



DWYER HARRIS



# FINANCIAL SERVICES AND CREDIT

## QUARTERLY UPDATE

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## GENERAL

### FSR Act

The *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) (the **FSR Act**) received [assent](#) on 17 December 2020. The FSR Act implements a range of recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Banking Royal Commission**). The FSR Act affects a number of subject areas covered in this update, and we have included each of the FSR Act reforms under the applicable subject headings.

## CONSUMER CREDIT

### Credit Reform Bill

The Government [introduced](#) the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020* (Cth) (the **Credit Reform Bill**) on 9 December 2020. The Credit Reform Bill includes the proposed repeal of responsible lending obligations, together with a number of other reforms which are set out in the sections below. The Credit Reform Bill has been referred to the Senate Economics Legislation Committee and the Committee is due to report by 12 March 2021.

### Responsible lending reforms

Following the announcement on 25 September 2020 of the proposed removal of responsible lending obligations, the Treasury [released](#) exposure draft legislation, regulations and credit standards on 4 November 2020. Please see our article [here](#) for more information. The proposed changes were then rolled into the Credit Reform Bill.

In summary, the Credit Reform Bill amends the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**) so that responsible lending obligations apply only to small amount credit contracts and consumer leases and small amount credit contract-equivalent loans by authorised deposit taking institutions (**ADIs**). The Minister will be given the power to make credit standards for non-ADIs by legislative instrument, so that they can align with the credit standards that ADIs are subject to under prudential standards set by the Australian Prudential Regulation Authority (**APRA**).

These reforms are scheduled to commence when the Act receives royal assent (or 1 March 2021 if later).

### Amendments to the best interests obligations

The Credit Reform Bill also proposes to amend the best interests obligations applicable to mortgage brokers so that they apply to other credit assistance providers. The best interests duty for mortgage brokers commenced on 1 January 2021.

### Reverse mortgage changes

The Credit Reform Bill includes amendments to the National Credit Code in relation to reverse mortgages. The principal change is that, in addition to giving equity projections to the consumer, a licensee will be required to show the consumer a comparison of the consumer's stated expected aged care costs. This will involve asking the consumer about their expected future aged care accommodation needs, including the time (if any) at which the consumer has stated they are likely to incur costs for future aged care accommodation and the likely amount of those costs, and presenting the consumer's stated expected future aged care accommodation costs together with the equity projection.

## Reforms for small amount credit contracts and consumer leases

The Credit Reform Bill includes the following proposed changes to the credit legislation in relation to small amount credit contracts:

- licensees must not enter into a small amount credit contract with a consumer if the repayments under the contract would not meet the requirements prescribed in the regulations;
- a small amount credit contract is currently presumed to be unsuitable for a consumer if the consumer has had two or more other small amount credit contracts in the past 90 days or is in default under another small amount credit contract. This rebuttable presumption will be repealed;
- small amount credit contracts must have equal repayments and equal repayment intervals over the life of the loan, subject to certain limited exceptions;
- licensees cannot charge a consumer monthly fees in respect of the residual term of the small amount credit contract where the consumer fully repays the loan early;
- licensees are prohibited from making unsolicited communications to a consumer that contain an offer or invitation to enter into or apply for a small amount credit contract in certain circumstances;
- licensees must document in writing their assessment that a small amount credit contract is not unsuitable for a consumer; and
- licensees must display information and give information to consumers about small amount credit contracts in accordance with requirements determined by the Australian Securities and Investments Commission (**ASIC**) in a legislative instrument.

In relation to consumer leases, the Credit Reform Bill proposes:

- consumer leases for an indefinite period will be regulated;
- introducing a cap on the amount a lessor can charge in connection with a consumer lease;
- introducing the concept of ‘consumer leases for household goods’ in the NCCP Act and the following obligations in respect of those consumer leases:
  - requiring lessors to collect and consider a consumer’s account statements for the 90 days prior to entering into a consumer lease for household goods with the consumer;
  - requiring lessors to disclose to lessees the base price of the goods hired under the lease and the difference between the total amount payable by the lessee in connection with the lease and the base price;
  - prohibiting lessors from undertaking door-to-door selling of consumer leases for household goods;
  - requiring licensees to document in writing their assessment or preliminary assessment that a consumer lease for household goods is not unsuitable for a consumer; and
  - requiring licensees to display and give information to consumers in accordance with the requirements determined by ASIC in a legislative instrument; and
- introducing a new regulation-making power to set a protected earnings amount for consumer leases for household goods.

The Credit Reform Bill also proposes to ban avoidance schemes that are designed to avoid the application of the NCCP Act in relation to small amount credit contracts and consumer leases.

