

## Article Information

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## Banking & Finance Summary Updates - December 2020

**There have been numerous updates in the industry over the past months from regulators and the Government.**

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### AFCA

- In [D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited \[2020\] NSWSC 1690](#) Justice Stevenson of the New South Wales Supreme Court ruled that AFCA has the contractual authority to deal only with complaints against AFS licensees regarding the conduct of an authorised representative if that representative was acting within the scope of their authority.
  - Piper Alderman acted for D H Flinders, a corporate trustee, who challenged the contractual authority of AFCA to determine complaints brought against it by investors in a home loan product issued by EFSOL Pty Ltd (In Liquidation). D H Flinders also argued that the manner in which AFCA conducted the complaints breached its contractual obligation of procedural fairness and impartiality.
  - EFSOL was an Authorised Representative operating under D H Flinders' Australian Financial Services Licence for a wholesale financial product. This authority did not contemplate or authorise the EFSOL home loan product. Despite the absence of any authority or a customer relationship AFCA asserted that by reason alone of EFSOL being an Authorised Representative of DH Flinders, AFCA had the power to determine complaints brought against D H Flinders relating to any EFSOL conduct.
  - Justice Stevenson disagreed and held that in the absence of a customer relationship or EFSOL acting within its usual or ostensible authority '*AFCA has no contractual authority, jurisdiction or power to determine the complaints.*'
  - The EFSOL related complaints were only brought against D H Flinders after an AFCA legal officer had contacted the complainants, told them of D H Flinders existence and advised them to make a claim. Justice Stevenson found that AFCA's conduct stepped beyond AFCA's legitimate function of assisting complainants and amounted to AFCA entering the fray in contravention of its contractual obligation of procedural fairness, impartiality and fairness.
- On 6 November 2020 AFCA released its [2019-20 Annual Review](#). The Review revealed that the dispute resolution body received 80,546 complaints from consumers and small businesses, a 14% increase in the monthly average compared to the last financial year. The majority of complaints pertained to banking and finance (58%), followed by general insurances (24%) and superannuation (9%). Despite the increase in the number of complaints, the average time to achieve an outcome was 73 days.

### ASIC

- On 16 November 2020 ASIC released [Report 672 'Buy-Now-Pay-Later An Industry Update'](#). The Report examined the extensive growth of the industry, focussing on a number of key factors. The Report revealed that the number of active BNPL accounts held by BNPL providers has steadily increased each financial year from 2015/16 (around 487,000 active accounts) to 2018/19 (around 3.7 million active accounts), and that the total revenue of the six BNPL providers increased by 50% from \$266 million in the 2017/18 financial year to \$398 million in the 2018/19 financial year.
- ASIC further discussed the impact of the BNPL arrangement on consumers, stating that roughly 21% of BNPL consumers surveyed had missed a payment in the last 12 months. The number of missed payment fees between June 2016 and June 2019 made up approximately 55% of total revenue for BNPL providers. A survey conducted by

ASIC revealed that 20% of consumers surveyed indicated that they had to cut back on or went without essentials (such as meals) and 15% of consumers said that had to take out an additional loan to make repayments.

- ASIC has [sought further feedback](#) on an amended product intervention order concerning continuing credit contracts. The amended proposed PIO seeks to exclude some BNPL arrangements and non-cash payment facilities from being inadvertently captured by the restrictions.
- On 1 December 2020, [ASIC commenced proceedings against CBA](#) for overcharging interests on business overdraft accounts. The interest charged was substantially higher than what its customers were advised. ASIC alleged that from 29 December 2011 to 31 March 2018, CBA had:
  - provided customers with terms and conditions for certain credit facilities that stated an interest rate to be charged or that had been charged (in most cases, 16% per annum);
  - sent periodic account statements to customers referencing the rate at which interest rate was being charged (in most cases, 16% per annum); and
  - due to a systems error, charged more than 2,200 customers a different, higher interest rate on their overdraft accounts (in most cases approximately 34% per annum).

The overcharging totalled more than \$2.9 million.

Furthermore, ASIC alleged that CBA had engaged in conduct that contravened financial services laws on 12,119 occasions. On these occasions, CBA had:

- made misleading representations that contravened s 12DB(1)(g) of the ASIC Act;
- engaged in misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act; and
- failed to comply with its obligation to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act.
- On 11 December 2020, ASIC released regulatory guide (RG 274) outlining their expectations for compliance with the new design and distribution obligations.

## OAIC

- On 23 November 2020 the OAIC issued its first 6-month [Report on the COVIDSafe App](#). The Report sets out the performance of the Privacy Commissioner's functions and the exercise of the Commissioner's powers under or in relation to Part VIIIA of the Privacy Act. During the reporting period, the Commissioner received 10 enquiries for general information and one enquiry on how to make a complaint.

