwise engage in conduct that affects money or other property. The amendments also targets members of these networks who remain wilfully blind to the nature and origins of proceeds of crime that they deal with as a means of avoiding money laundering offences, by creating new offences of engaging in conduct in relation to "proceeds of general crime", which remove the need to link money or other property to a kind of indictable offence, and instead take an "all crimes" approach to predicate offending.

Rule extended on COVID-19 early release of super

AUSTRAC has [extended](#) the rule for streamlined customer verification under the COVID-19 early release of superannuation initiative until 31 December 2020.

DISPUTES AND ENFORCEMENT

Updated guidance on complaints handling

ASIC [released](#) on 30 July 2020 updated requirements for dealing with consumer and small business complaints by financial firms under internal dispute resolution (**IDR**) procedures. The new requirements will apply from 5 October 2021.

The requirements are set out in a new Regulatory Guide 271 *Internal dispute resolution* (RG 271). RG 271 includes some provisions which are enforceable (not merely guidance). The enforceable provisions have been made enforceable by a legislative instrument issued by ASIC, the *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* [made](#) on 30 July 2020.

RG 271 will replace ASIC's existing regulatory guide on dispute resolution (RG 165) on 5 October 2021. The enforceable IDR requirements will then apply to complaints received on or after that date. They will:

- require financial firms to deal with issues raised by consumers that meet a specific definition of "complaint" under their IDR procedures. Those procedures must comply with ASIC's standards and requirements;
- set requirements in relation to objections to superannuation death benefit distribution decisions;
- set requirements in relation to reviews of unresolved IDR complaints by firms' customer advocates;
- place obligations on financial firms when outsourcing part or all of their IDR procedures;
- set out what financial firms must include in an IDR response; the maximum timeframes that financial firms have to provide an IDR response; and the circumstances in which a financial firm does not need to provide an IDR response within the maximum IDR timeframe;
- require financial firms to inform consumers about their right to pursue their complaint with AFCA and have processes for identifying, escalating, analysing and reporting on systemic issues arising from complaints; and
- set standards for the design, implementation and ongoing improvement of firms' IDR procedures including:
 - making the IDR procedures free of charge to consumers and easy to use and understand;
 - resourcing the IDR procedures so that they operate fairly, effectively, and efficiently;
 - ensuring that authorities for determining and/or approving complaint outcomes and financial delegations in place for paying amounts to complainants facilitate the fair and efficient resolution of complaints;
 - having an effective system for recording and tracking complaints;
 - implementing complaint resolution outcomes in a timely manner; and
 - reporting complaints data regularly to senior management and boards.

For further in-depth guidance read our article [here](#).

ASIC will not appeal Westpac responsible lending case

ASIC [announced](#) on 22 July 2020 that it will not seek special leave to appeal to the High Court in the Westpac responsible lending case, following June 2020 decision of the full Federal Court to reject its earlier appeal. ASIC said that will review its Regulatory Guide RG 209 *Credit licensing: responsible lending conduct* in light of the Federal Court decision.

ASIC proceedings on fees for no service

ASIC has [commenced](#) civil penalty proceedings against State Super Financial Services Australia Limited (**StatePlus**) in relation to charging fees for no service. The action relates to conduct from 1 April 2013 to 30 June 2018. ASIC alleges that StatePlus charged more than 36,000 members fees for financial advice that was not provided, contravening its obligation as a financial services licensee to act efficiently, honestly and fairly, and inconsistently with its disclosure documents which included promises to provide annual financial advice to members.

ASIC has also [commenced](#) proceedings against Asgard Capital Management Limited (**Asgard**) for charging adviser fees to customers where finance financial advice was not provided, and

also against Asgard and BT Funds Management Limited for making allegedly misleading representations in half yearly or annual account statements regarding the charging of adviser fees.

ASIC update on compensation for financial advice related misconduct

ASIC has provided an [update](#) on compensation paid or offered by major banking and financial services institutions. As of 30 June 2020, a total of \$1.05 billion in compensation has been paid or offered to customers who suffered loss or detriment because of fees for no service misconduct or non-compliant advice.

ASIC sues adviser, alleging inadequate cyber security

ASIC has [commenced](#) proceedings in the Federal Court of Australia against RI Advice Group Pty Ltd (**RI**), a financial services licensee, alleging that it failed to have adequate cyber security systems. ASIC claims that there have been a number of alleged cyber breach incidents at authorised representatives (**ARs**) of RI. ASIC alleges that RI failed to have adequate policies, systems and resources which were reasonably appropriate to manage risk in respect of cybersecurity and cyber resilience.

ASIC civil penalty proceedings against Dixon Advisory

ASIC has [commenced](#) proceedings in the Federal Court against Dixon Advisory and Superannuation Services Limited (**Dixon Advisory**). Dixon Advisory is a subsidiary of ASX-listed Evans Dixon Limited (**Evans Dixon**). According to ASIC, Dixon Advisory representatives failed to act in their clients' best interests and to provide advice appropriate to the clients' circumstances. The claim concerns recommendations made to eight clients between 2 September 2015 and 31 May 2019 in relation to investing in the US Masters Residential Property Fund (**URF**) and URF-related products. ASIC says that Dixon Advisory representatives knew or ought to have known that there was a conflict between their clients' interests and the interests of entities associated with Dixon Advisory within the Evans Dixon group, and failed to give priority to the clients' interests.