These reforms are scheduled to commence six months after the Act receives royal assent.

## Conflicted remuneration ban commences

The ban on conflicted remuneration for credit assistance providers commenced on 1 January 2021. ASIC deferred the original commencement date of 1 July 2020 by a legislative instrument,

the *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487* [made](#) on 27 May 2020. On 16 October 2020, ASIC [amended](#) this instrument by the *ASIC Credit (Amendment) Instrument 2020/963* to clarify that the deferral applied to a benefit given in relation to the provision of a credit service before 1 January 2021, irrespective of whether the benefit was given before, on or after 1 January 2021.

## ASIC report on buy now pay later

On 16 November 2020, ASIC [released](#) an industry update report (Report 672) on the buy now pay later (**BNPL**) industry. The report looks at the growth and evolution of the BNPL industry, finding that there were more than 6.1 million open accounts as of 30 June 2019, representing up to 30% of the Australian adult population. The report also considers the impact of BNPL arrangements on consumers, finding that some consumers who use these arrangements are experiencing financial hardship. The report notes that BNPL arrangements are subject to ASIC's new product intervention power and the new design and distribution obligations.

## Proposed use of product intervention powers

ASIC [announced](#) on 10 November 2020 that it was seeking further feedback on its proposed use of its product intervention powers to address significant detriment in relation to certain types of continuing credit contracts.

## COMPETITION

### Home loan price inquiry - final report

The Australian Competition and Consumer Commission (the **ACCC**) [published](#) the final report of its home loan price inquiry on 5 December 2020. The ACCC recommends in its report that:

- lenders be required to regularly prompt borrowers whose loans are older than three years to review their current interest rate and to consider the potential benefits of switching products or lenders, with consumer trials and testing to inform the design and presentation of the prompt;
- lenders be required to provide a standardised discharge authority form to borrowers, which should be easy to access, fill out and submit;
- a time limit of 10 business days should be imposed on lenders to complete the discharge authority process; and
- continued monitoring of home loan prices and competition in the home loan market.

According to the ACCC, borrowers with home loans between three and five years old paid on average about 58 basis points more than the average interest rate paid for new loans, and as loans age, the gap widens between the rates paid on older loans compared with new loans.

## CONSUMER PROTECTION

### Unfair contract terms to be banned

On 6 November 2020 the Federal and State and Territory Ministers for fair trading and consumer protection [announced](#) proposed amendments to the unfair contract terms legislation. Under the amendments, unfair contract terms will be made unlawful. Currently, an unfair contract term is only void (i.e. not enforceable). When the law is changed, unfair contract terms will not be automatically void, and courts will be able to order civil penalties if contracts are found to have unfair terms. Courts are to be given the power to impose remedies for unfair contract terms. These could include orders such as changing the terms of the contract, or an order that a term is void. For further details please see our article [here](#).

## CORPORATE

### Virtual meetings and electronic document execution to be made permanent

In October 2020, the Treasury [released](#) exposure draft legislation to make permanent the temporary relief which allows companies to hold meetings virtually, send meeting-related materials electronically and validly execute documents electronically. The consultation period ended on 6 November 2020.

## FINANCIAL ADVICE

### ASIC consultation on affordable financial advice

A consultation paper was [released](#) by ASIC on 17 November 2020 in relation to access to affordable financial advice. Consultation Paper 332 *Promoting access to affordable advice for consumers* seeks input on the issues and impediments relating to the supply of good quality affordable personal advice, and the practical steps that can be taken by ASIC and industry to improve consumer access to quality affordable advice. A focus of the paper is on promoting access to quality “limited advice” where the advice does not cover all areas relevant to the client. Submissions are due by 18 January 2021 and ASIC plans to hold industry roundtables to discuss issues raised in the submissions.

In a related development, the Financial Services Council [released](#) a Future of Advice report on 20 October 2020. The report analyses the current landscape for financial advice within Australia and presents recommendations which aim to address the issues facing individuals seeking advice, and financial advisers.

### ASIC proposes updated guidance on remediation

ASIC [released](#) a consultation paper on 3 December 2020 seeking feedback on key issues identified for updating Regulatory Guide 256 *Client review and remediation conducted by advice licensees*. The consultation period ends on 26 February 2021.

### Technical updates to RG 246

ASIC [released](#) technical updates to Regulatory Guide 246 *Conflicted and other banned remuneration* on 10 December 2020 to reflect the end of the grandfathering of conflicted remuneration for financial product advice from 1 January 2021, and the extension of the ban to stamping fees paid in relation to listed investment companies and listed investment trusts that took effect on 1 July 2020.