## Government Consultations

- Treasury has released a [Payments System Review Issues Paper](#) to review the regulatory architecture of the Australian payments system to ensure it remains fit-for-purpose and is capable of supporting continued innovation. Submissions in response to the issues paper are open until 31 December 2020.
- The Morrison Government has released the [terms of reference and issues paper](#) for a broad review of the Privacy Act. The review will focus on, amongst other things, the scope and application of the Privacy Act, whether individuals should have a direct right of action to enforce obligations under the Privacy Act and whether a statutory tort for serious invasions of privacy should be introduced. Public submissions are open until 29 November 2020, however a further opportunity to comment will be available impending the release of a discussion paper in 2021.
- On 12 November the [Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) was introduced into the House of Representatives, to effect a number reforms from the Banking Royal Commission, being:
  - Recommendation 1.15 - enforceable code provisions
  - Recommendations 4.5 and 4.6 - insurer avoidance of life insurance contracts, and duty to take reasonable care not to make a misrepresentation
  - Recommendation 4.3 - deferred sales model for add-on insurance
  - Recommendation 4.4 - caps on commissions
  - Recommendations 3.4 and 4.1 - prohibition on hawking of financial products
  - Recommendation 4.2 - use of terms 'insurance' and 'insurer'
  - Recommendation 4.8 - AFSL requirement for claims handling and settling services
  - Recommendation 3.1 - trustees of RSEs should have no other duty
  - Recommendations 3.8, 6.3, 6.4 and 6.5 - adjusting ASIC and APRA's roles in superannuation
  - Recommendations 1.6 and 2.7 - reference checking and information sharing protocol
  - Recommendations 1.6, 2.8 and 7.2 - breach reporting and remediation reforms
  - Recommendations 1.6 and 2.9 - investigating and remediating misconduct
  - Recommendation 6.9 - statutory obligation to cooperate
  - Recommendation 6.11 - formalising ASIC meeting procedures

- On 9 December 2020, the Bill was introduced into the Senate and the third reading was subsequently agreed to the following day. The majority of the amendments are intended to take effect on 1 January 2021.

## AUSTRAC

- AUSTRAC's recent publication, [AUSTRAC Insights: Assessing M:L/TF Risk](#), provides businesses with updated guidance on assessing and managing the risk of ML/TF. The document focusses on building resilience against criminal exploitation by identifying areas of risk and managing such vulnerabilities. AUSTRAC stated that an adequate ML/TF risk assessment should do the following:
  - identify and evaluate the ML/TF risk posed to your business, having regard to its nature, size and complexity;
  - take into account your customer types, the designated services you offer, the methods you use to deliver those services and the foreign jurisdictions you deal with; and
  - assess the inherent risk, also known as initial risk, before any AML/CTF systems have been applied to reduce the risk.
- AUSTRAC also emphasised the importance of thoroughly documenting risk assessments and regularly conducting reviews to expose newfound weaknesses.

## Legislative and Regulatory Updates

- The [Anti-Money Laundering and Counter terrorism Financing and Other Legislation Amendment Bill 2019](#) was **passed** on 10 December 2020 in the Senate. The Senate heard and agreed to both the second and third readings on the same day. The amendments expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party.
- The [National Consumer Credit Protection Amendment \(Supporting Economic Recovery Bill\)](#) was introduced and read a first time in the House of Representatives on 9 December 2020. The amendments purport to remove responsible lending laws in an effort to temper stringent credit rules and encourage the flow of credit.
- On 10 December 2020 ASIC released technical updates to [RG 246 'Conflicted and Other Banned Remuneration'](#). The updated RG 246 clarifies that the law does not prescribe a timeframe for repaying commissions that are being clawed back where a life insurance policy has been cancelled or reduced in the first two years. The guide sets out:
  - ASIC's expectations for how an Australian financial services (AFS) licensee and its representatives can comply with the conflicted and other banned remuneration provisions; and
  - how ASIC will administer these provisions.

The guide also identifies the recent update for the:

- ending of grandfathering of conflicted remuneration for financial product advice from 1 January 2021; and
- extension of the ban on conflicted remuneration to stamping fees paid in relation to listed investment companies and listed investment trusts (excluding real estate investment trusts) that took effect on 1 July 2020.

The updated guide clarified that legislation does not identify a prescribed timeframe for repaying commissions which are being brought back where a life insurance policy has been cancelled or reduced in the first two years.

The main takeaways from the updated guide was that:

- Divs 4 and 5 of Pt 7.7A of the *Corporations Act 2001* (Cth) concerning conflicted and other banned remuneration provisions primarily aim to more closely align with the interests of those providing financial product advice with the interests of their retail clients.
  - Division 4 prohibits conflicted remuneration, including volume-based benefits and some performance benefits for employees.
  - Division 5 prohibits other remuneration, such as volume-based shelf-space fees and asset-based fees on borrowed amounts

## Recent speeches by the Australian Federal Treasurer speeches pertaining to financial services

- [Simplifying access to credit for consumers and small businesses](#) (9 December 2020);
- [Strengthening and streamlining oversight of the financial advice sector](#) (9 December 2020); and
- [Parliament passes legislation to implement further Hayne Royal Commission recommendations](#) (10 December 2020).