ASIC wins case against Rent 2 Own Cars

The Federal Court has [found](#) in favour of ASIC in an action taken by ASIC against Rent to Own Cars Australia Pty Ltd (**R2O**) and two persons who had been directors. R2O operated its business through a network of franchisees. The franchisee entity or a person employed by the franchisee were authorised as the credit representative of R2O. ASIC took action in relation to 232 contracts for car finance made between 1 March 2017 and 18 June 2018. The credit was provided by R2O through a hire purchase style of contract.

The Federal Court found that R2O breached the interest rate cap in the National Credit Code by charging consumers interest rates of more than 48% per annum, and in the case of some contracts, had misled consumers by understating the cost of credit and failing to calculate the interest rate as required by the National Credit Code.

The Court also found that the former directors were involved in some of the conduct of the company which would make them personally liable for civil penalty orders.

There will be a further hearing on the amount of the penalty and the length of injunctions to be imposed on R2O and the two directors.

Cases on responding to ASIC notices and claiming privilege

ASIC has [reported](#) on two recent court decisions which it says support its position on the obligations of companies when responding to ASIC notices, and claims of legal professional privilege. ASIC has summarised the key points as follows:

- Under section 33 of the ASIC Act, ASIC can require the production of specified documents in a person's "possession" for the purposes of an investigation. Those issued with such a notice are required to produce not only the documents in their physical possession, but those in their custody or under their control.
- A notice may require production of a large number of documents, but this does not mean the notice is too broad. The relevance of documents called for is a matter for ASIC to determine by reference to its investigation.
- The mere fact that a notice might be burdensome or oppressive because of the work and expense involved in complying with it will not, of itself, provide a reasonable excuse for non-compliance.
- Those making legal professional privilege claims over a document must be able to substantiate their claims.
- Producing a document to ASIC without claiming legal professional privilege can be a clear waiver of that privilege.
- Those wishing to disclose a document to ASIC while maintaining a legal professional privilege claim over it should follow the instructions contained in the notice and seek ASIC's formal agreement.

AUSTRAC and Westpac settle

Westpac and AUSTRAC have [settled](#) their litigation regarding breaches of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**). Westpac has agreed to pay a \$1.3 billion dollar penalty. The Federal Court of Australia must now consider the proposed settlement and penalty. The settlement also involves Westpac admitting to contravening the AML/CTF Act on over 23 million occasions.

AUSTRAC infringement notice to State Street

AUSTRAC has [issued](#) an infringement notice to State Street Bank and Trust Company for over \$1.24 million for failing to report international funds transfers.

ASIC sues Allianz over travel insurance

On 30 September 2020 ASIC [announced](#) that it had commenced proceedings against Allianz Australia Insurance Ltd (**Allianz**) and its related company AWP Australia Pty Ltd (**AWP**), alleging the alleged misleading sale of travel insurance that was sold through three websites run by Expedia Inc (**Expedia**) in the period February 2015 to September 2018.

ASIC alleges that Allianz failed to correctly disclose the basis upon which premiums were calculated in product disclosure statements available on the websites, that Allianz and/or AWP allowed the sale of insurance to customers who were ineligible to make claims under the policies, and that Allianz and/or AWP allowed the Expedia websites to misuse a quote from the Department of Foreign Affairs and Trade about the importance of purchasing travel insurance.

Cigno and BHF Solutions sued by ASIC over unlicensed credit activity

ASIC has commenced [proceedings](#) in the Federal Court against Cigno Pty Ltd (**Cigno**) and BHF Solutions Pty Ltd (**BHF**). ASIC alleges contraventions of the NCCP Act. It claims that BHF and Cigno operate a lending model that provides small amounts of credit to a large number of consumers and charges substantial fees on the amounts borrowed, and that BHF and Cigno do not hold, and have never held, an Australian credit licence.

ANZ \$10 million penalty for unconscionable conduct

The Federal Court of Australia has [ordered](#) Australia and New Zealand Banking Group Limited (**ANZ**) to pay \$10 million in penalties after finding that ANZ engaged in unconscionable conduct and breached its obligations as a financial services licensee. The conduct occurred over the period between August 2003 and September 2015. ANZ charged fees to personal and business customers in relation to periodic payments, including fees for periodic payments that could not be made due to insufficient funds in the customer's account, and transaction fees charged for successful periodic payments. Under its terms and conditions, ANZ was not entitled to charge these fees to customers where the periodic payment was made between two accounts held in the same customer name.

NAB trustee companies slugged with \$57.5 million penalty

MLC Nominees Pty Ltd (**MLC**) and NULIS Nominees (Australia) Limited (**NULIS**) have been [ordered](#) by the Federal Court of Australia to pay penalties totalling \$57.5 million (\$49.5 million for MLC and \$8 million for NULIS). The Court found that they had made false and misleading representations to superannuation members about their entitlement to charge plan service fees and members' obligations to pay the fees. The Court also found that that MLC and NULIS failed to ensure that their financial services were provided efficiently, honestly and fairly.

Volkswagen and ASIC settle

ASIC has [settled](#) its claim against Volkswagen Financial Services Australia Pty Limited (**VWFSA**) in the Federal Court of Australia regarding responsible lending practices. VWFSA has given an enforceable undertaking under which VWFSA agrees to implement a consumer remediation program which will provide around \$4.7 million to approximately 1,800 consumers. VWFSA will proactively contact the consumers who are eligible for the program.

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