### Bill for further Banking Royal Commission responses

The *Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020* (Cth) [introduced](#) on 9 December 2020 implements further recommendations of the Banking Royal Commission to improve consumer protections. The Bill:

- requires financial services providers that receive fees under an ongoing fee arrangement to provide clients with a single document each year which outlines the fees that will be charged and the services which the client will be entitled to in the following 12 months and which seeks annual renewal from clients for all ongoing fee arrangements, and to obtain written consent before fees under an ongoing fee arrangement can be deducted from a client’s account;
- amends the *Corporations Act 2001* (Cth) (the **Corporations Act**) to require a financial services licensee or authorised representative to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client;

- and
- amends the superannuation legislation to increase the visibility of advice fees for all superannuation products and to prohibit the charging of ongoing advice fees from MySuper products.

## FASEA to go

The Treasurer [announced](#) on 9 December 2020 that the Financial Adviser Standards and Ethics Authority (**FASEA**) will be wound up. The Government will expand the operation of the Financial Services and Credit Panel (**FSCP**) within ASIC. The FSCP currently supports ASIC in the exercise of its regulatory functions with respect to the making of banning orders against individuals for misconduct. The standard-making functions of FASEA will be moved to Treasury, with the standards to be set by legislative instrument. Remaining elements of FASEA's role, including administering the adviser examination, will be incorporated into the FSCP's expanded mandate. Legislation implementing these reforms will be introduced into Parliament in the first half of 2021.

## FINANCIAL MARKETS

### Managing risk during LIBOR transition

Information Sheet 252: *Managing conduct risk during LIBOR transition* [released](#) by ASIC on 30 November 2020 provides guidance on managing conduct risk during the transition away from the London Interbank Offered Rate (**LIBOR**). LIBOR is expected to cease after the end of 2021.

### Product intervention order – contracts for difference

ASIC has [made](#) a product intervention order, the *ASIC Corporations (Product Intervention Order–Contracts for Difference) Instrument 2020/986*. The order imposes certain conditions on specified dealing in over-the-counter contracts for difference (**CFDs**) in relation to retail clients, prohibits giving or offering specified benefits to retail clients or prospective retail clients in specified circumstances, and requires CFD issuers to take reasonable steps to notify their retail clients of the terms of the instrument.

## FINANCIAL PRODUCTS

### Time-sharing schemes updated guidance

ASIC [released](#) an updated Regulatory Guide 160 *Time-sharing schemes* on 11 December 2020. This follows a consultation process. Industry generally has until 30 September 2021 to implement the new requirements set out in the updated RG 160.

## FINANCIAL SERVICES

### ASIC guide on DDO

ASIC [released](#) its guide on the design and distribution obligations (**DDO**) on 11 December 2020. The guide, RG 274, provides principles based guidance on the DDO, which commence on 5 October 2021.

On 10 December 2020 ASIC [made](#) a legislative instrument to modify the DDO law in relation to exchange traded products, the *ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090*.

### Treatment of lease assets for AFSL requirements

ASIC has [issued](#) Consultation Paper 336 *Financial requirements: Treatment of lease assets*,

seeking industry feedback on ASIC's proposal to change the treatment of lease assets in the calculation of financial requirements applicable to Australian financial services licensees.

## Anti-hawking reform

The FSR Act amends the Corporations Act to include a new general prohibition of offers to sell or issue financial products made in the course of, or because of, unsolicited contact. The general prohibition will apply to all kinds of financial products, including securities and interests in managed investment schemes, except in certain circumstances. "Unsolicited contact" is any contact in relation to a financial product to which the consumer did not consent that is made by telephone, in face-to-face meetings or any other real-time interaction which is in the nature of a discussion or conversation. Contact is not unsolicited if the consumer consented to the contact in relation to the financial product. For a consumer to consent to contact, they must make a positive, voluntary and clear request to be contacted about the financial product, and the consent must be provided before the contact is initiated, which means that offers cannot be made to consumers during cold calls or other unsolicited contact even if the consumer makes a positive, voluntary and clear request during that contact. The amendments also give consumers the power to specify how they can be contacted and the power to withdraw or vary consent at any time. This reform will commence on 5 October 2021.

## ASIC review of school banking programs

On 15 December 2020, ASIC [released](#) the report of its review into school banking programs. ASIC says that the key findings of the review were:

- School banking programs claim to help children develop long term savings habits; however, providers were unable to demonstrate that these programs in and of themselves improve savings behaviour.
- Payments to schools for implementing school banking programs incentivise schools to encourage greater participation in the programs.
- Young children are vulnerable consumers and are exposed to sophisticated advertising and marketing tactics by school banking program providers.
- School banking program providers fail to effectively disclose that a strategic objective of these programs is customer acquisition.

ASIC has developed a set of questions for school communities to consider in assessing and implementing school banking programs.

## FINANCIAL SYSTEM

### Enforceable code provisions

The FSR Act amends the Corporations Act and the NCCP Act to allow ASIC to designate enforceable code provisions in approved codes of conduct. A breach of an enforceable code provision may attract civil penalties or other administrative enforcement action from ASIC. The FSR Act also establishes a mandatory code of conduct framework for the financial services and consumer credit industry through regulations, with the ability to designate certain provisions as civil penalty provisions. These amendments implement a recommendation of the Banking Royal Commission and commenced on 1 January 2021.

### Reference checking and information sharing

The FSR Act gives effect to recommendations of the Banking Royal Commission by imposing a new obligation on Australian financial services licensees and Australian credit licensees, in respect of mortgage brokers, to comply with a reference checking and information sharing obligations. This reform generally applies from 1 October 2021.

On 19 November 2020, ASIC [released](#) a consultation paper on a new reference checking and information sharing protocol for financial advisers and mortgage brokers. This follows on a recommendation of the Banking Royal Commission which was then legislated by the FSR Act.

The ASIC draft protocol sets out obligations for licensees to undertake reference checks on persons who are seeking to be employed or authorised as a financial advisor or mortgage broker. The consultation period ends on 29 January 2021.

## Breach reporting

The FSR Act gives effect to recommendations of the Banking Royal Commission by:

- clarifying and strengthening the breach reporting regime for Australian financial services licensees;
- introducing a comparable breach reporting regime for Australian credit licensees; and
- requiring financial services licensees and credit licensees to report serious compliance concerns about financial advisers and mortgage brokers respectively.

The FSR Act also imposes a new obligation on Australian financial services licensees and on Australian credit licensees who are mortgage brokers to investigate misconduct and promptly remediate affected clients.

These reforms generally apply from 1 October 2021.

## APRA and ASIC must cooperate

The FSR Act seeks to remove barriers to co-operation and information sharing between APRA and ASIC, including requiring the regulators to notify each other when they reasonably believe there may be material breaches of each other's legislation. This reform implements a recommendation of the Banking Royal Commission and commenced on 1 January 2021.

## BEAR implementation at the big banks

APRA [released](#) an information paper on 11 December 2020 detailing the findings from its review of the implementation of the Banking Executive Accountability Regime (**BEAR**) by Australia and New Zealand Banking Group Limited (**ANZ**), Commonwealth Bank of Australia (**CBA**) and National Australia Bank Limited (**NAB**). APRA's review found that all three banks had designed adequate frameworks to implement the BEAR and that this had helped to deliver greater clarity and transparency of individual accountabilities at ADIs, sharpened challenge by boards on actions taken by accountable persons to meet their obligations, and more targeted engagement between APRA and ADIs to deliver prudential outcomes.

## Banking Code amendments approved

On 8 January 2021, ASIC [announced](#) that it had approved variations to the Banking Code of Practice (**Code**) as proposed by the Australian Banking Association. According to ASIC, the amendments:

- Amend the Code's definition of 'banking services' to address an anomaly in the Code's previous wording that had the unintended result of excluding certain types of small business banking customers who would otherwise meet the Code's definition of 'small business'.
- Make some minor amendments to the Code's definition of 'small business'.
- Extend the application of the Code's COVID-19 Special Note, which allows for special application of specified Code provisions in light of the extraordinary external environment caused by COVID-19, for a further six months until 1 September 2021.
- Specify situations in which banks may decline to continue dealing with a representative

- that a customer in financial difficulty has appointed, if the bank reasonably considers that representative is no longer able to act in the customer's best interests.
- Align the Code's timeframes for responding to complaints with the updated timeframes in ASIC's Regulatory Guide 271 *Internal dispute resolution*, which is due to commence on 5 October 2021.

## FUNDS

### AFS licensing requirement for trustees of unregistered managed investment schemes

On 25 November 2020, ASIC [released](#) Information Sheet 251 *AFS licensing requirement for trustees of unregistered managed investment schemes*. The information sheet outlines the financial services licensing requirements in the Corporations Act that apply to a trustee of an unregistered scheme that issues, varies or disposes of interests in unregistered schemes that are financial products, and the limits of the exemptions from the financial services licensing requirements in the Corporations Act.

## INSOLVENCY

### Corporate insolvency reforms enacted

The *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) received [assent](#) on 15 December 2020. The Act:

- creates a debt restructuring process for eligible small companies;
- provides temporary relief for eligible companies seeking to enter this debt restructuring process;
- creates a simplified liquidation process for a creditors' voluntary winding up of an insolvent company;
- amends the Insolvency Practice Schedule to refine the registration requirements for a liquidator; and
- expands the situations where documents relating to the external administration of a company may be given electronically. It also allows documents relating to the external administration of a company to be signed electronically.

The provisions of the Act commenced on 1 January 2021, other than the last mentioned reform which commenced on 16 December 2020.

### Updated guidance on share transfers under deed of company arrangement

ASIC has [updated](#) its regulatory guidance on when it will give Chapter 6 relief for share transfers under s444GA of the Corporations Act, which allows shares of a company in administration to be transferred by an administrator as part of a deed of company arrangement.

## INSURANCE

### Amendments to Insurance Contracts Act

The FSR Act amends the *Insurance Contracts Act 1984* (Cth) (the **ICA**) to limit the circumstances when an insurer can avoid a life insurance contract on the basis of non-fraudulent misrepresentation or non-disclosure by an insured. The FSR Act also amends the ICA to replace the duty of disclosure for consumer insurance contracts with a duty to take reasonable care not to make a misrepresentation. These amendments implement recommendations of the Banking Royal Commission and commenced on 1 January 2021.

## Deferred sales model for add-on insurance

The FSR Act amends the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) to implement an industry wide deferred sales model for the sale of add-on insurance products. The deferred sales model applies across all sales channels, including in-person and online. It prohibits the sale of add-on insurance products for at least four days after a customer has entered into a commitment to acquire the principal product or service.

The deferred sales model does not apply to: products that are the subject of an ASIC product intervention order which imposes a deferred sales period; comprehensive car insurance; products exempted by regulations; persons that ASIC exempts by notifiable instrument; and products recommended by financial advisers.

During the add-on insurance deferral period, prohibitions apply in relation to the sale of an add-on insurance products and to communicating with customers in relation to an add-on insurance product. These apply to both the principal provider and related third parties who sell add-on insurance products. In the six week period after the beginning of the add-on insurance deferral period, add-on insurance products may be sold to customers. However, communication with the customer in forms other than writing is restricted. Six weeks after the beginning of the add-on insurance deferral period, the deferred sales model ends. After that time, any contact made by the principal provider or a third party with the customer will be subject to the anti-hawking obligations. At any stage, a customer can inform either the principal provider or a related third party that they no longer wish to receive offers, requests or invitations to purchase or apply for an add-on insurance product. Once a customer has made such a request, it is an offence for the principal provider or a third party to offer, request or invite a customer to purchase or apply for an add-on insurance product.

This reform gives effect to a recommendation of the Banking Royal Commission and will commence on 5 October 2021.

## Caps on commissions for add-on products

The FSR Act provides ASIC with the power, by legislative instrument, to set caps on the amount of commission that may be paid in relation to certain add-on risk products sold in connection with the sale or long-term lease of a motor vehicle, and makes it a criminal offence, civil penalty and offence of strict liability for a person to pay or receive a commission in relation to an add-on risk product that exceeds the cap determined by ASIC for that product. The FSR Act also gives consumers the right to recover commissions paid in excess of the cap. This reform implements a recommendation of the Banking Royal Commission and commenced on 1 January 2021.

## Use of terms ‘insurance’ and ‘insurer’

The FSR Act amends the *Insurance Act 1973* (Cth) so that a strict liability offence will arise for a person who uses the term ‘insurance’ to describe a product or service that they purport to offer as insurance, if the product or service is not insurance, and it is likely that the product or service could mistakenly be believed to be insurance. It also creates a strict liability offence for a person to use the term ‘insurer’ to describe themselves if the person could mistakenly be believed to offer insurance, and either the product is not insurance, or the person is not appropriately registered or authorised under insurance legislation. The offences do not apply to government entities, State insurance, products or services prescribed by the regulations, or entities exempted by ASIC. This reform commenced on 1 January 2021.

## Removal of claims handling exemption

The FSR Act gives effect to a recommendation of the Banking Royal Commission to make claims handling and settling a financial service under the Corporations Act. This reform commenced on 1 January 2021. ASIC also [released](#) a draft information sheet on this topic on 27 November 2020.

## New accounting standard

ASIC has [released](#) information on matters to be considered by insurers to prepare for compliance with the new Accounting Standard AASB 17 on insurance contracts, which is effective for reporting periods beginning on or after 1 January 2023.

## PAYMENTS

### Review of payments system

The Treasurer [announced](#) on 21 October 2020 that the Government will review the regulatory architecture of the Australian payments system. The review will look at whether the regulatory architecture of the payments system is fit for purpose, given rapid changes in technology, and how to drive increased productivity through innovation and competition. It will also assess government payment systems, and analyse global trends to determine how Australia can remain internationally competitive. Mr Scott Farrell was appointed to lead the review. A consultation paper was [released](#) by Treasury on 20 November 2020 and the consultation period has now closed.

### Report on stored value facilities

The Council of Financial Regulators (CFR) [published](#) a report of its review of the regulation of stored-value facilities (SVFs) in Australia in November 2020. The recommendations of the report include:

- SVFs should be introduced as a new class of regulated product, replacing 'purchased payment facilities' in the regulatory framework. Regulation of SVFs should be graduated and commensurate with risks to consumers.
- Certain SVFs (and other payment products) that pose limited risk to consumers – such as small and/or limited-purpose facilities – should continue to be largely exempt from most regulatory requirements.
- Issuers of payment products that hold client funds for only a short period of time for the purpose of facilitating a payment should be required to hold an Australian financial services licence from ASIC and comply with the requirements of an updated ePayments Code.
- ASIC should be given the power to make compliance with the ePayments Code mandatory, such as through a rule-making power.
- APRA and ASIC should be responsible for regulating and licensing SVF providers, and the Reserve Bank of Australia should no longer be involved in regulating individual providers of SVFs.

## PRIVACY AND DATA

### Consumer Data Right

From 1 November 2020, customers of the four major banks can share their banking data from home loans and personal loans. Joint accounts, closed accounts, direct debits, scheduled payments and payees are also available. However there are some outstanding deliverables and the ACCC has agreed to a [rectification schedule](#) with each of the banks to address these areas.

The ACCC made [amendments](#) to the Consumer Data Right Rules in December 2020, following consent from the Treasurer. The new rules expand the types of consumers who can use the Consumer Data Right (CDR) to include more business customers. The CDR rule-making function will transfer from the ACCC to the Minister on 28 February 2021.

## Review of Privacy Act – issues paper

The Attorney-General's Department [released](#) an issues paper as part of its review of the *Privacy Act 1988* (Cth) on 30 October 2020. A discussion paper is scheduled to be issued in 2021.

## Data Availability and Transparency Bill

The *Data Availability and Transparency Bill 2020* (Cth) was [introduced](#) on 9 December 2020. The Bill establishes a new data sharing scheme to serve as a pathway and regulatory framework for sharing public sector data. 'Sharing' involves providing controlled access to data, as distinct from open release to the public. To oversee the scheme the Bill creates a new independent regulator, the National Data Commissioner.

## PRUDENTIAL

### APRA consults on credit risk standards

The new Prudential Standard APS 220 Credit Risk Management (**APS 220**) was finalised in December 2019. APS 220 was due to be implemented from 1 January 2021 but was deferred for a year due to COVID-19. APRA has [noted](#) that the proposed responsible lending reforms will require some amendments to its credit-related prudential standards or guidance if the reforms are passed as legislation. APRA has also announced that it is commencing a consultation on the new APS 220, with feedback due by 29 January 2021.

APRA also [released](#) a consultation on draft Reporting Standard ARS 220.0 Credit Risk Management (**ARS 220.0**) on 28 October 2020. APRA has proposed updating ARS 220.0 to align it with the final version of APS 220.

### Interim capital treatment of equity investments in subsidiaries

On 10 November 2020 APRA [released](#) a letter to all ADIs to advise of an interim change to the capital treatment of new or additional equity investments in banking and insurance subsidiaries.

### Draft prudential standard on remuneration

On 12 November 2020, APRA [released](#) an updated prudential standard for remuneration (CPS 511) for a second round of consultation. There is an accompanying response paper and submissions are due by 12 February 2021.

### CBA and Allianz additional capital reduced

On 20 November 2020 APRA [announced](#) that it was reducing the \$1 billion capital add-on applied to CBA by \$500 million in response to the bank's progress in addressing concerns over its governance, accountability and risk culture frameworks and practices.

On 10 December 2020 APRA [announced](#) that it was reducing the \$250 million additional capital requirement applied to Allianz Australia Limited (**Allianz**) by \$100 million in response to Allianz's progress in addressing issues identified in the insurer's risk governance self-assessment.

### APRA increases Bendigo and Adelaide Bank liquidity requirements

On 21 October 2020 APRA [announced](#) that it had increased Bendigo and Adelaide Bank's minimum liquidity requirement for past non-compliance with APRA's ADI prudential standard on liquidity. APRA has also required a review by an independent third party into the bank's adherence with APRA's liquidity requirements.

## ADI capital framework proposals

APRA on 8 December 2020 [announced](#) proposed changes to the ADI capital framework aimed at embedding 'unquestionably strong' levels of capital, improving the flexibility of the framework, and improving the transparency of ADI capital strength. The new framework is scheduled for commencement on 1 January 2023.

## MO and DDO for RSEs

On 15 December 2020 APRA and ASIC [issued](#) a letter to registrable superannuation entity (RSE) licensees in relation to member outcomes (MO) obligations and design and DDO, to assist in better understanding the interaction of their requirements. APRA has also [published](#) FAQs on MO assessments.

## Updated capital management guidance

APRA [announced](#) on 15 December 2020 that it had provided updated capital management guidance to ADIs and insurers, replacing its recommendation in July this year for banks to retain at least half of their earnings. From the start of 2021, APRA will no longer hold banks to a minimum level of earnings retention.

## Scrutiny of securitisation practices

APRA [issued](#) a letter to all ADIs in December 2020 regarding the repurchase from their securitisations of certain residential mortgage loans that were subject to repayment deferral. In APRA's view, this represents implicit support, which is inconsistent with Prudential Standard APS 120 Securitisation (APS 120). APRA recommended that ADIs conform to the letter and intent of APS 120.

## SUPERANNUATION

### Your Future, Your Super package

On 26 November 2020 Treasury [released](#) exposure draft legislation for the Your Future, Your Super package announced in the 2020-21 Budget. The consultation period has now ended. The proposed legislation would:

- require employers to make contributions into an employee's existing fund, if new employees have one and do not choose a fund to receive contributions;
- require APRA to conduct an annual performance test for MySuper products, and other products specified in regulations. Trustees will be required to give notice to members when a product fails the test. Where a product has failed the performance test in two consecutive years, the trustee is prohibited from accepting new beneficiaries into that product. APRA may lift the prohibition if circumstances specified in the regulations are satisfied;
- provide certainty and transparency about the basis by which superannuation products will be ranked and published on a website maintained by the ATO; and
- require superannuation trustees to act in the best financial interests of their members.

### Duties of corporate trustees

The FSR Act amends the superannuation legislation to impose a new condition on licences held by a body corporate trustee of a registrable superannuation entity. The new licence condition prohibits these trustees from having a duty to act in the interests of another person, subject to exceptions that enable trustees to carry out their ordinary functions as a trustee of a registrable superannuation entity. This amendment will commence on 1 July 2021 and was announced as part of the Government's response to the Banking Royal Commission.

## Role of ASIC and APRA

The FSR Act amends the superannuation legislation to vary the roles and responsibilities of superannuation industry regulators. It extends ASIC's role in superannuation regulation to cover consumer protection and market integrity regulation. The FSR Act also extends the Australian financial services licensing regime under the Corporations Act and the consumer protection provisions under the ASIC Act to cover a broader range of activities undertaken by APRA-regulated superannuation trustees. These reforms commenced on 1 January 2021.

## Regulations to remove exemptions

The *Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020* (Cth) were [made](#) on 10 December 2020 in conjunction with the FSR Act. The purpose of the Regulations is to remove certain exemptions from the requirement to hold an Australian financial services licence, and to make other minor amendments. The Regulations repeal the exemption for trustees of non-public offer superannuation funds from the requirement to hold an Australian financial services licence to deal in financial products (including superannuation interests). The Regulations also make a number of minor amendments relating to exemptions for pooled superannuation trusts and the submission of certain notices to the Commissioner of Taxation.

## Extended relief from portfolio holdings disclosure

ASIC has [deferred](#) the first reporting date for superannuation funds to disclose their portfolio holdings as supporting regulations have not yet been made. The relief from portfolio holdings disclosure was originally due to end on 31 December 2020. ASIC has amended the first reporting day to 31 December 2021.

## Report on value of insurance in superannuation

On 14 December 2020, ASIC [released](#) a report on measuring the value for money that consumers receive from default insurance provided by their superannuation funds.

## AML/CTF

### AML/CTF Act amendments

The *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020* (Cth) received [assent](#) on 18 December 2020. The Act amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**) to:

- expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party;
- prohibit reporting entities from providing a designated service if customer identification procedures cannot be performed;
- prohibit financial institutions from entering into a correspondent banking relationship that permits its accounts to be used by a shell bank;
- require banks to conduct due diligence assessments before entering, and during, all correspondent banking relationships; and
- expand exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports and related information with external auditors and foreign members of corporate and designated business groups.

There are also amendments to the AML/CTF Act and other legislation in relation to information sharing and offences.

## Cash restrictions bill will not proceed

The *Currency (Restrictions on the Use of Cash) Bill 2019* (Cth) will not be proceeding after failing to pass the Senate. The Bill would have created new offences if an entity made or accepted cash payments of \$10,000 or more.

## DISPUTES AND ENFORCEMENT

### ASIC wins against NAB

On 19 October 2020, the Federal Court of Australia [handed down](#) a \$15 million civil penalty to NAB for breaching section 31(1) of the NCCP Act, which forbids credit licensees from dealing with entities engaging in credit activity without an Australian credit licence. This was the result of an ASIC investigation which revealed that 16 NAB bankers had accepted documents about customers from 25 third parties who were unlicensed for credit activity. This case was the first time that ASIC has brought civil proceedings for breaches of section 31(1) of the NCCP Act.

### AUSTRAC \$1.3 billion Westpac penalty approved

On 21 October 2020, the Federal Court of Australia [approved](#) AUSTRAC's proposed \$1.3 billion penalty against Westpac Banking Corporation (**Westpac**) for multiple violations of the AML/CTF Act, the largest civil penalty in Australian history.

### CBA penalty for problem gambler conduct

In *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 1543, the Federal Court of Australia [found](#) that CBA had breached the responsible lending obligations in the NCCP Act in relation to a problem gambler who was offered and then made a credit limit increase despite the customer informing CBA that he was a problem gambler and did not wish to increase his credit limit until he was able to get his gambling under control. The court awarded a civil penalty of \$150,000.

### Allianz remediation

Allianz Australia Insurance Limited and AWP Australia Pty Ltd have [agreed](#) with ASIC to pay remediation including refunds for misconduct in relation to the sale of travel insurance. ASIC says that the value of the remediation is \$10 million.

### \$75 million in penalties to OTC derivative issuers

The Federal Court has [ordered](#) that three over-the-counter (**OTC**) derivative issuers, AGM Markets Pty Ltd, OT Markets Pty Ltd and Ozifin Tech Pty Ltd, pay a total of \$75 million in pecuniary penalties for repeated unconscionable conduct while providing OTC derivatives to Australian retail investors.

### AFCA jurisdiction restrained by NSW Supreme Court ruling

On 26 November 2020, the Supreme Court of New South Wales ruled in *DH Flinders Pty Limited v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690 that the Australian Financial Complaints Authority (**AFCA**) had no authority to determine a dispute against an Australian financial services licence holder where the complaint is precipitated by alleged behaviour of a representative acting outside their capacity. The Court also made comments that were critical of AFCA's process of handling complaints. AFCA released a [statement](#) surrounding the potential effects on future complaints.

## **Youi breached duty of utmost good faith**

The Federal Court [ruled](#) on 27 November 2020 that Youi Pty Ltd had violated its duty of utmost good faith as mandated in the ICA. The civil proceedings were initiated by ASIC on behalf of a Broken Hill resident, whose damage claims were not resolved for nearly two years.

## **ASIC sues CBA over interest overcharging**

On 1 December 2020 ASIC [commenced](#) civil penalty proceedings in the Federal Court against CBA alleging the overcharging of interest on business overdraft accounts, despite attempts to manually fix the overcharging error.

## **APRA action against Westpac over liquidity standards**

APRA [announced](#) on 1 December 2020 that it had taken enforcement action against Westpac in response to material breaches of liquidity prudential standards identified during 2019 and 2020.

## **APRA agrees to enforceable undertaking from Westpac**

On 3 December 2020 APRA [announced](#) that it had agreed to an enforceable undertaking from Westpac pledging to lift substantially its efforts to address risk governance deficiencies. APRA's concerns arose from the findings of the risk governance review into Westpac that APRA commenced in response to AUSTRAC's allegations of anti-money laundering breaches in December 2019.

## **ACCC cartel charges against ANZ and others**

On 8 December 2020 the ACCC [announced](#) that ANZ, Citigroup Global Markets Australia Pty Limited (**Citigroup**), Deutsche Bank AG (**Deutsche Bank**) and six senior banking executives had been committed to the Federal Court of Australia for trial on criminal cartel charges. Citigroup, Deutsche Bank, ANZ and the executives were charged in June 2018 following an ACCC investigation. The charges involve alleged cartel arrangements in 2015 relating to trading in ANZ shares held by Deutsche Bank and Citigroup.

## **ASIC sues La Trobe**

On 18 December 2020 ASIC [commenced](#) civil penalty proceedings against La Trobe Financial Asset Management Ltd (**La Trobe**) in its capacity as the responsible entity of the La Trobe Australian Credit Fund (the **Fund**). ASIC alleges La Trobe marketed the Fund throughout Australia in ways that were misleading or deceptive, or likely to mislead or deceive.

## **ASIC v Squirrel**

On 23 December 2020, ASIC [commenced](#) civil penalty proceedings against Squirrel Superannuation Services Pty Ltd (**Squirrel**). ASIC alleges that Squirrel made misleading representations in relation to a brochure distributed between 2015 and 2018.

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